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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1991 to December 31, 1991

VOLUME 2

PAGES 819-1724

John Ellis
Commissioner of Education

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON REMAND
OAK DKT. NO. EDU 9682-90
AGENCY DKT. NO. 289-9/89

JAMES KOCHMAN,
Petitioner,
v.
KEANSBURG BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner, (Klausner & Hunter, attorneys)
Joseph Orlando, Esq., for respondent, (Ansell, Fox, Zaro, McGovern & Bennett, attorneys)

Record Closed: March 14, 1991 Decided: April 29, 1991

HONORABLE **DANIEL B. McKEOWN**, ALJ:

PROCEDURAL HISTORY

James Kochman (petitioner) is a teacher with a tenure status in the employ of the Keansburg Board of Education (Board). The Board withheld salary increments from petitioner for 1989-90 for excessive and chronic absenteeism. Petitioner filed a Petition of Appeal to the Commissioner challenging that action. After the matter was declared a contested case and a hearing was conducted, this judge issued an initial decision October 6, 1990 in which it was found that petitioner was absent from school during 1988-89 54 days from his teaching duties and that during his 26 years of employment with the Board he was absent a combined 590.5 days in the form of sick days and worker's compensation

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days. Nevertheless, the conclusion was reached that the Board's action withholding salary increments from petitioner for 1989-90 was arbitrary and capricious because the Board's concern for continuity of instruction as required under prior administrative rulings was not conveyed to him during 1988-89 or any prior period in which excessive absenteeism was occurring; that the Board did not consider the nature of petitioner's absences in arriving at its judgment to withhold salary increments; and, that the Board simply considered the number of absences for 1983-84 forward as a basis for it to take its action; and, finally, that the Board acted without good cause to withhold petitioner's salary increments for 1989-90.

On November 15, 1990 the Commissioner issued a final decision remanding the matter for further inquiry on the issue of the Board's expression of concern to petitioner for the continuity of instruction. The Commissioner stated:

> During the 1988-89 school year, the year upon which the increment withholding is based, petitioner did receive three letters signed by the board secretary/business manager which make a specific mention of a concern for the impact excessive absences have on students and continuity of instruction. (Exhibits R-6, 7, 8) The ALJ [this judge] did not accept these letters as documentation of a concern about petitioner's excessive absenteeism on instruction because the board secretary/business manager who signed the letters is not petitioner's professional supervisor. In the Commissioner's judgment, this is an insufficient basis for rejecting demonstration of a concern of the negative impact of excessive absenteeism on instruction. There is a need for further inquiry to determine at whose direction the letters were sent. Clearly, they were not sent out of the blue by the board secretary/business manager. If they were sent at the direction of the Board or by one of its admimistrative agents who has supervisory responsibility for instruction, then it would place form over substance to reject those letters as documenting instructional concern over the absences.

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> Additionally, the ALJ's recitation of facts indicates on page 8 of the initial decision that the Board transferred petitioner upon his return to work after his accident, having engaged another teacher to assume petitioner's instructional duties for his eighth grade class. This transfer needs further fact finding to determine (1) if such assignment was related to a concern for the continuity of instruction of his eighth grade students and (2) what reasons were provided to petitioner for the transfer, when they were provided and by whom.
>
> Accordingly, for the reasons stated above, the Commissioner remands the matter to the Office of Administrative Law for the sole and limited purpose of augmenting the record relative to Exhibits R-6, 7 and 8 and petitioner's removal from his eighth grade class assignments during the 1988-89 school year.
> * * *

The case was refiled November 26, 1990 as a contested case with the Office of Administrative Law under the provisions of N.J.S.A. 52:14F-1 et seq. A written notice of a plenary hearing scheduled for March 13, 1991 was sent to the parties on December 19, 1990, and a confirmation notice of that date was sent February 4, 1991. Two days before the scheduled hearing on March 13, Board counsel requested by telephone call an adjournment of the scheduled hearing date because the superintendent of schools was to attend a convention. The requested adjournment was denied by this judge on the bases that the matter had been scheduled for March 13 since December, 1990; the requested adjournment 48 hours prior to the scheduled commencement of the hearing was not timely; the superintendent knew of the scheduled hearing date of March 13 since and, had the matter been adjourned it would not have been rescheduled for a lenghty period of time due to this judge's calendar at that time. Factors considered in denying Board counsel's request for an adjournment include Board counsel had adequate opportunity for hearing preparation based on the Commissioner's remand and that no reason other than the superintendent's attendance at a convention was proffered as the basis for the adjournment; the need for reasonable expeditious disposition of the matter; and, the need for an economically effective operation of this already scheduled hearing and other

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scheduled hearings, and the impact an adjournment of a case scheduled for more than two months would have not only upon that case but upon all other cases as well. Fair play demands that adjournment request made 48 hours prior to hearing not be granted upon the basis of attendance at a convention by a potential witness when that witness had more than 60 days notice of the scheduled hearing. See Waters v. Island Transportation Corp., N.J. App. Div., Jan 12, 1989, A-5726-86 T7 (unpub). The hearing proceeded as scheduled March 13, 1991 at which time the Board secretary, Edith Chmiel, testified for the Board as did petitioner James Kochman. The record closed March 14, 1991.

Findings are reached in this initial decision that the referenced documents, R-6, R-7, and R-8, were sent by the Board secretary at the direction of the superintendent for reasons other than an expressed concern for the continuity of instruction relating to petitioner's absences and that petitioner was transferred by the Board from his assignment as a teacher of eighth grade to that of a permanent substitute for the reason that the superintendent wanted to retain the teacher who had been substituting for petitioner in that assignment. The conclusion is reached that the action of the Board to withhold salary increments from petitioner for 1989-90 is, under prior administrative rulings, arbitrary and capricious because its concern for continuity of instruction was not conveyed to him during 1988-89 or during any prior period in which excessive absenteeism was occuring.

A recitation of certain facts established at the original hearing is in order. Petitioner has been employed by the Board as a teacher since 1964-65. So that the documents R-6, R-7 and R-8, specifically referenced by the Commissioner in his decision on remand, are understood within the context of all factual circumstances, certain facts established at the original hearing and as set forth in the original initial decision are reproduced here:

* * *

2. On January 3, 1984 petitioner slipped on a puddle in a school hallway which resulted in documented orthopedic and neurological problems.

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3. On January 28, 1986 a workers' compensation judge awarded both temporary and permanent disability benefits to petitioner regarding the January 3, 1984 accident. (P-13).

4. On January 7, 1988 petitioner slipped on a patch of ice on school grounds which resulted in additional orthopedic and neurological problems.

5. In a workers' compensation judgment issued on May 1, 1990 (P-14) petitioner was awarded both temporary and permanent disability benefits relating to the January 7, 1988 accident.

6. Petitioner's school attendance record (R-1) since the 1983-84 academic year, during which he suffered injury from the slip and fall on water accident, is as follows exclusive of absences for personal days, professional days, and other:

YEAR	SICK	WORKERS' COMPENSATION
1983-84	0	110
1984-85	2	49
1985-86	3	25
1986-87	20.5	0
1987-88	8.5	52.5
1988-89	35	19
TOTALS	69.0	255.5

While petitioner's attendance record in evidence (R-1) shows he used 54.5 sick days in 1988/89 and 3 workers' compensation days, petitioner testified at hearing that while he was absent a total of 67.5 days during that year, 19 absences were workers' compensation days.

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7. There is no dispute that all absences incurred by petitioner from 1983-84 were for legitimate reasons of illness.

8. During 1983/84 the superintendent requested petitioner in writing (R-2) to submit his medical status, a medical prognosis, and an anticipated date of return to school.

9. Near the end of the following academic year, 1984-85, petitioner's annual summary evaluation (R-3) provides that his attendance must improve in 1985-86 "in fairness to the students." Petitioner responded on the face of the report as follows:

> Under existing compensation laws, I am not to be penalized for filing a compensation claim or penalized for days used pursuant to that claim. Therefore, I want my annual performance report changed so that it reflects only the days absent that are not related to my compensation claim of January 3, 1984. I have only 2 absences not related to my compensation claim. * * *

No change was made to the report. Within two weeks thereafter and perhaps because of petitioner's reply, the superintendent advised petitioner in writing (R-4) that Board policy provides for a written warning to professional personnel who have been on sick leave for 11 or more days in one year. Superintendent advised petitioner that the letter constituted a written warning because he was absent for 11 or more days in 1984-85.

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10. The referenced Board policy (R-1) defines excessive absenteeism in the following manner:

Excessive absenteeism
(sick leave only)

a. 11 or more days in one year warrants a written warning.
b. 11 or more days in four (4) consecutive years warrants for a tenured employee the withholding of an increment and for the second offense a disability retirement.
c. 50 days in one (1) year warrants the withholding of a salary increment from a tenured employee and, for the second offense, disability retirement for that employee.

11. During the next academic year, 1985-86 the superintendent requested petitioner in writing (R-5) to meet with him in order to discuss his absenteeism and medical circumstances. Petitioner was also advised he could have a union representative with him if he chose. Superintendent explained at hearing that while the meeting was held, petitioner's absenteeism was not discussed; rather, the possibility of petitioner's retirement was the topic of discussion.

12. At the end of the next academic year, 1986-87, petitioner's performance was evaluated in an annual summary evaluation (P-2) in the following manner:

1. Petitioner provides appropriate instruction to meet the diagnosed needs of the student;

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2. Petitioner conducts continuous diagnosis of the students' progress, skills and needs;

3. Petitioner meets with the students' parents as scheduled and when ever necessary.

13. Shortly after the annual summary evaluation (P-2) issued June 10, 1987, the superintendent sent petitioner a letter (R-5a) dated July 2, 1987 by which petitioner was again officially warned in writing that he was on sick leave for 11 or more days during 1986-87 and, thus, in violation of Board policy.

14. There is no evidence in this record regarding exchanges of correspondence between school authorities and petitioner in 1987-88, although petitioner was absent a combined 61 days, 52.5 of which were workers' compensation days due to injuries sustained in the slip and fall on ice accident, January 7, 1988. It is to be noted, however, that in petitioner's annual performance report (P-3) for this academic year his performance as a teacher of basic skills was evaluated in the following manner:

1. Petitioner provides appropriate instruction to meet the diagnosed needs of the students;

2. Petitioner conducts continuous diagnosis of the students' progress, skills and needs;

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3. Petitioner maintains a current and accurate read of the students' participation in the program.

It is also noted that on the face of the document it is stated petitioner's pupils achieve "very positive results" on standardized tests in reading, writing, and mathematics.

15. During the next academic year, 1988-89, petitioner was assigned to teach 8th grade. He was involved in a motor vehicle accident on November 4, 1988 with a tractor-trailer which resulted in neck and back injuries to petitioner, as well as to his chest and shoulder. Though he was not hospitalized, petitioner underwent physical therapy and he was absent from work November 5, 1988 to January 10, 1989. (R-12) (See also, R-9).

16. During petitioner's absence from school following the motor vehicle accident, the Board secretary requested (R-6) petitioner on December 6, 1988 to submit from his physician a statement regarding his medical status, prognosis, and the approximate time he was expected to return to work. On January 5, 1989 the Board secretary advised petitioner (R-7) that because no response was received to her earlier letter and that his absence was "causing an unfair burden on your students because of the uncertainity of your return," an appointment was made for him to be examined by Doctor Robert Finnesey on January 16, 1989. Shortly after this letter, petitioner submitted to the Board secretary a note from his own physician, a Dr. Allegra, which is dated November 10, 1988. The note states that petitioner was

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undergoing heat, massage, and ultra sound treatment for back sprain and spasam two to three times per week. In addition, a copy of a handwritten note addressed to the superintendent which petitioner says he submitted during November 1988 was also sent to the Board secretary. The superintendent denies having received either the note or the physician's note. On February 2, 1989 the superintendent wrote (R-9) petitioner and advised that he was being docked a day's pay because of his failure to return to school following his examination by Dr. Finnesey on January 20, 1989.

17. Upon his return to work petitioner was assigned as a permanent substitute because another full-time substitute had been engaged by the Board to teach his 8th grade class following the accident. During this assignment, petitioner was absent from school 2.5 days. On or about March 30, 1989 petitioner was reassigned to teach basic skills until the end of the school year during which time petitioner was absent 12 days.

18. On June 8, 1989 the Board secretary advised (R-10) petitioner that his employment may be discussed by the Board at a meeting scheduled for June 15, 1989.

19. On June 20, 1989 the Board secretary advised petitioner in writing (R-11) that the Board acted June 15, 1989 to withhold salary increments from him permanently because of "absenteeism." This is the only time the Board withheld salary increments from petitioner for 'absenteeism.' The Board secretary further advised petitioner:

> This [action] followed a careful review of your absenteeism and its effect on the continuity and quality of the educational service being received.

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20. On June 21, 1989 the school principal prepared an annual summary evaluation on petitioner's performance during 1988-89 in which he states the following:

> Because of the rate of absence from the positions assigned and therefore, the difficulty in maintaining continuity of the diagnostic progress of students skills and instructional needs, Mr. Kochman was not able to be an asset to the Keansburg educational system for the 1989-90 school years.
>
> Mr. Kochman was transferred twice during the year. A summary of the indicators regarding effectiveness would be inappropriate. For example, Mr, Kochman cannot be held responsible for the scores of the students as he was transferred to basic skills on March 30th just two weeks before the test was given to the students.

Thereafter, and made part of the annual summary evaluation, the principal reviews petitioner's absences from 1983-84 through 1987-88 and as recited above. Finally, the school principal recommended that petitioner's salary increments be withheld, an action which had already been taken by the Board six days earlier.

21. Petitioner testified at hearing that throughout his employment whenever he foresaw extended absences he would insure that his emergency lesson plans were as up-to-date as possible. However, the superintendent testified that the emergency substitute lesson plans, a three day lesson plan at best, was totally ineffective and petitioner's absences were extremely disruptive.

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22. During petitioner's 26 years of employment with the Board he would have earned approximately 260 sick days. See, N.J.S.A. 18A:37-2. In that same period of time he used approximately 242 sick days, in addition to a total of 248.5 workers' compensation days granted him.

HEARING ON REMAND

Board secretary Edith Chmiel testified that pursuant to Board policy number 206 (RR-1) the superintendent has sole and exclusive responsibility for and full supervisory power over all employees without regard to the nature or scope of their employment or duties which, of course, includes petitioner. However, Ms. Chmiel is not certain if the superintendent personally evaluated petitioner in the performance of his duties during 1988-89, nor is she certain if the curriculum coordinator supervised petitioner, nor is she certain that the principal of the school to which petitioner was assigned evaluated the performance of petitioner during 1988-89. No one of petitioner's supervisors was called to testify.

In regard to the document, R-6, Ms. Chmiel acknowledges having sent that letter on December 6, 1988 to petitioner at the direction of the superintendent. The letter is reproduced here in full:

> Since you [petitioner] have been on an extended sick leave since 4 November 1988, it will be necessary for the Board to receive the following information from your physician:
>
> 1. Your medical status.
> 2. Your prognosis.
> 3. The approximate time when you will be expected to return to work.
>
> Due to the importance of this matter in dealing with the continuing education of your students, I would appreciate this information being forwarded to me within seven (7) days of the date of this letter.

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> Please accept my wishes for your speedy recovery. If there is anything I can do, please contact my office.

The Board secretary, Ms. Chmiel, was specific in her testimony that the reason the superintendent directed to send this letter to petitioner was soley because of the number of days petitioner was absent from school and the absence of knowledge when he was to return. The superintendent wanted to know when petitioner was to return for the purpose of planning for classroom coverage for the remainder of the 1988-89 academic year. In the absence of testimony from the superintendent, I infer that even had he been present at the hearing his testimony would have been consistent with the testimony of Ms. Chmiel. See U.S.Postal Svc. v. Kearny, 10 N.J. Tax 217, 222 (Tax Ct. 1988).

In regard to the document, R-7, Ms. Chmiel specifically testified that the superintendent directed her to send this letter on January 5, 1989 because of the absence of a response to the first letter. The letter, R-7, is reproduced here in full:

> The Board of Education has not received any notification from you or your physicians as to your medical status or an approximate date when you will return to your teaching duties.
>
> As you know, this is causing an unfair burden on your students because of the uncertainty of your return.
>
> Due to this lack of information, an appointment has been made for you on Monday, 16 January 1989 at 1:30 p.m., with:
>
> Dr. Robert Finnesey
> 1568 Highway 38
> Wall, NJ 07719 280-1616

In regard to document, R-8, Board secretary Ms. Chmiel specifically testified that the superintendent directed her to send this letter which is dated January 10, 1989, because while acknowledging having received a note from petitioner's physician neither she nor the superintendent had knowledge when petitioner was to return to work. This letter, R-8, is reproduced here in full:

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> I am in receipt of the attached (no date) which stated you were receiving heat, massage and ultrasound for a sprain with spasm. According to the note from Dr. Alegra, that you referred to; (sic) however, no one in the district has received any notification as to why you are out or when you would expect to return to work.
>
> In your note you stated that you were seeing Dr. Alegra on 20 December 1988 and hope to be released after that visit. You also stated that you would notify both parties of my inquiry. As of the 6th of January I have not heard from either party or yourself as to your current status.
>
> As you know, in order to properly maintain an educational foundation for your students, continuity is essential. To achieve this goal it would be beneficial to know of your progress so we know what direction to take, which was felt could be determined by another physician. I would hope that your meeting with Dr. Finnesey on January 20th would assist us in our objective.

Board secretary Ms. Chmiel specifically testified that no one of the preceding three letters (R-7, R-8, R-9) would have been sent if she or the superintendent had knowledge when petitioner was to return to active status. Finally, in regard to these three letters, Ms. Chmiel testified that the administrative purpose of sending out these kinds of letters is to comply with the provisions of the Board's disciplinary policy (P-1).

Next, Ms. Chmiel testified in regard to petitioner's transfer upon his return to work after his motor vehicle accident, that she was at the meeting at which the superintendent recommended the transfer to the Board. Ms. Chmiel was specific that the recommendation was made to the Board, without discussion, because it is not at all unusual for teachers to be transferred during the course of any school year. The superintendent did advise Ms. Chmiel privately that he brought about petitioner's transfer because of the absence of knowledge when petitioner was to return and he did not want to disrupt the classroom and the teacher who had been filling in during petitioner's absence.

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Ms. Chmiel testified without equivocation that the superintendent made the recommendation to the Board on January 19, 1989, without discussion regarding reasons why, that petitioner be transferred from his then assignment as a teacher of eighth grade to that of a permanent substitute.

Petitioner testifed at the hearing on remand that the superintendent did not ever observe his performance for purposes of evaluation and that during 1988-89 while supervisory personnel did observe and evaluate his performance, not one mentioned absenteeism accept in the annual summary evaluation for 1988-89 after the Board had already acted to withhold the controverted salary increments. Petitioner persists that at no time during 1988-89 did any supervisor discuss with him prior to the action of the Board to withhold salary increments for 1989-90 the impact his absences from school were perceived to have been having on his pupils or on the continuity of instruction.

In regard to his transfer upon his return from the accident in January, 1989 petitioner testified that no reasons were ever given him by anyone for that action. The school principal never discussed his changed asssignment with him prior to his receipt of a letter (PP-1) from the superintendent on or about January 20, 1989 which states in full as follows:

> At a regular meeting of the Board of Education, held on January 19, 1989, it was recommended and approved that your assignment be changed to that of a Permanent Substitute, from your present assignment as 8th Grade Teacher, effective January 11, 1989.

Petitioner testified that when he reported for work upon his return to duty following his absence because of the accident, he was then told he was on day-to-day assignments.

FINDINGS OF FACT

I find a preponderance of credible evidence submitted at the hearing on remand, in conjunction with all other facts in this record, establishes the following facts:

1. The overriding concern of the superintendent with respect to petitioner's absences during 1988-89 was the date he was to return to duty so that he, the superintendent, would have

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knowledge of the length of time the services of the substitute teacher would be necessary. As shown by the testimony of the Board secretary, had the superintendent and she known of petitioner's anticipated date of return no one of the letters, R-6, R-7, or R-8, would have been sent.

2. While mention is made in the December 6, 1988 letter (R-6) of '* * * the importance of this matter in dealing with the continuing education of your students * * *' and, the letter of January 5, 1989 (R-7) mentions '* * * an unfair burden on your students because of the uncertainty of your return * * *', and the letter of January 10, 1989 (R-8) mentions '* * * continuity is essential * * *' it must be remembered that the Board secretary's unequivocal testimony is that the sole reason these letters were sent petitioner was because neither she nor the superintendent had knowledge of when petitioner was to return to duty and for purposes of complying with the Board's disciplinary policy regarding absenteeism. Therefore, had the Board secretary and superintendent had such knowledge there would have been no articulated concern regarding 'continuity' because the letters would not have been sent. Consequently, I infer that mere mention of the words 'continuing education,' or 'unfair burden' or 'continuity' is insufficient to show the Board made a good faith effort to consider the circumstances of petitioner's absences or the impact of such absences on the continuity of instruction. I specifically find that these three letters do not, individually or collectively, evince an articulated concern by school authorities to petitioner regarding the affect his absences was having on the continuity of instruction. Furthermore, I specifically find no evidence to show the Board or the superintendent considered the particular circumstances of petitioner's absences during 1988-89, particularly in light of the Board secretary's testimony regarding the purpose of sending R-6, R-7, and R-8.

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3. Petitioner was transferred, without comment, by the Board upon the recommendation made to it, without discussion, by the superintendent. The superintendent privately told the Board secretary he did not want to disrupt the class or the teacher assigned to it upon petitioner's return to active duty. I specifically find that while that concern regarding class disruption of his 8th grade students was provided the Board secretary, those reasons were neither provided to the Board because of the practice of transferring teachers during the course of the year, nor were such reasons provided to petitioner.

DISCUSSION AND CONCLUSION

The foregoing facts established at the hearing on remand, which are consistent with all other facts found and reported in the original initial decision, fail to disclose that the Board or the superintendent or the Board secretary conveyed to petitioner during 1988-89 that his absences were causing concern for the continuity of instruction nor is there evidence to show the Board considered the particular circumstances of the total absences and the impact of the absences on the continuity of instruction, nor is there evidence to show that petitioner's attendance had been identified as a problem area in his evaluation and professional improvement until after the Board determine to withhold the controverted salary increments.

Consequently, I **CONCLUDE** that it is not 'to place form over substance' in rejecting the letters, R-7, R-8, and R-9, as documentation of the expression of instructional concern to petitioner by the Board or school authorities in regard to his absences. I **FURTHER CONCLUDE**, therefore, that the action of the Board to withhold salary increments from petitioner for 1989-90 based on absences in 1988-89 is arbitrary and capricious because its concern for continuity of instruction was not conveyed to him during 1988-89; that the Board did not consider the nature of petitioner's absences in arriving at its judgment to withhold salary increments and, by inference, I **CONCLUDE** that the Board simply considered the number of absences from 1983-84 forward as the basis, otherwise mechanistic, to take its action.

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Therefore, based on the foregoing reasons in addition to the reasons atriculated in the original initial decision it is hereby **ORDERED** that the salary increments withheld from petitioner for 1989-90 be retroactively awarded to him and that appropirate adjustments be made to his salary.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 29, 1991
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

4/30/91
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 6 1991
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

PP-1 Letter January 20, 1989

RR-1 Board Policy #206

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JAMES KOCHMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. The Keansburg Board of Education's exceptions and petitioner's reply thereto were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

The Board's exceptions state that at the commencement of the hearing on remand the ALJ made opening remarks to the effect that he had no intention of changing his factual findings, including specific reference to number 17 of his Findings of Fact and that he believed no additional fact-finding was warranted. As such, the Board contends that the ALJ may have had a predisposition against it and if he did, he should have disqualified himself from hearing the matter pursuant to N.J.A.C. 1:1-14.12. Given this, the Board requests that the Commissioner make an independent review of the record in order to determine whether bias on the part of the ALJ did exist and, if so, the extent to which it impaired his objectivity. (Board's Exceptions, at p. 2)

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The Board's exceptions further aver that, the superintendent, as its agent having supervisory responsibility for instruction, did in fact convey to petitioner a concern that his absences were negatively impacting on the continuity of instruction both expressively and by fair implication. In support of this, the Board points to its Policy Number 206 (Exhibit RR-1) which grants the superintendent sole and exclusive supervisory responsibility over all employees of the district. The Board also avers that the absence of a personal evaluation of petitioner's performance by the superintendent should not be conclusive as to whether or not petitioner's absences negatively impacted on the continuity of instruction. (Id., at p. 3)

The Board maintains that it is not unusual for there to be little or no discussion regarding the reasons for a particular transfer because it must rely on and often defer to the superintendent to make professional judgments regarding educational effectiveness. This occurs because one of the superintendent's job responsibilities delineated in Policy Number 206 is "to exercise such educational and administrative leadership, supervision and guidance of staff as may be necessary for producing the best possible education conditions and outcomes for students" and because the Board is often made up of lay persons. (Id.)

The Board also maintains that the ALJ erred in concluding that the letters sent by the Board secretary were merely to ascertain when petitioner would return to work. It asserts that the ALJ's rejection of those letters because he interpreted the Board secretary's testimony to mean that they would not have been sent if petitioner had informed the Board of his return date, constit" an

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improper basis for not deeming them to be an expression of concern for the continuity of instruction. As to this, the Board contends, inter alia, that the need to determine when a teacher will return to the classroom is directly related to a concern for the continuity of instruction; ascertaining petitioner's return date was not the sole purpose for sending the letters, and the possibility that the letters may not have been sent if petitioner had given his return date is irrelevant. (Id., at p. 4) Of this the Board states:

> First, the need to determine when a teacher will return to the classroom is directly related to a concern for continuity of instruction. Only by attempting to ascertain when a teacher will continue teaching a particular class, can appropriate arrangements be made for continuing instruction in a manner which enables students to learn effectively. Thus, in addition to the actual expression of a concern for continuity contained in those letters, the request itself is an expression of such concern.
>
> Second, the possibility that those letters would not have been sent if the Superintendent was made aware of the date Petitioner might return to the classroom is irrelevant. The fact is that those letters did indeed explicitly and implicitly express a concern for the continuity of instruction. Those letters were sent, received and, as illustrated by the testimony of the Petitioner himself at the Remand Hearing, understood as expressing a concern for his student's continuity of instruction.
>
> As stated by the ALJ in factual finding number one of the recent Decision, "the overriding concern of the Superintendent with respect to Petitioner's absences during 1988-89 was the date he was to return to duty so that he, the superintendent, would have knowledge of the length of time the services of the substitute teacher would be necessary." The Board submits that such concern is one that is directly related to a concern for the continuity of instruction of Petitioner's students. Significantly, a teacher was retained to take over Petitioner's teaching responsibilities with respect to his eighth grade class in order to insure such continuity. As stated at page 13 of the recent Decision, "the

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> Superintendent wanted to know when Petitioner was to return for the purpose of planning for classroom coverage for the remainder of the 1988-89 academic year."
>
> (Board's Exceptions, at p. 4)

With respect to the issue of petitioner's transfer, the Board asserts:

> With respect to the Petitioner's transfers during the 1988-89 academic year, the Superintendent's judgment was logical and consistent with sound educational policy. Furthermore, such transfers gave implicit indications of the concern for student's continuity of instruction. The fact that Petitioner never questioned why he was being transferred (as illustrated by his testimony at the Remand Hearing), is indicative of his actual knowledge of the reasons for such transfer.
>
> The ALJ determined in factual finding number 17 as follows:
>
> > Upon his return to work, Petitioner was assigned as a permanent substitute because another full-time substitute had been engaged by the Board to teach his eighth grade class following the accident. During this assignment, Petitioner was absent from school 2.5 days. On or about March 30, 1989, Petitioner was reassigned to teach basis skills until the end of the school year during which time Petitioner was absent twelve (12) days.
>
> It is clear that the Superintendent determined that the reason that another teacher was assigned to teach his eighth grade class was to insure consistent education of those students. Given Petitioner's long history of absenteeism and proneness to injury, it was logical to assign Petitioner to a permanent substitute teacher position where such absences would have a minimal impact on student instruction. Furthermore, when there was a need for a basic skills teacher, Petitioner [was] a logical candidate for the position in light of his improved attendance (2.5 absences) and prior experience. In this position, Petitioner was able to provide some continuity having only been absent an average of one (1) day per week in his assignment as a basic skills teacher. (Id., at pp. 5-6)

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Upon careful and independent review of the record in this matter, the Commissioner finds that while the ALJ may not have agreed with the need for a hearing on remand, he nonetheless carried out his responsibilities with respect to the Commissioner's precise directives on remand without any demonstration of bias.

Further, upon thorough examination of the record, including the recommended decision on remand and the arguments of the parties, the Commissioner agrees with and adopts as his own the conclusion that petitioner was not informed by his supervisors of the concern for continuity of instruction caused by his high absenteeism. Notwithstanding the Board's protestations otherwise, there was no evidence presented at the hearing on remand to counter the Board secretary's testimony that the disputed letters (Exhibits R-6, R-7 and R-8) were for any purpose other than ascertaining petitioner's date of return to his teaching position. A review of the factual circumstances of this matter leads the Commissioner to agree with the ALJ's conclusion that

> ***While mention is made in the December 6, 1988 letter (R-6) of '***the importance of this matter in dealing with the continuing education of your students***' and, the letter of January 5, 1989 (R-7) mentions '***an unfair burden on your students because of the uncertainty of your return***', and the letter of January 10, 1989 (R-8) mentions '***continuity is essential***' it must be remembered that the Board secretary's unequivocal testimony is that the sole reason these letters were sent petitioner was because neither she nor the superintendent had knowledge of when petitioner was to return to duty and for purposes of complying with the Board's disciplinary policy regarding absenteeism. Therefore, had the Board secretary and superintendent had such knowledge there would have been no articulated concern regarding 'continuity' because the letters would not have been sent. Consequently, I infer that mere mention of the words 'continuing education,' or

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> 'unfair burden' or 'continuity' is insufficient to show the Board made a good faith effort to consider the circumstances of petitioner's absences or the impact of such absences on the continuity of instruction. I specifically find that these three letters do not, individually or collectively, evince an articulated concern by school authorities to petitioner regarding the affect his absences was having on the continuity of instruction. Furthermore, I specifically find no evidence to show the Board or the superintendent considered the particular circumstances of petitioner's absences during 1988-89, particularly in light of the Board secretary's testimony regarding the purpose of sending R-6, R-7, and R-8.
>
> (Initial Decision, at p. 16)

Moreover, insofar as the transfer is concerned, the record indicates that while the superintendent privately told the Board secretary of his concern for the continuity of instruction, that concern was neither conveyed to, nor considered by, the Board itself when acting on the transfer, nor was it conveyed to petitioner. The Commissioner finds as unpersuasive the Board's arguments relative to deferring to the superintendent's expertise when acting to transfer petitioner in view of the fact that the superintendent expressed no reason for the transfer.

A review of petitioner's extensive record of high absenteeism certainly supports that the Board's action to withhold his salary increments was clearly justifiable. However, that is not the only consideration to be reviewed by the Commissioner in increment withholding matters related to absenteeism. An analysis of the case law with respect to increment withholding relating to absenteeism since the State Board of Education's decision in Meli v. Board of Education of the Burlington County Vocational-Technical Schools, decided December 4, 1985 has made it quite clear that a board of education is obligated to show that it considered the

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particular circumstances of the absences, not just the total number, and the impact of those absences on the continuity of instruction when it takes action on a salary withholding. Further, the case law has made it quite clear that the concern for the continuity of instruction must be conveyed to the staff member by his or her supervisors during the period in question in a manner that is not merely pro forma or mechanistic. Kuehn v. Board of Education of the Twp. of Teaneck, decided by the State Board of Education February 1, 1983; Meli, supra,; Vonita Smith v. Board of Education of the City of Trenton, Mercer County, decided April 8, 1989; Transky v. Board of Education of the City of Trenton, Mercer County, decided April 19, 1989, aff'd State Board, September 6, 1989; Bass et al. v. Board of Education of Union City, Hudson County, decided April 16, 1990. Consequently, notwithstanding the fact that frequent absenteeism of a teacher from regular classroom instruction by its very nature disrupts the continuity of instruction (In the Matter of Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403, 414) and no matter how reasonable the Commissioner believes the increment withholding to be under the factual circumstances of this matter, he is constrained to render his decision within the context of and in accordance with the aforementioned requirements of law.

Unfortunately, despite the clear and precise language of the increment withholding case law with respect to absenteeism, the Board herein and petitioner's supervisors failed to carry out the requirements of law as it relates to absenteeism and increment withholding. Thus, the Keansburg Board of Education and its agents, as well as all boards of education statewide and their agents, must

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be cautioned that even when the excessive absenteeism of a staff member appears to be plainly worthy of increment withholding, a board of education and its agents are not absolved from meeting the requirements of law set forth above, nor is the Commissioner absolved from rendering his decision in full compliance with that body of law.

Accordingly, the Commissioner adopts the ALJ's recommended decision to reverse the Board's action to withhold petitioner's salary increments for the 1989-90 school year. Therefore, it is ordered that the increments withheld from petitioner be restored and appropriate adjustments be made to his salary.

COMMISSIONER OF EDUCATION

JUNE 12, 1991

DATE OF MAILING - JUNE 12, 1991
Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4545-91
AGENCY DKT. NO. 78-4/91

F.J.T., III, ON BEHALF OF HIS
MINOR CHILD, F.J.T., IV,
Petitioner,

v.

BOARD OF EDUCATION OF
THE CITY OF BURLINGTON,
BURLINGTON COUNTY
Respondent.

Louis A. Colaquori, Esq., for petitioner
John E. Queenan, Jr., Esq., for respondent

Record Closed: May 23, 1991 Decided: May 31, 1991

BEFORE LILLARD E. LAW, ALJ :

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges, among other things, that his son, a pupil attending the public schools under the jurisdiction of the Board of Education of the City of Burlington (Board), was wrongfully denied selection as valedictorian for the Class of 1991 of the Burlington High School.

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The Board denies the allegation asserting, among other things, that it properl adopted a policy for determination of pupil class rank.

Petitioner filed his Petition of Appeal before the Commissioner of Educatio on April 9, 1991, with a request for an expedited hearing. The Board submitted it Answer to the Petition on April 26, 1991. On May 3, 1991, the matter wa transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 *et. seq.* and *N.J.S.A.* 14F-1*et. seq.* and a request for accelerated proceedings, pursuant to *N.J.A.C.* 1:1-9.4.

No prehearing conference was held. The matter, therefore, proceeded to hearing; which was held on May 23, 1991, at the Medford Lakes Municipal Court, Medford Lakes, New Jersey. Petitioner submitted a Trial Memorandum and the record closed on May 23, 1991.

ISSUES

The issues to be determined by this administrative tribunal are these:

1. Whether the traditional method of selecting the Senior Class Valedictorian at the conclusion of the second marking period of the pupil's twelfth grade is superseded by a Board policy holding that pupil class rank shall be calculated by the final grade earned in all subjects (at the conclusion of the fourth and final marking period) ?

2. Whether adequate notice was given to those teaching staff members responsible for administering the Board policy and/or those pupils affected by the implementation of the policy?

FINDINGS OF FACT

The relevant and material facts are neither contested nor in dispute. Therefore, the following recitation constitute my **FINDINGS OF FACT** in this matter:

On the morning of February 21, 1991, F.J.T., a pupil enrolled in the Board's Burlington High School (BHS) was summoned to report to the school's Guidance Office. In the corridor, outside of the Guidance Office, F.J.T. met his Guidance Counselor, Robert Shurilla, who shook F.J.T.'s hand and instructed him to

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immediately report to Elizabeth Johnson, Head Secretary of the Guidance Office. Ms. Johnson invited the pupil to sit down and wait for an announcement that was to be made over the school's public address system. Shortly thereafter, Mr. Williams, the BHS principal, announced over the public address system that F.J.T. was ranked the number one pupil of the senior class. The principal then proceeded to announce the remaining top nine ranked pupils of the graduating class of June 1991. The ten pupils then met in the Guidance Office where they exchanged congratulations on their respective achievements. F.J.T. was selected to attend a dinner where all of the number one ranked pupils in Burlington County were to be guests at the Mount Laurel Inn.

F.J.T. was then invited to Mr. Shurilla's office where Mr. Shurilla insisted that F.J.T. telephone his mother to tell her the news of F.J.T.'s achievement. The call was made and F.J.T. spoke briefly with his mother. Mr. Shurilla then talked with Mrs. T. and congratulated F.J.T. as the class valedictorian. Before F.J.T. left Mr. Shurilla's office to return to his assigned class, Mr. Shurilla handed F.J.T. an index card which described F.J.T.'s class rank as follows:

Unweighted GPA 3.929 Rank 1
Weighted [1] GPA 4.295 Rank 1
In a Class of 144
End of 2nd marking period
Senior Year (P-1)

Subsequently, on or about February 27, 1991, Superintendent of Schools Patricia E. Abernethy received a complaint from the parents of two pupils complaining about the selection of F.J.T. as the number one ranked pupil of the senior class. As a consequence of the complaint, Superintendent Abernethy caused the have the Board's policies examined and discovered a Policy entitled "Grading Systems," which provides that final exams (sic) in the high school will have a value of 1/5 of the final grade for full year courses and 1/3 for half year courses. This policy

[1] The evidence demonstrates the Board Adopted in November 1985 and Revised on August 11, 1986, a system for weighted grades to determine class rank. (P-4)

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was adopted by the Board on March 8, 1971, with four subsequent revisions, the last of which occurred on April 24, 1989. In addition, the Superintendent determined that final examinations are required by the Board policy adopted on March 8, 1971, with the last of two amendments occurring on July 25,1988. The Superintendent also found the Board Policy entitled "CLASS RANK," which provides as follows:

CLASS RANK

The Board of Education acknowledges the usefulness of a system of computing grade point averages and class ranking for secondary school graduates, both to inform pupils of their relative academic placement among their peers and to provide learning with a predictive device so that each pupil is more likely to be placed in an environment conducive to success.

The Board authorizes a system of class ranking, by grade point average, for pupils in grades 9-12. All pupils shall ranked together.

Class rank will be calculated by the final grade in all subjects, except those subjects for which no credit is awarded, and will not include failing grades. Weighted credit will be calculated for grades earned in an honors course, and college preparatory. The class ranking of a pupil who has transferred to this district will include the grades earned in the regular program of the prior school. Grades earned in private summer school program will not be included in the calculation of class rank.

Any two or more pupils whose computed grade point averages are identical will be given the same rank. The rank of the pupil who immediately follows a tied position will be determined by the total number of all preceding pupils not by the rank of the immediately preceding pupil.

A pupil's grade point average and rank in class will be entered on the pupil's record and will be subject to Board Policy 8330 on the release of pupil records.

Adopted: 11 August 1986
Revised : 24 April 1989 (P-3)

The Superintendent examined the BHS Student-Parent Handbook and found at page 30, the Grading Policy which includes four marking periods and a final examination. The Grading Policy states each marking period has a 1/5 value of the final grade and a marking period consists of approximately 42 days. (P-2)

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As a consequence of these discoveries, the Superintendent, who was new to the School District, brought this information to the attention of the BHS principal and members of the Guidance Department on or about March 8, 1991. Mr. Shurilla testified, credibly, that he was generally aware of the provisions in the BHS Student-Parent Handbook, however, during the eleven years he had been employed as a guidance counselor at BHS, the senior class valedictorian had always been selected at the end of the second marking period of the senior year. Mr. Shurilla testified he was unaware of the Board's Policy entitled "Class Rank" (P-3) and he first learned of the policy on March 8, 1991, at the meeting with the Superintendent.

Mr. Shurilla asserted he had not observed any writing which instructed the BHS Guidance Department on the procedure for the selection of the senior class valedictorian. He contended, moreover, that the tradition had been, during his eleven years with the Guidance Department, to determine the valedictorian at the close of the second marking period of the senior year or the end of the seventh semester of high school. This assertion by Mr. Shurilla was corroborated by Ms. Johnson and Jane Bowers, Guidance Chairperson and Supervisor. Barbara Keller, teacher of English of BHS for 28 years testified she was also familiar with the tradition of selecting the valedictorian at the end of the seventh semester of the pupils attendance at BHS. Similarly, Ronald Forst, mathematics teacher and Chairperson of the mathematics Department at BHS, asserted it was his understanding the procedure for the selection of the valedictorian involved the use of the pupils final grades for the first, second and third years of high school together with the grades at the end of the seventh semester of the fourth year of high school.

In support of the testimony of Shurilla, Johnson, Bowers, Keller and Forst, the petitioner offered two documents into evidence with the heading of Burlington City High School, entitled "Rankings," which state, in pertinent part:

> ... Class rank is determined by the grades achieved while attending high school. The first rank is determined at the end of the Junior year and the final rank is determined at the end of the first semester of the Senior year ...
>
> (P-6, P-7)

These two documents have handwritten dates of 1965-66 (P-6) and 1971-72 (P-7) respectively. In any event, there was an established precedence for the tradition

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of selecting the class valedictorian at the end of the second semester and prior to the end of the school year; as asserted by Shurilla, Johnson and Bowers.

Guidance personnel Shurilla, Johnson and Bowers testified, uniformly, they were unaware of the Board's policy entitled "Class Rank" (P-3). None of these individuals had been informed or advised of the adoption of the policy on August 11, 1986 or its revision on April 24, 1989, although it is the Guidance Department personnel's responsibility of establishing pupil class rank and assuring that it is properly placed on the appropriate pupil permanent record. Shurilla, Johnson and Bowers were unaware of the Board's adopted and revised Policy, "Class Rank," because they had applied the traditional selection process to the 1990 valedictorian without incident or comment, as they had done in prior years.

Subsequent to the meeting with the Superintendent on March 8, 1991, Mr. Shurilla called F.J.T. into his office at or about the sixth period to advise F.J.T. he could no longer refer to F.J.T. as the class valedictorian. Mr. Shurilla stated that parents of two pupils had complained to the school's administration about the selection procedure and that the final grades would now be determinative of the class rank and, thus, the selection of the valedictorian.

Thereafter, F.J.T. reported Mr. Shurilla's conversation to his parents. Mr. F.J.T., III, telephoned the President of the Board and F.J.T.'s parents were invited to attend a closed session of the Board on March 11, 1991. Notes of the meeting held on March 11, 1991, reveal that the Superintendent and Board President reviewed the issue with the Board, *i.e.*, the past practice and the current Board Policy for determining class rank. It was disclosed that the parents of two pupils raised the issue as to the procedure for the selection of class valedictorian and the additional questions raised by petitioner. The Board was advised by its legal counsel that the Board could not knowingly violate its own policy. Petitioner and his wife were permitted to address the Board, setting forth their dismay that the selection process had been in effect for 20 years and if the Board now desired to bring its policy into line, it should do so for the 1992 academic year. After expressing his apologies to petitioner, the Board President advised that since the policy was clear, there was little likelihood the Board would revert to past practice.

Mrs. T. testified, credibly, that from the beginning of F.J.T.'s freshman year at BHS, she had been advised by school personnel that the selection of the valedictorian was based upon the pupil's class rank at the end of the seventh

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semester. She testified that her son had received his class rank at the end of his sophomore year where he ranked third in a class of 143. F.J.T. did not receive a class rank at the end of the second marking period of his sophomore year. Similarly, F.J.T. received his class rank at the end of his junior year where he was ranked first in his unweighted Grade Point Average (GPA) and second in his weighted GPA. F.J.T. did not receive a class rank after the end of the second marking period of his junior year. It was only after the second marking period of his senior year that F.J.T. received his class rank, which was first for weighted and unweighted GPA. (P-1)

DISCUSSION AND CONCLUSION

There is neither question or doubt that the Board adopted its policy entitled "Class Rank" which provides, among other things, that a pupil's "class rank will be calculated by the final grade in all subjects" and that "weighted credit will be calculated for grades earned in an honors course, and college preparatory." (P-3) This policy was revised by Board action on April 14, 1989. There is no effective date set forth on the published policy. It may be presumed, therefore, that the policy, which was originally adopted on August 11, 1986, was in force and effect on April 24, 1989. It is noted here that on August 11, 1986, the same date the Board adopted its class rank policy, it amended its Weighted Grades Policy, which was originally adopted by the Board on November 25, 1985.

It has been the long-standing tradition at BHS to calculated and determine the graduating class valedictorian at the end of the second semester of the senior or twelfth year. This tradition and practice has been exercised at least since the 1965-66 academic year. The tradition was followed at the close of the 1985-86 school years, subsequent to the Board's adoption of its "Class Rank" policy. Similarly, the practice was continued each year thereafter, including the 1989-90 school year. Or, as petitioner observes, one-full year subsequent to the Board's last revision of the Class Rank policy on April 24, 1989.

Personnel of the BHS Guidance Department, whose responsibility it is to calculate class rank, testified, credibly, that they each were unaware of a change from the traditional manner in determining the senior class valedictorian until they were so advised by the Superintendent on March 8, 1991. Although they each were aware of the Grading Policy enunciated in the Student-Parent Handbook (P-2); that policy does not address the question as to how class rank is calculated nor the procedure for determination as to the selection of class valedictorian. The Guidance

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Chairperson, the Head Secretary to the Guidance Department and a tenured guidance counselor, each testified that they had not seen nor were made aware of the Board Policy, "Class Rank," prior to March 8, 1991. Nor were they made aware that this policy was to be applied in the selection of senior class valedictorian.

The Board's authority to establish a policy concerned with pupil class rank is clear. *N.J.S.A.* 18A:11-1 *et. seq.* The Board's authority to enact rules and regulations embraces the power to administer them. The Commissioner has consistently held that he will not substitute his judgment for that of a board of education in such matters when a board acts in good faith and is not arbitrary, capricious or unreasonable. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* aff'd State Board 15, aff'd 135 *N.J.L.* 329 (Sup. Ct. 1947), aff'd 136 *N.J.L.* 521 (E. & A. 1948). 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. *IMO the Tenure Hearing of William Lavin* 1976 *S.L. D.* 796, 800.

I **FIND** and **CONCLUDE** that the herein Board acted within its statutory authority when it adopted and revised its policy know as Class Rank.

I **FIND** and **CONCLUDE**, however, that the Board's implementation of its Class Rank policy for the 1991 graduating class and its application for the selection of valedictorian was and is unreasonable. This is so because the Board knew, or should have known, of the long-standing tradition of determining the individual who is to be the senior class valedictorian occurred at the end of the second grading period of the twelfth year. Yet, with such knowledge, the Board failed to properly interpret its Class Rank policy to those responsible for administering it or to those pupils who might be affected by its implementation in the selection of the senior class valedictorian. The extent to which the long-standing tradition has been allowed and permitted to continue by the Board, can not now reasonably be discontinued on a mere complaint or without proper notice. *See High Horizons Dev. v. N.J. D.O.T.* 231 *N.J. Super.* 399 (App. Div. 1989). As the Commissioner said in *Amitabh Shankar v. Board of Education of the City of New Brunswick*, 1989 *S.L. D.* ____, at p. 19, "... the Commissioner finds and determines that a valedictorian selection process, through which the district honors its finest scholars, is of sufficient import to require more than an *ad hoc* administrative procedure. Such a significant scholastic distinction requires board adoption of a formal board policy.

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I **CONCLUDE** that the Board has failed to properly or adequately communicate its policy for the determination and selection of its senior class valedictorian to the entire pupil population and/or to those teaching staff members concerned with such determination and selection. I **DO NOT FIND** the Board's policy entitled "Class Rank" to be unreasonable but, rather, a legitimate exercise of the Board's authority and prerogative to establish order in determining pupil class rank for each of the years in attendance at BHS. I do **FIND** and **CONCLUDE** that, pursuant to the Commissioner's holding in *Shankar, supra.*, the Board is required to specify, by policy, its criteria, practice and procedure for the selection of senior class valedictorian and to communicate that policy to the entire school community.

I finally **CONCLUDE**, under the facts and circumstances of the instant matter, that the selection of F.J.T., IV, as valedictorian for the BHS Class of 1991 should be **SUSTAINED.**

ORDER

Accordingly, it is hereby **ORDERED** that the Board of Education of the City of Burlington designate F.J.T., IV as its valedictorian for the Class of June 1991 for Burlington City High School.

It is further **ORDERED** that petitioner's prayer for Damages, Costs and Attorney Fees are hereby **DENIED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

31 May 1991
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

June 3, 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 03 1991
Date

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 Index cards
P-2 Parent-Student Handbook
P-3 Policy-Class Rank
P-4 Board of Education Minutes, August 11, 1986
P-5 Board of Education Minutes, April 24, 1989
P-6 Rankings 1965-66
P-7 Rankings 1971-72

FOR RESPONDENT:

R-1 Board of Education Minutes
R-2 Final Examinations

WITNESSES

FOR PETITIONER:

Robert Shurilla
Elizabeth Johnson
Jane Bowers
Barbara Keller
Ronald Frost
F.J.T., IV
Mrs. K. T.
F.J.T., III

FOR RESPONDENT:

William Ryan, Jr.

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F.J.T., III, on behalf of his minor child, F.J.T., IV.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law pursuant to expedited hearing have been reviewed. Petitioner submitted a statement expressing his accord with the determination of the ALJ. The Board indicated that it would file no exceptions.

Upon a careful and independent review of the instant matter, the Commissioner reverses the initial decision for the reasons which follow.

The Commissioner concurs with the ALJ that Exhibit P-3, "Class Rank" represents a properly adopted board policy which was in full force and effect as of April 24, 1989. The Commissioner further agrees with the ALJ that on August 11, 1986, the same date on which the Board adopted its class rank policy, it amended its "Weighted Grades Policy," which was originally adopted by the Board on November 25, 1985. Moreover, by announcing the grading policy in the student handbook, pupils, faculty and staff were placed on

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notice of a change in how final grades for full year courses and half year courses were to be calculated. The record before the Commissioner indicates that Mr. Shurilla, the guidance counselor who announced to F.J.T., IV that he was to be class valedictorian, was aware of said "weighted grades policy" provisions in the student handbook. (See initial decision, at p. 5)

The board's duly promulgated grading policy, while not explicit, plainly infers that final grades are to be the basis upon which class rank is to be determined. Such grading policy clearly mandates that marking period grades are calculated on the basis of four marking periods and a final examination, each marking period of which has a 1/5 value of the final grade. P-3, the duly enacted 1989 class rank policy, while silent in regard to when the class valedictorian determination shall be made, plainly states that class rank will be calculated by the final grades in all subjects.

Merely because the guidance counselor and the principal did not know of the changed class rank policy -- which they should have because it is their job to know -- the Commissioner may not punish the student who endeavored diligently throughout his or her senior year to achieve the status of valedictorian simply to avoid embarrassment to staff or the student whose misfortune it was to have been prematurely selected by the erroneous practice of announcing said status at the end of the second marking period of the senior year. To agree with the ALJ would not only unfairly compromise the Board of Education's intent in revising its policy for selection of a class valedictorian, but also would improperly deny the honors and benefits of this laudable achievement to that student who persisted in his or her academic pursuits throughout the

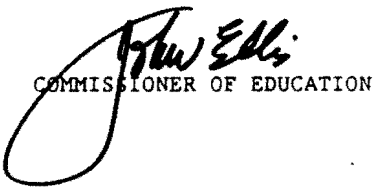
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full course of the senior year. Such an outcome plainly cannot be sanctioned. See Amitabh Shankar v. Board of Education of the City of New Brunswick decided by the Commissioner, June 22, 1989, wherein the Commissioner stated:

> ***the Commissioner finds and determines that a valedictorian selection process, through which the district honors its finest scholars, is of sufficient import to require more than an ad hoc administrative procedure. Such a significant scholastic distinction requires board adoption of a formal board policy. (Id., at p. 19)

Accordingly, the Commissioner rejects the initial decision finding F.J.T., IV valedictorian based on application of past practice in the district.

In so deciding, the Commissioner is mindful of the disappointment to which F.J.T., IV and his family have been exposed by having been prematurely selected as class valedictorian. In consideration of the student petitioner and his family, and to balance the interests of all those affected by this decision, the Commissioner suggests, but does not direct, that the Board may wish to consider the possibility of co-valedictorians for this year only.



COMMISSIONER OF EDUCATION

JUNE 13, 1991

DATE OF MAILING JUNE 13, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2104-89
AGENCY DKT. NO. 365-11/88
PERC DKT. NO. PRB 2289-90 - PRC 2289-
AGENCY NO. CO-89-137
(CONSOLIDATED)

MAINLAND REGIONAL EDUCATION ASSOCIATION ON BEHALF OF JOYCE PRINTZ AND JAMIE DiGIOVANNI,
Petitioner,
v.

BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Steven R. Cohen, Esq. for petitioners, (Selikoff & Cohen, attorney)
Louis J. Greco, Esq., for respondent

Record Closed: January 30, 1991 Decided: April 30, 1991

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners alleged that the action by the Board of Education of the Mainland Regional High School District (Board) to withhold their salary increments for the 1988-89 school year was contrary to the provisions of N.J.S.A. 18A:29-14, N.J.S.A 18A:30-1, the Board's own policy and the provisions of the negotiated agreement between the Board and the Mainland Regional Education Association (Association).

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On or about November 23, 1988, petitioners Printz, DiGiovanni and the Association instituted a Petition of Appeal with the Commissioner of Education (Commissioner) and an Unfair Labor Practice Charge with the Public Employment Relations Commission (PERC). Following the transmission of the Petition of Appeal to the Office of Administrative Law (OAL) as a contested case, pursuant to N.J.S.A.52:14B-1et. seq. and N.J.S.A. 14F-1 et. seq., the Board propounded a Motion to Consolidate the Petition and the Unfair Labor Practice Charge for designation of the Commissioner as having the predominate interest pursuant to N.J.A.C 1:1-17.5. On August 11, 1989, this tribunal issued an Order granting the Board's Motion. Subsequently, the Commission and PERC issued a joint order adopting this tribunal's determination concerning consolidation and predominate interest on September 15, 1989 and September 19, 1989, respectively.

The prehearing conference was conducted in this matter on October 31, 1989, followed by a prehearing order dated November 13, 1989. Hearings were conducted on April 18 and 20, 1990, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey.

Subsequently, the parties engaged in protracted settlement negotiations which resulted in a settlement agreement between the Board and petitioner Printz. Accordingly, the issues and controversy between petitioner Printz have been resolved rendering these proceedings as to her now moot. The matter before this tribunal as to petitioner Di Giovanni remain active and is now ready for disposition.

ISSUES

The issues, as agreed to by the parties at the prehearing conference and as modified as a consequence of petitioner Printz having been removed from this matter, are as follows:

1. Whether respondent lacked "good cause" or any other legitimate grounds within the meaning of said statute [N.J.S.A 18A:29-14] for its action to withhold petitioner's salary increments?

2. Whether respondent applied Policy 4151 ex post facto by basing its action upon petitioner's attendance record for the five school years preceding March, 1988, when it promulgated said policy?

3. Whether it was unreasonable for respondent to conclude that petitioner was "excessively absent" based upon the facts before it?

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4. Whether the Board's determination was based upon mere mathematical consequence, i.e., the number of days absent as of the date of respondent's action, unaffected by the reason(s) for the absence?

5. Whether the decision contravenes the Kopera standard (Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960)) as interpreted in Montville Township Education Association,,et al v. Montville Township Bd. of Ed. Super. Ct. App. Div. Dkt. No. A-1178-84T7 (decided December 6, 1985); Meli v. Bd. of Ed. of the Burlington County Vocational -Technical Schools, Burlington County, 1985 S.L.D., SB#27-85 (State Board of Education, decided December 6, 1985); and related cases?

6. Whether respondent's evaluation system as presently constructed is mechanical in nature and does not take legitimate illnesses or disabilities into proper account?

7. Whether respondent's action was arbitrary, capricious and otherwise ultra vires in that it effectively reduced the amount of sick leave petitioner was entitled to, notwithstanding her entitlement to a minimum of ten days by statute and under the applicable collective bargaining agreement in the Mainland Regional High School District?

8. Whether respondent's action was arbitrary, capricious and otherwise ultra vires in that it effectively nullified petitioner's entitlement to personal leave under Article XIII of the collectively negotiated agreement?

9. Whether respondent's action to permanently withhold the salary adjustments and increments of DiGiovanni for the 1988-89 school year contravenes her contractual entitlement to sick leave and personal leave pursuant to Article XIII of the collectively negotiated agreement?

10. Whether respondent's personnel action with respect to bargaining unit member DiGiovanni, all of which were taken under the guise of N.J.S.A. 18A: 29-14, effectively nullified and chilled her entitlements to sick leave and personal leave under Article XIII of the collective bargaining agreement then in full force and effect between charging party and respondent?

11. Whether respondent's personnel actions with respect to bargaining unit member DiGiovanni, who did not exceed contractual limits for use of sick and personal leave, constitutes a unilateral alteration of the terms and conditions of employment negotiated between charging party and respondent as embodied in Article XIII of their collectively negotiated agreement?

12. Whether respondent's personnel actions with respect to DiGiovanni have had the effect of nullifying and chilling use of sick leave and personal leave under Article XIII by the other members of charging party's bargaining unit?

13. Whether, by reason of the foregoing, respondent has acted in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5)?

14. If petitioner's leave was within contractual and statutory entitlements, has the Board proven a disruption of continuity of instruction? Transky v. Trenton Comm. Dec. April 19, 1989.

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UNCONTESTED FACTS

Petitioner DiGiovanni is a tenured teaching staff member in the employ of the Board. Petitioner commenced her employment in or about 1977.

A teaching staff member, steadily employed by the Board and protected by tenure, is entitled to a minimum of ten school days of sick leave with full pay in any school year. N.J.S.A. 18A:30-2. Pursuant to statute, N.J.S.A. 18A:30-3, all days of such minimum sick leave not utilize during a given year shall be accumulated to be used for additional sick leave as needed in subsequent years.

The Association, pursuant to the New Jersey Employer-Employee Relations Act (Act) , N.J.S.A. 34:13A-1 et. seq., is the exclusive majority representative of a bargaining unit, which includes all regularly employed certified personnel not engaged as supervisory employees by the Board. Petitioner DiGiovanni is a member of the Association's bargaining unit.

The Board and the Association have been parties to a series of collectively negotiated agreements covering terms and conditions of employment, including all forms of leave to which the members of the Association's bargaining unit are entitled and any conditions under which such leave may be taken. The Board and Association were parties to a collectively and negotiated agreement for the period July 1, 1987 through June 30, 1988. Under Article XIII of said agreement, petitioner DiGiovanni was entitled to the following forms and amounts of temporary leave and sick leave:

Article XIII A.1 - three personal days
A.2 - three funeral days and three critical illness days
A.3 - professional days
B.1 - ten sick days (ten month employees);
- twelve sick days (twelve month employees)

On February 11, 1987, at the regular meeting of the Board, Policy and Regulation Number 4151, "Staff Attendance," was introduced for its first reading and approved. (The Board's policy stipulates that there must be two public readings of the policy before its adoption). On March 9, 1987, at a regular meeting of the Board, two staff members, who were members of the Association, raised questions with the Board concerning the Staff Attendance Policy prior to its second reading. The second reading of Policy 4151 was conducted and discussed by the members of

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the Board. On a roll call vote, the motion to adopt the policy was unanimously approved.

The adoption of Policy Number 4151 was a result of the School District's failure to pass this component of the State Department of Education's Monitoring System. Policy 4151 contains three major components; i.e., Staff Attendance, Staff Attendance Review and Improvement Plan, and Staff Attendance Disciplinary Action Guidelines. Under Staff Attendance the Policy reads as follows:

> The regular and prompt attendance of staff members is an essential element in the efficient operation of the School District. Absenteeism exacts a high cost in the depletion of District resources and in the disruption of the educational program. The Board considers conscientious attendance an important criteria of satisfactory job performance.
>
> A staff member who fails to give prompt notice of his absence; misuses sick leave, fails to verify his absence in accordance with District policy; falsifies the reason for an absence; is absence without authorization; is repeatedly tardy; or accumulates an excessive number of absence, may be subject to discipline, which may include the withholding of salary increments or certification of tenure charges. No employee will be discouraged from the prudent, necessary use of sick leave or any other leave provided for in the negotiated contract.

Under the Staff Attendance Review and Improvement Plan the Policy provides for "Planning," "Implementation," "In-Service Training," "Counseling," and "Discipline."

The Staff Attendance Disciplinary Action Guidelines of the Policy provide as follows:

STAFF ATTENDANCE DISCIPLINARY ACTION GUIDELINES

A staff member may be subject to disciplinary action for excessive absenteeism or other abuse of paid or unpaid leave. Examples of absenteeism which may require disciplinary action include, but are not limited to, the following:

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REASON	RECOMMENDED DISCIPLINARY ACTION*
Unexcused Absence:	
One unexcused absence in one year	Counseling, letter of reprimand; and automatic docking of pay at 1/200 or 1/240 of annual salary.
Two unexcused absences in one year, or five unexcused absences in three years.	In addition to automatic pay docking for each unexcused absence; withholding of increment and/or tenure hearing charges. Non-tenured staff may be terminated for unexcused absences.
Excused Absences:	
Eight absences by the midpoint of a given year.	Counseling
Nine absences in the current year and nine or more days in any two of the previous years; and a total absence of sixty days or more during a five year period, (excluding approved conference, workshop, field trip days and approved half or full year leaves of absence.)	Withholding of increment and/or tenure hearing charges will be considered after a review of the frequency pattern and type of absence.
A pattern of short term, (one to five day) absences on Mondays, or Fridays, or on days preceding or following school holidays:	
Three such occurrences in one year.	Counseling
Five such occurrences in one year	Letter of reprimand
Ten such occurrences in two years or less.	Withholding of increment, and/or tenure hearing charges may be considered after a review of the frequency pattern and reason for absence.

Note: Restoration of increment will be considered when a significant and sustained improvement of attendance is evidenced by an attendance record equal to or better than the district average during each of three consecutive years.

*A pattern of excessive absences by nontenured staff members may be cause for non-renewal or termination of employment. (J-1)

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Alfred Arena, Superintendent of Schools, presented Policy 4151 to all staff and faculty members at meetings in March 1987, and again in September, 1987. Policy Number 4151 was effective as of September 1987.

Policy 4151 was not the subject of collective negotiations between the Association and the Board prior to its adoption or subsequent thereto. Copies of Policy 4151 were distributed to all members of the staff.

Subsequently, the administration of the School District conducted a study of the attendance records of all 80 staff members. In a report submitted to the Board from Superintendent Arena (R-5), the administration identified eighteen (18) staff members who had reached the first threshold for disciplinary action; i.e., nine or more absences during the 1987-88 school year. After further study of the attendance records, a total of twelve individuals were eliminated from further review because they did not meet the additional test as specified in Policy 4151. These twelve individuals who were eliminated had not accumulated sixty or more absences over a five year period, or they were on various leaves of absences during the 1987-88 school year. A further review of the six remaining individuals resulted in three of those to also be eliminated after an intensive and individualized review of their attendance records. Petitioner DiGiovanni was among those three remaining staff members recommended to be disciplined. One of the three teaching staff members recommended for disciplinary action was dismissed by the Board, leaving petitioner DiGiovanni and former petitioner Printz subject to discipline under Policy 4151.

On April 15, 1988, petitioner DiGiovanni was advised by the Superintendent of her salary for the 1988-89 school year. (P-2) On June 30, 1988, petitioner was advised by way of letter from the High School Principal, Thomas P. Dougherty, that her absences were in excess of the District average and that petitioner may fall within the Guidelines established by the Board under Policy 4151. The principal, therefore, requested that petitioner make an appointment to meet with him to discuss her absenteeism "vis-a-vis this policy." (P-3)

A review of petitioner DiGiovanni's Annual Performance Report for the prior five years demonstrates as follows:

For the school year 1983-84, petitioner was found to be performing in a satisfactory manner in all aspects of her job description. With respect to her absence

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record for 1983-84, the report demonstrates that petitioner had used seven sick days, three personal days, and three critical illness days. There is no comment on the report to indicate that absenteeism was a problem. (P-1A)

For the 1984-85 school year, petitioner's Annual Performance Report demonstrates that she had performed satisfactorily within her job description. With regard to absenteeism, the record demonstrates that petitioner used four sick days, three personal days, one day for a funeral and one day for critical illness. There are no comments with respect to absenteeism. (P-1B)

With regard to petitioner's 1985-86 Annual Performance Report, it indicates that petitioner was satisfactorily performing all aspects of her job description. It also indicates that no areas are cited as in need of improvement at this time. The absentee record indicates that petitioner had used seven sick days, three personal days, and no professional days. The report also indicates that petitioner DiGiovanni was satisfactorily conforming to all Board policies and regulations. (P-1C)

Petitioner's Annual Performance Report for the 1986-87 school year demonstrates that she had used seven sick days, three personal days, one professional day and two critical illness days as of May 15, 1987. The supervisor who had completed the report noted that petitioner had satisfactorily complied with the school policies and regulations during the course of the school year except, as had been noted in writing, her failure to attend a Departmental meeting and a verbal notification of lateness to a morning assignment. Petitioner filed a rebuttal, in writing, with respect to these comments, among others. (P-1D)

Petitioner's 1987-88 Annual Performance Report indicates, among other things, that no areas were cited as in need of improvement at the time of the report. With regard petitioner's absences, the record demonstrates that she was absent four and one-half sick days, three personal days, and no professional days. The report continues to indicate that petitioner satisfactorily conformed to all policies and regulations of the Board. (P-1E)

By way of letter dated July 12, 1988, Superintendent Arena advised petitioner that the Board had scheduled an Executive Session for August 24, 1988, to discuss personnel items including a review of attendance records and the possibility of withholding increments and other salary adjustments. The Superintendent also advised petitioner that the matter would be discussed by the Board in Executive

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Session unless those persons whose rights may be affected request in writing that the matter be discussed publicly. (P-4)

Principal Dougherty wrote a letter to petitioner, dated July 18, 1988, wherein he thanked petitioner for taking the time to visit and discuss petitioner's attendance profile with the principal. Principal Dougherty expressed the hope that the meeting clarified the Board's attendance policy and how it may have an impact on petitioner's employment status. The principal assured petitioner that he was aware of, and hopefully sensitive to, the circumstances with which petitioner had to deal with these last couple of years. The principal also expressed that petitioner should enjoy the remaining days of summer and that he looked forward to seeing her in September. (P-5)

By way of letter dated August 30, 1988, Superintendent Arena advised petitioner DiGiovanni that the Board, at its regular meeting on August 29, 1988, voted to permanently withhold petitioner's 1988-89 salary adjustment and salary increment for excessive absenteeism in violation of the Board's Policy 4151. (P-6)

The record demonstrates that between the school years 1983-1984 and 1987-1988, petitioner DiGiovanni averaged 13.6 absences per year. During this five year period she was absent a total of 68 days. The breakdown illustrates that petitioner used a total of 46 sick days, 15 personal days, six critical illness days and one funeral day. (J-5)

This concludes a recitation of the undisputed facts in this matter.

TESTIMONIAL EVIDENCE

Eugene Sharp, Field Representative for the New Jersey Education Association (NJEA) testified, among other things, that he had worked with the Mainland Regional Education Association since about 1975, where he was involved with seven agreements reached between the Regional Educational Association and the Board. He asserted that prior to 1986 there were three different bargaining units within the school district. In or about 1986, the three bargaining units were consolidated into one bargaining unit.

With regard to the Agreement between the Regional Education Association and the Board for the term July 1 , 1987 through June 30, 1988, Sharp acted as the

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chief negotiating person for the Association. As such, Sharp was the chief spokesman for the Association during the bargaining process to reach the agreement. Sharp testified concerning Article XIII, the Leaves of Absence provisions in the Agreement. Sharp asserted, among other things, that the three former separate agreements were merely combined into one agreement. The new Agreement included, among other things, Personal Days; which provides for three Personal Days for all full-time employees, except for ten month secretarial/clerical employees the allowance is two and one-half days, and for custodial employees the allowance is two days.

Sharp also testified with regard to the provision for Death or Critical Illness in the Immediate Family. He asserted that the allowances here were carried over from previous agreements. He testified, moreover, that the Critical Illness provision is found in less than twenty percent of the agreements throughout the State of New Jersey. Sharp testified that during the negotiations for this Agreement (J-2) there was no discussion between the parties with respect to the Death or Critical Illness in the Immediate Family provisions. Sharp did testify that the definition of immediate family was expanded in the subsequent contract for the period July 1, 1988 through June 30, 1991 (J-3).

With regard to the provision for Professional/Work Related Leave, Sharp testified that the application of this provision of Article XIII was discretionary on the part of the Board. He testified that this provision also was carried over from previous agreements.

Sharp asserted that sanctions or disciplinary actions concerning absences or leaves of absences were never discussed in the negotiating sessions between the Association and the Board. With regard to Board Policy 4151, Sharp testified that he first saw the policy in writing in 1988. He contended that no Board member nor administrator of the School District sought to bargain with regard to Policy Number 4151. Sharp contended that he had learned from an Association member that the Board was taking disciplinary action against teachers pursuant to the Policy. Sharp mistakenly believed that Policy 4151 was adopted by the Board in March 1988. He asserted that teachers had called NJEA to report they were in trouble because of problems with attendance. Sharp read the Policy in preparation for a meeting with the Superintendent in July 1988. Sharp asserted that he attacked the Policy in two ways; i.e., (1) with respect to the substance of the policy and, (2) in consideration of the persons to be disciplined.

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Sharp advised the Superintendent that a review of the Policy would be necessary; that the Association would seek legal counsel and that it might take legal action thereafter. Sharp and the Association President met with the Superintendent on July 24, 1988 to express the Association's concern with the Policy. Sharp opined that the Policy's disciplinary guidelines did not comport with applicable statutes nor the Agreement between the Association and the Board. Sharp contended that individual circumstances were not taken into consideration when imposing disciplinary action upon a teaching staff member. He further asserted that the five distinctive steps in the Policy had not been implemented through the Board's disciplinary action guidelines. He argued that former petitioner Joyce Printz had not been afforded counseling as provided by the Policy Guidelines.

Sharp asserted that because of his and the Association's arguments with respect to the application of the Disciplinary Action Guidelines, the Board's disciplinary list was reduced from ten individuals to three; including former petitioner Joyce Printz and petitioner DiGiovanni, along with one other teaching staff member.

Sharp testified concerning an extensive discussion with the Superintendent regarding former petitioner Printz. His discussion about DiGiovanni, however, was general in nature and nothing specific appear in his notes of the meeting. Sharp did suggest that he had discussed the retroactive application of the Policy as it related to DiGiovanni which, he believed, was unfair.

Sharp testified he was again the chief spokesman for the Association with regard to the negotiations for the July 1, 1988-June 30, 1991 Agreement. He testified that all the negotiations were finalized by October 1988. He contends, moreover, the Board did not seek to reopen negotiations for the Article XIII leave provisions. However, the Personal Days were increased for the secretaries and custodians from the prior Agreement. Sharp also testified that the sick leave payout was modified in the new Agreement. In addition, under the Death and Critical Illness provision, the new Agreement expanded the definition of immediate family from ".... any relative residing in the immediate household " to "any person residing in the immediate household."

Sharp testified that there was an addendum to the Agreement entitled Attendance Recognition Program which amended the 1986-87 Agreement, and

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applied to the 1987-88 school year. He asserted the amended provision was effective for only one year and thereafter either party was free to place it on the negotiating table. Sharp believed the addendum to the Agreement (J-4) was an attempt by the Superintendent to satisfy negative comments with respect to the State Monitoring Procedures regarding staff absenteeism. Sharp asserted that J-4 was tied to Article XIII indirectly rather than directly. He further asserted the addendum to the Agreement (J-4) carried over into the 1988-1991 Agreement with modification, which appears now as Article XXIA. The Addendum to the Agreement purported to establish a one year experimental program intended to reward those teachers who maintain high levels of attendance and to encourage others to emulate their positive example. Article XXIA states a similar purpose.

On cross-examination, Sharp characterized the Board's policy and the Addendum to the Agreement as a carrot and stick incentive policy. He contended that Policy 4151 was the stick while the Addendum to the Agreement (J-4) was the carrot. Sharp conceded that the Commissioner of Education has held, in a variety of instances, that regular teacher attendance is important. He also conceded that employees under Policy 4151 can be disciplined even within the limits of the Agreement between the Association and the Board. He further conceded that Policy 4151 is an attempt to improve teacher attendance.

Jamie Rey DiGiovanni testified on her own behalf asserting, among other things, that she had been employed by the Board as a teacher of Spanish since September 1977. She testified concerning her Annual Performance Report and asserted there was no discussion that her absences were excessive or that any disciplinary action would be taken against her. She asserted she was never counseled about her attendance and that no one in the administration had ever mentioned anything about her attendance.

Petitioner DiGiovanni stated she first learned about the Board Policy 4151 at a faculty meeting conducted by Superintendent Arena. She believed, mistakenly, the meeting with the Superintendent was in March or April 1988. She understood the Policy was something new to be adopted by the Board, however, she did not feel threatened by the Policy. She understood that in the event there was a problem, she would be called in to explain her absences followed by a counseling session. She asserted she believed there would be a series of steps with respect to counseling and discipline. She also asserted she had received the Policy in stages; i.e., different pages were submitted to her over three different days.

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Petitioner DiGiovanni testified that on July 5,1988, she received a letter at home, dated June 30, 1988, from her principal, Thomas P. Dougherty. The principal stated in the letter that there may be a problem with her attendance. Petitioner immediately called the school and was surprised that her attendance was an issue. There was a reference as to the district average, however, petitioner was uncertain as to what district average concerned. Principal Dougherty was on vacation and, therefore, unavailable to meet with petitioner immediately. Petitioner met with Principal Dougherty on the subsequent Friday. She recalls the conversation with him concerning the adoption of the Policy 4151 by the Board, and that there might be a problem with petitioner's attendance. Petitioner asserted that Principal Dougherty told her not to be worried about it. The Principal did not have her personnel file with him during this discussion and conversation. When petitioner left the meeting, there was no indication that any disciplinary action would be taken against her.

On July 13, 1988, petitioner received a letter from Superintendent Arena which stated the Board had scheduled an Executive Session and it would discuss and review petitioner's attendance records with the possibility of withholding an increment and other salary adjustments. Petitioner was shocked to receive the letter and felt betrayed. Petitioner subsequently spoke to Principal Dougherty who was unaware of Superintendent Arena's letter to petitioner. Subsequently, petitioner received a letter dated July 18, 1988 from Principal Dougherty in which, among other things, he thanked petitioner for taking the time to come in and discuss her attendance profile, and he hoped the meeting clarified the Board's Attendance Policy and how it may impact upon her employment status. The Principal continued to assure petitioner he was aware and sensitive to the circumstances with which she had to deal these last couple of years. The Principal asserted that petitioner should enjoy the remaining days of summer and he looked forward to seeing her in September. Principal Dougherty did not indicate to petitioner that he recommended an increment withholding to the Superintendent.

Petitioner asserted that Superintendent Arena never discussed the circumstances of her absences with her. She asserted that her Grandmother, who had lived in the home, had passed away, and there were two occasions in which the family members had surgery. Superintendent Arena did not discuss these circumstances with petitioner. Moreover, petitioner asserted the Superintendent was supportive of her when she told him of her father's admission into a hospital for

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surgery. She asserted the Superintendent advised her that she should take whatever time was needed away from her job. Petitioner testified that Superintendent Arena had never contacted her to learn of the circumstances of her absences between July 12, 1988, the first letter the Superintendent addressed to petitioner, and August 29, 1988; the date of the regular meeting of the Board of Education, at which it took the action to permanently withhold petitioner's 1988 - 1989 salary adjustment and increment for excessive absenteeism.

Petitioner DiGiovanni testified extensively concerning certain of her absences beginning in the 1983-1984 school year and up through the 1987-1988 school year. During the 1983-1984 school year petitioner was absent three personal days and three critical illness days because her daughter, who was then three and one-half years of age, was having surgery. The absences were approved by the school's administration. In the 1984-1985 school year, petitioner was absent three personal days in September and October when her grandmother was ill. In November 1984, petitioner was absent under the critical illness days and also for the funeral of her grandmother. In 1985-1986, petitioner was going through a divorce action and was absent three personal days, which were approved by the school's administration after she had completed a certification for her absence. During the 1986-1987 school year, petitioner was absent for critical illness days and also personal days when her father underwent heart surgery and she used the personal days to attend to her father. These days were approved by the school's administration. She asserted the absences were during the midyear examination week and she only missed time when she would be proctoring another teacher's examination.

Petitioner testified concerning personal days of absence in the 1987-1988 school year where, in November 1987, she was absent three personal days to attend a seminar entitled, "Life Spring". This program was designed to improve one's self and relationships with others. Petitioner discussed the program with the Superintendent and the Principal in two separate conversations. There were two other staff members involved in the seminar as instructors. Both of the instructors were given professional leave days. Petitioner was denied professional leave days, but was excused from her teaching duties on the basis of her use of three personal days. Petitioner asserted she was encouraged by the Principal and the Superintendent to participate in the seminar. Petitioner was denied professional days absence because the two teachers were in the school's Psychology Department and she was not. She was required to complete a form and certification, which was approved by her supervisor, the Principal and the Superintendent. She testified that

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there was no indication her salary adjustment or increment was in jeopardy when she used these personal days.

Petitioner testified that Superintendent Arena had never asked her to review the reasons or circumstances of her absence prior to, or subsequent to, her receipt of the Superintendent's letter dated July 12, 1988. She asserted that all of the certifications she submitted with respect to her absence were checked off as "approved". She stated there was no warning or reprimand, either oral or in writing, about of the use of the sick leave days.

On cross-examination, petitioner asserted she did not envision any reason to review her absences with Superintendent Arena. She further asserted that attendance has never been brought to her attention with respect to her Annual Professional Improvement Plan. The record demonstrates, however, that in an Improvement Plan dated May 30, 1985, it was recommended that petitioner "improve attendance to achieve a goal of 95% attendance." Petitioner subsequently testified she submitted a disclaimer with regard to her Personal Improvement Plan dated May 31, 1985. The disclaimer was prepared for her by a union member. The disclaimer states, among other things, that petitioner did not recognize as an accurate reflection of her attendance record, the so-called percentage figure of absence rate calculated. The disclaimer continues to state the figure calculated violated petitioner's statutory and contractual rights as well as the guidelines issued by the State Board of Education. (P-7) The three days absence with regard to the Professional Improvement Plan and the disclaimer related to three days in which the teachers were out on strike.

Erland Chau, a teacher of Science in the Board's employ and current President of the Association, testified on petitioner's behalf. During the 1984-1985 school year Chau received an admonition concerning 95% attendance on his Personal Improvement Plan. He asserted a supervisor informed him that the admonition on his Personal Improvement Plan was as a consequence of the "strike" in which the faculty engaged during that school year. Chau stated he filed a disclaimer to the Personal Improvement Plan, which was prepared by the Association in response to the 95% profile. Chau contended there was a tense relationship between the Association and the Board immediately following the strike, and that this tense relationship continued throughout the 1984-1985 school year.

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Chau asserted that he spoke to the Board with regard to former petitioner Printz and petitioner DiGiovanni. He asserted the Association members were concerned about the implementation of Policy 4151 and its affect upon the use of the sick days by the staff members. He contended many staff members were reluctant to use sick days when, in fact, the staff member was actually ill. On cross-examination, Chau testified, among other things, that the Board's Policy 4151 became the basis of discussion among the Association members. Chau did not know when the Board adopted Policy 4151. Nor was he aware whether the Association had taken any action in September 1987, or thereafter, with PERC with respect to an unfair labor practice; or whether it took any action before the Commissioner of Education concerning the Policy. He was aware there was discussion about staff attendance rates in the State Mandated Monitoring System during the 1984-1985 school year.

Alfred Arena, who became the Board's Superintendent of Schools in August 1986, testified he became aware of the Report of the 1984-1985 State Mandated Monitoring subsequent to his employment. He asserted he became aware of the prior monitoring in September 1986, when he received a report from the Atlantic County Superintendent of Schools. The School District had failed to receive full certification as a consequence of the monitoring program. Specifically, the school district failed in two areas: i.e., Special Education and Staff Attendance. Superintendent Arena reviewed the Monitoring Report with respect to staff attendance and learned that the monitors considered an absentee rate of 5% as acceptable.

As a consequence of the State Monitoring Program, Superintendent Arena recommended to the Board the adoption of Policy 4151. The Board first considered the Policy through its Policy Committee in January 1987. As the herein record notes, on February 11, 1987, Policy 4151 was introduced to the Board for its first reading. Subsequently, on March 9, 1988, the Board adopted Policy 4151. Superintendent Arena stated that during the public session of the Board's regular meeting on March 9, 1987, two representatives of the Association were present and inquired of the Board as to the intent of the policy and as to a definition for excused absence. These inquiries were responded to by members of the Board and Superintendent Arena.

The Superintendent reviewed the Board's records with respect to grievances filed by staff members concerning their 1985 Professional Improvement Programs,

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where it was recommended that each staff member improve their attendance to the 95% standard. The Superintendent found there were no grievances filed by staff members concerning the Professional Improvement Program recommendation. Also, the Association did not file any legal action after the Board's adoption of Policy 4151. Nor was there any action taken by the Association after September 1987, when Superintendent Arena made the second presentation to the staff members concerning the implementation of Policy 4151.

The Superintendent studied the attendance records of all 80 teaching staff members in the Board's employ. He originally identified eighteen (18) staff members for disciplinary action. These staff members reached the first criteria of nine (9) absences in one year during the last five (5) years. After further study, the eighteen (18) targeted teaching staff members was reduced to six (6) staff members. The next criterion, which was long - term, short-term absences, resulted in the six (6) questionable records to be reduced to four (4) staff members. One of the four was recommended to be excused, which ultimately led to three (3) people whose increments were recommended to be withheld. Later, one (1) teacher's withheld increment was reinstated by the Board after consideration of reasons for the absences, which left former petitioner Printz and petitioner DiGiovanni as the only two (2) individuals recommended for the withholding of their adjustment and salary increments. As the record shows, Printz and the Board settled their differences, leaving petitioner DiGiovanni as to the only staff member subject to sanctions under Board Policy 4151.

Superintendent Arena opined that staff absenteeism was detrimental to the educational program. Such staff absenteeism interfered with the theories being taught and interfered with consistent instruction. He opined that staff absenteeism had another effect; i.e., the employment of substitute teachers who are not certified in the discipline being taught, which creates other problems. In the absence of certified substitutes, it is necessary for the school administration to call upon other permanent staff members to fill in for the absent staff member which, again, creates problems of scheduling, program continuity, among other things. He asserted it is easier to employ qualified substitute teachers for the long-term absence as compared with the short-term or daily absence. In a document prepared for this litigation and not reviewed by the Board, the Superintendent demonstrated there were only two certified substitutes for fourteen absences by DiGiovanni during the 1987-1988 school year. He could produce no record with respect to certified or noncertified substitutes for DiGiovanni for the 1986-1987 school year. The two

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certified substitutes for DiGiovanni during the 1987-1988 school year were full time staff members of the Mainland Regional High School. (R-7)

On cross-examination Superintendent Arena testified, among other things, that Policy 4151 adopted by the Board was used by his former employer, the Haddonfield Board of Education, and he brought the Policy with him when he moved to the Mainland Regional School District. Although the published Policy appears to have a 1980 copyright of the New Jersey School Boards Association, Arena asserted he did not receive the Policy from the New Jersey School Boards Association. He asserted the Haddonfield Board of Education adopted the Policy for the 1985-1986 school year. Arena did not change any of the wording of the Haddonfield Policy when it was reviewed by the Mainland Administrative Staff, its Board President and the Grievance Chairman of the Association. He asserted he reviewed the Policy with the Board's attorney prior to its presentation to the Board.

Superintendent Arena conceded that the July meeting between DiGiovanni and Principal Dougherty would not have been meaningful to avoid a penalty for the 1987-1988 school year. He also conceded that when eight absences are reported by midyear of each academic year, the teacher is suppose to be counseled by the building principal.

Superintendent Arena testified that patterns of absences: i.e., Monday-Friday absences, was an indicator of abuse of sick leave or other leave provisions. Another form of abuse would be absences before or after holidays. His asserted that a teaching staff member determined to have committed these types of absences three times or more would be counseled. A teaching staff member where these incidents occurred five times or more would receive a letter of reprimand which would be placed in the teachers personnel file. The Superintendent conceded, moreover, that petitioner DiGiovanni's absences were legitimate and that no such pattern of absences were discerned. For the period in question, petitioner DiGiovanni was absent 68 days which included sick leave days, personal days, critical illness and funeral leave days. In making his recommendation to withhold petitioner's salary increment, the Superintendent told the Board members of the reasons for each absence but not the circumstances attendant thereto. The Superintendent conceded that Policy 4151 calls for a sequence of events for a teacher to challenge the Policy. He also asserted that no staff member is to be discouraged from using those days available to the individual that appear in the Agreement between the Board and the Association. He asserted the Board was attempting to the correct the abuse of the

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three personal leave days available to all teaching staff members contending, it was impossible for the Board to provide all staff members the use of all three personal days each academic year.

Superintendent Arena asserted that in addition to the two meetings he held with the staff members where Policy 4151 was explained, the teachers were invited to ask questions about the Policy; which he answered. He asserted that petitioner DiGiovanni asked no questions nor did she ever ask for a review her attendance record.

LEGAL ARGUMENTS

The parties legal arguments are summarized herein below as follows:

The Board observes that the Brief filed on behalf of petitioner raises essentially four substantive arguments in favor of petitioner as follows:

1. That the Board's action resulted from a mathematical calculation under it's policy and no more.
2. That the petitioner had insufficient notice that she was at risk.
3. That teacher absenteeism within contractual meritorious entitlements cannot be the basis of an increment withholding by a Board of Education.
4. That the Board's adoption of Policy 4151 constituted a refusal by the Board to bargain the terms and conditions of employment.

At Point I of the Board's argument, it contends that the scope of review of the Board's action is limited to determining the presence, in the record, of a factual basis for the action taken. The Board argues that the review to be conducted by this tribunal, and in turn by the Commissioner, is very limited in scope. It is not the charge of this tribunal to reevaluate the merits of the Board's opinion regarding the sufficiency of the DiGiovanni absences to warrant withholding of her increment in accordance with the Board Policy 4151. Whether or not this Court agrees or disagrees with petitioner's absences being sufficient to warrant the withholding, the standard of review is limited only to determining whether or not the Board 's decision was arbitrary, or any way unreasonable, or constituted an abuse of the Board's legislatively vested discretion. The Board argues that if this Court has a

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difference of opinion with the conclusion reached by the individual Board members, it is not by itself a sufficient basis to warrant a reversal of the Board's action.

The Board cites the holding by the Appellant Division of New Jersey Superior Court in the matter of Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, affirm. State Board 1979 S.L.D. 876, reversed per curim 1980 S.L.D. 1539 (App. Div.), that where there is no more than a difference of opinion between the local Board of Education and the State Board of Education on an increment withholding; the difference of opinion is an insufficient basis for reversing the local Board's decision. The herein Board contends that this Rule of review applies and controls in the proceedings now being considered by this Administrative tribunal.

At Point I of petitioner's brief, she contends that Board Policy No. 4151 is an arbitrary, capricious and ultra vires policy used to withhold her 1988-1989 salary increment; based solely upon the total number of temporary leave days utilized under statute and contract as of the date of the Board's action. Petitioner contends that Policy 4151 relies exclusively upon sheer numbers of absences, without considering the reasons for those absences. She contends the Board miscalculates the raw numbers by erroneously including days of temporary leave; which were bargained for under the contract (Agreement), and even absences which were actually approve by Administrative personnel. Petitioner argues the Policy's reliance upon the mere fact that her use of temporary leave exceeded 60 days in the last five years, without consideration of the reasons for, or the characterization of those absences as sick days or personal days, is clearly arbitrary, capricious and unlawful. It shows a mechanistic application of Policy 4151 based upon mere mathematical consequence; which is patently unfair to petitioner and all other members of the Association's bargaining unit, and must render the Policy invalid. Petitioner cites the matter in Montville Township Education Association v. Montville Township Board of Education, Superior Court Appellate Division, Dkt. No. A-1178 84T7 (Decided December 6, 1985), wherein the Commissioner said:

> ...[T]he Commissioner cannot accept as reasonable an attendance evaluation system which would determine the teachers' evaluation solely upon the basis of the accumulative number of days of absence, regardless of the circumstances of the absence of a teacher's previous attendance history.

Petitioner also cites Neptune Township Education Association v. Board of Education of the Township of Neptune, Monmouth County, 1989 S.L.D. __, Commissioner of Education No. 188-89 (Decided July 10, 1989), wherein the Commissioner held that a

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Board of Education may not promulgate attendance policies which discipline staff members based on sheer number of absences without taking into consideration the nature of the absences. Such action will not be upheld by the Commissioner or the Courts.

Petitioner argues that by the Board penalizing her for her legitimate use of contractual and statutory days, and using the negotiated days in the computation of the total number of days absent, the Board effectively nullified and chilled her entitlement to personal leave under Article XIII of the collectively negotiated Agreement. In its decision to withhold DiGiovanni's increment based upon a 68-day total absences , the Board failed to consider the circumstances of her absences. All three personal days taken by DiGiovanni during the 1987-1988 school year were for a Life -Spring seminar to which the Principal and Superintendent of Schools had encouraged her to attend, and which was approved by the Superintendent. These days were nonetheless included in the computation of DiGiovanni's 60-day total. The Board thus used days of leave which were approved by its own administrative personnel in order to penalize petitioner. Nor did the Board consider the circumstances of DiGiovanni's other personal days. DiGiovanni was forced, in 1984-1985, to take one critical illness and one funeral day due to the illness and death of her grandmother; and in 1986-1987, two critical illness days due to her father's surgery. These absences were indispensably necessary for DiGiovanni, as well as being legitimately within her contractual and statutory allotment, and the Board should have considered the extenuating circumstances of these absences. Petitioner cites the matter in Yvonne Melli v. Board of Education of the Burlington County Vocational - Technical Schools, Burlington County, 1985 S.L.D. __, State Board No. 27-85 (Decided December 6, 1985), where it was held that where all of a teacher's absences were legitimate and within statutory and contractual limits, the school Board was required to consider the circumstances of the absences in their decision to withhold salary increments for excessive absenteeism.

Petitioner argues that Policy 4151 was unfairly applied to her in an ex post facto manner. Although the Policy was implemented on March 9, 1987, the calculation of the number of days of absence commences with the 1983-1984 school year. By including a teacher's attendance record several years before the Policy's effective date, petitioner contends that the Board improperly penalized her. In addition, petitioner had no opportunity to improve her attendance prior to the implementation of disciplinary proceedings such as the increment withholding. Petitioner contends that the Policy should only have been applied to absences which

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occurred after its implementation. This method of counting past absences is patently arbitrary, capricious and constitutes an ultra vires action on the part of the Board, claims petitioner.

The Board observes in its Brief at Point III, petitioner's argument that absenteeism by a teacher within legal entitlements is absolutely immune from sanction by way of increment withholding by a Board of Education. The Board asserts that this is not the case in our State. It contends that even if the legal composition as stated by petitioner did apply in New Jersey, the Board nonetheless contends that a "pattern" absenteeism under Policy 4151 cannot occur (at least as to the type applicable to petitioner DiGiovanni) while a teacher remains within his or her mathematical entitlement to sick leave. The Board refers to Policy 4151 (J-1) under the section entitled "Reasons", at page three.

The Board contends even if the argument in favor of petitioner DiGiovanni that her absences were mathematically within contract entitlements to be true, that is nonetheless not a basis for relief in accordance with prior decisions of the Commissioner of Education. Specifically, in Neptune Township Education Association v. Board of Education of the Town of Neptune, OAL Dkt. No. EDU 4432-88 (Decided May 25, 1989), the Commissioner held that "...even legitimate (absences) are not immune from disciplinary action being taken by a Board of Education seeking to deter the harmful or deleterious effect of excessive absences on the continuity of instruction being provided to its students..." The Commissioner also held in the same case, as he frequently has, that the sheer "number of days" is not an adequate basis for such action by a Board of Education unless it also considers the reasons for the specific absences taken by a staff member. The Board agrees with this proposition and argues that it applied this standard to petitioner DiGiovanni. The Board emphasizes the Neptune decision for the clear holding that a teacher's argument that he or she has taken absences only within the contract entitlement does not isolate that teacher from having his or her increment withheld as a result of inappropriate patterns of absenteeism. To the extent that petitioners may have been operating under the assumption that a contrary rule applies in New Jersey, the respondent Board has made it clear through its course of dealing with petitioners in regard to its adoption and dissemination of Policy 4151, what its intentions were. The Board contends it may be that the Association and some of its members were operating under an misapprehension about the manner in which it could use its contract sick days and personal days, however, there has been nothing put forth in the record that would indicate that this mistaken belief on their part (if

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it existed) was in any way cause by or contributed to by the conduct of Respondent Board. On the contrary, the testimony is clear before this tribunal, including in the form of admissions by Mr. Sharp, Mr. Chau and petitioner DiGiovanni herself, that Policy 4151 was thoroughly disseminated to all staff and the content of the Policy was specifically explained to and discussed with Staff at an in-service meeting with School District Administration prior to the 1987-1988 academic year.

At Point II of her Brief, petitioner contends that the Board violated its own stated Policy regarding absenteeism by failing to follow the procedures of progressive discipline as set forth under its own standards for review and guidelines. Petitioner observes that according to Policy 4151, counseling is the beginning point of the progressive disciplinary process. Petitioner further observes that although the increment withholding of petitioner DiGiovanni was extensively based upon the 60-day limit for excused absences within a five year period, no "counseling" ever occurred for her. Rather, the Board bypassed the procedure for minor discipline such as counseling and letters of reprimand it had expressly provided for the more egregious concern, unexcused absences, and proceeded directly to the severe and unwarranted penalty of withholding of increment.

Petitioner argues that while the Board may assert that petitioner DiGiovanni was invited to meet with administration to discuss her "attendance problems," she contends that Superintendent Arena conceded on the record that these meetings occurred "after the fact," and did not amount to meaningful counseling. Thus, petitioner contends, the Board failed to abide by its own directive to provide employees with a meaningful progression of discipline under the Guidelines before imposing the most severe economic penalty -- permanent withholding of salary increment. Petitioner observes that Policy 4151 seeks to penalize those employees who have shown a pattern of illegitimate absences: "a pattern of short-term, ...absences on Mondays, or Fridays, or on days preceding or following school holidays...," and sets forth a schedule of discipline for such infractions. Under the Policy, a pattern exhibited three times is to be addressed by counseling; five times, by reprimand. The penalty of withholding of increment is not to be imposed until a pattern as occurred ten times in two years or less. These are patterns which would alert the Board to the fact that the employees' use of leave time is becoming "abusive." By contrast, the salary increment withheld from petitioner herein was for legitimate absences; there is no question of "pattern" or "abuse." Petitioner contends that Superintendent Arena conceded on cross-examination that she suffered a worse penalty for having had legitimate absences than she would have suffered had her absences under the Policy been considered "abusive." Petitioner

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asserts that a Policy which imposes a lesser penalty for abusive absences than for legitimate absences is totally unsupportable under the case law. Petitioner contends she was never told the specific portion of Policy 4151 she allegedly violated. Petitioner concedes that although the Policy makes reference in several places to the fact that "excessive " absences will be penalized, she contends the Board has not disclosed where the line was drawn for "excessive absenteeism." No definition is found in the Policy, nor does any specific portion of the Policy relate to the penalty for "excessive absenteeism." Petitioner contends the Board is thus arbitrarily and summarily penalizing employees without disclosing the specific violation under the Policy except for a vague mention of "excessive absenteeism," which is based on a subjective standard or no standard at all. She asserts that by failing to follow its own stated procedures regarding counseling and letters of reprimand, and by failing to provide an objective standard by which "excessive absenteeism" should be measured, the Board has exposed the arbitrariness of its own attendance policy. She contends the Board must be constrained to follow its own policies and procedures in a matter which protects its rights to make such policies, but is fair to employees.

At Point III of her Brief, petitioner observes that Board Policy 4151 was introduced at the regular Board of Education meeting on February 11, 1987 and unilaterally adopted by the Board on March 9, 1987. She contends the effect of this action was to unilaterally alter the number of contractually and statutorily allotted leave days guaranteed to members of the Association's bargaining unit. This was discovered when the Board applied Policy 4151 in acting to withhold the salary increments of Printz and DiGiovanni. Petitioner contends that this amounts to a refusal to bargain in good faith, and is an unfair labor practice in violation of N.J.S.A 34:13A.4(a) (1) and (a) (5) of the New Jersey Employer-Employee Relations Act (Act). Petitioner contends that at all times material herein, the Board had a statutory obligation under N.J.S.A. 34:13A-4.3 to collectively negotiate with the Association respecting all terms and conditions of employment. She asserts that School Board policies covering leave time, and the attendant disciplinary procedures for the violation of such policies, are indisputably mandatorily negotiable terms and conditions of employment.

Petitioner observes the Board has professed a goal of reducing absenteeism in the school district. She asserts this goal could be achieved in numerous ways, including diminishing the number of leave days which are contractually allotted to school district employees. Petitioner insist, however, that such changes must be

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accomplished through bilateral negotiations. Petitioner contends the Board's negotiations history shows that it did not intend a bilaterally negotiated change in the number of allotted leave days. She refers to the testimony of Eugene Sharp, the Association's chief negotiator, who asserted that at no time in the history of the parties collective negotiations did the Board propose to cut down the number of contractually allowed days. A comparison of the various contractual agreements between the Board and the Association demonstrates that the number of days allowed to secretary-clerical and custodial personnel was actually increased from two and one-half to three days for secretarial/clerical personnel and from two to three days for custodial personnel. Therefore, petitioner contends, the Board is withholding the increments of certain employees for using legitimate leave time while actually increasing leave time for others.

Petitioner contends that by its unilateral adoption of Policy 4151, and by imposing the penalty of withholding of increment upon any staff member who exceeds 60 absences during the five-year period regardless of the reasons for those absences, the Board has effectively reduced, nullified and contravened statutory and contractually entitlements to ten days' annual sick leave, three days' personal leave, critical illness and funeral days, and professional/work related days under Article A XIII of the Collective Bargaining Agreement. The fear of such a penalty is "prejudicial consequence which contravenes the allowance for sick leave in the event of illness or disability" and further chills and discourages DiGiovanni and her fellow bargaining unit members from taking those contractually agreed upon days. Montville, App. Div. Dkt. No. A-1178 84T7, at 6. Accordingly, petitioner contends, a violation of N.J.S.A. 34:13A-5.4(a) (1) and (5) must be found.

At Point IV of her Brief, petitioner asserts the Board has not shown sufficient "good cause" for withholding her increment under the withholding statutes N.J.S.A. 18A:29-14, or under the standard set by the Court in the matter of Kopera v. Board of Education of the Town of West Orange, 60 N.J. Super. 288 (App. Div. 1960). The standard for the denial of an increment to a teaching staff member pursuant to Kopera is : (1) Whether the underlying facts were as those who made the evaluation claim; and (2) Whether it was unreasonable for them to conclude as they did on upon those facts. Id. at 296-297. The employee bears the burden of proving unreasonableness. Ibid. Petitioner DiGiovanni asserts that she can easily meet her burden under the Kopera standard. First, she claims, the facts are not as they are claimed to be. Petitioner asserts it has been established that the Board based its decision to withhold the increment for "excessive absenteeism." Petitioner

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argues, the taking of leave days which are well within the statutory and contractual limits does not constitute "excessive absenteeism." She contends, therefore, it was unreasonable for the Board to characterize her absences as "excessive absenteeism" which is "good cause" for increment withholding. By showing the salary increment of petitioner DiGiovanni was withheld based upon the total days of absence, including administratively approved days, petitioner has clearly shown that the facts regarding her number of days of absence during the five-year period covered by Policy 4151 are not as the administration claims them to be.

Petitioner observes the second part of Kopera requires that petitioner show that it was unreasonable for the administration to conclude as they did based upon the foregoing facts. In support of her position, petitioner relies on the matter of Bass v. Board of Education of Union City, Morris County, 1990 S.L.D. ___, Commissioner of Education No. 97-90 (Decided April 16, 1990). Petitioner contends that none of her Annual Performance Reviews for the years for which attendance was considered in the withholding of her increment mentioned attendance as a problem area in need of correction. Petitioner DiGiovanni's Annual Performance Reports from the school years 1983 to 1988 inclusive, each make reference to her "satisfactory performance of job description," state that there are "no areas in need of improvement," and contain no reference in any of the five years in issue to attendance as a problem area. Petitioner concedes, however, that a reference to "attendance" is found on her Performance Improvement Plans for the 1984-1985 school year which indicated a goal of 95% attendance for the coming year. Petitioner contends it is unrebutted that the Board's imposition of a "95% attendance," and the resultant Union disclaimer, arose as a response to strike activity. Petitioner asserts the Board cannot not now claim that the Performance Evaluation Reports put employees on notice of a 95% attendance policy or to attendance as their problem area.

Petitioner observes that Superintendent Arena prepared an attendance report (R-5) recommending certain teacher staff members be considered for increment withholding and his reasons therefore. This report mentions several teaching staff members by name, however, the report was not shared with the staff but only with members of the Board. The report noted the names of several staff members, the extenuating circumstances for a high number of absences, and recommended these employees' increments not be withheld. The withholding of petitioner DiGiovanni's increment was thus arbitrary in that the individual reasons for the absences of other employees were allowed to be considered as mitigating factors and those employees

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increments were not withheld. The report then mentioned the increments of Wayton, Printz and DiGiovanni should be withheld without specifying the circumstances behind their absences; yet, after the fact, a decision was made not to withhold the increment of Wayton. The Board has not disclosed its reasoning for this decision. Petitioner asserts the Board should have been required to show why this distinction was made to the detriment of DiGiovanni.

Petitioner DiGiovanni declares she was given no opportunity to improve her attendance before adverse salary action was taken against her. She asserts that traditionally, teachers are notified by Boards of Education of their salary status for the succeeding school year by April 30. N.J.S.A. 18A:27-10. The Mainland Board of Education is no exception. It traditionally notifies teachers of their salary status by April 30, as well. Petitioner asserts, however, with regard to the withholding of increments of this case, no opportunity was given to her to alter the sequence of events. She was notified of the need to "discuss" attendance by letter dated June 30, 1988, and her increment was to be withheld by letter dated August 30, 1988. Petitioner asserts that obviously, she could not improve her attendance between the end of June and August, 1988, when school was not in session. Petitioner contends, therefore, the Board is unable to meet the Kopera standard for "good cause" to show that its decision to withhold her increment was not an arbitrary and unreasonable one.

At Point V of her Brief, petitioner contends the Board has failed to show a "discontinuity of instruction" which had an adverse effect upon the education process under the standard set forth in Transky v. Board of Education of the City of Trenton, 1989 S.L.D., _____, Commissioner of Education, 90-89 (Decided April 19, 1989). Petitioner asserts that the Transky standard provides that:

> In order for a Board of Education to reasonably and lawfully consider the absence as part of a decision to withhold an increment, the Board must consider the particular circumstances of the absences and assess the degree of any discontinuity of instruction or other negative impact on students that was caused by the absences. Id. at 16.

Petitioner contends the Board herein has not presented any credible proof that petitioner's DiGiovanni's absences caused her effectiveness as a teacher to be diminished or that her absences had any negative impact upon her students. Petitioner asserts it is especially significant that none of her evaluations indicated attendance as a problem area. Bass v. Board of Education of Union City, Morris County, 1990 S.L.D. ___, Commissioner of Education No. 97-90 (Decided April 16,

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1990). Petitioner observes the Board bears the burden of establishing discontinuity of instruction. She further observes the Board asserted that the impact of DiGiovanni's absenteeism was detrimental to the school district. The only proof offered of this assertion is based upon a claim that when DiGiovanni was absent, the school district could only provide certificated substitute teaching personnel for two days of the fourteen days petitioner was absent from duty for the 1987-1988 school year.

In response to petitioner's arguments, the Board contends that Policy 4151 does not constitute a unilateral alteration of the terms and conditions of employment but, rather, the policy does no more than recognize what the Commissioner has held on numerous occasions; i.e., that the inappropriate pattern or use of even legitimate sick leave entitlements can lead to the withholding of a salary increment. The Board contends that in order for PERC to find the Board in this instance unilaterally altered the terms and conditions of employment, it must set aside the entire history of Commissioner and State Board of Education decisions upholding increment withholdings based upon absenteeism patterns as opposed to numerical abuses of sick leave and other leave entitlements. In this regard, none of the case law relied upon by petitioner says any more than that terms and conditions of employment need to be negotiated in good faith by public employers. The Board agrees with this proposition, however, it disagrees that any of the case citations or legal principals relied upon by petitioner require that Policy 4151 either be set aside or modified in any way since its implication is only to implement the prior rulings of both the Commissioner and the State Board of Education addressing the increment withholding powers of local boards of education with regard to absenteeism.

The Board argues that to the extent there may be a conflict between the interest of the State Department of Education regarding teacher absenteeism and the rules of the Public Employment Relations Commission concerning the implementation of sick leave entitlements and absenteeism policies in general, this tribunal has previously ruled that the dominant interest in this regard lies with the State Department of Education. If a conflict between the Department of Education and PERC were found to exist, and the Board contends there is none, that conflict should be resolved in favor of the State Department of Education's interest in insuring strict job attendance by classroom teachers for all of the educational reasons which have been the basis for Department and Court decisions in this subject area over the years.

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The Board contends the record is replete with testimony by all of the witnesses that the Petitioning Association "slept on its rights," if indeed it ever had any rights, by failing to address the content or adoption of Policy 4151 by the Board. For this reason alone, without regard to the general lack of merit of the unfair labor practice argument put forth by Petitioner, Petitioner's complaint in regard to the adoption of Policy 4151 should be summarily dismissed by this Court. The Board cites the testimony of Mr. Sharp, Mr. Chau and Petitioner DiGiovanni herself that Policy 4151 was thoroughly disseminated to all staff members and the content of the Policy was specifically explained to and discussed with the Staff at meetings conducted by the Superintendent prior to the 1987-88 academic year.

The Board contends that as long as the withholding of an increment based upon absenteeism reflects a review of the merits of each individual case and is not a result of the mathematical formula, then the Commissioner will uphold the action of the local board of education even in a case where the number of days is taken into consideration. In the Matter of Vonita Smith vs. Board of Education of the City of Trenton, OAL DKT. No. EDU 5255-88 (Decided March 6, 1989), states that the Board must consider: "(1) the nature of illness and not just the number of days absent; and (2) the impact of the absences on the continuity of instruction..." The Board suggests that this two part standard of the Smith decision has been met by it in the instant matter. The Board observes there was ample testimony from Petitioner's own witness, Eugene Sharp, concerning meetings held with the School District Administration resulting in a reduction of the number of persons for whom increment withholding had been recommended by the Superintendent. After discussing the cases on an individual merit basis, the Superintendent's recommendation was withdrawn. In addition, the fact that the Board itself reviewed three cases and took action on only two of those individuals, throwing out the third because of the reasons for the absences, makes it absolutely clear that the Board reviewed and considered those absences on an individual case basis.

The Board asserts that its concern for the continuity of instruction was specifically conveyed to the staff members during the period in which the excessive absenteeism was occurring. The Board contends this standard has more than been satisfied in the proceedings before this tribunal in several respects. Mr. Chau testified that during the period of time Policy 4151 was being considered by the Board, it was brought to the attention of the professional staff and the professional staff was familiar with the Policy. Mr. Sharp, the NJEA Field Representative, testified he had conducted discussions with Superintendent Arena concerning some of the

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procedural aspects of Policy 4151 and, more importantly, the Association did not attempt in any way to negotiate the contents of Policy 4151. The failure of the Association to attempt to negotiate was also confirmed by Mr. Chau. The Board contends it needs to look no further than the second sentence of Policy 4151 for a declaration that program impact is a part of the evaluation of absenteeism process. That sentence states, "absenteeism exacts a high cost in the depletion of District resources and in the destruction of the educational program."

DISCUSSIONS AND CONCLUSIONS

N.J.S.A. 18A:29-14 authorizes a local board of education to withhold the employment increment, or the adjustment increment, or both, from an employee in any one year for inefficiency or other good cause. The affected employee may appeal the board of education action to the Commission of Education, pursuant to N.J.A.C. 6:24-4.1, incorporating N.J.A.C. 6:24-1.1 et. seq. as authorized by N.J.S.A. 18A:6-9. The purpose of N.J.S.A. 18A:29-14 is to reward only those individuals who have contributed to the educational process, thereby encouraging high standards of performance. Board of Education Bernards Twp. v. Bernards Twp. Education Association, 79 N.J. 311 (1979) at 321. The decision to withhold an increment is, therefore, a matter of essential managerial prerogative which has been delegated by the Legislature to the local board, and it cannot be bargained away. Board of Education Bernards Twp. at 321. A board's decision to withhold an increment cannot be overturned unless it is determined to have been patently arbitrary, without a rational basis or induced by improper motives. See, Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). The burden of proving the unreasonableness of the board's actions lies with the affected employee. Id at 297. Excessive absenteeism is good cause for withholding an employee's increment. Trautwein v. Board of Education of Bound Brook, 1978, S.L.D. 445, aff'd State Board 1979 S.L.D. 876, rev'd per curiam 1980 S.L.D. 1539 (N.J. App. Div.), cert. den. 85 N.J. 469 (1980).

As the Board observed, petitioner has combined the 14 issues appearing in the prehearing order, and reduced them into four substantive arguments. For the sake of consistency, I will follow petitioner's organizational pattern.

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I. Whether Board Policy 4151 is an Arbitrary, Mechanistically Applied Policy?

The record demonstrates that the Superintendent, subsequent to the Board's adoption of Policy 4151, discussed its implications with the staff on two occasions and distributed copies of the Policy to all staff members. Thereafter, the Superintendent reviewed the attendance-absentee records of all staff members to determine if any one would be subject to disciplinary action for excessive absenteeism, or other abuse of paid or unpaid leave, under the Policy's Staff Attendance Disciplinary Action Guidelines. Eighteen (18) staff members were identified as having nine or more absences during the 1987-88 school year. Thus, the 18 staff members were subject to the withholding of their annual salary increment or the filing of tenure charges against them, or both. After further study and review of the attendance records of the 18 individuals, 12 staff members were eliminated from any disciplinary action under the terms of the Policy.

Six staff members remained as subject to disciplinary action. Additional review of the records resulted the removal of three of the six staff members from consideration for disciplinary action pursuant to the Policy. Petitioner and two other staff members were recommended to the Board by the Superintendent for the withholding of their annual salary increments. The Board, however, rejected the Superintendent's recommendation as to one staff member after having more fully considered the staff members attendance-absenteeism records. Thus, only two staff members remained to be disciplined under the Policy; i.e., petitioner and former petitioner Printz. The record discloses that Print and the Board settled their differences, leaving petitioner DiGiovanni as the only person subject to discipline under Policy 4151 for the 1988-89 school year.

Petitioner alleges, among other things, that Policy 4151 relies exclusively upon sheer numbers of absences, without considering the reasons for the absences. The hearing record does not bear out this allegation. Rather, the record clearly demonstrates that consideration of factors, other than sheer numbers, was at work when the Superintendent and the Board reduced the number of individuals subject to discipline under the Policy from eighteen to two. The reduction of certain staff members occurred over a period of time, where a number of factors and variables were considered which caused the individual staff members to be absent from his/her assigned duties. Although the number of absences was utilized, it was not the sole or exclusive factor in determining the sanction to be imposed.

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The Appellant bench of our Superior Court has held that absenteeism is good cause for a board of education to withhold an employee's increment. Trautwein, supra. The Commissioner remarked about teacher absenteeism in In the Matter of Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County, 1977 S.L.D. 403 at 414 that:

> ...The Commissioner has held that pupils are required to be in regular attendance in the public schools. William J. Wheatley et al v. Board of Education of the City of Burlington County, 1974, S.L.D. 851. No less a requirement should be made upon the teachers who are to serve the pupils required to be in attendance pursuant to the compulsory education statutes of this State. N.J.S.A. 18A:38-25 et. seq.

The Commissioner continued to state in Reilly, that :

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefits of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil The regular contact of the pupils with their assigned teacher is vital to this process. (Id. at 414)

The Superintendent and Board herein determined, among other things, that petitioner's absences disrupted the continuity of instruction and, therefore, she was subject to the sanction of the withholding of her salary increment for the 1988-89 school year.

I **FIND and CONCLUDE** that the facts in this matter do not show that the Board mechanistically applied Policy 4151 to petitioner when it determined to withhold her salary increment. Rather, the evidence demonstrates the Board considered factors other than mere numbers of days absence. I so **CONCLUDE.**

I **CONCLUDE**, therefore, that petitioner has failed to demonstrate, by a preponderance of the reliable and credible evidence, that the Board's action to withhold her salary increment was arbitrary, capricious or otherwise ultra vires.

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II. Whether the Board Failed to Properly Apply Policy 4151 in Withholding Petitioner's Salary Increment

The Board's authority to establish policy is quite clear. N.J.S.A. 18A:11-1 provides in pertinent part, as follows:

> The Board shall ---
>
> ....
>
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees ,,,,; and
>
> d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

Thus it is within of the purview of the Board to establish a policy concerned with the attendance of its employees.

It is clear that a stated policy must be reasonable. It follows that the interpretation and implementation of that policy must also be reasonable. Guidelines for interpretation of a policy were set forth in Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County, 1973 S.L.D. 102 as follows:

> ...In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. (citation omitted) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. (citations omitted) (at p. 106)

There is neither question nor doubt that Policy 4151 provides for counseling of a staff member by a member of the Board's administration in instances where it is found the staff member to have been excessively absent with either unexcused and/or excused absences. As petitioner observes, counseling is the beginning of a progressive disciplinary process and, it appears from a reading of Policy 4151, that it provides for progressive discipline. That is to say, counseling (or a letter of

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reprimand in some instances) precedes the sanction of withholding of an increment or the more severe sanction of tenure charges.

It cannot be fairly said that Principal Dougherty's letter of June 30,1988 to petitioner, where the principal stated there might be a problem with her attendance, was actual notice that petitioner would be subject to discipline under Policy 4151. Nor can it be fairly said that petitioner's subsequent conversation with Principal Dougherty's constituted "counseling" within the meaning of the Policy. Indeed, the herein record demonstrates that Principal Dougherty was more sympathetic towards petitioner and the problems that resulted in her absences than "counseling" her with regard to those absences. The principal advised petitioner not to worry about her past absences and did not indicate that any disciplinary action would be taken against her. There is nothing in this record which would indicate that Principal Dougherty recommended the withholding of petitioner's salary increment for the 1988 school year.

I **FIND and CONCLUDE** that, to the extent the Board's Policy 4151 provides for counseling for unexcused and excused absences, Petitioner DiGiovanni was not provided such counseling prior to the Board's action to withhold her salary increment for the 1988-89 school year.

I **CONCLUDE** therefore, the Board failed to apply the terms and conditions of Policy 4151 to petitioner DiGiovanni prior to its action to withhold has salary increment.

III. Whether the Board's Adoption of Policy 4151 and Its Application to Petitioner DiGiovanni, Unilaterally Altered the Terms and Conditions of Employment and, Thus, Violated N.J.S.A 34:13A-5.4 (a)

Petitioner Association contends the Board had a statutory obligation to collectively negotiate Policy 4151 with it, under N.J.S.A. 34:13A-5.3. It asserts that policies covering leave time, and the attendant disciplinary procedures for the violation of such policies, are indisputably mandatory negotiable terms and conditions of employment.

The facts in this mater clearly demonstrate that the Association knew of the Board's action to promulgate and implement Policy 4151. There is no showing that the Board refused to negotiate the terms and conditions of the Policy or that the

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Association was even interested in placing the Policy on the negotiating table. There is not any showing by the Association that a grievance has been filed challenging the procedure of Policy 4151.

The Association relies, in part, upon the PERC decision In re Glassboro Board of Education, PERC No. 77-12, 2 N.J.P.E.R. 355 (1976). There, PERC held that :

> ...[A]n employer may establish policies and procedures relating to the violation of (a tardiness and absenteeism) policy, provided, however, that the employer must, upon demand, negotiate with the majority representative regarding such matter to the extent that they establish or modify terms and conditions of employment... (emphasis added)

There has been absolutely no showing that the Board refused to negotiate with the Association after it made its demand to do so. Nor, for that matter, is there anything on this record to demonstrate that the Association ever made a demand to negotiate Policy 4151.

N.J.E.A. Field Representative Sharp's testimony demonstrates his awareness of Policy 4151 and its implementation. Sharp met with the Superintendent on July 24,1988 to express his concern about the Policy and to suggest that the Association would seek legal counsel and, perhaps, take legal action. Sharp even argued as to the application of the Policy with regard to two of the Associations members; i.e., Printz and DiGiovanni. There is nothing in this record, however, to demonstrate that the Board refused to negotiate Policy 4151 upon a demand by the Association. In re Glassboro Board of Education, supra. Nor is there anything in this hearing record to indicate that Sharp or any member of the Association requested that Policy 4151 be the subject for discussion or negotiations.

Petitioners Association and petitioner DiGiovanni were made aware of Policy 4151 prior to its implementation by the Board. The Policy clearly and unambiguously provides for disciplinary action against any staff member who is found to have committed "...excessive absenteeism or other abuse of paid or unpaid leave." (J-1) Excessive absenteeism, therefore, if demonstrated, is an abuse of statutory and/or contracted leave time and subject to disciplinary action. Trautwein, supra.; Neptune, supra.; Vonita Smith, supra. •

I **CONCLUDE**, therefore, that the Board's implementation of Policy 4151 does not constitute an unilateral alteration of the terms and conditions of employment

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but, rather, the exercise of its managerial prerogative to withhold petitioner DiGiovanni's salary increment to which she was not entitled. Bernards Twp., supra.

I **CONCLUDE** therefore, that Petitioner's Association has failed to demonstrate, by a preponderance of the credible evidence, that the Board violated N.J.S.A 34:13-5.3.

Accordingly, it is **ORDERED** that this charge against the Board be and hereby is **DISMISSED.**

IV. Whether the Board Did Not Have "Good Cause" Within the Meaning of N.J.S.A. 18A;29-14, Nor the Kopera "Good Cause" Standard to Withhold Petitioner DiGiovanni's Increment

An analysis of the Kopera standard for the denial of an increment to a teacher on the ground of excessive absenteeism is found in Trautwein, supra. where the Appellate bench stated:

> ...We said [in Kopera] 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 a reasonable basis existed for the evaluation.
>
> The Appellate Court continued to say, in Kopera:
>
> ...since the proceeding before the Commissioner was the first "hearing" afforded the appellant of the type specified in Masiello, supra. [25 N.J. 390 (1958)], we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. [60 N.J. Super. at 296-2970] 1980 S.L.D. 1541

Here, as in Trautwein, the underlying fact of petitioner DiGiovanni's record of absenteeism over the years is not controverted. As the Court continued to observed in Trautwein:

> It is evident, moreover, that nowhere in the chain of administrative review is there disagreement with the general proposition that a teacher's excessive absences may constitute

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good cause for the local board's withholding of a salary increment. 1980 S.L.D. 1542

In the instant matter, petitioner admits to her absentee record. Here, as in Trautwein, where "there were no absences exceeding her entitlement." (1980 S.L.D. 1540), the underlying facts nevertheless are those claimed; i.e., that petitioner's absences were excessive. In addition, the Superintendent testified extensively concerning the effect of a regular teacher's absences upon the continuity of the educational process and, specifically, concerning the unavailability of proper substitute teachers in petitioner DiGiovanni's speciality.

Considering all of the factors in this matter, I **CONCLUDE** that it was not unreasonable for the Board to conclude, as it did on those facts, to withhold Petitioner's DiGiovanni's salary increment for the 1988-89 school year.

It must be further observed that petitioner has the opportunity to restore the increment under Policy 4151 when she demonstrates a "significant and sustained improvement of attendance." Policy 4151, Note.

ORDER

Accordingly, it is hereby **ORDERED** that the determination of the Board to withhold the salary increment of petitioner Jamie DiGiovanni is hereby **AFFIRMED** and **SUSTAINED.**

It is, therefore, **ORDERED** that the Petition of Appeal before the Commissioner and the Unfair Labor Charge before PERC be and are hereby **DISMISSED.**

I hereby **FILE** this Initial Decision with **COMMISSIONER OF EDUCATION.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF EDUCATION** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to *N.J.A.C.* 1:1-17.8, upon rendering its final decision **COMMISSIONER OF EDUCATION** shall forward the record, including this recommended decision and its final decision, to **PERC** which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **COMMISSIONER OF EDUCATION** shall, pursuant to *N.J.A.C.* 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **PERC** within forty-five (45) days of the predominant agency decision. If **PERC** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

30 April 1991
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/3/91
DATE

COMMISSIONER OF EDUCATION

Mailed to Parties:

MAY 09 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

lmh

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WITNESSES

PETITIONER

Eugene Sharp
Jamie Rey DiGiovanni
Joyce Helen Printz
Erland Chau

RESPONDENT

Alfred Arena

DOCUMENTS IN EVIDENCE

JOINT EXHIBITS

J-1 Board Policy #4151
J-2 Agreement between Mainland Regional Board of Education and Association, July 1, 1987-June 30, 1988
J-3 Agreement between Mainland Regional Board of Education and Association, July 1, 1988-June 30, 1991
J-4 Addendum to Agreement - Attendance Recognition Program (6 pages) Amend 1986-87 Agreement
J-5 Staff Attendance Information, Jamie DiGiovanni

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PETITIONER'S EXHIBITS

P-1A Annual Performance Report 1983-84 DiGiovanni
P-1B Annual Performance Report 1984-85 DiGiovanni
P-1C Annual Performance Report 1985-86 DiGiovanni
P-1D Annual Performance Report 1986-87 DiGiovanni
P-1E Annual Performance Report 1987-88 DiGiovanni
P-2 Memorandum to DiGiovanni, April 15, 1988 from Dr. Alfred Arena, Superintendent
P-3 Letter to DiGiovanni, June 30, 1988, from Thomas P. Dougherty, Principal
P-4 Letter to DiGiovanni, July 12, 1988, from Superintendent Arena
P-5 Letter to DiGiovanni, July 18, 1988, from Thomas P. Dougherty, Principal
P-6 Letter to DiGiovanni, August 30, 1988, from Superintendent Arena
P-7 Disclaimer RE: PIP 5/31/85
P-8 Annual Performance Report Printz 1986-87
P-9 Annual Performance Report Printz 1987-88
P-10 Annual Performance Report Printz 1985-86
P-11 Annual Performance Report Printz 1984-85
P12 Annual Performance Report Printz 1983-84
P-13 Letter to Printz, April 15, 1988, from Superintendent Arena
P-14 Memorandum to Printz June 16, 1988, from Thomas P. Dougherty, Principal
P-15 Letter, June 20, 1988, to Printz, from Superintendent Arena
P-16 Letter, July 12, 1988, to Printz from Superintendent Arena
P-17 Attendance Conference Follow-up Report, Joyce Printz
P-18 Staff Attendance Information, Joyce Printz (Stipulate that document was used by the Board for action to withhold increment August, 1988)
P-19 Revised Staff Attendance Information for Joyce Printz dated December 15, 1988, Attached days changed from sick leave to Workers' Compensation Leave
P-20 Letter, August 30, 1988, to Joyce Printz from Superintendent Arena

RESPONDENT'S EXHIBITS

R-1 Improvement Plan (PIP) - May 30, 1985 - DiGiovanni
R-2 Improvement Plan (PIP) - May 30, 1985 - Printz
R-3 Board of Education Minutes, February 11, 1987
R-4 Board of Education Minutes, March 9, 1987
R-5 Two page Memorandum - Superintendent's Report RE: Attendance
R-6 Substitute teachers - Printz - 1986-89
R-7 Substitute teachers - DiGiovanni - 1986-89

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OAL DKT. NO. EDU 2104-89
PERC DKT. NO. PRC 2289-90

MAINLAND REGIONAL EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Association, on behalf of Petitioner DiGiovanni, filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Association posits three points of exception to the initial decision, which are summarized, in pertinent part below.

POINT I

THE ALJ ERRED IN FINDING AND CONCLUDING THAT BOARD POLICY 4151 WAS NOT AN ARBITRARY MECHANISTICALLY APPLIED POLICY AS THE RECORD IS CLEAR THAT THE BOARD CONSIDERED ONLY THE NUMBERS AND NOT THE CIRCUMSTANCES OF PETITIONER'S ABSENCES.

The Association refers to the uncontested facts established in the record to support its contention that Petitioner DiGiovanni's absences at issue in the five relevant school years of 1983-84 through 1987-88 were all authorized under the collectively bargained agreement with the district. It claims that in none of the school

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years at issue did Petitioner DiGiovanni take more than three personal days, three funeral days, three critical illness days, three professional days and ten sick days. The Association admits that nonetheless, she did have 68 absences during such period. It avers that the ALJ erred in his findings, claiming that the record reveals that the Board considered nothing substantive other than numbers in determining to withhold Petitioner's increment. It claims that the ALJ's summary of the testimony of Petitioner DiGiovanni and Superintendent Arena indicates that the Board considered only the number of days missed, citing the initial decision at pages 13-14 and 18 in this regard.

The Association avers in exceptions that the parties are in agreement as to the lack of abuse on petitioner's part of the sick, personal and other leave provisions authorized by the collective negotiations agreement. Moreover, the Association asserts that the superintendent conceded that the absences had been approved and that there was no pattern of abusive absences underminding the leave policies but, instead, was concerned with the number of leave days petitioner had taken in the last five years, and cites the initial decision at pages 18-19. The Association further claims that while the superintendent approved petitioner's three personal days of leave in school year 1987-88 to attend a seminar, he made an issue in his testimony of the number of personal leave days which she took in that and other school years, citing the initial decision at pages 14, 18-19 in support of this proposition. Thus, the Association contends, the ALJ's conclusion that the Board considered factors other than the mere number of days is thus unsupported in the record. Averring that there was no clear explanation adduced at

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hearing as to why the original list of individuals whose increments were to be withheld due to absenteeism was reduced or why Petitioner DiGiovanni was retained, the Association claims nonetheless that it is immaterial that the Board may have considered the circumstances of others on the list; it is only material whether they considered the circumstances of Petitioner DiGiovanni's absences. The Association submits the record is clear that the Board did not.

Further, the Association argues that the superintendent's statements as to the detrimental nature of staff absenteeism on the district's educational program are not sufficient to support the mechanistic approach taken and, instead, speak to a "sheer numbers" approach which has been disallowed by prior decisions of the Commissioner such as Montville Township Education Association et al. v. Montville Township Board of Education, 1984 S.L.D. 550, State Board rev'd 559, N.J. Superior Court Appellate Division rev'd/rem. to St. Bd. 1985 S.L.D. 1972 and Neptune Township Education Association v. Board of Education of the Township of Neptune, Monmouth County, decided by the Commissioner July 10, 1989.

Also, the Association excepts to the ALJ's conclusion that petitioner failed to demonstrate that the Board's action was arbitrary. On the contrary, it contends that the Board relied on the arbitrary factor of the number of absences and did not consider the circumstances relating to those absences. It contends:

> ***The unrebutted testimony of Petitioner further demonstrated that she had taken "critical illness days" for such undeniably warranted reasons as attending to her father following heart surgery and had taken personal days for such equally legitimate reasons as attendance at a divorce proceeding and attendance at a personal development seminar expressly recommended by both her Principal and Superintendent. Initial Decision at 14. On another occasion, "critical

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> illness days" had been taken when her daughter was hospitalized for surgery. Id. To withhold teachers' increments for those undeniably and indisputably bona fide grounds is to engage in arbitrary and capricious conduct for which the only justification is the numbers of the absences but not their underlying circumstances. As the Appellate Division stated in Montville Board of Education, supra, "the assigned rating is merely mathematical consequence, and [as such] is arbitrary." Id. at 4. Such a "mathematical consequence," as was applied herein irrespective of the bona fide nature of the absences involved, clearly contravenes the "good cause" standard required by the Legislature at N.J.S.A. 18A:29-14 and must accordingly be overturned.
>
> (Exceptions, at p. 5)

At Point II, the Association avers:

> THE ALJ ERRED IN CONCLUDING THAT THE BOARD ACTED REASONABLY IN ITS WITHHOLDING OF PETITIONER'S INCREMENTS, AS THE BOARD ACTED IN VIOLATION OF ITS OWN POLICY OF PROGRESSIVE DISCIPLINE AND UNFAIRLY "SCAPEGOATED" PETITIONER WITHOUT CONSIDERING THE CIRCUMSTANCES OF HER ABSENCES, ALL OF WHICH WERE DULY APPROVED.

While the Association agrees with the ALJ's conclusion that Petitioner DiGiovanni was not provided counseling prior to the Board's action to withhold her salary increment for the 1988-89 school year in accord with the Board's Policy 4151, and further agrees with the ALJ that the Board failed to follow the progressive discipline outlined in said policy, it excepts to the ALJ's conclusion that it was not unreasonable for the Board to withhold her increment based on such facts. The Association believes that such conclusion is inconsistent with the ALJ's earlier conclusion in the initial decision that the Board contravened its own policy, and further adds that such conclusion is inconsistent with the Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 296-7 (App.. Div. 1960) standard. Citing Matawan Teachers Association v. Matawan-Aberdeen Regional School District Board of Education, 223 N.J.

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Super. 504, 509 (App. Div. 1988) for the proposition that public bodies such as boards of education are compelled to adhere to those bylaws and policies which they adopt, provided that said bylaws and policies do not conflict with statute. The Association claims that the principal, Mr. Dougherty, the Boards's agent, acted in a manner completely contrary to the purposes of progressive discipline in that he assured petitioner that her absences had been bona fide and that he was sympathetic to her concerns. The Association further notes that both the superintendent and the principal personally approved certain of the personal days and conceded that other absences to attend family members' illnesses were legitimate, citing page 14 of the initial decision in support of this claim. It argues that both the principal and the superintendent had conveyed that petitioner's use of leave time was appropriate, but then upon adoption of Policy 4151, sought to transform their prior approval into disapproval.

The Association also maintains that in failing to comply with its own policy which requires counseling as a step preliminary to an increment withholding, the Board acted unreasonably and thus cannot meet the Kopera standard. It contends that the unreasonableness of the Board's actions are apparent in that the principal failed to provide notice to petitioner that her past absences were problematic and in need of correction. The Association concedes that while the principal's view of the absences were not shared by the newly appointed superintendent, it would nonetheless be unreasonable for petitioner to be put in a position where she could not rely on the statements of her principal.

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The Association finds the Appellate Division Decision in Trautwein v. Bound Brook Board of Education, 1980 S.L.D. 1539 inapposite as there was no allegation in that case of a district board's failure to comply with its own policy. The Association claims that the equities in this matter weigh in Petitioner DiGiovanni's favor in that she had been led to believe that her absences were not only fully approved and authorized by Board officials, but also that those Board agents, after adopting a progressive discipline policy, failed to follow it. In sustaining the Board's action, the Association claims, the ALJ has allowed the Board to lull an employee into a false sense of complacency and then summarily withhold his or her increments. The Association submits that petitioner should not be made to suffer without the notice and lesser discipline required under the Board's policy. Such arbitrary and unreasonable conduct cannot be sanctioned and does not constitute a statutory standard of "good cause" required for the withholding of increments under N.J.S.A. 18A:29-14, the Association contends.

At Point III, the Association states:

> THE BOARD COMMITTED AN UNFAIR LABOR PRACTICE BY UNILATERALLY IMPLEMENTING POLICY 4151 AND CONTINUING TO MAINTAIN SAID POLICY EVEN AFTER VIGOROUS ASSOCIATION PROTEST HAD BEEN MADE.

Said exception addresses the issues to be adjudicated by PERC and thus are not considered by the Commissioner of Education as such arguments are not within his purview pursuant to N.J.S.A. 18A:6-9.

In summation, the Association submits, on behalf of Petitioner DiGiovanni, that the initial decision be reversed and that the increment withholding be overturned.

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Upon a careful and independent review of the record of this predominant interest matter, wherein it has been determined that the Commissioner of Education enjoys primary jurisdiction to determine whether the Board's action in permanently withholding petitioner's 1988-89 salary adjustment and salary increment for excessive absenteeism in violation of the Board's Policy 4151 was arbitrary, caprious or unreasonable, the Commissioner rejects the initial decision for the reasons which follow.

The Commissioner's review of the record of this matter reveals the withholding action against Petitioner DiGiovanni was flawed in two respects. The first error relates to the Board's failure to follow the progressive discipline set forth in its Policy 4151. The second relates to its failure to demonstrate its concern for continuity of instruction to the staff member during the period in which the excessive absenteeism was occurring, in this case, particularly during the year for which the increment was withheld, as set forth in James Kochman v. Board of Education of the Borough of Keansburg, Monmouth County, decided by the Commissioner November 15, 1990; Vonita Smith v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner April 18, 1989; and Bass et al. v. Union City Board of Education, Hudson County, decided by the Commissioner April 16, 1990.

While the policy in question, Policy 4151, appears acceptable as written, at issue, inter alia, is whether the Board applied said policy in a nonarbitrary manner. In this regard the Commissioner agrees with the ALJ's conclusion found at page 34 of the initial decision that

> ***to the extent the Board's Policy 4151 provides for counseling for unexcused and excused

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> absences, Petitioner DiGiovanni was not provided such counseling prior to the Board's action to withhold her salary increment for the 1988-89 school year.
>
> I CONCLUDE therefore, the Board failed to apply the terms and conditions of Policy 4151 to petitioner DiGiovanni prior to its action to withhold her salary increment.

The Commissioner further concurs with the ALJ's conclusion that Policy 4151 provides for counseling of a staff member by a member of the Board's administration in instances where it is found the staff member was excessively absent with either unexcused and/or excused absences. The record makes plain that neither the principal's June 30, 1988 letter indicating that there might be a problem with petitioner's attendance nor that her later conversation with the principal, when he expressed sympathy toward the circumstances underlying her absences, satisfied the requirement stated in the policy for counseling those who were at risk of violating the attendance policy. Certainly, such conversation failed to put petitioner on notice of a possible increment withholding for the 1988 school year. Accordingly, the Commissioner deems such failure to conform to its own policy arbitrary, capricious and unreasonable. See, Matawan Regional Teachers Association v. Matawan-Aberdeen Regional District Board of Education, 223 N.J. Super. 504, 509 (App. Div. 1988)

As to the matter of whether petitioner was apprised that her record of attendance was affecting the continuity of instruction, the Commissioner would emphasize the ALJ's recitation of the current status of the law in this regard. In Vonita Smith, supra, the Board withheld Ms. Smith's salary increment because her absences, the result of a chronic disease of which the Board had

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knowledge, exceeded the Board policy of incidental absences which defined an arbitrary figure of 5% or more such incidental absences as excessive and improper. The Commissioner, finding that the Board had acted arbitrarily, held:

> ***[I]n order for an increment withholding to be upheld where absenteeism is the issue there must be clear evidence of having considered (1) the nature of the illness and not just the number of absences (Kuehn, supra; Meli, supra) and (2) the impact of the absences on continuity of instruction. The consideration at both the principal and Board levels on these two critical elements appears to have been mechanistic and cursory. In other words, the record simply does not demonstrate clearly that the inidividual circumstances of the absences were weighed by either the principal or the Board vis-a-vis the 5% excessive absentee rate or that the concern for the impact of absences on continuity of instructions was considered ***.
>
> This is not to say, however, that petitioner is right in her argument that the burden of proof shifts to the Board in regard to continuity of instruction for, as expressed in Meli, 1984 S.L.D. 906, 903, aff'd State Board 921 [the predecessor case to the Meli decision of the State Board cited above]:
>
> > 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

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> 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.
> (at 913-914)

> What is necessary to demonstrate, however, is that the concern for continuity of instruction was specifically conveyed to the staff member during the period in which the excessive absenteeism was occurring, not merely at the end of the line of a series of fill in the blank memos***. (emphasis in text)
> (Slip opinion, at p. 17)

In demonstrating that the Board's concern for continuity of instruction is conveyed to any such staff member, the Commissioner has held that evaluations and professional improvement plans for the affected teacher must reflect that a need for remediation is perceived. (Bass, supra) Moreover, the Commissioner has held in Kochman, supra,

> In order for the increment withholding to be sustained, the record must demonstrate that the staff member's superiors specifically conveyed a concern to him/her during the school year upon which the increment withholding is based that excessive absenteeism was negatively impacting on the continuity of instruction and that the nature of the illness was considered by the Board in reaching a decision to withhold an increment.*** (emphasis in text) (at pp. 22-23)

The record of this matter provides no evidence that Petitioner DiGiovanni was made aware that the Board was concerned

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for continuity of instruction as a result of her absences through her professional improvement plans or her annual performance reports for any of the years under which her attendance record was scrutinized, with the exception of the PIP dated May 31, 1985, which recommended that she "improve attendance to achieve a goal of 95% attendance." (Initial Decision, at p. 15, quoting R-1) Said notation was made a full year and a half before the effective date of Policy 4151, and appears to have been a goal developed in response to attendance conditions following a strike during the 1984-85 school year. See Initial Decision at page 15. On the contrary, the record is replete with otherwise glowing annual evaluations and positive professional improvement plans of Petitioner DiGiovanni. The Commissioner is thus convinced that the Board failed to apprise petitioner during the 1987-88 school year, or for that matter, at any time theretofore that her absences were disruptive of the educational process in contravention of Kochman, supra, and Smith, supra. Accordingly, the withholding in this matter must be reversed and petitioner restored to the same place on the salary scale she would have enjoyed had her increments not been withheld for the 1988-89 school year.

Accordingly, the initial decision is reversed for the reasons expressed herein.

In so concluding, the Commissioner casts no judgment on those issues presented in this matter relative to the collective bargaining agreement, but rather defers to PERC's jurisdiction to determine any such issues remaining in this case.



COMMISSIONER OF EDUCATION

JUNE 17, 1991

DATE OF MAILING - JUNE 17, 1991

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S.Z., a minor, by her guardian ad litem, D.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

For Petitioner, Bocchini & Bliss (Joseph L. Bocchini, Esq.)

For Respondent, Paglione & Massi (Michael Paglione, Esq.)

This matter was opened before the Commissioner by way of a Petition of Appeal with Motion for Emergent Relief filed on June 11, 1991. Therein petitioner alleged that, after the conclusion of her expulsion hearing on May 28, 1991, at a hearing arising from the same incidents as led to her own hearing but centering on another student, the Board accepted testimony against her outside of her presence and that of her attorney, and subsequently used that testimony in reaching its final decision to expel her on May 30, 1991. In so doing, petitioner alleged, the Board denied her rights of due process as well as her Fourteenth Amendment right to be confronted by and examine witnesses, so that its decision to preclude her participation in graduation exercises must be set aside. (Petitioner was provided with home instruction to the end of the school year and is expected to complete requirements for graduation prior to ceremonies.)

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On the same day, the matter was transmitted to the Office of Administrative Law for purposes of an emergent relief hearing. The hearing was held on June 14, 1991, at which time the ALJ issued an oral decision finding petitioner's material factual allegations to be unrefuted by any evidence presented by the Board and her position correct as a matter of law, so that emergent relief was granted on that basis. A written memorialization of this decision, together with a tape recording of the bench decision, was provided to the Commissioner on June 17, 1991.

The record of this matter, including the tape recording of proceedings before the ALJ, and the initial decision on motion of the Office of Administrative Law have now been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner concurs with the ALJ that in the absence of evidence to the contrary, the facts presented herein demonstrate a clear violation of petitioner's right to have been confronted by and to have examined the witnesses against her in conjunction with her expulsion hearing, and that the resulting Board vote to expel her on the eve of graduation was tainted by the comments of witnesses thus improperly entertained. This being so, and it being anticipated by both parties that petitioner will have met all requirements for graduation prior to ceremonies through completion of the home instruction provided her during her suspension and through the duration of this appeal, the Board cannot preclude petitioner from participating in graduation exercises. Tibbs v. Board of Education of the Township of Franklin 59 N.J. 506 (1971); R.R. v. Board of Education of Shore Regional High School, 109 N.J. Super. 337 (1970).

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Accordingly, the Commissioner affirms the decision of the ALJ granting petitioner's motion for emergent relief for the reasons stated by him in his tape recorded initial decision. Given the findings leading to this decision, the Commissioner further deems this matter concluded without prejudice to petitioner's right to seek expungement of her record.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JUNE 18, 1991

DATE OF MAILING - JUNE 18, 1991

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A.F., by her guardian ad litem, B.M.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioners, Helt & Helt (Jay G. Helt, Esq., of Counsel)

For Respondent, Reussille, Mausner, Carotenuto, Bruno & Barger (Martin M. Barger, Esq., of Counsel)

The record and order rendered by the Office of Administrative Law have been reviewed. The tape recording of the hearing of this emergent relief matter was inaudible. A second tape was provided by the ALJ on June 17, 1991 setting forth his factual and legal findings and conclusions. The Board filed timely exceptions to the Order on Motion, and the petitioners filed timely reply exceptions thereto. On June 18, 1991, the Board submitted a reply to petitioners' reply memorandum. Such submission has not been considered in the disposition of this matter insofar as there exists no provision in law permitting such reply.

The Board's exceptions first establish its version of the facts concerning the participation of A.F., a senior at Holmdel High School, at the graduation ceremonies scheduled for Tuesday, June 18, 1991 at 7:00 p.m., in light of her behavior at the high school prom on June 7, 1991.

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The Board excepts to the ALJ's conclusion that A.F. should be permitted to attend and participate in the graduation ceremonies relying on such case law as Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super. 40, 46-7 (App. Div. 1962); C.G. and B.G. v. Board of Education, David Brearly High School, 80 S.L.D. 1178, 1185; and Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965) for the proposition that the action of the Board of Education is presumed to be valid and can only be set aside if petitioner can establish that such action was arbitrary, capricious or unreasonable. The Board adds that the Commissioner of Education cannot substitute his judgment for that of the local Board of Education, and can only determine whether it had a reasonable basis for its conclusion, citing M.G. v. Board of Education of West Deptford, 83 S.L.D. 339, 354 in support of this proposition.

The Board cites R.H. v. Board of Education of the Township of Delanco, 74 S.L.D. 655, 656 among other cases in support of its disciplinary action, averring that it is within the Board's authority to deny participation of A.F. in the Holmdel graduation ceremonies on June 18, 1991. It claims she has failed to carry her burden of proof in that "[she] was admittedly drunk and disoriented. She actually passed out in another limousine. This alone would permit suspension from the graduation ceremony." (Exceptions, at p. 8) Moreover, the Board claims that A.F. twice ignored the directive of the principal, Dr. White, and entered into prom activities. "Couple this with her intoxication and it is clear why A.F. is not being permitted to attend the graduation ceremony." (Id.)

The Board submits that the recommendation of the ALJ is in error and must be rejected.

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Petitioners' reply exceptions argue, inter alia:

The treatment to A.F. has not been even handed. She was punished for a non-existent policy and then suspended from school and barred from graduation while those similarly behaving were not punished.

Under Thomas, supra at 332 an administrator's decision should be upset if unreasonable. Richard White's decision to bar A.F. from graduation was totally unreasonable in light of the fact that:

(a) she had never had a disciplinary action against her in 13 years of school at Holmdel;

(b) she had been a class officer at Holmdel High School for four years;

(c) she had been involved in a significant amount of school activities, organizations and sports during high school and had worked extremely hard for the school and her class;

(d) as a result of the prom incident she had already been punished twice, in that she had been told not to go back into the prom and then was subsequently suspended from school, which no other students who behaved similarly received three punishments as did she; and

(e) To additionally bar A.F. from graduation after she had already received two punishments for the prom night incident would be patently unreasonable and improper.

The decision to bar A.F. from graduation by the Principal was unreasonable. The Commissioner under M.G. Board of Education of West Deptford, 83 S.L.D. 339, 354, can find under the facts provided that the decision was unreasonable and allow her to attend graduation ceremonies.

This case differs from R.H. v. Board of Education of the Township of Delanco, 74 S.L.D. 655, wherein a student uttered an obscenity to a teacher. No facts of that type whatsoever have any relationship to the case at hand. A.F. was polite and courteous throughout the prom evening as testified to by Richard White.

As compared with the facts of R.H. v. Board of Education, supra, to the case herein, the penalty herein is excessively harsh when one realizes that to add the loss of attendance at graduation

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> to the two other punishments A.F. already received for the prom night incident would be excessive and unjust.
>
> The Board herein, through its Principal, has a right under the cases to exercise discipline and provide appropriate penalties. However, the cases are very clear that the penalties must not be arbitrary, capricious or unjust. The facts of the cases cited by Respondents bear no relationship to the case herein. Respondents cite case after case that are factually unrelated to the case herein.
>
> To bar A.F. from her graduation in light of her prior perfect record, significant school accomplishments, the poor behavior and lack of punishment of other prom goers, would be arbitrary, unreasonable, unjust and discriminatory.
>
> It is undisputed and uncontroverted by the facts of this case that Richard White's decision to bar A.F. from graduation was excessive, unjust and patently unfair. The facts are very strong in this regard as deduced at trial.
>
> It is respectfully submitted that Judge Sullivan's well reasoned and enlightened decision should be accepted. (emphasis in text)
>
> (Reply Exceptions, at pp. 4-5)

Upon a careful and independent review of the instant matter, including the second tape prepared by the ALJ of his findings of fact and conclusions of law, the Commissioner reverses the decision of the Office of Administrative Law for the reasons which follow.

It is uncontested in the record that A.F. attended a pre-prom party where she consumed 5-6 cups of beer. The record further establishes that by the time she reached the prom, A.F. admitted she was "pretty drunk" (reconstructed tape by ALJ Sullivan), and that in such state, unable to find her own limo, she "fell asleep" (reconstructed tape) or passed out in another limo having left the Sheraton Hotel, the site of the prom, to get money

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for her prom picture. The ALJ further found as fact that a security guard discovered A.F. in such state, and referred the matter to Dr. White, the principal, who directed A.F. to the lobby for the evening, and further directed that she was not to go into the ballroom for the duration of the event. Also, the record makes plain that A.F. conceded that she entered the dance floor in defiance of the principal's orders in order to dance with her friends (reconstructed tape).

Whether the seniors were aware of the district's purported policy that those attending the prom were not to leave the building as a measure to ensure that no student inbibe, or carry into the prom, alcohol or other controlled dangerous substances is in dispute between the parties. The ALJ makes no finding of fact in such regard. The Commissioner notes for the record that such policy is common practice in the State of New Jersey and, in the absence of clear evidence or findings in the record, thus accepts the principal's position that the seniors at Holmdel High School were aware of such prohibition.

However, even assuming arguendo that the seniors were not specifically told that they were not to leave the prom after entering the hotel, they were unquestionably made aware that they were absolutely forbidden from engaging in the use of alcohol or other controlled dangerous substances on prom night. R-1, the notice sent to parents and their seniors dated May 17, 1991 is unequivocal in expressing said restriction:

> SENIOR PROM
>
> Unacceptable behavior at the Senior Prom will be grounds for elimination from graduation exercises. I am particularly concerned with drinking, drugs or their effects on the behavior of students.

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> As you can see, we are trying to nurture predicability (sic) rather than chance in the conduct of our final activities of the year. Seniors whose behavior is risky for us to predict will be selected to receive their diplomas privately. Conversely, those who have demonstrated reliability will participate in the activities to the extent that they are not likely to embarrass their parents, their school, and themselves.
>
> Graduation should be important to parents and students alike. High school graduation is a milestone to parents in the rearing of their children; it usually marks the beginning of the youngster's physical separation from home. Graduation should also mean something special to the students, capping their public school educations and being the absolutely last time they will ever be together with all of their classmates. I solicit your fullest cooperation in making this a memorable event for all of us.
>
> Respectfully,
>
> Richard H. White, Ed.D.
> Principal

Thus, it is the Commissioner's determination that notwithstanding whether the pupils knew not to leave the building once the principal discovered A.F.'s inebriated condition, he was completely within his rights to restrict her further actions, to deny her the privilege of participation in graduation exercises, and to take further disciplinary action if deemed appropriate by the Board. The Commissioner has previously said in Boult and Harris v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948):

> ***it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a

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> judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.*** (at 13)

Said letter provided ample warning to parents and pupils alike that the behavior of seniors at the prom was to be subject to careful scrutiny, particularly in regard to drugs and alcohol. In the Commissioner's view, that A.F. exacerbated the extremely serious nature of her violation of law and school policy against drinking by defying the principal's directive to remain in the lobby for the duration of the prom provided the Board with further reason to penalize her as it did. Notwithstanding that she was a student of unblemished disciplinary record, her behavior in failing to abide by the directives of the principal constitutes insubordination. In so finding, the Commissioner is particularly unmoved by A.F.'s contention that she disobeyed the principal and danced with her friends because the song was one of special meaning to her. That her insubordination was quiet instead of characterized by shouts and protestations likewise does not excuse her behavior any more than does her past unblemished record. It is the Commissioner's conclusion that A.F. failed to behave responsibly both before and during the prom. A student of such unblemished record should have conducted herself in a manner consistent with that record. The Commissioner so finds.

The Commissioner is troubled by the ALJ's conclusion that although drunk, A.F. harmed no one and because of her leadership role, particularly her participation in Students Against Drunk Driving, should be permitted to attend the graduation ceremonies at

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Holmdel High School. A.F. admits that she attended the pre-prom party and indulged in 5-6 cups of beer. One cannot escape the conclusion that A.F. fully chose to drink in violation of law and school policy. She must therefore bear the consequences of such action. In so concluding, the Commissioner recognizes the degree to which alcohol consumption is prevalent among students and that its abuse has frequently lead to tragedy. The Commissioner feels he must strongly support in every way possible the efforts of school administrators and officials to prevent students from imbibing alcoholic beverages or partaking of other controlled dangerous substances.

For the above reasons, the Commissioner rejects the Initial Decision on Motion and denies A.F. the privilege of attending the graduation ceremonies at Holmdel High School. He further affirms the other penalties meted by the Board in the case concerning A.F., and in so doing, relies on such case law as Thomas, supra, and Boult and Harris, supra, for the proposition that the action of a board of education is presumed to be valid and can only be set aside if the petitioner can established that such action was arbitrary, capricious or unreasonable. The Commissioner finds and determines that petitioners herein have failed in such burden and, thus, dismisses the Petition of Appeal, with prejudice.

ACTING COMMISSIONER OF EDUCATION

JUNE 18, 1991

DATE OF MAILING - JUNE 18, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5793-91

AGENCY DKT. NO. 196-6/91

A.F., A MINOR, BY HER GUARDIAN AD LITEM, BRENDA M. HELT,

Petitioners,

v.

HOLMDEL TOWNSHIP BOARD OF EDUCATION AND RICHARD WHITE, PRINCIPAL OF THE HOLMDEL TOWNSHIP HIGH SCHOOL AND AGENT/SERVANT/EMPLOYEE OF THE HOLMDEL TOWNSHIP BOARD OF EDUCATION,

Respondents.

Jay G. Helt, Esq., for the petitioner, A.F., (Helt and Helt, attorneys)

Martin Barger, Esq., for the respondent, Holmdel Board of Education and Richard White, Principal, (Reussille, Mausner, Carotenuto, Bruno and Barger, attorneys)

Record Closed: June 13, 1991 Decided: June 14, 1991

BEFORE **WALTER F. SULLIVAN**, ALJ:

On June 12, 1991, Jay G. Helt, Esq., counsel for the petitioner, filed a Petition and Notice of Motion requesting that the above-entitled matter be heard on an emergent basis. Petitioner on behalf of minor child, seeks emergency relief and a stay of Board's determination disallowing minor from attending graduation exercises on June 19, 1991, as

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a result of alleged misconduct at the prom. Petitioner also seeks expungement of record of disciplinary matter. On that date, the matter was transmitted to the Office of Administrative Law and and an oral argument was scheduled before myself on June 13, 1991. The matter was heard and an Order issued on June 14, 1991.

A hearing was conducted on June 13, 1991. In the course of the hearing, I granted A.F.'s motion for emergent relief.

Under these circumstances, I **CONCLUDE** and **ORDER** that all issues in contention have been fully disposed of. I therefore **CONCLUDE** and **ORDER** that this matter be returned to the Department of Education.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/19/91
DATE

WALTER F. SULLIVAN, ALJ

Receipt Acknowledged:

6/20/91
DATE

DEPARTMENT OF EDUCATION

JUN 26 1991
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

slf

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HELT & HELT, ESQS.
142 Highway 34, Suite 350
P.O. Box 369
Holmdel, NJ 07733
(908) 946-9000

Attorneys for Petitioners

A.F., a minor, by her Guardian ad litem, BRENDA M. HELT, Petitioners vs. HOLMDEL TOWNSHIP BOARD OF EDUCATION AND RICHARD WHITE, PRINCIPAL OF THE HOLMDEL TOWNSHIP HIGH SCHOOL AND AGENT/SERVANT/EMPLOYEE OF THE HOMDEL TOWNSHIP BOARD OF EDUCATION, Respondents	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL NO. EDU5793-91 AGENCY DOCKET NO. 196-6/91 NOTICE OF MOTION FOR THE PETITION OF AMY FERRIER, BY HER GUARDIAN AD LITEM, TO BE HEARD ON THE MERITS ON AN EMERGENT BASIS

THIS MATTER having been heard before the Honorable Walter F. Sullivan on June 13, 1991 and the Petitioner having been represented by Jay G. Helt, Esq. of the firm of Helt & Helt, Esqs.; and the Respondents having been represented by Martin Barger, Esq. of the firm of Reussille, Mausner, Carotenuto, Bruno & Barger, Esqs., and after trial of the above matter, and the Court having considered the testimony of the witnesses and the documents filed and the arguments of counsel having been heard and for good cause shown;

IT IS on this 14 day of JUNE 1991 ORDERED that the Petitioner, A.F., a minor, shall be permitted to attend the graduation ceremonies of the Holmdel High School, Holmdel, New Jersey on June 18, 1991, and

IT IS FURTHER ORDERED that this Order may be approved, rejected or modified by the Commissioner of Education pursuant to the Uniform Administrative Practice Rules.

WALTER F. SULLIVAN, A.L.J.

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A.F., a minor by her guardian ad litem, B.M.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law dated June 19, 1991 have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the ALJ that, as a result of a hearing before the Office of Administrative Law on Motion for Emergent Relief on June 13, 1991 and a Commissioner of Education decision rendered on Motion for Emergent Relief on June 18, 1991, all issues in contention have been fully disposed of, albeit that the Commissioner's decision reversed that of the Office of Administrative Law. Accordingly, the instant matter is dismissed, with prejudice.

JULY 23, 1991

DATE OF MAILING - JULY 23, 1991

COMMISSIONER OF EDUCATION

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BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Jeffrey I. Bacon, Esq.

For the Respondent, Orlando, Kearney & Brady (Francis J. Orlando, Esq., of Counsel)

This matter has been opened before the Commissioner by way of a Petition of Appeal from the Lindenwold Board of Education (Board) seeking an Order from the Commissioner directing a special district tax of $262,379.19 to offset a deficit of that amount accrued during the 1989-90 school year. An Answer was filed by the Borough Council of the Borough of Lindenwold on May 6, 1991.

By way of a telephone conference call of counsel a briefing schedule was established with June 10, 1991 being set as the date for final submission on the part of the Board. The record was closed as of the end of the business day on June 10, 1991.

BOARD'S POSITION

The Board seeks the special tax levy from the Commissioner due to a deficit which occurred during the 1989-90 school year which it argues arose as a result of what it alleges to be unforseen

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increases in staff insurance and special education tuition. In so contending, the Board argues that the aforesaid shortfalls in budgeting were a consequence of a substantial unanticipated increase in employee insurance premium during the 1989-90 school year which the Board was obligated to meet by virtue of a collective bargaining agreement. The increase in special education tuition, it contends, arose as a result of a further unanticipated increase in tuition payments for out-of-district placements. The Board suggests that had it not taken remedial action during the Spring of 1990 upon being informed of the deficit, the amount of such deficit would have been larger.

In order to remedy its deficit problem, the Board through its Superintendent wrote to the Mayor and Council seeking a meeting for the purpose of discussing the shortfall, which meeting took place on January 9, 1991. At the conclusion of the meeting, the Council refused to assist the Board, necessitating a referendum being called on April 2, 1991 seeking a special tax levy from the voters pursuant to N.J.S.A. 18A:22-41. Upon defeat of the referendum seeking a special tax levy, the Board filed the petition which is the subject matter of this case.

In the Board's view, failure by the Commissioner to authorize the amount requested would result in the Board's having insufficient funds available to fund a thorough and efficient system of education for the balance of the 1990-91 school year. In support of such contention, the Board offers an affidavit of Herbert F. Johnson, Assistant Superintendent. (See Petitioner's Exhibit B.) The Board further offers as proof of the existence of the deficit a

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copy of the State Audit Report attached as Petitioner's Exhibit A. In support of its efforts to address these issues responsible for the occurrence of the deficit, the Board offers its Corrective Action Plan as Petitioner's Exhibit C and the approval of such plan by the Acting Director of the State Department's Division of Compliance as Petitioner's Exhibit D.

In support of its legal position, the Board recounts its constitutional and statutory mandate to provide a thorough and efficient system of education which it contends it cannot effectuate without the additional monies requested herein. It calls upon the Commissioner to utilize the authority relied upon by him under similar circumstances to assure a thorough and efficient education pursuant to N.J.S.A. 18A:7A-1 et seq. In the Matter of the Application of the Upper Freehold Regional Board of Education, Monmouth County, 1978 S.L.D. 304 and Board of Education of the Sussex County Vocational School District v. Board of Chosen Freeholders, Sussex County v. Sussex County Vocational-Technical Teachers Association, 1979 S.L.D. 206.

Finally, the Board, while acknowledging faults in its recordkeeping procedures, denies that the reason for the deficit was due to such faults, alleging instead that it was due to a budget which was bare bones after having been reduced by the governing body upon defeat at the polls on April 4, 1989 and was thus unable to support the unanticipated increases in insurance premium and special education tuition. Given the current circumstances, the Board contends that it finds itself faced with a situation where it cannot

meet its payroll requirements absent massive reductions in force which would result in closing down the school system.*

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COUNCIL'S POSITION

In response to the Board's contention that its deficit was a result of unanticipated increases in insurance and special education tuition during the 1989-90 school year, the Council argues that such consequence arose because of the district's own under budgeting of these accounts despite having expended more in the previous year than was budgeted for in 1989-90. The Council contends that experience in regard to health care insurance is escalating cost and that the Board's shortfall was a result of its own flawed financial planning and management.

In support of its position, the Council cites the report of a State Audit which found that "***need was not the driving budget development force, rather, unsubstantiated percentage increases were applied to an already inadequate budget***." (Respondent's Brief, Exhibit A, at p. 2) The Council further points out that the Board's own auditors admonished the Board for failure to properly reconcile its budgetary line item accounts on a monthly basis. (See Respondent's Brief, Exhibit C.)

The Council argues against the Commissioner's granting of the relief sought since the deficit was not only of the Board's own making but due to its lack of diligence in taking appropriate steps to rectify it. Despite being aware of the shortfall by its own

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* The Commissioner notes that on Wednesday, June 5, 1991 the State Board of Education affirmed an emergency aid appropriation of $84,407 to offset a 1990-91 deficit in special education funds, such appropriation does not provide for the deficit at issue herein.

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admission in the Spring of 1990, the Board took no remedial action to curtail expenditures until January 1991 and those actions were inadequate involving merely the ending of discretionary expenditures and failing to replace only one maintenance worker. The Council contends that the Board took no steps to reduce either professional or clerical staff.

The Council further points out that despite the knowledge of the shortfall in the Spring of 1990, the Board did not meet with the Mayor and Council until January of 1991 and delayed its special referendum until April 2, 1991.

By way of legal argument, the Council disputes the statutory authority of the Commissioner to grant the relief requested in this matter. While N.J.S.A. 18A:22-40 and 41 authorize submitting requests for additional taxes to be presented to the voters, there is no statute which specifically authorizes an appeal to the Commissioner if the voters reject such request for additional taxation. In so arguing, the Council finds Sussex County, supra, and Upper Freehold, supra, inapplicable since these were a vocational school and a regional high school respectively as opposed to Lindenwold which is a K-6 Type II district.

The Council further offers the legal defense of untimeliness on the grounds that the Board, despite being aware of the deficit as early as the Spring of 1990, did not meet with the governing body until January of 1991 and did not submit its request for additional taxation until April of 1991. The Council calls for dismissal insofar as the Petition of Appeal in this matter was filed some 16 days after the defeat of the referendum rather than the 15

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days defined as the period for appealing a decision of the governing body by N.J.S.A. 18A:22-37.

The Council further argues for dismissal because of the Board's alleged failure to implement appropriate corrective action in a timely manner since it took no action to curtail discretionary spending until more than six months after it became aware of the problem.

Finally, the Council urges the Commissioner to clearly identify those individuals responsible for the current deficit and initiate disciplinary action.

BOARD'S REBUTTAL

By way of rebuttal, the Board argues that whatever reasons the Council may ascribe to the shortfall, the expenses incurred in the insurance and tuition accounts are expenditures which must be legitimately met. Whatever deficiencies in recordkeeping may have existed, the Board contends, have been corrected. The Board further denies that it failed to curtail expenditures in a timely manner, contending that had savings not been effectuated, the deficit for 1989-90 would have been even larger than the $262,379.19 at issue in this matter. The Board further submits that the areas in which savings could be made were severely restricted by virtue of the Council having reduced the 1989-90 budget by $282,000 after defeat by the electorate. It further denies any delay in either meeting with the Mayor and Council or in submitting the Petition of Appeal in this matter.

By way of rebuttal to the governing body's challenge to the Commissioner's authority to provide the relief in this matter, the

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Board quotes extensively from Upper Freehold, supra, in which the Commissioner found that "***voter reluctance to approve necessary expenditures does not render the Commissioner powerless to take corrective action.***" (Petitioner's Reply, at p. 5)

The Board likewise denies that it procrastinated in filing its appeal, contending that it met with the Mayor and Council upon determining the exact amount of the deficit and promptly held the special election when such meeting failed to produce the requested result.

Finally, the Board argues that it is unnecessary for the Commissioner to identify specific individuals responsible for the deficit. Instead, they argue that it should focus upon improving its performance rather than seeking to place blame on specific individuals.

COMMISSIONER'S FINDING

The Commissioner has carefully considered the arguments of the parties in this matter. In so doing, he cannot but conclude that the Board has not conducted its fiscal operations in a manner which is necessary to ensure that its pupils have access to a thorough and efficient system of education. It cannot be gainsaid that the Board under budgeted accounts which were vital to its operation and that its recordkeeping was not consistent with prudent management. The various audits, part of the record here, speak eloquently to that effect. Nor can the Board use the excuse that the action of the governing body in cutting $282,000 out of its 1989-90 budget was responsible for the eventual shortfall which occurred. If the Board realized that a cut of such magnitude would

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leave it in a financially precarious position, it had the constitutional responsibility and statutory right to appeal such reduction to the Commissioner of Education. To have failed to do so if it believed its budget was inadequate was an abdication of its duty.

On the other hand, there is plenty of blame to go around in this matter. If the Board failed in its fiscal management responsibilities and in its responsibility to appeal from an inadequate budget, the governing body is not blameless in that it failed to provide a tax levy sufficient to ensure a thorough and efficient system of education which is the standard it must apply when reviewing a defeated budget.

In assessing the arguments of the governing body as to the Commissioner's authority in this matter, the Commissioner finds such arguments entirely without merit. There is no question as to the Commissioner's authority to direct an additional tax levy when he finds such tax levy to be necessary to assure a thorough and efficient system of education. The distinctions which the Respondent governing body draws in this matter between Lindenwold and the other districts in which the Commissioner has directed additional tax levies are distinctions without a difference. The mere fact that Upper Freehold is a regional school district, while petitioner in this matter is a K-6 school district, in no way detracts from the Commissioner's authority to direct an additional tax levy if he determines such to be necessary to ensure a thorough and efficient system of education.

Further, the Commissioner likewise finds the argument of the governing body that the petition in this matter is untimely is entirely without merit. While it may well be argued that the Board

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could have gone to the electorate earlier, such a finding is unnecessary to the deliberations herein. It is unquestioned that the Board did file its petition seeking relief from the Commissioner within 90 days from the cause of action as set forth in regulation. (N.J.A.C. 6:24-1.2(c))

Whether the Board in this matter could have initiated corrective action earlier in this matter as claimed by the governing body is not an issue which bears upon the question of whether the relief requested in this matter should be granted in order to assure the continued operation of the district. Assuming arguendo that earlier economies could have been effectuated, a contention denied by the Board, it must be noted that there is no argument from the governing body that the deficit exists and that failure to address the deficit imperils the ability of the district to continue to provide a thorough and efficient system of education for the balance of the school year.

Consequently, in light of the foregoing, the Commissioner has no alternative other than to assure that the Lindenwold Public Schools have sufficient resources to conclude the 1990-91 school year without the continued impediment of the deficit incurred during the 1989-90 school year. To be sure, such determination on the Commissioner's part is reached with extreme reluctance in that it is clear from the audits of both the Board's own auditor and that of the State audit that the Lindenwold Board has not managed its finances efficiently and in concert with its statutory and constitutional responsibilities. Nevertheless, the children cannot be held hostage to the Board's shortcomings. Therefore, the

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Commissioner directs that the governing body of the Borough of Lindenwold certify to the Camden County Board of Taxation an additional tax levy of $262,379.19 to offset the deficit accrued by the Lindenwold Board of Education during the 1989-90 school year. In so doing, the Commissioner further directs that the Camden County Superintendent of Schools take such steps as necessary to assure the implementation of the district's Corrective Action Plan and to assure that future budgets are adequately funded.

IT IS SO ORDERED this 17 day of June 1991.

COMMISSIONER OF EDUCATION

JUNE 17, 1991

DATE OF MAILING - JUNE 18, 1991

Pending State Board

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BOARD OF EDUCATION OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOROUGH COUNCIL OF THE BOROUGH OF LINDENWOLD, CAMDEN COUNTY, RESPONDENT.	:	DECISION ON MOTION

For the Petitioner, Jeffrey I. Baron, Esq.

For the Respondent, Orlando, Kearney & Brady
(Francis J. Orlando, Esq., of Counsel)

This matter has been opened before the Commissioner by the Borough Council of Lindenwold through the filing of a Notice of Motion for a Stay and the Lindenwold Board of Education's Memorandum of Law opposing a Stay of the Commissioner's decision rendered on June 17, 1991. The Commissioner's decision is currently pending on appeal before the State Board of Education.

The Borough seeks a stay of the Commissioner's order directing it to certify to the Camden County Board of Taxation an additional tax levy of $262,379.19 to offset the deficit accrued by the Board during the 1989-90 school year pending resolution of the appeal before the State Board.

The Borough's affidavit in support of its motion urges that if the monies are compelled to be raised during the pendency of

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appeal and it is ultimately successful, there will be many problems as to how the taxpayers will be reimbursed which could be both cumbersome and costly. It avers that if the appeal is ultimately denied, the money can then be raised, but if the appeal is successful, there is then no need to go to the Board to recoup the tax dollars collected.

The Borough's appeal to the State Board contends that (1) the Commissioner is without legal authority to overturn the decision of the voters and (2) it is improper to burden the taxpayers with a deficit that arose due to the Board's mismanagement and minimal efforts to reduce the deficit in a timely fashion.

The Board opposes the grant of a stay on the basis of the fact that the Borough has failed to meet the standard for the grant of injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982). The Board urges that (1) the Borough has failed to establish that it will suffer irreparable harm if the stay is denied; (2) the Borough has not shown that there is a reasonable probability of ultimate success on the merits of the matter; (3) the law is well settled that the Commissioner had the authority to act as he did in the case; and (4) balancing of the relative hardship to the parties weighs in the favor of the stay being denied.

The assistant superintendent's affidavit submitted in support of the Board's opposition to the grant of a stay urges that substantial encumbrances remain unpaid from the 1990-91 school year due to the $262,379.19 deficit and that at the current time the total encumbrances exceed $110,000, a figure which changes constantly due to program expenditures and receipt of bills from

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vendors. The affidavit also states that without receipt of the monies ordered by the Commissioner, the Board will be unable to pay its outstanding obligations for the 1990-91 school year without using 1991-92 school year funds. Thus, the budget for 1991-92, which is on appeal to the Commissioner, will be further jeopardized and the provision of a thorough and efficient education placed in danger.

Upon careful and thorough review of the arguments of the parties in this matter in light of the standards set forth by the New Jersey Supreme Court for the grant of injunctive relief in Crowe, supra, it is determined that the Borough's request for a stay is herein DENIED on the basis of the fact that the Borough has failed to demonstrate that (1) it will suffer irreparable harm if the stay is denied; (2) it has a likelihood of prevailing on the merits of the matter; (3) the relative hardship it would experience if the stay is denied is greater than that which the Board will experience if the stay is granted; or (4) the public interest compels the grant of the stay.

IT IS SO ORDERED this 17 day of July 1991.

COMMISSIONER OF EDUCATION

JULY 17, 1991

DATE OF MAILING - JULY 18, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5130-90
AGENCY DKT. NO. 117-5/90

IN THE MATTER OF THE TENURE HEARING OF LENA WHITE, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

David F. Corrigan, Esq., appearing for petitioner
(Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., appearing for respondent
(Feintuch & Porwich, attorneys)

Record Closed: March 20, 1991 Decided: May 2, 1991

BEFORE **MARYLOUISE LUCCHI**, ALJ:

This matter concerns tenure charges brought against the respondent, Lena White, which were certified by Dr. Elena J. Scambio, the State District Superintendent on May 3, 1990. The matter was transmitted to the Office of Administrative Law on June 29, 1990, 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. The matter was originally set down for a prehearing on August 27, 1990. This date was adjourned due to the fact that an erroneous notice indicating it was a telephone prehearing had gone to the parties. It was rescheduled for September 4, 1990 at the Office of Administrative Law, (OAL) 185 Washington Street, Newark, New Jersey. At that time, a prehearing was conducted by Joseph F. Martone, ALJ due to the illness of this ALJ. The matter was then set down for a hearing on February 19 and 20, 1991, at the OAL in Newark. On February 19, 1991, the hearing did not take place due to the absence of Philip

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Feintuch, attorney for the respondent. Upon contacting the attorney's office it was indicated that he was unavailable. On February 20, 1991, the hearing did in fact take place and the testimony concluded on that date. The record was left open for posthearing submissions by both parties. These were scheduled for a brief by the respondent by March 6, 1991 and a responsive filing, if necessary, by the petitioner on or before March 20, 1991. On March 20, 1991, after receipt of the posthearing submissions, the record closed.

ISSUES

The question in this case is whether or not the charges brought against Lena White, a tenured teacher, employed by the State Operated School District of the City of Jersey City, can be sustained. Should those charges be sustained the question then turns to whether or not there is some mitigating or excusing factor with respect to those charges. The charges as outlined in the statement of charges includes an allegation of chronic and excessive absence as well as chronic and/or excessive lateness. Dismissal is sought pursuant to *N.J.S.A.* 18A:6-10.

UNCONTESTED FACTS

The one matter which is not in dispute is the amount of absences and latenesses which Lena White engaged in. The dates of the absences and latenesses are delineated in P-1 through P-8 in evidence. For the sake of giving a framework to this opinion so that the reader can understand the absence and lateness scenario presented in this case, this ALJ will summarize only the total amount of absences and latenesses for each school year from those documents. For a list of specific dates within the school year the individual must turn to the exhibits specifically.

1. For the school year 1989/1990, the following is a total of absences and latenesses occurring between September and March 20, 1990.

   (a) Absences - the petitioner was absent 15 full days as well as one full day for a death in the family, and two full days for emergency personal business, making 18 complete days of absence. Additionally, there were five

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days in which partial absences occurred ranging from two hours to three and one-half hours.

(b) Respondent was late on 42 occasions.

2. In the school year ranging from September 1988 through June 1989 Ms. White was absent a total of 130 days comprising both personal injury and personal business days. Additionally, she had partial absences ranging from three-quarters of an hour to two and one-quarter hours on two separate occasions.

3. In the year beginning September 1987 and extending through June 1988, Ms. White was absent a total of 76 days comprising both personal illness as well as personal business days. She also shows partial absences on four occasions ranging from three-quarters of an hour to two and one-quarter hours.

4. In the school year ranging from September 1986 through June 1987, Ms. White had a total of 29 absences for personal illness as well as two partial absences ranging from two hours to two and three-quarter hours.

5. In the school year beginning September 1985 and concluding June 1986, the petitioner had 13 days absence as a result of either personal injury or personal business as well as 41 days of injury leave. She also had a partial absence of two and three-quarter hours.

6. For the school year beginning in September 1984 and extending through June 1985, Ms. White had 30 days of absence which included two days of injury leave.

7. For the school year beginning September 1983 and continuing through June 1984, Ms. White had a total of 37 absences for both personal injury as well as personal business.

8. For the school year beginning September 1982 and continuing through June 1983, Ms. White had a total of 35 days absence.

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In addition to agreeing that the petitioner was absent and/or late on those days, both sides also concede that, at any time a leave request was submitted by Lena White, it was in fact granted by the Jersey City public schools. Additionally, the salary increments were withheld for the petitioner in the school year 1987/1988 as well as 1988/1989.

As these facts are in dispute, I **FIND** them to be uncontested facts in the case.

TESTIMONY

At the time of the hearing, Anne E. Butler testified regarding the respondent. She was employed by the Jersey City board of education and was hired in 1970 as an English teacher. She worked in that capacity for eleven years, and in 1981 became a vice principal. In 1984, she served as an acting principal and in 1985, once again, became a vice principal. Beginning 1986, she became principal of the Dickinson School.

In September 1989, the respondent transferred to the Dickinson School. There was, after this, a period of several weeks when she went back to her original school, however, starting in September 1989 she was considered to be a teacher at the Dickinson School. Respondent's function was that of a Spanish teacher.

On February 13, 1990, Ms. Butler sent a memo to Robert Y. Schaefer, who was the interim personnel director, regarding what she termed an unsatisfactory attendance record on the part of respondent. (P-13, Ev.). Ms. Butler testified, based upon her training and experience, as to the impact of successive and/or chronic absences upon the student population. She stated that the damage to the students was "incalculable." She stated that this was especially so with high school students. At the high school, there were 1,220 students to 200 faculty members. It was necessary, in her opinion, for everybody to do their share in order to make the learning and school functions move smoothly. In January 1990, mid-term exams occurred, and according to Ms. Butler, students began to get "hyper." Students were not sure they were ready to take the necessary exam. As a result, some came and spoke with Ms. Butler. At that time, according to her, she reassured the

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students. On January 24, 1990 she spoke with respondent. According to her, respondent's answer was, "Didn't she get the leave papers?"

Butler testified that any time an individual was absent, even with appropriate excuse, it was necessary to get a substitute teacher to take their class. Butler indicated that during the January 1990 incident, respondent gave no reasonable excuse for her absence and made no attempt to explain the situation. She did state that on the day before the conversation she had an accident. As a result, she was given a slip to go to the medical center. This dealt only with that particular day.

Butler indicated that absences have a severe impact on foreign language study, since it requires a building of both skills and vocabulary. Respondent had freshman classes and as a result, there was concern that they would not be prepared to move on to their second year of Spanish study.

In addition to the question of the subject matter itself, Butler stated that due to the fact that this is an urban school district the importance of attendance takes on a different character as well. It is necessary for faculty members to act as role models, both being on time and being prepared. It is hypocritical, according to her, to ask students not to be absent or late if the teacher is both in some form of successive pattern.

She stated that during the 1989/1990 school year some students came and complained at the exam time and that there were some random complaints along the way.

She conceded that she never personally evaluated the respondent. She did however have to speak with respondent on two or three occasions. During one of these conversations she advised respondent that her salary increment was in jeopardy. She did not however say that her job was in jeopardy, because at that time Butler was unaware of her past history at other schools.

Butler also conceded that there is no board policy as to what is considered to be an "excessive" amount of absences. No specific number will trigger this. She did however, recommend that respondent's salary increment be withheld and it was in fact withheld.

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Butler indicated that she does not have any records comparing the results of respondent's teaching with the results of other Spanish teachers employed at the school either during this pertinent period of time or during some other period of time. She stated that Mr. Russomagno did this type of evaluation.

During the absences, Butler stated that sometimes substitute teachers for that particular subject area were secured. Other times when this could not be accomplished other teachers went and took the class. When that occurred, it could mean that the person taking the class was not a teacher in Spanish and therefore, did not have the ability to assist or teach the students in the area in which they were supposed to be studying. She stated that respondent taught both first and second year Spanish and she was unaware of how many students from the first year class of respondent actually went on to the second year of Spanish. She also was unaware as to how many students may have failed.

She stated that she did speak with respondent in January and after this conversation her attendance record improved somewhat.

Butler described the policy regarding approval of absences. She stated that if the individual is absent for five days within a 30-day period they must bring in "leave papers." A doctor fills them out and then the papers go to the board of education in order to determine if the leave is granted. She did not know of any leave being denied during the 1989/1990 school year. She did state that subsequent to January 1990 she did not get further visits from students regarding the problem. She also has not spoke with respondent since May 3, 1990.

Butler stated that she did counsel respondent on numerous occasions regarding lateness. According to Butler her latenesses in that school year were excessive. The system employed by that school was that there was a sign in book. In the event the individual was late arriving for work they would have to sign in with the time they arrived at the building. Butler stated she spoke with respondent on a number of occasions due to the fact that Butler was often located at the sign in area.

Lennon A. Ross also testified at the time of the hearing for the petitioner. He stated that he was first employed as a teacher in 1956. He became an administrator

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subsequent to that, and served as a vice principal from 1974 to 1976. In 1976 he began as a principal. He has been a principal at Snyder High School since 1978 continuously until the time of the hearing. He was acquainted with Lena White, who was a language teacher at Snyder High School for a number of years.

Mr. Ross went through the attendance records from the 1982-1983 school year through and including the 1988/1989 school year. These have already been described in the uncontested facts portion of this decision and are embodied in P-2 evidence through P-8 evidence.

He stated that there came a time when he recommended that the respondent's salary increment for the next school year which was 1987/1988 be withheld. He wrote a letter to Mr. Lanzillo, the assistant superintendent of the board of education, recommending that due to an extensive history of absenteeism over a period of three years, the salary increment for the respondent should be denied. Subsequent to this, a resolution was passed withholding the salary increment for the school year 1987/1988. (P-12, Ev.).

After the 1987/1988 salary increment was withheld, Mr. Ross stated that there was no improvement in respondent's attendance record during the 1987/1988 school year. As a result, he stated that he sent a letter dated June 29, 1988 to Mr. Lanzillo recommending that respondent's 1988/1989 salary increment also be withheld based upon a history of extended absenteeism over a period of three years. Subsequent to this letter a resolution withholding the salary increment for the 1988/1989 school year was passed. (P-10, Ev.).

Ross stated that in the school year 1988/1989 there was also poor attendance exhibited by the respondent. As a result, he sent a memo to Dr. Kegelman, who was at that time assistant superintendent, regarding absences of the respondent. (P-14, Ev.). In that letter he indicated that students had lost 37 percent of their instructional time based upon the amount of absences of the respondent and as a result, would not be prepared for the mid-term exams. He also indicated the possibility of having to possibly postpone the mid-term exam for those pupils which she taught in both Spanish and psychology.

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Mr. Ross stated that students and teachers had complained to him about the situation. On January 18, 1989, after receipt of a letter from a parent complaining anonymously about an unnamed teacher, which he stated had to have been the respondent, he sent a memo to Mr. Lanzillo regarding the situation. (P-15, Ev.). Prior to this he had also sent a memo in 1988 to Mr. Lanzillo regarding the attendance pattern of the respondent with a copy to Dr. Kegelman and to respondent herself. That memo outlined that there had been a problem in the attendance pattern of the teacher, and also discusses the negative aspect which is being reflected to both students and teachers as a result. (P-17, Ev.). Prior to that in June 1988, Mr. Ross also sent a memo to Dr. Kegelman regarding problems that students would be experiencing as a result of the attendance pattern of respondent.

Even before that in 1986, Mr. Ross had sent a letter to Mr. Russomagno regarding the problems presented by insufficient instruction provided to the students in order to secure a fair evaluation of their skills. This letter asked for guidance as to how best to address this problem. (P-19, Ev.).

Mr. Ross stated that in his opinion and based upon his training and experience the attendance of the teacher was extremely important. The attendance of respondent, according to him, was "very unsatisfactory."

He stated that he was able to observe the impact of the absences upon her students. According to him these would have a direct and not merely consequential impact upon the students which she taught. Certain students complained and according to him certain parents also complained. The parents who complained expressed worry over their children's continuing education.

He stated that he counselled White on a number of occasions and indicated to her that improvement was needed. She stated to him that she would improve however, according to him the situation never got better. He stated that he counselled her at least four or five specific times.

In the 1988/1989 school year Mr. Ross stated he had formed an opinion based upon the years of trying to rectify the problem of absenteeism as to whether or not she should continue teaching. This opinion he stated was based both on his training as a teacher and upon his allegiance to the students and their educational needs. He

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stated that as a result of all those factors it was his opinion that she should not continue teaching.

Mr. Ross did indicate that leave of absence forms are filed and that no leave of absence in the case of respondent was ever denied. He stated that he met with her and spoke with her on a number of occasions about improving her attendance however, no improvement resulted. He however, did not bring charges against her. He also was unable to state as a result of some of his letters what occurred.

Mr. Ross stated that on certain occasions there was a substitute teacher in the appropriate subject area, although on other occasions due to inavailability another teacher, who would not necessarily be versed in the subject matter which respondent taught, was necessary. He stated also that he knew of times when there was a substitute teacher with no lesson plan having been left by Ms. White. According to him he would note it with a memo to the individual teacher, in this case Ms. White, although he did not have any of these memos available at the time of the hearing.

Ross stated that at Snyder High School respondent taught Spanish as well as psychology. One out five courses was a psychology class.

Ross conceded that he had no documentation that the students were adversely affected.

Barbato R. Russomagno testified during the hearing. He stated that he had been employed by Jersey City in 1967 as a Spanish teacher. From 1968 to 1974 he worked at Bloomfield College. In 1974 he returned to Jersey City once again as a teacher. In 1975 he became a supervisor of bilingual bicultural education and the English as a second language program (ESL). In 1980 he took over supervision of the foreign languages program.

His duties as the supervisor of the foreign languages program involved administrative aspects as well as development of curriculum, testing instruments, in-service training, evaluating teachers and observing teachers.

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Before the initiation of the school year a letter goes out to each individual teacher to tell them what they are responsible for. According to Russomagno each teacher must have certain things available during the observation period including the seating chart, a lesson plan and other items which the teacher is aware of in advance due to the letter.

It is Russomagno's job to go in and observe the teacher and to make an evaluation of their classroom performance. The observation occurs for a full 45 minute class and all documents are to be available and then evaluated.

Russomagno has been the respondent's supervisor since 1982.

He stated that he did an observation and evaluation on the respondent. That occurred on March 7, 1990 which was the last time he had formally evaluated her. (P-20, Ev.). He also evaluated her regarding absences and latenesses. In order to do that he obtained the records. He stated that he also found absences and latenesses a problem with respect to lesson plans and continuity. He found lapses in time in the lesson plans.

He stated that absences and latenesses have a negative impact upon continuity of instruction. According to him, for weeks at a time no lessons were planned. There needs to be continuity from the prior lesson to the next lesson. According to him what was written up was superficial and would need reinforcement and further work. These factors had to do with absences and not specifically with latenesses. According to him the only manner in which he uses lateness to evaluate is with respect to the fact that according to him it is unprofessional and impacts adversely on others.

Russomagno did an evaluation of the respondent on February 22, 1988. (P-21, Ev.). He stated that in this case the circumstances were similar and the effect of absences was the same as described above. He stated he discussed the evaluation with the respondent regarding lateness and absences, and discussed the fact with her that these must be corrected. Respondent signed the evaluation form.

Russomagno did an evaluation of the respondent on March 25, 1987. (P-24, Ev.). At that time, he stated that the problem of absence impeding continuity of

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instruction and learning was also present. He discussed this problem with respondent.

Russomagno did an evaluation of the respondent on December 17, 1984. (P-30, Ev.). At that time one of the things that was pointed out was the necessity to prepare daily lesson plans. According to Russomagno, due to the fact that respondent had three separate classes of Spanish, the need existed to have each class's lesson plan prepared separately. He state this was due to the fact that classes were not identical in their abilities nor in the rate at which the class progressed. They require continuous meaningful instruction. This must take into account individual class differences. If these are not prepared ahead of time then no continuity exists with respect to each individual class.

Russomagno stated that based upon his training and experience it was his opinion that respondent had a negative impact upon her students. He stated that there were occasions when lesson plans were not prepared. According to him there were weeks at a time in which some lesson plans said "repeat last week."

Russomagno conceded that he had evaluated White only six times between 1983 and his last evaluation which came to a total of an eight year passage of time. He stated however that if you combine the problems involving lesson plans with intermittent absences then the question becomes what one does with the classes. With excessive absence it is impossible to reach the parameters of the learning experience with the same degree that might otherwise be attained. He did not however have any documentary evidence that the problems involved with the respondent adversely impacted upon the performance of the students.

He conceded that in some of his evaluations attendance was not mentioned in the section entitled "Areas Needing Improvement." He stated however that the problem of lesson plans was listed and certain evaluations did mention the attendance problem.

He also conceded that tenured teachers are not required to have lesson plans submitted other than an emergency lesson plan which must be available in the compartment of that particular teacher. This must occur in the event that the individual is absent. The emergency lesson plan should cover what is going on in the

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classroom. Once a particular week is over it is necessary for the class to move on. When a substitute is secured, the substitute is supposed to be from the same subject area. If they are not however, the lack of lesson plan becomes even more devastating.

Robert Schaeffer also testified at the time of the hearing. He has worked for the Jersey City public schools and is director of human resources. He is responsible for hiring and maintaining records. As a part of that it is also necessary for him to maintain personnel records. Through him a number of other performance reports were authenticated and kept in the normal course of business and entered into evidence. (See P-23, P-25, P-26, P-27, P-28, P-29 and P-31, Ev.).

He also explained the leave of absence policy for Jersey City. He stated that that was governed by union contracts. He stated that if an individual was absent for six days in a 30 day period for medical reasons it is necessary for them to obtain the forms from the supervisor. The individual then takes these forms to their doctor who submits them to the central office for approval. If the board is satisified with the reason behind it the leave can be approved, and if the board is not satisfied they have the power to deny the leave.

Without the testimony of a witness, another instructional observation evaluation report was entered into evidence dated December 3, 1987. Both sides agreed that this was kept in the normal course of business in the respondent's personnel file and it was entered into evidence without objection.

Respondent herself testified during the hearing. She stated that she had worked for Jersey City for nine years. She had a certification in both Spanish and psychology. She stated she had taught at Snyder High School as well as Dickinson, and then several weeks in another school with a return to Dickinson.

She explained she had, in fact, been absent over those periods of time indicated by the attendance records, however, in each case she applied for a leave of absence which always was granted. No leave of absence for which she applied had ever been denied.

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She stated she spoke with Ms. Butler in approximately January 1990. At that time, Ms. Butler asked her why she was out of work. She acknowledged asking Ms. Butler whether she had gotten the leave papers.

The respondent indicates that she was never advised at any time that her job was in jeopardy due to her attendance record.

She indicated that she did have certain discussions with Mr. Ross about improving her attendance. She did acknowledge that in the 1988/1989 school year she was continuously out from January 30, 1989 until the end of the year. She stated that her niece died and she nearly had a nervous breakdown. Subsequent to this she said that the board of education never asked for an evaluation by a doctor of their choice. Not only did they not request that for this particular absence period, but they did not request that for any other period of absence.

She acknowledged that she was advised at Snyder High School by Mr. Russomagno that her students' grades were somewhat low. She stated that her students' grades at Dickinson, however, were good.

She acknowledged that increments had been withheld from her as to her salary in 1987/1988 as well as the 1988/1989 school year. She agreed that she thought that the increments were withheld based upon her absences. She stated that she thought it would be over if she improved and that this was the worse that could happen to her with respect to her job situation.

She did meet with Mr. Lanzillo who stated to her that her attendance was unsatisfactory. Ms. Butler, Mr. Russomagno and Mr. Ross had also told her that her attendance was unsatisfactory.

She acknowledged receiving copies of the evaluations that were done for her and that sometimes those evaluations mentioned the attendance issue.

With respect to the denial of the increment she stated that she had gotten notice that it had been withheld. She did not however discuss this with anyone from the board of education.

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FINDINGS OF FACTS

Having listened to the testimony, reviewed the evidence and having assessed the credibility of the witnesses, I hereby FIND the following to be facts:

1. Those uncontested facts previously found are hereby incorporated by reference as facts for the purposes of this case.

2. Respondent, Lena White, was counselled on a number of occasions by Ms. Butler regarding her latenesses. She was also counselled on a number of occasions by Lennon Ross with regard to both absenteeism and lateness.

3. Those withheld salary increments referred to in number one were the direct result of respondent's poor attendance in the Jersey City school system.

4. In those written evaluations which were prepared regarding respondent, and in most cases signed by respondent, mention was made of both the problem of absences as well lateness. While these topics did not occur in each and every one of the evaluations they were, however, present in the majority of the evaluations.

5. Repeated absenteeism to the extent as found in this case causes a serious disruption to continuity of study for the students in respondent's classes, whether the subject matter is Spanish or psychology.

6. Notwithstanding the disruption to continuity of schedule and learning, it is clear that repeated absenteeism also is not the role model to which school systems aspire.

7. Respondent was aware that the withholding of her salary increments on the two occasions previously listed was due to her absenteeism.

8. The very fact that respondent had been counselled on several occasions regarding the problem clearly shows that warning was given to her that there was dissatisfaction with the pattern of absences in which she

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engaged, notwithstanding the fact that each period of absence was ultimately excused and leave was granted by the school board.

9. While no definition is given for the term "excessive absences" based upon the facts of this case, it is clear that respondent has accrued excessive absences.

DISCUSSION

In this case there is no little or no factual dispute regarding the actual absences themselves. The question which present itself is limited to whether or not, in a case where leaves of absence have been granted, a school board may then seek to terminate a tenured teacher.

Respondent, through counsel, argues that due to the fact that the leaves of absence had been granted it would be manifestly unfair for the school board to turn around and terminate the employment of the respondent based upon a theory of excessive absenteeism. Conversly, the board of education relies upon the theory that, whether or not excused, the question turns on whether the continuity of instruction during the time period of the absences has somehow been adversely affected.

High absenteeism has previously been deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse. *Montville Township Education Association v. Board of Education of the Township of Montville*, OAL Dkt. No. EDU 8247-83, Commissioner's Decision at 10 (April 16, 1984); *Angelucci v. West Orange Board of Education*, 180 S.L.D. 1066. This being the case the burden shifts to the teacher to show that performance is unaffected by continued absences, notwithstanding the legitimacy of excuse. *Vonita Smith v. Board of Education of the City of Trenton*, OAL Dkt. No. EDU 5255-88, Commissioner's Decision (April 18, 1984).

Clearly then, the mere fact that leaves had been granted does not remove the possibility of some form of action against the teacher in a case where excessive absenteeism is a factor.

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In each case the necessary focus is not merely the number of days of absence but a consideration of the nature of the absences themselves. Beyond that the particular circumstances must be looked into. The inquiry however, does not stop there. It is necessary to also assess the impact that the absences have had on the continuity of instruction during the period of time in which the absences occurred. There also logically must be some form of warning given to the employee that his or her superiors were dissatisfied with the pattern of absences which has come forward.

In *Kelsey v. Board of Education of the City of Trenton*, OAL Dkt. No. EDU 5773-88, Commissioner's Decision (May 11, 1989), the following clearly outlined the procedure which must be followed:

> What a board of education is required to show, however, is that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences, cite omitted; (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences. (cite omitted)
> (Slip opinion at page 19).

Applying these tests to the facts in this case it is clear that the number of absences themselves are excessive. While leave of absence papers were submitted and granted in each case, it is equally as clear that the impact of the absences on the continuity of instruction during the period of time in which they occurred was significant and adverse.

This brings us to the last factor which must be discussed regarding whether or not there had been some warning given to the employee by his or her superiors that there has been some dissatisfaction with the pattern of attendance engaged in. Respondent stated at the time of the hearing that while her salary increments had been withheld on two separate occasions, she had no idea that her job was in jeopardy. In fact, she stated that it was her opinion that, should the salary be withheld, that would take care of the entire matter, and no further action could be taken against her. This belief is not credible. It certainly has to be clear to all

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teachers, and it undoubtedly was to this particular one, that suspension or denial of salary increments if unsuccessful in improving one's attendance would lead to further more dire consequences. As a result, there had been warning to the employee that her supervisors were dissatisfied with her pattern of absence.

It must be noted throughout this discussion that there is no question that the absences had been approved by the board of education. The question is whether or not, notwithstanding that approval, there are sufficient grounds to remove a tenured teacher from that position. In order to find sufficient grounds it is necessary to find that there has been adverse impact upon the continuity of instruction.

In this case, based upon the testimony as well as the evidence presented, it is clear that in a foreign language class prolonged periods of absence will not only disrupt the continuity of the study, but may also make further years study in that particular language impossible.

CONCLUSION

Based upon the foregoing, I **CONCLUDE**, that while leaves of absence were granted to the respondent for those periods of absence reflected in her employment records, the impact of those, albeit excused, absences on the continuity of instruction is so significant as to be detrimental to the student population. I **FURTHER CONCLUDE** based upon the foregoing that just cause exists as delineated in *N.J.S.A.* 18A:6-10 for the dismissal of Lena White, a tenured teacher with the Jersey City school district.

ORDER

It is hereby **ORDERED** that Lena White, a tenured teacher with the Jersey City school district, be and hereby is dismissed from her position as a teacher pursuant to *N.J.S.A.* 18A:6-10.

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I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSISON OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/2/91
Date

MARYLOUISE LUCCHI, ALJ

Receipt Acknowledged:

5/7/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 09 1991
Date

OFFICE OF ADMINISTRATIVE LAW

am

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WITNESSES

For petitioner:

Anne E. Butler
Lennon A. Ross
Barbara R. Russomagno
Robert Schaeffer

For respondent:

Lena White

EVIDENCE LIST

P-1 Attendance Record 1989-1990

P-2 Attendance Record 1988-1989

P-3 Attendance Record 1987-1988

P-4 Attendance Record 1986-1987

P-5 Attendance Record 1985-1986

P-6 Attendance Record 1984-1985

P-7 Attendance Record 1983-1984

P-8 Attendance Record 1982-1983

P-9 Letter dated June 29, 1988 recommending the denial of increments for 1988-1989 to Ms. White due to excessive absenteeism, 4 pages

P-10 Board resolution withholding Ms. White's 1988-1989 employment and adjustment increments for unsatisfactory ratings and excessive absenteeism, 2 pages

P-11 Letter dated March 5, 1987 recommending denial of increment for Ms. White for 1987-1988 for poor attendance

P-12 Board resolution withholding Ms. Whaite's 1987-1988 increments

P-13 Memorandum to personnel director from principal at Dickinson High School dated February 13, 1990 regarding continued problems with Ms. White's absenteeism

P-14 Memorandum to assistant superintendent from principal of Snyder High School dated January 24, 1989 regarding Ms. White's absenteeism and problems with students' preparation for mid-term

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P-15 Memorandum to assistant superintendent from principal of Snyder High School dated January 18, 1989 regarding continued problems with Ms. White's absenteeism, attaching parent complaint

P-16 Id. Written record of conference between Ms. White and assistant superintendent Lanzillo on September 22, 1988 regarding Ms. White's absenteeism

P-17 Memorandum to assistant superintendent from principal of Snyder High School dated September 19, 1988 regarding continued problems with Ms. White's absenteeism

P-18 Memorandum to assistant superintendent from principal of Snyder High School dated June 7, 1988 regarding Ms. White's absenteeism and problems with students' preparation for final exams

P-19 Letter to Language Supervisor from principal of Snyder High School dated January 29, 1986 regarding effect of attendance problems

P-20 Observation/Evaluation Report dated March 7, 1990

P-21 Observation/Evaluation Report dated February 22, 1988

P-22 Observation/Evaluation Report dated December 3, 1987

P-23 Annual Written Performance Report dated June 12, 1987

P-24 Observation/Evaluation Report dated March 25, 1987

P-25 Observation/Evaluation Report dated October 30, 1986

P-26 Annual Written Performance Report dated June 23, 1986

P-27 Annual Written Performance Report dated June 7, 1985

P-28 Observation/Evaluation Report dated March 7, 1985

P-29 Observation/Evaluation Report dated March 6, 1985

P-30 Observation/Evaluation Report dated December 17, 1984

P-31 Annual Written Performance Report dated June 14, 1984

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IN THE MATTER OF THE TENURE HEARING OF LENA WHITE, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent's exceptions were timely filed by her attorney pursuant to the requirements of N.J.A.C. 1:1-18.4, as was petitioner's reply thereto. Respondent White herself also filed a number of letters from the student body which she requested the Commissioner to consider in rendering his determination. However, these letters may not be considered because evidence new to the record may not be submitted to the Commissioner by way of exceptions.

Respondent urges that the initial decision should be reversed because termination is too extreme a sanction. She avers that there was not one word of testimony even remotely suggesting that she had any idea or cause to believe that her job was at any time in jeopardy. As to this, respondent maintains that the only communication she received was that her increments were withheld and that no one document was ever given to her advising her that more punitive action could or would be taken. She also avers that no one counseled her that the Board thought its action of denying her

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salary increments was serious or that if she could not come to work, she could ask for an extended leave of absence. While she acknowledges that her absenteeism dictates some punitive action, respondent urges that her actions fall far short of the ultimate punishment of dismissal.

In addition to the above, respondent relies upon the brief submitted to the Administrative Law Judge.

Petitioner's reply exceptions urge that it is absolutely not true that respondent was not sufficiently warned that her absenteeism was unsatisfactory and argues that its brief and reply brief submitted to the ALJ demonstrates the absurdity of her claim.

Upon a careful and independent review of the record in this matter, the Commissioner is in full agreement with the findings and conclusions of the ALJ that there are sufficient grounds to remove respondent from her tenured position as a teacher in the State-operated School District of Jersey City due to her prolonged history of excessive absenteeism and tardiness which adversely impacted on the continuity of instruction of her students. The Commissioner finds totally without merit respondent's argument that she was not aware of the seriousness of her absenteeism because no one counseled her that petitioner thought increment withholding was serious or that she could be subject to dismissal. Increment withholding is the most severe sanction short of dismissal which a board of education may apply to a tenured teaching staff member. To suggest that one can be denied thousands of dollars in salary increases over a two-year period and the individual not be aware of the seriousness of the problem underlying the withholdings is simply ludicrous. Further, the record more than amply demonstrates that

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the concern for respondent's excessive absenteeism had been conveyed to her as early as 1984. Petitioner's reply brief captures well the essence of this as follows:

> 1. 6/14/84 -- White's P.I.P. advises of the need for "improvement in attendance" (Exhibit 31);
>
> 2. 3/6/85 -- White was advised to improve attendance (Exhibit 29);
>
> 3. 6/3/85 -- White was advised to "better attendance" (Exhibit 27);
>
> 4. 6/23/86 -- White was advised to "better attendance" (Exhibit 26);
>
> 5. 10/30/86 -- White was advised of areas needing improvement: extremely poor attendance record (Exhibit 25);
>
> 6. 3/25/87 -- White was told, in writing, that "teacher absences impede continuity of instruction and learning" (Exhibit 24);
>
> 7. 6/12/87 -- White was told the need "to significantly reduce the number of incidental absences" (Exhibit 23);
>
> 8. 9/19/88 -- Lennon Ross advises Mr. Lanzillo, with a copy to White, that "this office still stands ready to start removal proceedings against this teacher." (Exhibit 17);
>
> 9. 1/24/89 -- White is again told about her poor attendance (Exhibit 14);
>
> 10. 1987-1988: White's increment was withheld (Exhibit 12); and
>
> 11. 1998-89: White's increment is again withheld for excessive absenteeism (Exhibit 10) (Petitioner's Reply Brief, at pp. 1-2)

To have experienced the withholding of her salary increments for two consecutive years, 1987-88 and 1988-89, for excessive absenteeism and still have had 18 days of full absences, 5 days of partial absences and 42 occasions of tardiness between

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September 1989 and March 20, 1990 (Initial Decision, at pp. 2-3) indicates to the Commissioner that the sanction of dismissal is unquestionably appropriate. As was found in the case entitled In the Matter of the Tenure Hearing of Edna Booth, School District of West Orange, 1985 S.L.D. 722, aff'd State Board of Education April 1, 1987, aff'd N.J. Superior Court Appellate Division November 13, 1987, dismissal is appropriate when two years of the monetary sanction of increment withholding for excessive absenteeism has proven unsuccessful in improving a staff member's prolonged history of poor attendance.

Accordingly for the reasons set forth in the initial decision and expanded upon herein, respondent is dismissed from her tenured position as teacher in the State-operated School District of Jersey City as of the date of this decision. The matter shall be transmitted to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6(a)1 for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 19, 1991

DATE OF MAILING - JUNE 19, 1991

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IN THE MATTER OF THE TENURE HEARING OF LENA WHITE, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, June 19, 1991.

For the Petitioner-Respondent, Murray, Murray & Corrigan (David F. Corrigan, Esq., of Counsel)

For the Respondent-Appellant, Lena White, pro se

On June 19, 1991, the Commissioner of Education upheld tenure charges certified against Lena White (hereinafter "Respondent"), a tenured teaching staff member, for excessive absenteeism, and directed that she be dismissed from her tenured position. Respondent appealed to the State Board of Education, mailing her notice of appeal dated July 29, 1991 by certified mail on July 30.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.17, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to

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extend it. E.g., B.W., a minor child by his parents, J.W. and B.W. v. Board of Education of the City of Brigantine and Safety Bus Service, decided by the State Board of Education, November 4, 1987.

In this case, the Commissioner's decision was rendered on June 19, 1991 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was filed on June 22. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), Respondent was required to file notice of appeal by July 22, 1991. As noted, Respondent did not file by that date. Accordingly, the matter was referred to our Legal Committee for consideration of the effect of Respondent's failure to file timely notice.[1]

Respondent was notified of such referral by letter of August 2, 1991. In response thereto, Respondent stated in an undated letter received by the State Board on August 13 that her attorney had advised her that she had 45 days to file an appeal to the State Board.[2]

While we are sensitive to the fact that Respondent is acting before us on a pro se basis, we conclude that the requirement with which she failed to comply is of such significance that we

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[1] We note that Respondent's notice was also deficient in that it failed to include proof of service on her adversary and on the Commissioner as required by N.J.A.C. 6:2-1.7(b). This deficiency was subsequently cured by the Respondent.

[2] We note that although Respondent is acting pro se in her instant appeal to the State Board, she was represented by counsel in proceedings before the Commissioner.

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appeal in this matter. See Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989) (dismissal of appeal by State Board upheld where Appellate Division found notice of appeal to have been filed one day late by appellant's counsel who alleged that he had misread or misunderstood the applicable regulations).

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis in the record before us, which includes no indication of the circumstances surrounding the filing except for Petitioner's bare contention that she received incorrect advice, for relaxing such requirement in this particular instance. Nor do we find this case to present us with a matter of public importance or with substantive issues of transcendent importance warranting a determination on the merits.

Accordingly, we dismiss Respondent's appeal for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

September 4, 1991
Date of mailing 6 SEP 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6471-90
AGENCY DKT. NO. 194-6/90

MICHAEL TIMKO AND JOHN J. MIKUSH,
Petitioners,
v.
BRIDGEWATER RARITAN REGIONAL
SCHOOL DISTRICT, SOMERSET COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioners (Lake and Schwartz, attorneys)

Daniel C. Soriano, Jr., Esq., for respondent (Soriano & Gross, attorneys)

Robert B. Rottkamp, Jr., Esq., for intervenors (Rottkamp & Flacks, attorneys)

Record Closed: April 1, 1991 Decided: May 3, 1991

BEFORE **EDITH KLINGER**, ALJ:

On June 21, 1990, petitioners filed a petition of appeal with the Department of Education, Division of Controversies and Disputes, alleging that respondent, the Bridgewater Raritan Regional School District (District), violated petitioners' respective tenure and seniority rights under *N.J.S.A.* 18A:28-5 and/or *N.J.A.C.* 6:3-1.10 *et seq.* following a reorganization of the grade assignments given to petitioners' respective supervisory positions. The District filed an answer to petitioners' verified petition, and on August 15, 1990, the Department of Education transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing conference was held on October 3, 1990, at which it was determined that the following issues were to be resolved at hearing:

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1. Following the reorganization, did the District fail to appoint petitioners to newly-created supervisory positions in violation of their tenure and/or seniority rights?

2. Following the reorganization, did the District replace petitioners in their positions with nontenured or less senior supervisors in violation of petitioners' tenure and/or seniority rights?

3. To what relief, if any, are petitioners entitled?

Barbara J. Kane, John Iatesta, Edmund Khoury, and Thomas Crop were granted leave to intervene as parties in this matter. These individuals will be more fully identified in the stipulation of facts by the parties set forth in full below.

The hearing was held on February 7, 1991, and the record closed on April 1, 1991, when the last submission of the parties was received.

STIPULATION OF FACTS

1. Petitioner, Michael Timko, has been employed by respondent since September 1966, and during the period of his employment, has been assigned as follows:

September 1966 - March 27, 1978	Teacher of Social Studies
March 28, 1978 - June 30, 1990	Chairperson of the Social Studies Department at High School East

Petitioner holds a regular teacher of social studies instructional certificate and regular supervisor and principal administrative certificates.

2. Petitioner, John J. Mikush, has been employed by respondent since September 1959 and, during the period of his employment, has been assigned as follows:

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September 1959 - June 1966	Teacher of Industrial Arts
September 1, 1966 - June 30, 1990	Chairperson of Industrial Arts Department at High School West

Petitioner holds a regular teacher of industrial arts instructional certificate and a supervisor of industrial arts administrative certificate.

3. Respondent took formal action on March 27, 1990, to abolish several supervisory positions and to create new supervisory positions to reflect a reorganization of supervisory positions. The effective date of the reorganization was July 1, 1990.

4. The Somerset County Superintendent of Schools approved the position descriptions for the newly-created supervisory positions by letter dated April 5, 1990.

5. Prior to the reorganization, Timko was the chairperson of the Social Studies Department at High School East, and Thomas J. Crop was the chairperson of the Social Studies Department at High School West. Both Timko and Crop have acquired tenure in the position of supervisor. Timko and Crop had 12.3 years and 9 years, respectively, of seniority in the position of Social Studies Department chairperson.

6. Prior to the reorganization, Mikush was the chairperson of the Industrial Arts Department at High School West and Edmund N. Khoury was the chairperson of the Industrial Arts Department at High School East. Khoury has acquired tenure in the position of supervisor. Mikush and Khoury had 24 years and 18 years, respectively, of seniority in the position of Industrial Arts Department chairperson.

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7. The Social Studies chairs and the Industrial Arts chairs at High School East and High School West were abolished as of July 1, 1990, incident to the reorganization of supervisory positions.

8. The position of supervisor of Social Studies, 6-12, and the position of supervisor of Industrial Technology and Home Economics, 6-12, were created incident to the reorganization of supervisory positions, effective July 1, 1990.

9. Both High School East and High School West encompass grades nine through twelve. The newly-created position of supervisor of Social Studies, 6-12, has supervisory responsibility for grades six through twelve. Similarly, the newly-created position of supervisor of Industrial Technology and Home Economics, 6-12, has supervisory responsibility for grades six through twelve.

10. Petitioner Timko was a candidate and interviewed for the position of supervisor of Social Studies, 6-12. Respondent appointed Thomas J. Crop to that position.

11. Petitioner Mikush was a candidate and interviewed for the position of supervisor of Industrial Technology and Home Economics, 6-12. Respondent appointed Edmund N. Khoury to the position.

12. Both petitioners Timko and Mikush were reassigned to classroom teaching positions for the 1990-1991 school year.

13. Respondent currently employs two nontenured supervisors -- John Iatesta and Barbara Jean Kane.

14. John Iatesta commenced his employment in the District on November 1, 1989, in the position of supervisor of Instruction. Iatesta continued in the position of supervisor of Instruction until July 1, 1990, when the position was abolished incident to the reorganization of supervisory positions. From November 1, 1989 through June 30, 1990, Iatesta was assigned District-wide

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supervisory responsibilities in the subject areas of music and art. Iatesta was appointed to the newly-created position of supervisor of Fine Arts and Music, K-12, effective July 1, 1990. The position description for supervisor of Fine Arts and Music, K-12, requires certification both as a supervisor and as a teacher of art or music.

15. Barbara Jean Kane has been employed by respondent since September 1970. Kane was appointed to the newly-created position of supervisor of Staff Development, K-12, effective July 1, 1990. The position description for supervisor of Staff Development, K-12, requires certification both as a supervisor and as an elementary school teacher.

16. Thomas J. Crop, Edmund N. Khoury, John Iatesta, and Barbara Jean Kane were notified by respondent in writing that their right to continue in their respective positions was being challenged by petitioners and that they have a right to intervene in accordance with the provisions of *N.J.A.C.* 1:1-16.1.

17. A June 26, 1990 resolution of the Board provided for early tenure to teaching staff members employed by the District in the 12-month position of supervisor of Instruction, resulting in early tenure for Marian Palumbo, supervisor of Mathematics for Computer Education, K-8. Marian Palumbo is not a party to this case.

It was also agreed at hearing that there were no allegations by petitioners that the reorganization was done in bad faith by the Board.

REVIEW OF TESTIMONY

John Mikush testified that in his prior position as department chairperson in the Industrial Arts Department, he performed the same duties as those assigned to the present position of supervisor of Industrial Technology and Home Economics, 6-12. He claims that the only significant change in duties between his abolished position and the new one was that the supervisor position carried responsibilities for grades six through twelve. Mikush

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primarily supervised teachers of grades nine through twelve but stated that he had some supervisory experience involving grades six through eight.

On cross-examination, it appeared that, as chairperson in the Industrial Arts Department, Mikush taught between one to three classes a day. The present supervisors have no classroom responsibility. Mikush did not think this a significant difference. He admitted that he did not actually supervise the home economics and industrial arts teachers in grades six, seven, and eight during the years prior to the reorganization. The new supervisor is responsible for supervising these teachers. As department chairperson, Mikush reported to the principal of High School West and was occasionally called for consultation by the principal of the junior high school. The new supervisor reports to principals of both junior high schools and both high schools in the District, as well as to the assistant superintendent of the District. As department chairperson, Mikush made no direct report to the assistant superintendent. His district-wide responsibilities were limited to serving on district-wide committees. The former department chairpersons had their own collective bargaining unit, of which Mikush was a member. The present supervisors are not members of this unit.

Timko was previously a department chairperson of Social Studies in High School East. In this position, he had supervisory responsibilities in the social studies area. The newly-created position of supervisor of Social Studies has responsibility for supervision of social studies teachers from grades six through twelve. Timko had no curriculum development responsibilities for grades six through eight as department chair. He served merely in an advisory capacity in the development of the five-year curriculum plan. Timko also taught three classes a day as department chair at High School East. The newly-created supervisor of Social Studies has no classroom responsibilities.

Edmund N. Khoury, the present supervisor of Industrial Technology and Home Economics, 6-12, was the former department chair for Industrial Arts at High School West. He testified that the duties of his new position are significantly different from his old position. His office is presently located in the administration building, but he spends a large portion of his time traveling between buildings in the four schools under his supervision so that he can observe and evaluate all 21 teachers in the high schools and middle schools and visit every home economics and shop area to inspect for safety defects. He also put into effect inventory procedures for all four schools. He is presently involved in developing curriculum in his subject areas in the middle schools as well as in the high

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schools. He holds departmental meetings at the middle schools to discuss inventory and curriculum and makes recommendations. There were no departmental meetings prior to the reorganization. Khoury is now responsible for assisting with the budget at the middle school, which was never within the scope of his responsibility as department chairperson. He was never involved with hiring teachers for the middle school, which is part of his present job description. Khoury estimated that he spends 35 to 40 percent of his working time at the two middle schools. He now serves on district supervisory committees. As department chairperson, he was infrequently involved in these meetings because of his teaching duties. He coordinates his function with the principals of all four schools, whereas he previously reported only to the principal in the high school in wh he was employed.

Thomas Crop is the present supervisor of Social Studies, 6-1 He was the prior department chairperson for Social Studies, 9-12, at High School Wes. Most of his time is now spent observing and supervising 26 members of the teaching staff, 12 at the middle schools and 14 at the high schools. As department chairperson, he supervised six full-time and two part-time teachers. He estimated that he presently spends approximately 25 percent of his working time at the middle schools. Prior to the reorganization, he had no responsibilities at the other District high school or in either middle school. Crop now reports to the assistant superintendent of the District rather than to the principal at the high school. Like Khoury, he finds that his new responsibilities extend to the middle schools, where he conducts grade level faculty meetings and individual meetings with teachers, helps to develop curriculum guides, and meets jointly with the middle school and high school social studies teachers.

Crop pointed out that some of the responsibilities set forth in the job descriptions of the "supervisor" and "department chairperson" are generic to any supervisory position. However, the scope and the focus of these generic items differ substantially between the two positions; the responsibility of the supervisor's job is greatly expanded from that of the department chairperson.

Dr. Richard Horowitz, the Superintendent of Schools of the District, was involved with the reorganization of supervisory personnel. The main objective, according to Horowitz, was to reform the supervision of teachers. It was designed to change the way teachers were observed, supervised, and evaluated. Supervision of instruction became the primary focus and the changes implemented with the reorganization were consistent with this goal. The District wanted direct subject matter supervision in the middle school in regard

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to the specialized areas of fine arts, music, social studies, industrial arts, and home economics. The plan was to have someone other than the principal supervise instruction in these areas.

The supervisor was to have two types of certification, reflecting two different types of skills: a broad knowledge of supervision and instruction and also a good knowledge of the subject matter.

In the area of Staff Development, K-12, and Fine Arts and Music, K-2, the supervisor would need teaching certificates for kindergarten through eighth grades since the new supervisors would now be involved with all grades through high school. The supervisors are, to some extent, teachers of teachers, so that they must be aware of teaching methods appropriate for the different grade levels which they are called upon to supervise. They also, for this reason, must have knowledge of any specialized areas that they are supervising so that they can provide modeling and analysis of instructional techniques in the classroom. According to Horowitz, prior to the reorganization, the department chairperson did not need to hold a certificate in the subject matter of his or her department.

The candidates were selected following interviews, and it has been stipulated that there is no bad faith alleged in the manner in which they were chosen.

Dr. Joseph McGarry is the assistant superintendent for Curriculum and Instruction of the District. He served on the district-wide committee to improve instruction which structured the reorganization. The committee looked at the supervisory system and determined that at the middle school level, there were no subject chairpersons in supervisory positions, and there were no regular meetings between the members of the middle school special departments with the subject area supervisory personnel in the high school. It appeared that the administration and supervision of these special subject matter areas was left entirely to the middle school principals. The committee determined that the organization should be structured to fit in with the team-teaching approach existing in the middle school but with more structure imposed. It was felt that the loose network of team teachers in the middle school needed supervisory personnel to pull these departments together.

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As an example of the enlarged supervisory duties of the new position, McGarry explained that the supervisor of Social Studies is now not only solely responsible for curriculum for grades six through twelve, but he also coordinates the teaching of social studies with the supervisor of the subject area in kindergarten through the fifth grades. There is no industrial arts program below grade six.

Two new supervisory positions were created during the reorganization. These are presently occupied by John Iatesta and Barbara Jean Kane, both nontenured teachers.

Iatesta was appointed to the position of supervisor of Fine Arts and Music, K-12. The position calls for certification both as a supervisor and as a teacher of art or music. Neither Timko nor Mikush hold certificates in these subject matter areas and could not qualify for these positions since they require the subject matter expertise: A supervisor of band teachers would have to know about bands in order to effectively evaluate a band teacher's instructional performance.

Kane was appointed as supervisor of Staff Development, K-12. The position requires certification as a supervisor and as an elementary school teacher since the supervisor will be observing and evaluating teaching methods, such as the whole language program, which are used in kindergarten through second grade to teach reading along with other subjects. Neither Timko nor Mikush have this certification.

Both of these positions and their required certifications were approved by the Somerset County Superintendent of Schools, by letter dated April 5, 1990, during the course of the reorganization.

Based upon the testimony and the evidence presented, I **FIND** that the position of supervisor of Social Studies, 6-12, is substantially different from the former positions of department chairperson of Social Studies in the high schools of the District which were abolished during the reorganization. It is undisputed that Mikush accrued greater seniority than Khoury in the abolished position. I **FIND** that the newly-created position of supervisor of Industrial Technology and Home Economics, 6-12, is a substantially different position than the position of department chairperson of Industrial Arts which was abolished during the reorganization. It is undisputed that Timko accrued greater seniority than Crop in the abolished position.

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I **FIND** that neither Timko nor Mikush hold the appropriate certifications for the newly-created positions of supervisor of Fine Arts and Music, K-12, or supervisor of Staff Development, K-12. I **FIND** that there are valid educational reasons for requiring that the two supervisory positions be held by persons with the appropriate certifications as approved by the Somerset County Superintendent of Schools. I further **FIND** that John Iatesta holds the appropriate certifications for the position of supervisor of Fine Arts and Music, K-12, and Barbara Jean Kane holds the appropriate certifications for the position of supervisor of Staff Development, K-12.

DISCUSSION OF LAW AND CONCLUSIONS

The Board concedes that if one of the two high school industrial arts chairperson positions or one of the two high school social studies chairperson positions had been abolished, Mikush and Timko would have been entitled to the remaining positions, respectively, because of their greater seniority. It argues, however, that as long as the positions are no longer substantially the same, petitioners have no seniority entitlement to be appointed to the newly-created supervisory positions. This is the controlling question of law addressed. *See, Elsa Denerie v. Bd. of Ed. of Passaic Co., Regional High School Dist. No. 1*, 1990 *S.L.D.* ___(July 2, 1990), aff'd State Board (Oct. 3, 1990).

The testimony shows that the new positions are clearly not the same as the old. The supervisors have no teaching duties and little administrative responsibility. They perform almost entirely supervisory responsibilities on a district-wide basis. These supervisory duties include responsibilities never given to the building-based department chairpersons. It further appears that the similarities in job description between the "chairperson" and "the supervisor" are generic supervisory functions common to all positions with supervisory responsibilities.

The Board correctly applied the opinion of the Commissioner in *Thomas J. Santarsiero, et. al. v. Bd. of Ed. of Parsippany-Troy Hills*, 1984 *S.L.D.* 854, 879 (May 14, 1984), aff'd State Board, 1984 *S.L.D.* 880 (Oct. 3, 1984), to the facts in this matter:

> 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

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> make them identical nor is the difference between the 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.

In the present case, the seniority which Mikush and Timko accrued in their department chairperson positions does not entitle them to lay tenure or seniority claims to the newly-created positions. *George Hatt v. Bd. of Ed. of the Tp. of Bloomfield*, 1988 S.L.D. ___ (July 11, 1988). On this basis, I **CONCLUDE** that Mikush and Timko did not have claims by virtue of tenure or seniority to the newly-created positions of supervisor of Social Studies and supervisor of Industrial Arts and Home Economics.

Since there is no contention that there was any bad faith in the reorganization and no evidence was introduced that there was anything arbitrary or capricious or an abuse of the discretion of the Board in hiring Crop and Khoury for the newly-created supervisory positions, I **CONCLUDE** that Timko and Mikush are not entitled to these positions and there has been no violation of their tenure and seniority rights by respondent.

The two newly-created positions of supervisor of Fine Arts and Music, K-12, and supervisor of Staff Development, K-12, require certifications which neither Timko nor Mikush possess. It is the responsibility of the county Superintendent to determine the appropriate certification requirements for all newly-created supervisory positions, and the appropriate procedures were followed in this case. Because of the duties of the positions, I **FIND** that these required certifications are reasonable and appropriate for the job to be done. Neither Timko nor Mikush has the appropriate certifications and, therefore, even if the present incumbents in these positions are nontenured, neither petitioner is a qualified applicant for either position; therefore, there can be no violation of either petitioner's tenure and/or seniority rights in the Board's failure to appoint him to one of these supervisory positions.

In *Capodilupo v. W. Orange Tp. Bd. of Ed.*, 218 *N.J. Super.* 510, 515 (App. Div. 1987), the Appellate Division affirmed the State Board of Education's determination that a board's obligation to consider tenure in this context be balanced by "sound educationally based reasons for its decision to retain a nontenured teacher." The Board

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has presented sound educational reasons for appointing both Iatesta and Kane to the supervisory positions which they presently hold. I therefore **CONCLUDE** that it is not a violation of the tenure and/or seniority rights of Timko or Mikush for the Board to retain Iatesta and Kane in these positions.

Based upon the above, I **CONCLUDE** that petitioners Timko and Mikush have not carried their burden of proving by a preponderance of the credible evidence that the Board failed to appoint them to the newly-created supervisory positions in the District following a district-wide reorganization in violation of their tenure and/or seniority rights.

It is therefore **ORDERED** that the action of the Board of Education of the Bridgewater Raritan Regional School District be **AFFIRMED**, and the appeals of Michael Timko and John J. Mikush be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

EDITH KLINGER, ALJ

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Receipt Acknowledged:

5/7/91
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 09 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

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APPENDIX

WITNESSES

For Petitioners:
John J. Mikush
Michael Timko

For Respondent:
Dr. Richard Horowitz
Dr. Joseph McGarry
Edmund N. Khoury
Thomas Crop

JOINT EXHIBITS

A	Personnel Record of Michael Timko
B	Personnel Record of John J. Mikush
C	Meeting Agenda for the Bridgewater Raritan Regional Board of Education Regular Meeting, March 27, 1990
D	Job Descriptions for the supervisory positions created and the supervisory positions abolished
E	Letter of April 5, 1990, from the Somerset County Superintendent of Schools approving the newly-created supervisory positions
F	Employment record of Thomas Crop
G	Employment Record of Edmund N. Khoury
H	Employment Record of Barbara Kane
I	Certificates of Timko
J	Certificates of Mikush
K	Certificates of Thomas Crop
L	Certificates of Edmund N. Khoury
M	Certificates of John Iatesta
N	Certificates of Barbara Kane
O	Resolution of the Bridgewater Raritan Regional Board of Education concerning tenure acquisition by supervisors of instruction

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MICHAEL TIMKO AND JOHN J. MIKUSH,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4. Intervenors Crop, Khoury, Iatesta and Kane share in the Board's reply exceptions.

Petitioners aver that the positions of supervisor of social studies, grades 6-12, and supervisor of industrial technology and home economics, grades 6-12, are not distinct as to tenure and seniority from the positions of chairperson of social studies and chairperson of the industrial arts department. In support of this, they emphasize that it was stipulated by the parties that Petitioner Timko has accrued 12.3 years of seniority in the category of supervisor of social studies and Petitioner Mikush has accrued 24 years in the category of supervisor of industrial arts/home economics. Further, they reiterate their contention argued before the Administrative Law Judge that the change in duties between the former department chairperson positions and the newly created

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supervisory positions are more one of scope than of substance. They urge that the fact the new positions have responsibilities for two high schools instead of one and for three new grades, i.e., grades 6, 7, and 8, and no classroom duties does not mean that the positions are not substantially the same.

In support of their position, petitioners cite Walldov et al. v. Board of Education of East Brunswick, 1985 S.L.D. 598, aff'd State Board 617, dismissed New Jersey Superior Court Appellate Division, February 26, 1986, which ruled that when the East Brunswick Board of Education acted to create new positions responsible for the supervision of subject matter in two junior high schools rather than in one, the new positions were not deemed to be substantially different from the prior department chairperson positions merely because the scope of the positions expanded to include two junior high schools rather than one and the supervisory responsibilities remained essentially the same.

Petitioners also aver that local requirements may not defeat their tenure rights to the two supervisory positions currently held by nontenured staff members.

The Board's reply exceptions aver among other things that petitioners are incorrect in arguing that the former department chairperson positions and the newly created supervisory positions are included within the same seniority category because under N.J.A.C. 6:3-1.10(1)(12), each approved supervisory title and position description is a separate seniority category. As such, the seniority accrued as department chairperson is not transferable to the newly created supervisory positions.

The Board further argues that petitioners' reliance on Walldov, supra, is misplaced in the light of the Commissioner's

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ruling in that matter which it believes fully supports its position as cited below:

> The Commissioner will first address the issue of whether the supervisory positions are essentially the same or different, after which he will address the change in qualifications.
>
> Upon a careful review of the record in this matter, the Commissioner determines that the disputed mathematics, science, and language arts/English positions do not constitute different positions from the prior ones because the duties and responsibilities are viturally the same and the seniority categories remain unchanged. The fact that two junior high schools are involved versus one is not significant enough to warrant a determination that the positions are substantively different from those that had existed previously. As is argued by petitioners, a principal who has responsibility for one school and is then assigned two would not constitute a "new" position.
>
> The above is not applicable to the visual and practical arts and guidance positions, however. There are substantive differences that exist, notwithstanding the fact that the duties and responsibilities stated in the job description are essentially the same. The "new" positions relate to two specific levels of schooling (both junior and senior high school) which encompass a broader grade span (7-12). Also of significance is the fact that the new positions constitute different seniority categories than previously which is unlike the first three supervisory positions addressed herein (emphasis in text)
>
> (at 615)

The Board also contends that notwithstanding the implication of petitioners' arguments with respect to the tenure claim to the two supervisory positions held by nontenured staff, it is only Timko that is asserting a claim since Mikush holds only a limited supervisor certificate entitled supervisor of industrial arts. (Exhibit H, Stipulation of Facts) Further, the Board rebuts petitioners' arguments relative to a local certification requirement, averring, inter alia, that (1) the ALJ found on page 11 of the

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initial decision that the appropriate certification requirements for all newly created supervisory positions were determined by the county superintendent; (2) a local requirement is one that has not been approved by the county superintendent; (3) the Commissioner has approved supervisory and subject matter certification previously; and (4) the ALJ found that because of the duties of the disputed supervisory positions, the required certifications were reasonable and appropriate.

Upon independent review of the record in this matter, the Commissioner is in agreement with and adopts as his own the finding and conclusion of the ALJ that Timko's tenure and seniority rights were not violated when the Board did not appoint him to the newly created supervisory position of supervisor of social studies, grades 7-12, nor were Mikush's rights violated when the Board failed to appoint him as supervisor of industrial arts and home economics. Contrary to petitioners' arguments otherwise, Walldov, supra, does not support their argument that they are entitled to the social studies and industrial arts/home economics supervisory positions on the basis of seniority. The factual circumstances as they relate to Timko and Mikush in the instant matter are akin to the guidance and visual arts positions in Walldov where the petitioners' claims were defeated as set forth above because the newly created positions were not substantively the same as the previously held positions. As in the Walldov matter, the new supervisory positions for social studies and industrial arts/home economics include responsibilities for two levels of schooling, high school and middle school, as opposed to the previously held grade 9-12 department chairperson positions. Thus, the seniority categories for each are different. Timko and

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Mikush in accordance with N.J.A.C. 6:3-1.10(1)(12) acquired seniority in the separate categories for the supervisory titles under which they served, i.e., department chairperson, grades 9-12; whereas, the new positions constitute different seniority categories as dictated by the title for each (supervisor of social studies, grades 6-12 and supervisor of industrial arts and home economics, grades 6-12).

Notwithstanding this determination, it must be emphasized that although neither of the petitioners had a seniority entitlement to the new supervisory positions discussed above, the Board could not fill the two new supervisory positions with nontenured supervisors when there are tenured supervisors on a preferred eligibility list. Under such circumstances, a board of education is permitted to interview those tenured supervisors on a preferred eligibility list and select those who it believes would best fulfill the responsibilities. Schienholz et al. v. Ewing Township Board of Education, Mercer County, decided June 19, 1989, aff'd in part, rev'd in part State Board of Education, February 2, 1990, aff'd N.J. Super. Court Appellate Division, November 19, 1990. Thus, the Board's action, herein, was appropriate.

As to the issue of the disputed supervisory positions held by nontenured supervisors, however, the Commissioner is unable to accept the ALJ's findings and conclusion that Petitioner Timko did not have entitlement to one of the positions irrespective of his not holding a subject matter endorsement. Since Mikush's supervisory endorsement is specifically limited to the supervision of industrial arts, the scope of his endorsement does not authorize him to supervise in other subject areas. However, Timko's supervisory

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endorsement is a general one such that he is entitled to serve in any position for which a supervisory endorsement is required which is held by a nontenured supervisor. As to the arguments raised about local certification requirements, it must be emphasized that there is nothing to prevent a board of education from having such requirements but those requirements cannot thwart the tenure rights of a staff member on a preferred eligibility list. See South River Education Association v. Board of Education of South River, decided by State Board of Education November 4, 1987, aff'd New Jersey Superior Court Appellate Division April 16, 1990; Schienholz, supra; Herbert v. Bd. of Ed. of Middletown, decided July 25, 1989, aff'd State Board August 1, 1990, aff'd New Jersey Superior Court Appellate Division May 22, 1991.

Moreover, the two most recent New Jersey Appellate Court decisions interpreting the rights of tenured administrative/supervisory staff have quite emphatically rejected the concept of retaining a nontenured staff member who has desired certification(s) or experience beyond the supervisory or administrative certificate required for a given position. See Schienholz, supra, and Herbert, supra. The following passage from Herbert is quite explicit in the rejection of the "sound educational basis" for retaining a nontenured staff member in an administrative/supervisory position over a tenured administrator or supervisor. It reads in pertinent part:

> On this appeal the Middletown Board argues that there is a "sound educational basis" for appointing Cohen to the position based on the distinctions between the two candidates and the uniqueness of the duties required by the position. Hence, the Middletown Board asks us to declare that the tenure rights protected by

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Legislative wisdom are subject to an exception where there is a "sound educational basis" fairly exercised.

We cannot agree and we affirm for the reasons expressed by the State Board in its decision dated August 3, 1990. As we pointed out in a recent unreported case cited by the parties involving certified principalships, Schienholz v. Bd. of Ed. of Twp. of Ewing, Docket No. A-2905-89T3 (App. Div. November 19, 1990), certif. denied ____ N.J. ____ (March 5, 1991),

> ...we are mindful of the dilemma that is presented to local boards of education by the interpretation of tenure preference which we announced in Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den. 109 N.J. 514 (1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den. 110 N.J. 512 (1988). We can only remind one, however, that the Legislature, in this wisdom, has chosen to protect such a right in omnibus fashion with the passage of N.J.S.A. 18A:28-12 and we are not privileged to change that basic decision, even if we were inclined to do so.
>
> Furthermore, the arguments presented on this appeal suggest that the problem is created, not by the tenure statute, but with the implementing regulations concerning the certification of principals. Compare N.J.S.A. 18A:26-2 with N.J.A.C. 6:11-3.3(a) and 6:11-3.4. Before 1969 separate certifications had been issued for elementary and secondary principalships. The State Board decided to eliminate that distinction and chose to issue a single principal's certificate, contrary to beliefs held in educational circles regarding the differences between such principalships. Apparently the State Board feared dealing with a "multiplicity of certificates." Consistent therewith, a transfer from one level to another within the "position" of principal has consistently been held to be a change of assignment rather than a change of position. See Di Nunzio v. Bd. of Ed. of Twp. of Pemberton, 1977 S.L.D. 24 aff'd 1978

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S.L.D. 843; Flanagan v. Camden Bd. of Ed., 1980 S.L.D. 1283 (Awarding certificate as a principal entitles Petitioner to supervise any grade or subject matter area established in Respondent's school district.)

> As a consequence, qualification certifications are issued to persons who may then act as principals without any regard for the differences in the supervisory dutues of elementary, junior high or high school positions, which all parties seem to agree do exist. We can only observe that such regulations therefore seem to ignore the realities of the different duties performed by such principals. Thus, it is this situation which appears to lie at the heart of the problems raised here.

> Likewise, in this case, the problem lies with the fact that supervisor certificates are issued without regard to the differences which may exist in the requirements to perform the various jobs and duties of such personnel. Any remedy therefore must rest with the Legislature in the first instance and the State Board's implementing regulations in the second. The fact that Herbert is "less qualified" than Cohen to perform the job is irrelevant, as the law now stands.
>
> (Slip Opinion, at pp. 3-5)

Consequently, it is determined that the ALJ erred in her conclusion that Petitioner Timko's tenure rights were not violated when the Board appointed nontenured personnel to supervisory positions which he was qualified to fill by virtue of his being a tenured supervisor.

Accordingly, the initial decision is reversed insofar as Petitioner Timko is concerned and the ALJ's acceptance of the argument that a tenured staff member need not be given a position for which he or she is qualified when there is a sound educational basis for appointing a nontenured individual. Therefore, the Board is ordered to reinstate Petitioner Timko to a supervisory position

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held by a nontenured supervisor together with all back pay and emoluments to which he is entitled as a result of his improper denial of a supervisory position.

In addition, the Commissioner must express a concern regarding the stipulation of fact set forth on page 5 of the initial decision which reads:

> ***A June 26, 1990 resolution of the Board provided for early tenure to teaching staff members employed by the District in the 12-month position of supervisor of Instruction, resulting in early tenure for Marian Palumbo, supervisor of Mathematics for Computer Education, K-8. Marian Palumbo is not a party to this case.

This stipulated fact was never elaborated upon once stated by the ALJ; thus, the Commissioner does not have any detail of its precise meaning. As a result, he directs that the Somerset County Superintendent review the June 26, 1990 resolution and its precise application vis-a-vis teaching staff members in the district who are in the position of supervisor to determine if the Board's actions with respect to the resolution are in conformity with the New Jersey Supreme Court decision in Rall v. Board of Education of the City of Bayonne, 54 N.J. 373 (1969) which ruled that the grant of early tenure must be extended to all individuals within a given class of employees. See also Spadoro v. Coyle and Jersey City Board of Education, 1965 S.L.D. 134 and Pickering v. Board of Education of North Plainfield, Somerset County, decided June 25, 1987 and January 20, 1988, aff'd State Board of Education, June 1, 1988, aff'd New Jersey Superior Court Appellate Division May 8, 1989, cert. den. 117 N.J. 138 (1989).

JUNE 19, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - JUNE 19, 1991

Pending State Board

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L.L., on behalf of her minor child, A.T.,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL, SALEM COUNTY,	:	DECISION
	:	
RESPONDENT.	:	
	:	

This matter was opened before the Commissioner on June 13, 1991 by way of a Petition of Appeal and Motion for Emergent Relief seeking reversal of a determination by the Penns Grove-Carneys Point Regional to prohibit A.T. from participation in baccalaureate and graduation exercises. A.T. was barred from such participation based upon an incident which occurred on May 25, 1991 during a senior trip to Disney World. The incident in question involved an accusation of shoplifting leveled against A.T. and another student, R.C.

Upon receipt of the Petition of Appeal in this matter, it was transmitted to the Office of Administrative Law without an Answer for an emergent relief hearing. On June 18, 1991 the ALJ conducting the emergent relief hearing granted the relief requested and recommended that A.T. be permitted to attend both baccalaureate and graduation exercises. Inasmuch as such finding by the ALJ was rendered with insufficient time for the decision and tape of the proceeding before OAL to be transmitted to the Commissioner for his

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review, the Board raised no formal objection to A.T.'s participation in baccalaureate exercises without prejudice to its right to file exceptions to the ALJ's determination relative to graduation.

Since no written opinion has been provided in this matter, it is appropriate to set forth the position of the parties prior to the Commission rendering his determination.

PETITIONER'S POSITION

Petitioner contends he was sitting on a curb outside of a shop with another student in Orlando, Florida while on a senior trip to the Magic Kingdom at Disney World. While so sitting, petitioner contends a fellow student, R.C., came out of the shop and asked him to hold his bag which was ripped while he re-entered the shop to get a new bag. R.C. then came out of the shop accompanied by a security officer who thereupon accused A.T. of shoplifting along with R.C.

Despite protestations of innocence, A.T. argues that he was forced to sign a confession of shoplifting because he was pressured by fear of being turned over to the police as threatened by the security officer. He was unable to convince the chaperones of his innocence who directed that he remain in his motel room for most of the remainder of the trip or with the chaperones and, thus, was denied the freedom of participation experienced by the other students on the trip.

Notwithstanding the restrictions placed upon him by the chaperones, A.T. admits to having determined to go along with his friends to enjoy Epcot Center. He contends he did so because he believed the punishment to be unfair since he was innocent of any wrongdoing as attested to by R.C., the other student accused of the shoplifting.

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Upon return home he was suspended and denied the right to participate in graduation exercises despite his continued protestations of innocence.

Petitioner further contends that his failure to follow all the restrictions placed on him by the chaperones was due to his frustration and anger at having been falsely accused and restricted.

BOARD'S POSITION

The Respondent's (Board) position in this matter is set forth in affidavits from Dr. Albert D. Graham Jr., vice principal of the Penns Grove High School, and Ms. Carole Hummel, who accompanied A.T. as the chaperones on the trip. In response to A.T.'s contentions, Dr. Graham recounts the allegations of shoplifting against A.T. and accords then credence further contending that Ms. Carole Hummel, the other chaperone, heard A.T. admit to the theft.

Even setting aside the accusations of shoplifting against A.T., Dr. Graham recounts what he believes to be the extremely serious count of direct disobedience and insubordination on A.T.'s part in defiantly refusing to comply with the restrictions imposed upon him by the chaperones. Such behavior, alleges Dr. Graham was in direct contravention of the senior class trip rules agreed to and signed by all students attending the trip including A.T. (See Respondent's Exhibit A.) Said rules made clear that any violation would result in restrictions being imposed and further indicate that anyone refusing those restrictions would be suspended for two weeks and be denied participation in baccalaureate and graduation activities. Exhibit A is A.T.'s signed copy of those rules.

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Ms. Hummel's affidavit essentially repeats the recitation of events set forth by Dr. Graham except that she contends that A.T. admitted to her that he participated in the shoplifting, then denied it and finally admitted it when confronted with the threat of calling the police. Ms. Hummel further relates in detail the refusal of A.T. to accept the restrictions imposed upon him by Dr. Graham, including A.T.'s assertion that if directed to return to the motel, he would not go. At this time, Ms. Hummel recounts A.T. was warned that failure to obey the directions of the chaperones would result in further punishment. Ms. Hummel's affidavit indicates that Dr. Graham specifically counseled A.T. on the significance of his decision, but she further indicates that A.T.'s response was to repeat his refusal in a loud voice utilizing profane language.

BOARD'S EXCEPTIONS

The Board filed exceptions by way of telefax. The Board's exceptions initially argue that the ALJ did not apply the appropriate legal standard in granting the relief herein. The Board reiterates the sequence of events from its perspective and contends that since the ALJ found no fault with the behavior of the administrative staff in the manner in which they conducted themselves should have been bound by the settled legal principle that the actions of a board of education and its agents should be presumed correct provided they are not arbitrary, capricious or unreasonable. Quinlan v. Board of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962)

Further, the Board argues that the ALJ did not appropriately apply the standard for granting emergent relief

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pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982). In so contending, the Board concedes that the harm to A.T. is irreparable; however, the Board argues that the law in these matters is well settled in its favor as illustrated by Quinlan, supra. The Board asserts that the balancing of the equities likewise inures in its favor in that the district's orderly and effective administration of its schools weighs more heavily than petitioner's right to attend graduation ceremonies which is a right and not a privilege. Kenngott v. Lower Camden County Regional Bd. of Ed., 1975 S.L.D. 489

Ultimately, the Board argues this is not a case of shoplifting even if A.T.'s position is accepted, it is a case of deliberate and willful disobedience of the direction of the vice principal. In summary, the Board concludes:

> This was not a case where the Petitioner is being punished for shoplifting, as suggested by Petitioner and the Administrative Law Judge. The restrictions were initially imposed upon the Petitioner because there was evidence that he had been involved in shoplifting. It was reasonable for Dr. Graham to impose those restrictions, and the Administrative Law Judge found no fault with that determination. Even if Dr. Graham had not made a proper determination when the restrictions were initially imposed, A.T. had no right to disregard the restrictions. A.T. openly and defiantly did so. While persons may disagree as to the appropriateness of the penalty in this case, it is certain that the decision of the Board of Education to punish this kind of conduct by exclusion of A.T. from graduation ceremonies is not arbitrary, capricious or unreasonable. Consequently, the determination of the Board of Education must be affirmed and the determination of the ALJ reversed.
>
> (Board's Exceptions, at pp. 8-9)

PETITIONER'S REPLY

By letter dated June 19 and faxed to the Department of Education, petitioner indicated that there was no intention to file replies.

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COMMISSIONER'S DECISION

The Commissioner has carefully reviewed the affidavits submitted by the parties in this matter, the exceptions filed by the Board, as well as the tape of the oral argument before the ALJ and the decision rendered by the ALJ upon said tape. Based upon the aforesaid review, the Commissioner agrees with the argument raised by Respondent Board in that the ALJ failed to apply the appropriate legal standard both as to his conclusions relative to the Board's disciplinary action and in regard to the granting of emergent relief. In reviewing this matter, the Commissioner concludes that the Board's agents had an ample and reasonable basis for imposing the disciplinary measures taken against A.T. solely and exclusively for his conscious and willful disobedience of the direction given to him in Orlando by Dr. Graham. In that such action was neither arbitrary, capricious nor unreasonable, the Commissioner must uphold it. Quinlan, supra

Further, the Commissioner finds that petitioner failed to meet the standard required for the granting of pendente lite relief. He is not convinced that the petitioner has demonstrated a likelihood of prevailing on the merits and agrees with the Board that the law relative to upholding the actions of a board of education and specifically as to the law as it relates to the denial of the privilege of attending graduation ceremonies is well settled. R.H. v. Board of Education of the Township of Delanco, 1974 S.L.D. 655

In balancing the interest of the parties in this matter, the Commissioner is likewise convinced that the interest of the school district in maintaining the efficacy of its authority and right to discipline students, particularly in chaperoning events far

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from home, as was the circumstance in this case, far outweighs A.T.'s interest in attending his graduation ceremonies.

Finally, the Commissioner, after a careful and painstaking review of the arguments of both sides, believes that A.T. in this matter chose his own course and, thus, must accept the consequences of that course. The Commissioner is not unmoved by the scenario outlined by counsel for the petitioner and by the ALJ of a young man who worked hard to raise money for the "trip of a lifetime" and who believed himself to be unjustly accused and therefore lost control of his emotions and, thus, has been punished enough by the suspension and partial restrictions imposed upon him in Orlando. Yet, the Commissioner must recognize that A.T., when directed to remain with the chaperones, refused to do so. Further, upon such refusal, it is undeniably clear that Dr. Graham told him that by defiance he was sacrificing his right to graduation as did the rules of the trip signed by A.T. He nonetheless chose to accompany his friends in direct contravention of the vice principal's directives. Having so chosen, he must bear the consequences of said choice.

Consequently, the ALJ's determination is reversed and the right of the Board to bar A.T. from the graduation exercises at Penns Grove High School is upheld.

* * * *

The Commissioner notes that the parties at the eleventh hour entered into a stipulation which provides as follows:

> The parties to this matter, having agreed to an amicable resolution of their differences, hereby stipulate the following settlement:
>
> 1. In order to provide guidance for Respondent and other boards of education, the parties request that the Commissioner of Education provide his determination on the issue presented.

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2. A.T. shall be permitted to participate in graduation exercises at Penns Grove High School.

While it is not usual for the Commissioner to reach a conclusion on the merits of an issue made moot by the parties' stipulation, the Commissioner finds merit in the parties' request in that issues of the kind presented herein are common at the conclusion of a school year and may serve to provide guidance to both future petitioners and boards of education.

Therefore, while expressing no opposition to the parties' agreement to permit A.T. to participate in graduation exercises, the Commissioner lets stand his reasoning in this matter in response to the request of the parties.

COMMISSIONER OF EDUCATION

JUNE 21, 1991

DATE OF MAILING - JUNE 21, 1991

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BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MARYANN FISCHETTI, GERARD DENNY AND BARBARA DENNY, RESPONDENTS.	:	DECISION

For the Petitioner, Green & Dzwilewski, P.A.
(Paul H. Green, Esq., of Counsel)

This matter was opened as a controversy before the Commissioner by way of a Petition of Appeal filed by the Board of Education on March 22, 1991. Said petition alleged that P.F., son of Maryann Fischetti and nephew of the Dennys, was not supported by the Dennys as claimed, and was therefore not entitled to the free education he received in the district for the 1989-90 and 1990-91 school years, his junior and senior high school years respectively.

On March 25, 1991 and again on April 19, 1991, respondents were notified of their obligation to answer this petition by the Bureau of Controversies and Disputes. When no answer was received, on May 3, 1991, respondents were informed by certified mail that

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unless an answer was filed within ten (10) days, the Board's allegations against them would be deemed admitted and judgment would be rendered on that basis.

In reply to said notice, Respondent Fischetti submitted a letter dated May 11, 1991 stating that she had "received the Petition in reference to the case" and had enclosed "the Proof of Service [she] received with the Petition, and one of the two letters [she] received asking for the Proof of Service to be returned to you." Enclosed with this filing was a copy of the district's proof of service sheet and the Bureau's April 19, 1991 notice reminding respondents of their obligation to file an answer to the Board's petition.

Upon receipt of this submission, Bureau staff wrote to respondents on May 17, 1991 to ensure that they understood what was required of them by way of answer. Specifically, they were directed to file a substantive response to the Board's allegation that P.F. was not supported by the Dennys and was therefore not entitled to a free education in Fair Lawn. Respondents, who are not represented by counsel, were given an additional ten (10) days to submit an answer to the petition, before the Commissioner would deem the Board's allegations to be true. As of this date, no further communications have been received from respondents.

It thus appearing that respondents have failed to properly answer the allegations against them, the Commissioner hereby deems those allegations to be true. Accordingly, he finds and determines that P.F. was not entitled to a free public education in the School

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District of the Borough of Fair Lawn during the 1989-90 and 1990-91 school years and directs respondents to remit tuition to the district for the year 1989-90 in the amount of $6,818 and for the year 1990-91 in the amount of $7,239 pursuant to N.J.S.A. 18A:38-1(b).*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*The Commissioner notes that the Fair Lawn Board of Education appears to have a policy requiring submission of federal income tax returns as proof of nonparent support for school attendance purposes and cautions that while tax returns may be proffered as evidence by parents and affiants, they may not be required by the district as an absolute precondition of admitting students on an affidavit basis. Former Governor Kean addressed this issue in his September 6, 1983 veto message on a bill (Assembly Bill 1593 from the 1982 legislative session) attempting to amend N.J.S.A. 18A:38-1 to facilitate district requests for income tax returns. In that message, wherein he delivered an absolute veto, the Governor stated that "The use of the federal income tax form is of questionable legality and certain controversiality. The bill calls for the use of a 'current federal tax return or other documentation as the board may deem necessary' to corroborate affidavits of residency. Although the bill does not absolutely require the production of I.R.S. forms and restricts their use to the extent that they directly pertain to issues of child support, considerable invasion of privacy issues are raised by this provision." In response to the Governor's veto, subsequent legislation (enacted as P.L. 1985, c. 6) deleted all references to income tax returns.

JUNE 24, 1991

DATE OF MAILING - JUNE 24, 1991

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LARRY BEATTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEWTON, SUSSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

Gary A. Kraemer, Esq., for Petitioner (Daggett & Kraemer, attorneys)

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti & Woodruff, attorneys)

This matter was opened before the Commissioner of Education through the filing of a Petition of Appeal on February 20, 1991. The Board of Education of the Township of Newton (Board) submitted its answer to the petition on March 14, 1991. Upon review of the petition and answer, it was determined that the matter appeared amenable to being decided on a summary judgment basis. The record closed on June 1, 1991.

BACKGROUND

Petitioner's brief of April 30, 1991 sets forth the following background facts in the matter:

> The petitioner, Larry Beatty, at all relevant times was a tenured teacher in the Town of Newton school district, having been employed at the high school for about 25 years. On or about September 14, 1988 a 2-count Complaint was issued

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against the petitioner alleging that between June 21, 1988 and July 30, 1988 he committed aggravated sexual assault in violation of N.J.S.A. 2C:14-2(a)(2) and endangering the welfare of a child in violation of N.J.S.A. 2C:24-4a, both charges naming one T.O., petitioner's stepdaughter as the alleged victim (Exhibit A). As a result of the charges, the respondent Newton Board of Education suspended the petitioner from his teaching duties but continued paying his salary while the case was pending grand jury presentation.

On or about June 8, 1989, the Sussex County Grand Jury handed up a 6-count indictment against the petitioner alleging various acts of sexual conduct against sexual minor females including T.O. (Exhibit B). Following the indictment, the Assistant Superintendent Kenneth Hart notified the petitioner that he would be suspended without pay. Counsel for petitioner responded in a letter urging the Board of Education not to withhold the petitioner's salary (Exhibit C). Nevertheless, on or about September 7, 1989 the Board of Education determined that the petitioner would continue to be suspended without pay (Exhibit D). Up to this point, the respondent had not filed any tenure charges against the petitioner.

The trial on the indictment commenced before a jury in Sussex County in December 1990, and on December 20, 1990 the jury returned a verdict of not guilty, completely acquitting petitioner of all charges in all counts. Counsel for the petitioner notified the Superintendent of Schools in a letter dated December 21, 1990 of the acquittal and requested his back pay and reinstatement as a teacher (Exhibit E).

The Superintendent notified the petitioner in a letter dated December 20, 1990 that he would continue to be suspended pending the investigation of disciplinary charges by the Board, but that the suspension would be with pay starting December 21, 1990 (Exhibit F).

Counsel for the Board, Robert Tosti, Esq., notified peittioner's counsel in a letter dated January 8, 1991 that he intended to advise the Board at its next meeting that it was not obligated to the petitioner for back pay based upon his interpretation of N.J.S.A. 18A:6-8.3 (Exhibit G). The Board's counsel confirmed that the Board determined it did not owe the

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> petitioner back pay in a letter to petitioner's counsel dated January 23, 1991 (Exhibit H).
>
> The petition seeking back pay was filed with the Commissioner on February 14, 1991, and the matter was thereafter scheduled for disposition on a summary basis.
>
> The Board for the first time prepared tenure charges against the petitioner and served them upon him on April 24, 1991 (Exhibit I), over four months following his complete acquittal and exoneration of the charges contained in the indictment. (Petitioner's Brief, at pp. 1-2)

PETITIONER'S POSITION

Petitioner acknowledges that the Board had the authority to suspend him without pay upon his indictment pursuant to the provisions of N.J.S.A. 18A:6-8.3 which reads:

> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.***

Petitioner further acknowledges that such a procedure for public sector employees is commonplace, citing as an example N.J.S.A. 40A:14-149.1 which authorizes the suspension without pay of municipal police officers who are under indictment.

What petitioner challenges, however, is the refusal of the Board to pay him back salary withheld during the period of his suspension while under indictment despite the fact that the jury acquitted him on the indictment. It is petitioner's contention that in virtually all suspensions without pay of public employees, the law mandates that following acquittal or dismissal of the charges,

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back pay withheld during the suspension must be restored. In support of this, he cites N.J.S.A. 40A:149.2 which reads:

> If a suspended police officer is found not guilty at trial, the charges are dismissed or the prosecution is terminated, said officer shall be reinstated to his position and shall be entitled to recover all pay withheld during the period of suspension subject to any disciplinary proceedings or administrative action.

Petitioner further cites N.J.S.A. 40A:14-23, N.J.S.A. 40A:9-172 and N.J.S.A. 11:15-6 which mandate that various public employees such as firemen, civil service employees and municipal officers and employees be awarded back pay if a suspension or dismissal is judicially determined to have been illegal. These statutes lead petitioner to conclude that it is not surprising that the same protection has been afforded to school employees under the provisions of N.J.S.A. 18A:6-30 which reads:

> Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefor with the board or body by whom he was employed, within 30 days after such determination.

Petitioner also points to the following passage from the Appellate Court's decision in Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. Super. 38, 41 (App. Div. 1965) in support of his claim that the Board must grant him back pay given his exoneration.

> Plaintiff will not be prejudiced by the temporary suspension since it is conceded by defendant board that if he is ultimately acquitted of the criminal charges, he will be entitled to compensation for the period of his temporary suspension under N.J.S.A. 18:5-49.1 [now N.J.S.A. 18A:6-30].

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It is petitioner's contention that the right to back pay is clear and the only issue with respect to his entitlement to back pay is whether the Board may mitigate the amount of the back pay by monies he may have earned from other sources during the suspension. He cites in support of this argument Muller v. Bd. of Ed. of Jefferson Twp., 81 N.J. Super. 151, 159 (App. Div. 1963).

Petitioner also avers that it is helpful to examine the requirements set forth in N.J.S.A. 18A:6-14 dealing with the issue of back pay when there is an acquittal on tenure charges:

> ***Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determine of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.

Lastly, petitioner avers that at the time of his acquittal by the jury, the Board had no other pending tenure charges or other disciplinary action against him and the acquittal therefore amounts to a "final determination" that the suspension was without good cause, N.J.S.A. 18A:6-30.

BOARD'S POSITION

The Board states that in view of petitioner's acquittal, but in consideration of the possibility it might file tenure charges, it continued petitioner's suspension. It did, however,

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immediately place him back on the pay roll upon acquittal of the criminal charges. Tenure charges were served on petitioner on April 24, 1991.

It is the Board's position that there is no legal authority to support petitioner's demand for back pay. It avers that it acted pursuant to clear statutory authority when suspending petitioner without pay. N.J.S.A. 18A:6-8.3 Pawlak v. Board of Ed. of the Borough of Hopatcong, (App. Div. July 12, 1989)

The Board contends that within N.J.S.A. 18A:6-8.3 there is no reference to a back pay entitlement upon acquittal or other favorable disposition of an indictment and, given the absence of an express statutory grant of the relief petitioner seeks, his claim for back pay during the period of suspension due to indictment cannot be granted.

Further, it is the Board's contention that the issue before the Commissioner is one of first impression; therefore, petitioner's claims must be assessed in accordance with traditional concepts of statutory interpretation. As such, the Board argues that the Commissioner is required to give effect to the intent of the Legislature that enacted N.J.S.A. 18A:6-8.3 and he is not at liberty to ignore, alter or depart from the clear meaning of that statute's unambiguous language. Gauntt v. City of Bridgeton, 194 N.J. Super. 468, 482 (App. Div. 1984) In Re Barnert Memorial Hospital Rates, 92 N.J. 31, 40 (1983) The Board likewise points to DeHart v. Bambrick, 177 N.J. Super. 541, 549 (App. Div. 1981) as stating that the Commissioner "may not indulge in any interpretation other than that called for by [the statute's] express language," and that the Commissioner must enforce the legislative intent as written and not

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according to some supposed unexpressed intention. International Brotherhood of Electrical Workers v. Gillen, 174 N.J. Super. 326 (App. Div. 1986)

In light of the above, the Board contends that N.J.S.A. 18A:6-8.3 simply and unambiguously allows a board of education to suspend an employee without pay upon indictment and once the indictment is dismissed, the authority under the statute no longer exists whereupon, pay would resume as occurred in the instant matter. According to the Board, because the statute is silent on the issue of back pay, the Commissioner would have to add language and meaning to the statute beyond that expressed by the Legislature in order to grant petitioner's requested relief which would be improper.

In support of this, the Board avers that a comparison of N.J.S.A. 18A:6-8.3 with the statute cited above by petitioner with respect to the police officers emphasizes its point. That statute provides that where a police officer is suspended after indictment and is "found not guilty at trial," he or she is entitled to recover back pay. See DellaSerra v. Borough of Mountainside, 188 N.J. Super. 134 (Law Div. 1983) The Legislature expressed no such intent relative to school employees in the education laws. As to the cited statutes regarding firemen and other public employees, it is the Board's position that those statutes simply emphasize that the Legislature knows full well how to express its intent that suspended public employees receive back pay and it expressed no such intent in N.J.S.A. 18A:6-8.3.

As to petitioner's reliance upon N.J.S.A. 18A:6-30, the Board urges that the statute provides for back pay after an "illegal

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dismissal vs. suspension" and is consequently inapplicable since there was nothing illegal about petitioner's suspension. It is likewise the Board's position that Muller, supra, is not applicable since that matter involved the suspension without pay of a superintendent of schools in violation of law and contract. Moreover, petitioner's reliance upon Romanowski, supra, is seen by the Board to be inappropriate because (1) the decision predates the enactment of N.J.S.A. 18A:6-8.3 and (2) the decision's statement cited by petitioner above is not a judicial holding or even dicta. Rather, it is a concession made by the Jersey City Board of Education.

* * * *

Upon review of the legal arguments, including the parties' replies to the arguments summarized above, the Commissioner agrees with the Board's contention that this is a case of first impression. There has been no prior case either decided by the Commissioner or the courts which has expressly ruled on a school employee's entitlement to back pay for the period of an unpaid suspension while under indictment when the employee has been acquitted on the indictment after trial. The State Board of Education's June 1, 1988 decision in Pawlak, supra, briefly touches on the issue but the factual circumstances in that matter did not include acquittal of the charges underlying the indictment after trial by jury but rather disposition of an indictment through completion of a pretrial intervention program. The State Board's decision in Pawlak states:

> We likewise find Petitioner's claim for back pay for the period of his suspension pursuant to N.J.S.A. 18A:6-8.3 to be without merit. The statute makes no provision for back pay

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> regardless of the disposition of a criminal indictment, and we find no basis under the education laws upon which he would be entitled to back pay in these circumstances.
> (Slip Opinion, at p. 5)

Romanowski, supra is not deemed applicable to the issue under review in the instant matter essentially for the arguments advanced by the Board, i.e., the case predates the enactment of N.J.S.A. 18A:6-8.3 and the statement is merely a recitation of a concession made by the Jersey City Board of Education rather than being a judicial ruling or even dicta.

Secondly, the Commissioner agrees with the Board that any reliance on N.J.S.A. 18A:6-30 by petitioner in support of his claim for back pay is misplaced because the Board's action to suspend him without pay upon his indictment was entirely legal as set forth in N.J.S.A. 18A:6-8.3; therefore, it is concluded that the provisions of N.J.S.A. 18A:6-30 are not applicable in the instant matter, notwithstanding petitioner's many arguments otherwise.

Thirdly, the Board is also correct in stating that the statute governing the suspension of school employees under indictment, N.J.S.A. 18A:6-8.3, is silent with respect to any entitlement to back pay.

Notwithstanding the absence of specific statutory language, the Commissioner believes that in weighing the equities of this matter, fundamental fairness dictates that petitioner be granted back pay for the period of his unpaid suspension given that a trial by jury yielded a verdict of not guilty on the indictment which provided the basis for his suspension without pay under N.J.S.A. 18A:6-8.3. At the present time, petitioner has not been found guilty of any wrongdoing and the indictment upon which the

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suspension is based has been disposed of in his favor; therefore, it is concluded that as a matter of equity, back pay is warranted under the circumstances, less mitigation for monies earned during the period of his lawful suspension without pay from June 1989 to December 20, 1990. The fact that tenure charges are pending against petitioner and he has been lawfully suspended without pay under the provisions of N.J.S.A. 18A:6-10 does not alter the equities of the matter. If petitioner is found guilty of the tenure charges, an appropriate penalty shall be fashioned by the Commissioner, which could include but is not limited to reduction in salary or dismissal. N.J.S.A. 18A:6-10

In addition to the above, the Commissioner notes that in his reply to the brief submitted by the Board, petitioner argues that back pay includes sick pay, vacation pay and attorney fees. As to the last point, the New Jersey Supreme Court has unequivocably ruled that the Commissioner of Education is not authorized to grant attorney fees. Balsley v. North Hunterdon Board of Education, 117 N.J. 434 (1990) Therefore, petitioner's claim for such relief is hereby denied. As to the issue of sick pay and vacation pay, petitioner is to have restored to him whatever emoluments and benefits he would have had owing to him if he had never been suspended without pay under N.J.S.A. 18A:6-8.3.

IT IS SO ORDERED this 25th day of June 1991.

COMMISSIONER OF EDUCATION

JUNE 25, 1991

DATE OF MAILING - JUNE 26, 1991
Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 8346-90
AGENCY DKT. NO. 51-3/89
(EDU 2640-89 -- On Remand)

SCHOOL DISTRICT OF THE CITY OF GARFIELD, BERGEN COUNTY,
Petitioner,
v.

ROBERT B. OLEK,
Respondent.

Scott Topolski, Esq., for petitioner
(DeClemente, Topolski & Terlizzi, attorneys)

Sanford R. Oxfeld, for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: May 6, 1991 Decided: May 15, 1991

This is a transcript of the Administrative Law Judge's Oral Initial Decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE **ELINOR R. REINER,** ALJ:

On December 9, 1988, the Garfield Board of Education (hereinafter referred to as Board) suspended respondent, a teacher and wrestling team coach, after a search of his home by the county prosecutor's office revealed the presence of large amounts of steroids and other prescription drugs for which respondent did not have a valid prescription, hypodermic syringes, and a small quantity of marijuana. In July of 1989, respondent pled guilty to the following charges. possession of a

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hypodermic syringe or a needle, in violation of *N.J.S.A.* 2C:36-6, possession of a prescription legend drug, in violation of *N.J.S.A.* 2A:170-77.8, and unlawful use of a prescription legend drug, in violation of *N.J.S.A.* 2A:170-77.8.

In August 1989, the Board filed a motion for summary decision. During the time the motion was pending, the parties entered into settlement discussions which resulted in a settlement agreement. Thereafter, respondent challenged the agreement contending that he should not be held to its terms. The Administrative Law Judge (ALJ) held that the terms of the settlement agreement were binding and respondent appealed. The Commissioner of Education voided the agreement and remanded the case on October 11, 1990, for a hearing on the merits of the tenure charges.

The Board now renews its motion for summary decision, seeking respondent's removal by means of the forfeiture statute, *N.J.S.A.* 2C:51-2. Respondent maintains that the forfeiture provisions do not apply because the offenses, which did not involve controlled dangerous substances, do not satisfy the required elements of the statute.

Let me begin by saying that I agree with both petitioner and respondent that the offenses to which respondent pled guilty did not involve controlled dangerous substances. Pursuant to the New Jersey Controlled Dangerous Substances Act (Act), *N.J.S.A.* 24:21 *et seq.*, steroids are not defined as controlled dangerous substances. A controlled dangerous substance is defined as a drug, substance, or precursor in Schedules I through V of the Act (§§ 24:21-5 through 24:21-8.1). Steroids are not included in the schedules but are dealt with separately in *N.J.S.A.* 24:21-8.2, which states in pertinent part:

> The commissioner may add substances to or delete substances from the definition of anabolic steroids set forth in section 1 of *P.L.* 1989, c. 335 (C. 2C:35-2.1), and shall promulgate rules and regulations in accordance with the "Administrative Procedure Act," . . . to effectuate the purposes of this act."[1]

---

1. It is noted that a review of the rulemaking history of *N.J.A.C.* 8:65-10.1 *et seq.*, Controlled Dangerous Substances Schedules, reveals no new rule adding steroids to the list of controlled dangerous substances or regulating their use since *N.J.S.A.* 24:21-8.2 took effect in January 1990.

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While *N.J.S.A.* 2C:35-1.1 *et seq.* incorporates *N.J.S.A.* 24:21-1 *et seq.* into its provisions, thereby excluding steroids as a controlled dangerous substance, the statute makes it a crime to use or distribute anabolic steroids without a prescription. Under the provisions, possession of these drugs by a nonpractitioner, without a valid prescription, is a crime of the fourth degree while possession with the intent to manufacture, distribute, or dispense is a third-degree offense.

It is to be noted at this juncture that respondent pled guilty to the charges on or about July 1989. *N.J.S.A.* 2C:35-2.1, which imposes third- and fourth-degree penalties for the use or distribution of anabolic steroids, took effect January 12, 1990. Thus, respondent's conduct apparently came within the purview of previous statutory provisions which made possession or use without a valid prescription of prescription legend drugs, other than narcotics, depressants, stimulants, or controlled dangerous substances, a disorderly-persons offense.

However, even after having concluded that steroids are not defined as a controlled dangerous substance, pursuant to relevant statutory administrative code provisions, the issue with which I am faced is whether respondent has forfeited his employment. In this regard, I look first to *N.J.S.A.* 2C:51-2, which dictates the mandatory and automatic forfeiture of public employment when any of its elements are satisfied. That statute reads in pertinent part as follows:

> a. a person holding any public office, position, or employment, elective or appointive, under the 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 . . .
>
> (2) He is convicted of an offense involving or touching such office, position or employment;

Such forfeiture will take effect upon a finding of guilty by the trier of fact or a plea of guilty, if the court so orders, or upon sentencing unless the court, for good cause shown, orders a stay. *N.J.S.A.* 2C:51-2b(1) and (2).

In the instant case, respondent was not convicted of a crime of the third degree or above but pled guilty to several disorderly-persons offenses. In addition, whether

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the crimes involved "dishonesty," for the purpose of applying the forfeiture provisions, is certainly questionable because the term remains undefined in the case law. *See, Arocha & Gonzalez v. Hudson County Area Vocational and Technical Schools, BOE,* OAL DKT. EDU 9293-83 (July 2, 1984), adopted N.J. Comm. of Ed. (August 16, 1984), rejected on other grounds by N.J.B.O.E. (April 8, 1985). However, clearly respondent may forfeit his position under *N.J.S.A.* 2C:51-2a(2) if the offense involved or touched his position. It therefore behooves this tribunal to determine whether or not respondent has forfeited his position, which involves a determination of the meaning of involve or touch.

The forfeiture of a position for conviction of an offense involving or touching employment was directly at issue in *Moore v. Youth Correctional Institute,* 230 *N.J. Super.* 374 (App. Div. 1989), aff'd 119 *N.J.* 256 (1990). In determining whether a corrections officer's criminal conviction for harassing his immediate superior was one involving or touching his employment as a senior corrections officer, the appellate court rejected any requirement that the nexus be limited by time or location, stating as follows.

> . whether a conviction involves or touches employment under the forfeiture statute does not depend upon whether the criminally proscribed acts took place within the immediate confines of the employment's daily routine. The crux of the matter is whether the conviction and the facts upon which it is based have a direct and incompatible relationship with the duties required by the employment. *Id.* at 385-386.

Applying this test to the facts, the appellate court concluded that Moore's conviction for harassing his superior was one involving or touching his employment. The court stated:

> Moore was convicted of deliberate and threatening conduct toward Department personnel in retaliation for being disciplined. While that conduct did not take place during business hours, we cannot find that the conviction therefor became less incompatible with Moore's corrections employment because the conduct took place at his superior's home. On the contrary, Moore's threatening presence at Morris' home might well have an enhanced chilling effect on Morris' employment ability. Moore's conduct threatened the future work of the Department respecting the competence of both employees. Public safety was implicated and the elements of *N.J.S.A.* 2C:51-2a(2) were properly established. *Id.* at 389.

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Thus, in affirming the appellate court's decision in *Moore*, the New Jersey Supreme Court addressed the issue of the more ambiguous case and distinguished the situation where the offense is not so obviously related to employment. The court stated that such cases ". . . require an analysis of the nexus between the crime and the employment to determine if there is a sufficient relationship between the two to warrant the harsh penalty of forfeiture." *Moore*, 119 *N.J.* 256 at 266. The court then identified the factors necessary to determine whether an offense touches on employment to the extent of warranting forfeiture. "First, there is a need to assess the gravity of the crime as revealed by its nature, its context, and the identity of the victim. Second, there is a need to assess the qualifications required of the employee's public employment." *Id.* at 269.

The New Jersey Supreme Court also agreed with the lower court's finding that the nexus between the offense and the employment is not limited by time and location. *Id.* at 270. Emphasizing that it is the substance of the crime that should control, not whether it was committed during work hours or on work premises, the court stated:

> It was not relevant . . . where or when the employee committed the crime. What does appear relevant is that the offense rendered suspect the employee's future service to the State, both in the capacity of the employee's job at the time of the conviction and in every other potential capacity. . . . When the infraction casts a shadow over the employee as to make his or her continued service appear incompatible with the traits of trustworthiness, honesty, and obedience to law and order, then forfeiture is appropriate. *Ibid.*

In *Arocha & Gonzalez, supra,* the State Board of Education concluded that a janitor's conviction of conspiracy to possess marijuana touched his employment and justified forfeiture of his position pursuant to *N.J.S.A.* 2C:51-2a(2). In finding that a sufficient nexus existed between the respondent's position and the drug-related offense, the Board explained its position, citing broad policy considerations.

> Although other school employees are not necessarily required to meet the same standard of conduct as teachers, we find that all employees in the public school system who are charged with the care of students or have significant contact with students serve as adult role models and contribute to the student's education through what students see, hear, experience and learn about them. We conclude that, given this state's commitment to solving the widespread drug problem in the schools, each employee who is charged with the care of students or has

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> significant student contact is under a duty to conduct himself in a manner that in no way encourages or condones the use of drugs. We further conclude that when such employee is convicted of a drug related offense, he has violated that duty and, therefore, the conviction "touches" his position within the meaning of *N.J.S.A.* 2C:51-2a(2). [Board decision at 6-7.]

The Board thus held that where a public-school employee has been convicted of an offense involving a controlled substance, before forfeiture will apply, it must be shown only that the employee's position charged him or her with the care of students or involved significant contact with students. *Id.* at 8.

Other cases which have been looked to, but which are not conclusory, include *State v. Pitman*, 201 *N.J. Super.* 21, 26 (App. Div. 1985), wherein disorderly-persons offenses arose out of an alleged beating of a prison inmate, to which three correctional officers pled guilty, and were clearly held to be offenses involving or touching their offices, positions, or employment. *See also, New Jersey Turnpike Employees v. New Jersey Turnpike Auth.*, 200 *N.J. Super.* 48, 49 (App. Div. 1985), wherein a toll collector's conviction for being in possession of toll money he had reported missing made him subject to the forfeiture statute. *See also, Schonwald v. Dept. of Transportation,* 5 *N.J.A.R.* 473, 479 (1982) adopted Civ. Serv. Comm. (June 1, 1982), wherein an engineer in the Department of Transportation forfeited his position upon convictions for solicitation of a bribe, a crime which directly touched the administration of the engineer's position.

In the instant case, respondent contends that *Arocha & Gonzalez* is only applicable to matters involving controlled dangerous substances and that the case is not applicable here because anabolic steroids are not controlled dangerous substances. Respondent's viewpoint in the opinion of this judge is too narrow and ignores the rationale and policy considerations underlying the "involve and touch" analyses articulated in *Moore* and *Arocha & Gonzalez*. Moreover, respondent fails to point out that the exclusion of steroids from the controlled dangerous substances schedules does not mean that steroids are not drugs and are not dangerous.

I have taken judicial notice of the *Physicians' Desk Reference* 2274 (43rd ed. 1989) (the PDR). For example, the PDR warns of a form of hepatitis that may occur as a result of anabolic steroid use, in which liver and sometimes splenic tissue is replaced with blood-filled cysts. These cysts have been associated with liver failure

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that is often not recognized until life-threatening liver failure or intra-abdominal hemorrhage develops.

Other conditions that may develop include fatal, malignant hepatic tumors and blood lipid changes that may be marked and could have a serious impact on the risk of atherosclerosis and coronary artery disease. Other adverse reactions include inhibition of testicular function; menstrual irregularities; bleeding in patients on concomitant anticoagulant therapy; breast enlargement; deepening of the voice, hirsutism, and male pattern baldness in women; and edema with or without congestive heart failure may be a serious complication in individuals with preexisting cardiac, renal, or hepatic disease.

Finally, special precautions are necessary with the administration of anabolic steroids to children because of their effects on bone maturation and the risk of compromising final mature height. The PDR advises that the effect on bone maturation should be monitored by assessing bone age of the wrist and hand every six months.

In addition, while anabolic steroids may not result in the type of physical and psychological dependencies characteristic of controlled dangerous substances, the anabolic or tissue-building properties of these drugs has led to widespread abuse, particularly in athletes. Recognizing this problem, the PDR states, "Anabolic steroids have not been shown to enhance athletic ability." *Id.* at 2274. The legislature has also recognized the potential for abuse of these drugs and has made it a crime to use or distribute anabolic steroids. *N.J.S.A.* 2C:35-2.1. Further proof of the legislature's awareness of increasing abuse and the need to effectuate control measures is especially evident in the provisions contained in *N.J.S.A.* 2C:35-2.4, which directs the Commissioner to conduct a study on the feasibility of including anabolic steroids in the controlled dangerous substances schedules of *N.J.S.A.* 24:21-5 through 24:21-8.1.

In sum, I **CONCLUDE** that while steroids are not controlled dangerous substances, a conclusion which counsel have stipulated, they are nonetheless drugs and are dangerous. Under relevant case law interpreting the "involve and touch" requirement of the forfeiture provisions contained in *N.J.S.A.* 2C:51-2, respondent's disorderly-person offenses involving the possession and unlawful use of steroids and

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other related offenses touch and involve his position as a public school teacher and coach. The State's strong policy against encouraging or condoning the use of drugs, respondent's close contact with students, the seriousness of the offense, and the violation of the public trust which has occurred with the infraction make respondent's continued employment incompatible with the duties required by the position.

I therefore **CONCLUDE** that respondent has forfeited his employment as a teacher and a wrestling coach with the Garfield Board of Education. It is hereby **ORDERED** that petitioner's motion for summary decision is **GRANTED.**

In addition, Mr. Oxfeld indicated to me that there is a period of time after the first set of charges were filed, which I had found at a prior point in time to be invalid, until the second set of charges were filed that respondent was not receiving pay to which he was entitled or to which he is entitled even under this decision. It is my understanding that respondent was suspended with pay December 9, 1988. The first set of charges which I have found to be invalid were filed February 14, 1989. Respondent received pay until March 6, 1989. The second set of charges were not filed until April 14, 1989. Respondent did not receive pay from March 6, 1989 until April 14, 1989. He would therefore be entitled to the receipt of pay from March 6, 1989, at which point in time he was not receiving pay, until the second set of charges was properly filed on April 14, 1989. That is approximately a five-week period. He is entitled to that. The second set of charges was filed April 14, 1989, and the conviction occurred July 13, 1989. Since 120 days did not elapse from the filing of the second set of charges to the date of conviction, and thus forfeiture, he would not be entitled to the receipt of pay for that period of time. So, it is hereby **ORDERED** that respondent will receive pay from the period of March 6, 1989 until April 14, 1989. It is my understanding that this is not disputed by counsel.

END OF TRANSCRIPT

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I, Jane R. Pearson, hereby certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter.

DATE

Jane R. Pearson

This oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/17/91

DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAY 2 3 1991

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

jrp/e

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IN THE MATTER OF THE TENURE HEARING OF ROBERT OLEK, SCHOOL DISTRICT OF THE CITY OF GARFIELD, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The record of this matter and the initial decision on remand of the Office of Administrative Law have been reviewed. Exceptions by respondent (hereinafter "Olek") were timely filed pursuant to N.J.A.C. 1:1-18.4. Neither primary nor reply exceptions were filed by the Board.

In his exceptions, Olek initially contends that the ALJ ignored the Commissioner's prior decision in this matter, wherein the Commissioner rejected a proposed settlement and expressly remanded the matter for a hearing on the merits of the tenure charges against Olek. Because the ALJ concluded on remand that Olek had forfeited his position, Olek claims to have been denied the hearing to which he is entitled and which the Commissioner explicitly ordered in his prior decision. (Exceptions, at pp. 1-2)

Olek next purports that the ALJ has confused the standards for forfeiture with those for conduct unbecoming in her determination that the offenses to which Olek pled guilty touched upon his school employment. Olek here reiterates that he was not convicted of any involvement with controlled dangerous substances as

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defined in law, thus rendering Arocha and Gonzalez, supra, inapplicable; nor were there any allegations, even in the matters to which he did plead guilty, involving students, school time or school property. Thus, while the Board might have been able, arguendo, to put forward a case alleging conduct unbecoming a teaching staff member, a finding of unbecoming conduct is "by a far margin different from" a finding of forfeiture. (Exceptions, at pp. 3-8, quotation at p. 5)

Finally, Olek argues that, since his offenses were inarguably disorderly persons offenses, under N.J.S.A. 2C:51-2(d), it is the province of the sentencing judge and not an administrative agency to determine the applicability of the forfeiture statute. This is true, Olek avers, notwithstanding Arocha and Gonzalez, supra, which predates the addition of section (d) to the forfeiture statute and is thus further irrelevant to the instant matter. (Exceptions, at pp. 8-9)

Upon careful consideration, the Commissioner determines to reject Olek's exceptions and affirm the decision of the ALJ for the reasons stated in the initial decision together with the additional reasons set forth below.

Initially, the Commissioner observes that his previous rejection of the proposed settlement and remand of tenure charges for hearing in this matter neither precluded the Board from moving for a finding of forfeiture nor conferred upon Olek tenure hearing rights which would otherwise be lost upon such a finding. Olek's assertions to the contrary are tantamount to a claim that the Commissioner inherently considered and rejected the notion that Olek might have exposed himself to forfeiture, when in fact the

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Commissioner merely rejected a proposed settlement that would have exchanged Olek's resignation for the Board's agreement not to pursue further action against him. Because the Commissioner's acceptance of such agreements is contingent upon respondent's understanding that the charges against him or her will be referred to the State Board of Examiners, and because this understanding was lacking in Olek's case, the proposed settlement could not serve to dispose of the tenure matter once the Board had initiated it in the absence of a determination, after a hearing on the issue pursuant to Arocha and Gonzalez, supra, that forfeiture had in fact occurred.

Such a determination was specifically necessary in this case because Olek's offenses were neither third degree crimes nor offenses of patent dishonesty, nor so obviously related to his public employment that N.J.S.A. 2C:51-2 could have been deemed self-effectuating without establishment of a nexus between Olek's offenses and his employment. However, the Commissioner does not concur with Olek that it was the sole province of the sentencing judge to establish this nexus or that the absence of a declaration of forfeiture from that judge is dispositive of the forfeiture issue. To the contrary, it is clear that administrative agencies may make forfeiture determinations where the convicted disorderly person has not applied for and received from the sentencing court a waiver of forfeiture. Moore, supra; Arocha and Gonzalez, supra Moreover, in cases where forfeiture is not specifically raised by the court, the onus is on the applicant to seek a definitive ruling on the matter by way of waiver. Moore, supra As Olek did not make such application or receive such waiver, the Board is within its authority to seek invocation of the forfeiture statute and the Commissioner is within his jurisdiction to invoke it.

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He does so in the instant case because, while the specific offenses of which Olek was convicted--to which the Commissioner's scrutiny is strictly confined herein in contrast to the broader scope of review available to him in an unbecoming conduct proceeding--may not "involve" his employment in the sense that they did not occur on school property, engage school pupils or center on school affairs, they so intimately "touch upon" his role as a teacher that his continued service in that position is simply not viable.

The Commissioner fully concurs with the passages from Moore, supra, and Arocha and Gonzalez, supra, quoted by the ALJ at pages 4-6 of the initial decision, as well as with her application of those passages to the instant matter. The Commissioner is wholly unpersuaded by Olek's arguments that because his offenses involved steroids, rather than controlled dangerous substances, the holdings of Arocha and Gonzalez should not apply to him. To the contrary, the policy set forth in the passage cited at pages 5-6 is no less applicable to steroids than to marijuana:

> Although other school employees are not necessarily required to meet the same standard of conduct as teachers, we find that all employees in the public school system who are charged with the care of students or have significant contact with students serve as adult role models and contribute to the student's education through what students see, hear, experience and learn about them. We conclude that, given this state's commitment to solving the widespread drug problem in the schools, each employee who is charged with the care of students or has significant student contact is under a duty to conduct himself in a manner that in no way encourages or condones the use of drugs. We further conclude that when such employee is convicted of a drug related offense, he has violated that duty and, therefore, the conviction "touches" his position within the meaning of N.J.S.A. 2C:51-2a(2). (Board Decision at 6-7.)

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That the "state's commitment to solving the widespread drug problem in the schools" (Id.) extends to steroids was explicitly memoralized by the Legislature in its enactment of P.L. 1989, c. 216, when, in recognition that steroids fell outside the purview of a prior enactment but were nonetheless a targeted drug of abuse, the Legislature added anabolic steroids to its comprehensive 1987 substance abuse education act (N.J.S.A. 18A:40A-1 et seq.), thereby imposing curriculum, policy, student evaluation and treatment referral requirements with respect to steroids on every school district in the state. Thus, notwithstanding Olek's protestations to the contrary, for purposes of analyzing whether an offense "touches upon" school employment, that steroids are not "controlled dangerous substances" within the legislative and regulatory definition of that term is manifestly a distinction without a difference.

In sum, while his offenses did not directly involve students or his school district, while employed as a teacher Olek indisputedly used and possessed steroids in contravention of law and public policy. His offense is the more egregious in that he did so from a unique position: that of a science teacher, who by training would be presumed by students to have some clinical knowledge of the use and effects of drugs; that of mentor, whom students demonstrably admired and to whom they frequently turned for advice about body-building and fitness independent of his coaching activities; and that of former wrestling coach, a person viewed as an obvious authority with respect to physical development. (Certification of Harold N. Springstead and Exhibits appended thereto; Brief on Behalf of Petitioner, Exhibit C, Olek's letters of application for coaching

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position) Even accepting as true Olek's contention that he frequently counseled students against using steroids, the discrepancy between his words and actions would speak volumes to students, especially in view of this unique position. Further, the nature of Olek's offenses and the circumstances surrounding their discovery militate against a finding that it represented an isolated error in judgment or other situation where mitigating factors could fairly be said to come into play.

Under all of the circumstances, it seems indisputable that Olek's infraction "casts such a shadow over [him] as to make his*** continued service appear incompatible with the traits of trustworthiness, honesty and obedience to law***" (Moore, supra, at 270), and that in particular it has violated precisely the duty "to avoid conduct that encourages or condones drug use" that has been set down as a cardinal rule for all "contact" school employees--not merely teachers who are explicitly held to an even higher standard of conduct--by the State Board of Education (Arocha and Gonzalez, supra, at p. 8).

Accordingly, the initial decision of the Office of Administrative Law deeming Robert B. Olek to have forfeited his position as a teacher as of the date of his conviction is affirmed. The Board, however, is directed to pay Olek the approximately six weeks' salary due him under the ALJ's correct and uncontested analysis of salary due for the period prior to proper certification of tenure charges and before the effective date of forfeiture.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 27, 1991

DATE OF MAILING - JUNE 27, 1991
Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5126-90
AGENCY DKT. NO. 150-6/90

GEORGE C. SCHLENKER,
MARY R. CESTONE AND
VINCENT M. TELESCO,
Petitioners,
v.
BOARD OF EDUCATION
OF THE SCHOOL DISTRICT
OF MORRIS,
Respondent.

Margaret C. Murphy, Esq., for petitioners

Fredric J. Sirota, Esq., for respondent
(Wiley, Malehorn, & Sirota, attorneys)

Record Closed: March 19, 1991 Decided: May 13, 1991

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

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Statement of the Case

This is a suit by three school administrators who allege that a board of education illegally failed to implement its adopted salary schedule for the 1989-90 and 1990-90 school years. Essentially, the issue is whether a change in the administrators' salary structure violates petitioners' existing rights under statutes which make a board's "salary policy" binding on future boards. *N.J.S.A.* 18A:29-4.1, -4.3. Starting in 1989-90, the board changed its administrators' salary structure from a merit system based on teachers' increases to a tiered system based on flat percentage increases. Petitioners contend that they are entitled to a higher salary because of their continued performance after expiration of their contracts in reliance on the board's own past policies and practices. The school board responds that its past salary policy does not automatically entitle administrators to receive the same salary increases awarded to teachers.

For the following reasons, this decision adopts a middle ground. Neither the statutes nor prior board policy and practices requires that school administrators must be given salary increases equivalent to those given teachers under their independent negotiated agreement. Past policy and practice do not insulate school employees against changing economic conditions or shifting public priorities. Nevertheless, the board may only abandon its merit system prospectively, and must distribute whatever pot of money is currently available for administrative salary increases on the basis of the administrators' previous performance ratings.

Procedural History

On June 4, 1990, petitioners George C. Schlenker, Mary R. Cestone and Vincent M. Telesco filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent Board of Education of the Morris School District ("Board") filed its answer on June 10, 1990. Subsequently, on June 29, 1990 the Commissioner transmitted the matter to the Office of Administrative Law ("OAL")

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for determination as a contested case.[1] Initially, petitioners had sought relief for the 1989-90 school year. By order entered on January 28, 1991, the pleadings were amended to include the 1990-91 school year. The OAL held a hearing on February 5, 1991. Witnesses and exhibits are listed in the appendix. Both parties filed briefs on March 19, 1991, on which date the record closed. Time for preparation of the initial decision has been extended to May 17, 1991.

Findings of Fact

All of the material facts are undisputed. I **FIND** the following facts:

Petitioners are high-ranking administrators or supervisors employed by the Morris school district. Dr. George Schlenker is an assistant superintendent hired in September 1972. Vincent M. Telesco is also an assistant superintendent, and has worked for the district in one capacity or another since 1959. Mary R. Cestone was director of curriculum until her recent retirement on February 1st of this year. She started working for the district in 1966. Top-level administrators are 12-month employees, as distinguished from teachers who are usually 10-month employees. School officials at the upper level are so directly involved in managerial matters, including salary negotiations, that they do not belong to any bargaining unit representing lower-level administrators and supervisors.

Board policy pertaining to salary of administrators and supervisors remained essentially the same from 1976 until March 1990, when the Board took the action which petitioners challenge. On June 14, 1976 the Board had adopted a complex formula for calculating administrators' salary increases, set forth in §210.1-6 and Appendix B of its policy manual. Identical provisions were retained in a November 1982 revision of the policy manual. In 1986 the Board updated its policy manual with the assistance of the New Jersey School Boards Association. The salary policy, recodified as §2130, was readopted without major substantive changes. At its

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[1]Originally, this case was consolidated for hearing along with two related cases, *Betar et al. v. Morris Sch. Dist.*, OAL Dkt. No. EDU 5125-90, and *Schulzki et al., v. Morris Sch. Dist.*, OAL Dkt. No. EDU 5415-90. Before commencement of the hearing, however, the petitioners in the other two cases withdrew their claims.

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reorganization meeting for 1989-90, held on April 6, 1989 and ratified on April 13, 1989, the Board passed a routine resolution which "continued in force" virtually thousands of past polices, rules and regulations, including the policy in question. No special attention was paid at that time to administrators' salaries.

Although the old method for fixing administrators' salaries involved mathematical computation, the underlying theory "[was] not all that complicated." The process consists of two steps. First, the Board determined the total amount of money available for salary increases by multiplying the aggregate of all administrators' salaries in the prior year by a fixed percentage. Historically, that percentage has always been the same as "the percentage granted in the teachers' contract," which for 1989-90 was 9.75%. Nothing in the written policy, however, required that the administrators' increases be linked to the teachers' increases. Indeed, the old policy expressly provided that "[i]n arriving at a percentage increase to be applied to the total administrator salary accounts, the board will consider such factors as other salary settlements and economic conditions." Even under the old policy, the Board retained its managerial discretion to appropriate a suitable amount for salary increases in light of market forces and prevailing economic reality

Once the gross amount of the increase had been determined, the policy called for dividing up the total pie according to a formula containing several variables, including the relative importance of each particular job, the compensation paid in a reference group of 20 comparable school districts, and the results of each individual's annual performance evaluation. Here too, the Board was not irrevocably committed to making any specific payments. Instead, the written policy statement merely obligated the Board to work toward achieving "general goals." Indeed, the section entitled "Compensation" indicated:

> . . .Salary ranges will be set by the board, keeping in mind the reference group and a general goal of having the midpoint salaries at the 75th percentile of the reference group's prior year. Salary increases will be determined by performance against objectives, position in the range, *and other factors deemed appropriate by the board*. (Emphasis added).

It is only after the Board actually set the salary ranges that an essential contractual term, namely, the salaries of individual school administrators, could be definitely ascertained. When petitioners entered the 1989-90 school year, they did

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so without any clear assurance as to their salary increases. Petitioners expected that the Board would follow its past practice and, as suggested in a memorandum from the superintendent's office, that "final adjustments would be made following the settlement of the teacher contract." As a interim measure, the Board voted on October 16, 1989 to grant all supervisory staff an immediate increase of 4.5% retroactive to July 1st. While this adjustment clearly did not comply with the stated salary policy, no one had any complaints.

On March 26, 1990 a special committee of the Board recommended adoption of a new four-tiered salary plan. Board minutes reflect that the plan was designed "to cut the cost of the district's administrative salaries" and to correct inequalities due to the fact that the top administrators and central office staff "were paid at or above the 75th percentile" whereas building principals and department chairs "were below the 75th percentile." The new policy had the intended effect of narrowing the gap among the absolute amounts paid to administrators at different levels. Top administrators would receive a 5% increase; central office staff would receive 7%; and school principals and building-level staff would receive 9.75%. Under this plan, total administrative salaries would increase by 8.5% rather than 9.75%, achieving a projected savings of $28,000. The Board voted 5-to-3 to adopt this tiered salary approach.

Next, on April 5, 1990, the Board passed a resolution setting administrators' salaries for 1989-90 in accordance with its newly adopted salary policy. [2] Dr. Schlenker's 1989-90 salary is $82,821 , compared to his claim for $84,874 under the old policy. Mr. Telesco's salary is $85,012, compared to his claim for $88,657. Ms. Cestone's salary is $78,662, compared to her claim for $80,580. At the time of the hearing, the Board had not yet fixed administrators' salaries for the 1990-91 school year.

Conclusions of Law

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[2]Testimony at the hearing suggested that the Board may have made computational errors in the amounts due under its new plan. In light of the outcome of this appeal, the Board will have the opportunity to recalculate individual administrator's salaries.

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Based the foregoing facts and the applicable law, I **CONCLUDE** that the Board may legally reduce the total sum of money available for administrators' salaries for the 1989-90 school year. However, any change in local board policy regarding distribution of that money must be made prospectively, so that the Board must utilize its preexisting merit system in setting 1989-90 salaries but may switch to a flat percentage increase for 1990-91.

N.J.S.A. 18A:29-4.3 mandates that any board of education which employs staff members with full-time supervisory or administrative responsibilities "shall adopt salary schedules for each school year[.]" Salary schedules are expressly "subject to the provisions of *N.J.S.A* 18A:29-4.1," which authorize a board of education to "adopt a one, two or three year salary policy, including salary schedules . . . which shall not be less than those required by law." Further, *N.J.S.A* 18A:29-4.1 makes such salary policy "binding upon the adopting board and upon all future boards in the same district for a period of one, two or three years from the effective date of such policy[.]"

Since the adoption of the Teacher Quality Employment Act in 1985, the law requires a school board to pay its full-time professional staff minimum starting salaries of $18,500 per academic year. *N.J.S.A.* 18A:29-5. Statutes which formerly prescribed a detailed minimum salary schedule have been repealed Tenure laws also prohibit a school board from reducing the compensation paid to a tenured employee without a full hearing before the Commissioner. *N.J.S.A.* 18A:28-5. Failure to receive a salary *increase* does not constitute a *reduction* for purposes of tenure protection. K*opera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Tenured employees have no vested right to any future increases in salary. *Williams v. Plainfield Bd. of Ed.*, 176 *N.J. Super.* 154 (App. Div. 1980), certif. den. 87 *N.J.* 306 (1981).

Obviously, the Board fully complied with the minimum statutory requirements. As noted, the Board's adopted policy on administrators' salaries did not commit it to achieving parity with teachers. Specifically, the Board never bargained away its right to fix administrators' salaries annually. Unlike the typical multi-year contracts negotiated with the teachers' associations, the policy statement did not obligate the Board to pay any particular administrative salaries in future years. Reported administrative rulings uphold the authority of local boards to set reasonable limits

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on administrators' salary increases in any single year. *Ward v. Voorhees Bd. of Ed.*, 1979 *S.L.D.* 279, 286 (Comm'r 1979). See also, *In re Nash,* 1972 *S.L.D.* 281, 285 (Comm'r 1972).

Cases cited by petitioners are inapposite. *Stockton v. Trenton Bd. of Ed.*, 210 *N.J. Super.* 150 (App. Div. 1986) dealt with the timeliness of a claim under the 90-day rule and never reached the merits of the underlying controversy. In *dicta*, however, the Appellate Division strongly hinted that a local school official may not correct a past error by *reducing* a teacher from step 15 to step 14 on the salary guide. The case did not address the issue of entitlement to future salary increases. In *Cliffside Park Borough Bd. of Ed. v. Mayor & Council*, 100 *N.J. Super.* 490 (App. Div. 1968), which arose in the context of a school budget appeal, the only issue was whether a school board could legally agree to pay group health insurance premiums as a fringe benefit. Thus, the dispute did not implicate future benefits, but only whether the board's budget could properly include "the amount necessary to carry out the agreement it had made." 100 *N.J. Super.* at 494. *Orlando v. Bd. of Sch. Estimates*, 1984 *S.L.D.* __ (Comm'r Sept. 6, 1984) involved an attempt by a school board to abrogate existing rights under a two-year negotiated contract, in contrast to the present situation where there is no contract susceptible of enforcement.

Fundamental fairness, however, precludes the Board from scrapping its merit system without advance notice to those directly affected. While there is no statutory requirement that the Board adopt a merit system, the Board is bound by its own rules until they are properly changed. *Bergen Cty.Bd. of Vocational Schs. v. Bergen Cty. Vo-Tech. Ed. Ass'n*, No. A-3608-85T8, slip op. at 9 (N.J. App. Div. Feb. 5, 1987). Despite the absence of any promised amount of money, Board policy §2130 clearly articulated the manner of distributing whatever total sum might be devoted to administrators' salary increases. Each administrator's increment was dependent on the prior year's performance rating.

By the time that the Board voted to change its policy in late March 1990, petitioners had already received their 1988-89 performance ratings and had performed their duties for nearly two-thirds of the 1989-90 school year. Consequently, the merit system still governed the size of each petitioner's increment for 1989-90. With respect to the 1990-91 school year, the policy change took effect before the due date of the prior year's performance ratings. Moreover, when the

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new school year began, petitioners were aware that the Board had changed its policy for determining increases. Accordingly, the Board's tiered policy of flat percentage increases applies to administrators' increases in 1990-91.

Order

It is **ORDERED** that the Board may use a lesser percentage than in the teachers' contract in setting the total pot of money available for administrators' increases for 1989-90.

It is further **ORDERED** that this matter is remanded to the Board so it may recalculate the three petitioners' individual allotment for 1989-90 on the basis of the merit system. The OAL does not retain jurisdiction.

And further **ORDERED** that the Board may utilize its tiered flat-percentage system for determining petitioners' salary increase for 1990-91.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 13, 1991
Date

Kenneth Springer, A.L.J.

Receipt Acknowledged:

5/14/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 1991
Date

OFFICE OF ADMINISTRATIVE LAW

al

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APPENDIX

List of Witnesses

1. Dr. George C. Schlenker, assistant superintendent, Morris school district

2. Vincent N. Telesco, assistant superintendent, Morris school district

3. Mary R. Cestone

4. Anton Schulzki, department chair, Morris school district

5. Dr. Michael Lee Pisauro, deputy superintendent and board secretary, Morris school district

List of Exhibits

No.		Description
P-1		Copy of excerpt from the policy manual of the Morris school district, adopted June 14, 1976 and revised October 18, 1976
P-2	(a)	Copy of policy of the Morris school district No. 2130, adopted April 14, 1986 and revised December 8, 1986
	(b)	Copy of regulations of the Morris school district to implement police No. 2130, dated April 14, 1986
P-3	(a)	Copy of the agenda of the Board of Education of the Morris School District for the reorganization meeting on April 6, 1989
	(b)	Copy of an excerpt from the minutes of the board's reorganization meeting on April 6, 1989

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(c) Copy of a Board resolution adopted on April 13, 1989

P-4 Copy of a memorandum to the Board members on the letterhead of the Superintendent's Office, dated October 13, 1989

P-5 (a) Copy of an excerpt from the agenda of the Board for a regular business meeting on October 16, 1989

(b) Copy of an excerpt of the minutes of the Board for a regular business meeting on October 16, 1989

P-6 id. Copy of the agenda and minutes of the board for a regular business meeting on February 5, 1990

P-7 id. Handwritten notes of Dr. George C. Schlenker regarding the meeting of the board on March 12, 1990

P-8 Copy of an excerpt of the minutes of the board for a regular business meeting on March 26, 1990

P-9 (a) Copy of an amendment to policy No. 2130 of the Morris school district, adopted March 20, 1990

(b) Copy of a statement of official action of the Board, dated March 20, 1990

P-10 Copy of an excerpt for the minutes of the board for a meeting on April 5, 1990

P-11 Copy of Dr. Schlenker's calculation of salaries for the 1989-90 school year

P-12 Copy of Dr. Schlenker's calculation of salaries for the 1990-91 school year

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P-13 Copy of a memorandum to Dr. McIvor from Vincent M. Telesco, dated February 2, 1990

P-14 Copy of a letter to Christopher Martin from Anton Schulzki, dated March 16, 1990

R-1 Copy of an excerpt of the agenda of the board for a meeting on June 30, 1988

R-2 Copy of administrator salary ranges to be effective July 1, 1988

R-3 Copy of proposed 1989-90 salaries

R-4 Handwritten chart prepared by Dr. Michael Le Pisauro during the hearing on February 5, 1991

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GEORGE C. SCHLENKER ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed notwithstanding that an extension until June 3, 1991 had been granted. By virtue of said extension until June 3, 1991, the Board's exceptions, filed on that date were deemed timely. The Board's reply exceptions were not considered in the disposition of this matter because petitioners' exceptions were found to be untimely.

The Board excepts to the conclusion of the ALJ that the administrator's salary policy adopted by the Board at its Spring 1989 reorganization meeting, the "old" policy, was effective for the 1989-90 school year.

Following a recital of its version of the facts, the Board contends that with respect to the 1989-90 and 1990-91 school years, the only action taken by the Board that might relate to petitioners' salaries for the 1989-90 and 1990-91 school years was its adoption of the old policy prior to the 1989-90 year and its determination to

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give a 4.5% increase to administrators and supervisors at the beginning of the 1989-90 school year for the 1989-90 school year. It claims that to say that the foregoing fixes the old policy in place for the 1989-90 school year is without support.

Further relying on N.J.S.A. 18A:29-4.3, the Board submits that a salary schedule for administrators must be adopted for each year and that said law contains no requirement that it be adopted in advance of the year. The Board claims that it took that action in the Spring of 1990 for the 1989-90 school year. Moreover, it claims that all the witnesses at the hearing agreed that even assuming that the Board adopted the policy at its reorganization meeting, Policy 2130 does not permit the computation of salary. Rather, the Board claims, Policy 2130, along with all the other policies adopted during the 1989 reorganization meeting, does not include a percentage to be applied against the previous year's gross salaries for computing the increase. Further, it does not include a salary range which must establish the salary, the Board notes. The Board adds that these conditions had not been completed before the March 1990 amendment of the policy, and that all witnesses agreed to this point. It avers further that no 1989-90 salary could have been computed until the Board had made the aforementioned determinations and applied them against the amended policy in April of 1990.

Based on the foregoing, the Board contends it followed the dictates of N.J.S.A. 18A:29-4.3. The salary increases given under the policy and salary schedule as adopted first in March and then implemented in April of 1990 as applicable to the 1989-90 school year have been paid and have not been altered, the Board submits.

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It claims additionally that in the absence of a salary schedule prior to March and April of 1990, it was free to amend its prior practice and policy and to "establish for the first time as applicable to the 1989-90 school year, a 'policy including salary schedule' as required by N.J.S.A. 18A:29-4.3 as well as N.J.S.A. 18A:29-4.1" (Exceptions, at p. 5)

Summarizing, the Board avers that the old policy was never a salary policy including a salary schedule until the new policy, that is, the amendment to the policy, was adopted in March and April of 1990. It claims it was only at such point that the policy could arguably be amended and, thus, it is the new policy which is binding upon the Board for the 1989-90 school year rather than the old policy found binding by the Office of Administrative Law.

The Board adds that it takes no exception to the ALJ's conclusions as to the applicability of the new policy for the 1990-91 school year and the Office of Administrative Law's interpretation of the old policy, if such policy be eventually determined to be effective for the 1989-90 school year. The Board seeks reversal of that portion of the ALJ's decision regarding his conclusion that the old policy was effective for the 1989-90 school year.

Upon a careful and independent review of the instant matter, the Commissioner affirms the conclusions of the ALJ below. Before discussing the merits of the matter, the Commissioner notes for the record a letter dated May 23, 1991 from counsel for George Schlenker indicating that Dr. Schlenker, one of the petitioners in this matter, withdraws his Petition of Appeal, pursuant to N.J.A.C. 1:1-19.2. Said letter further indicates that Mr. Telesco and

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Mrs. Cestone will go forward with the petition. The Commissioner notes Mr. Schlenker's withdrawal from this contested matter.

N.J.S.A. 18A:29-4.1 states:

> A board of education of any district may adopt a one, two or three year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of one, two or three years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustment. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.

N.J.S.A. 18A:29-4.3 states:

> The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act for all such members, except that for a superintendent of schools the board may adopt a salary schedule. Such salary schedules shall be subject to the provisions of N.J.S.A. 18A:29-4.1.*** (emphasis supplied)

The Senate bill statement developed at the time of the passage of latter enactment specifies:

> SENATE, No. 364
>
> STATE OF NEW JERSEY
>
> DATED: FEBRUARY 14, 1972
>
> Senate Bill No. 364 requires every board of education to adopt, each school year, a salary schedule for full-time administrative or supervisory personnel and that such schedules be

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filed with the Commissioner of Education. Should it so desire, the board may adopt a salary schedule for the superintendent.

In addition, all guides adopted in accordance with this bill would be subject to the provisions of N.J.S 18A:29-4.1. This section provides that guides adopted by a board of education shall not be less than those required by law, shall be binding upon the adopting board and all future boards for a period of 2 years and that every school budget adopted, certified or approved by the board, the voters, the board of school estimate, the governing body of the municipality or municipalities or the Commissioner of Education shall contain the money necessary to implement fully such guides for that budget year.

STATEMENT

This bill provides that each board of education shall adopt salary schedules for full-time administrative and supervisory personnel except for the position of superintendent in which case a salary schedule is permissive.

This bill permits each board of education to determine the salary schedule to be used for paying supervisory and administrative personnel.

The Commissioner's reading of the above statutes and their legislative histories and his consideration of the facts of this matter comport with the ALJ's that a board may legally reduce the total sum of money available for administrators' salaries for the 1989-90 school year, but that any change in the board's policy regarding changes in any increments to be paid must be made prospectively. (See Initial Decision, at pp. 3-6.) (See also, South Hamilton Associates v. Mayor and Council of Town of Morristown, 99 N.J. 437 (1985) (Generally, legislation operates prospectively unless by its terms the legislation clearly manifests that it is to be applied retroactively.) Although somewhat inartfully worded, it must be presumed in reading N.J.S.A. 18A:29-4.3 that in stating that each board of education "***shall

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adopt salary schedules for each school year *** for all such members***" (N.J.S.A. 18A:29-4.3), the Legislature indicated that a board may carry over from year-to-year its properly adopted salary schedule or schedules for its full-time supervisory or administrative staff. See State v. Monturi, 155 N.J. Super., 317 (Law Div. 1984) (Statutory language should be given its ordinary meaning absent specific intent to the contrary.) The term "salary schedule" implies salary payments effective for more than a single year. To construe such language otherwise would require a board to adopt a new system of individual salary payments for each school year. By requiring that such salary schedules be subject to the provisions of N.J.S.A. 18A:29-4.1, the requirement that such guides extend for more than a single year is clarified. N.J.S.A. 18A:29-4.1 specifically addresses that such salary guides adopted by a board of education "shall be binding upon the adopting board and upon all future boards for a period of one, two or three years***."

Thus, the instant matter is reduced to a question of whether the Board's determination to adopt changed salary schedules in April 1990 provided adequate notice to the affected administrators and supervisors as to what measurements would be used to gauge whether they would receive an increment. It is plain from the record that the old policy, Policy 2130, based each administrator's salary increment on the preceding year's performance rating. (Initial Decision, at p. 7) It is also plain from the record that by the time the Board ratified its new policy, which also incorporated a performance factor in determining increments, petitioners had already received their 1988-89 performance ratings and had performed their duties for nearly two-thirds of the 1989-90 school year. (Id.)

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The Commissioner agrees with the ALJ that based upon these facts, the old system governed the size of each petitioner's increment for the 1989-90 school year. The Commissioner so finds for those reasons expressed by the ALJ at page 7 of the initial decision.

Accordingly, the Commissioner adopts the initial decision finding that the Board may use a lesser percentage than in the teacher's contract in setting the total pot of money available for administrators' increases in 1989-90. He further finds that the old system of establishing increments for petitioners governed the size of each petitioner s increment for 1989-90 but the Board may switch to its tiered flat percentage system for determining increases for 1990-91. The Commissioner directs that the Board recompute petitioners' individual allotments for 1989-90 based upon such findings.

COMMISSIONER OF EDUCATION

JUNE 27, 1991

DATE OF MAILING - JUNE 28, 1991

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GEORGE C. SCHLENKER ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MORRIS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner of Education decision issued in this matter on June 27, 1991. Said decision noted that the exceptions filed by the Board were not considered in that they were untimely. By letter dated July 2, 1991 petitioners' counsel objected to the finding that her exceptions were untimely, and requested the matter be reconsidered. Upon a careful review of the circumstances, the Commissioner has determined to reopen the matter and to consider petitioners' exceptions and the reply exceptions of both petitioners and the Board due to a mechanical error in the electronic time-stamp machine in the Office of the Bureau of Controversies and Disputes.

Petitioners' first exception sought to reverse the ALJ's conclusion that the four-tiered, "new" policy should be effective for the 1990-91 school year. The Commissioner's decision of June 27, 1991 determined that while Policy 2130 must be applied for the 1989-90 school year for the reasons expressed by the ALJ, the Board could switch to the new policy to establish administrators'

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increments for the 1990-91 school year. Petitioners' Exception One objects to the ALJ's conclusion that they had received adequate notice of the changed policy. Petitioners summarize the ALJ's reasons as stating that

> 1. the change took place before the due date for petitioners' evaluations for the 1989-90 school year; and
>
> 2. when the 1990-91 school year began, petitioners were aware that the Board's policy had changed. (Petitioners' Exceptions, at p. 3)

Petitioners reiterate their arguments raised below, contending

> ***it is irrelevant whether or no Petitioners' evaluations had been completed at the time the policy was changed; petitioners had no control over when their superiors would choose to complete their evaluations. The key point is that Petitioners had performed for nine months (or three-quarters of the year) under the prior board policy. That policy bound, not only Petitioners, but the Board itself. See Bergen County Board of Education of Vocational Schools v. Bergen County Vocational-Technical Educational Association, NO. A-3608-85T8 (App. Div. February 5, 1987) at 9. Because of Petitioners' substantial performance of their obligations under Policy #2130, the Board cannot be allowed to scrap its merit-pay system as applied to that period of time. Fundamental fairness precludes such action. (Id.)

Petitioners' Exception One poses no new arguments of law or fact but, rather, relies now on a case the ALJ cited in his decision, Bergen County Board of Education of Vocational Schools, supra, for the proposition that fundamental fairness precludes the Board's applying the new policy to the 1990-91 school year in that petitioners had substantially performed their obligations under Policy 2130 for one year in question and, thus, the Board could not apply the new policy to increments for 1990-91.

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The Commissioner remains unpersuaded by petitioners' claim that the Board was bound to follow the "old" policy for the 1990-91 school year. He is in accord with the ALJ that because the policy change took effect before the due date of the preceding year's performance ratings, and because petitioners were on notice at the beginning of the 1990-91 school year that the policy had changed, the Board's obligation to be bound by its own rules was satisfied. The policy change occurred in March of 1990, providing adequate notice to employees of a fact under which they had already labored under the old policy, that is that performance ratings would be a factor under the new system as well. Bergen County Board of Education of Vocational Schools, supra

Accordingly, petitioners' Exception One is dismissed as being without merit.

In Exception Two petitioners argue that because the Board granted some administrators increases for the years in question, N.J.S.A. 18A:28-5 requires that the Board be ordered to give the petitioners' herein the highest increase given any other administrator, claiming that Policy 2130, the old policy, permits only one value for "X" for all administrators. "X," petitioners explain, is the percent increase to be applied to the total administrator salary accounts under the old policy.

To this argument, the Board's reply exceptions counter:

> Firstly, this argument is untrue. Implementation by the Board of the "old" policy for 1989-90 would not reduce the salary of other teaching staff members, including administrators. Further, how could Petitioners possibly know this because, obviously, the Board hasn't done it or anything with respect to the application of the "old" policy for 1989-90 yet. No party to this date had even argued that either the "old" or

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> "new" policy requires all administrators to get the same percentage increase - Petitioners' demand without any facts or law or even any interested party, now apparently takes this position and is absolutely devoid of merit. Finally, neither this issue nor the allegedly affected "other administrators" are in this case. If, in fact, the Commissioner affirms the applicability of the "old" policy to the 1989-90 school year and teaching staff members other than the Petitioners herein are reduced in salary in violation of N.J.S.A. 18A:28-5, the undersigned is confident that such affected employees would seek recourse. Once again, that will not happen. (Board's Reply Exceptions, at p. 3)

The Commissioner's June 27, 1991 decision in this matter agreed with the ALJ's conclusion that Policy 2130 must be applied to the 1989-90 school year increments to be extended to the administrators in the employ of the Board. (See Initial Decision at p. 6. See also, Commissioner's decision at pp. 18-19.) While petitioners suggest in exceptions that the Board has already granted other administrators increases for the years in question, (see exceptions at p. 4), no citation or reference is made to support the truth of such contention, nor are the exceptions specific in elaborating on which administrators did or did not receive such increments or for which years such gains purportedly were made.

Having decided heretofore that the Board has the right to pay the petitioners herein pursuant to the new policy for the 1990-91 school year, the Commissioner dismisses the argument presented by petitioners that failure to be compensated in a manner consistent with the old policy for school year 1989-90 constitutes a reduction in salary in derogation of N.J.S.A. 18A:28-5. As indicated by the ALJ in the initial decision at p. 6, "***Failure to receive a salary increase does not constitute a reduction for purposes of tenure protection. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288,

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297 (App Div. 1960)." Thus, a failure to receive a salary in accord with petitioners' expectations does not constitute a reduction in salary in violation of N.J.S.A. 18A:28-5. The Commissioner so finds and thus dismisses petitioners' Exception Two as being without merit.

Accordingly, petitioners' exceptions in no way alter the disposition of the Commissioner's decision of June 27, 1991, which stands as the final decision in this matter.

COMMISSIONER OF EDUCATION

AUGUST 7, 1991

DATE OF MAILING - AUGUST 7, 1991

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL SUMMARY DECISION
OAL DKT. NO. EDU 5123-90
AGENCY REF. NO. 124-5/90

ANNETTE PURCELL and
DIANE SOLLITTO,
Petitioners,
v.
CLIFTON BOARD OF EDUCATION,
Respondent.

Robert F. Binetti, Esq., represented petitioners

Patrick C. English, Esq., represented respondent

Record Closed: April 10, 1991 Decided: May 24, 1991

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

PROCEDURAL BACKGROUND

In this matter, petitioners allege that respondent failed to properly discharge certain of its responsibilities. Respondent denies that this occurred. After referral to the Office of Administrative Law (OAL) for resolution 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., respondent filed a motion for summary decision, which the undersigned reserved decision on, in order to allow petitioners an opportunity to secure the services of an attorney and to have that attorney respond to the moving papers already on file. Petitioners' response was received on April 5, 1991 and the respondent replied on April 10, 1990, at which time the motion was deemed to have been submitted.

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ISSUES

The issues addressed by the motion for summary decision are those specifically set forth as follows in a Prehearing Order issued by Administrative Law Judge Edith Klinger on October 10, 1990:

1. Did the Board act in an arbitrary and capricious manner when it failed to certify tenure charges against Principal Rita Cadorin in response to petitioners' complaints?

2. Did the Board act in a discourteous manner to citizens appearing before it in an open public meeting?

   (a) Is Purcell entitled to an apology from the President of the Board for his actions toward her at the meeting of September 13, 1989?

3. What is the Board's responsibility for the action of district employees with respect to DYFS referrals?

4. Were petitioners' petitions filed in a timely manner?

5. To what relief, if any, are petitioners entitled?

ANALYSIS AND DISCUSSION

POINT I

N.J.S.A. 18A:6-11 specifically mandates that "Any charge made against any employee of a board of education . . . be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge . . . be presented to the board." (emphasis supplied).

In this case, based on the moving papers submitted by both sides, it is uncontroverted -- and I **FIND** as **FACTS** -- (a) that no written charge against Principal Rita Cadorin was filed with the secretary of the board of education; and (b) that no written statement of evidence under oath to support any charge was presented to the board of education. In the absence of such statutorily required documentation, the board was required to do nothing. More specifically, it was not obliged to determine whether

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* See N.J.S.A. 18A:6-11.

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there was probable cause to credit the evidence in support of a charge,* because the evidence and the charge were never reduced to writing. Thus, there was no basis for formal consideration by the board. A fortiori, it was not incumbent upon the board to determine whether a non-existent charge, if credited, was sufficient to warrant a dismissal or reduction of salary.*

On the strength of the foregoing, I **CONCLUDE** that the board of education was justified and acted properly in failing to certify tenure charges against Principal Rita Cadorin. Simply put, there is nothing in its inaction which can be characterized as arbitrary or capricious.

Finally, it is to be noted that the board did respond to petitioners' complaints about Principal Rita Cadorin by requiring her to answer the allegations made.** In fairness, the board attempted to accommodate the petitioners' concerns. Nevertheless, it was petitioners' failure to comply with the filing requirements of the Statute which dictated the board's course of inaction. Had the petitioners opted to formalize their complaints and fulfill the statutory requirements, the deliberations of the board would have been subject to scrutiny for arbitrariness and capriciousness. That however, didn't occur, so it would be speculative to address whether the board's informal, substantive reckoning (if any) of petitioners' complaints was arbitrary and capricious.

POINT II

With respect to whether the Board acted discourteously to Ms. Purcell when she spoke at a public meeting on September 13, 1989, I have listened to the relevant portion of an audio-cassette supplied by the attorney for respondent. Based on what I heard, I **FIND** that Board President Demikoff was extremely courteous and patient during the dialogue with Ms. Purcell. Thus, I **CONCLUDE** that Demikoff owes Purcell no apology whatsoever.

---

* See N.J.S.A. 18A:6-11.

** See response labelled Exhibit B, attached to Superintendent William C. Liess' affidavit.

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POINT III

Regarding DYFS referrals, petitioners seek clarification of what the board's role is in such matters, apparently because a child of one of the petitioners was suspected of having been abused, and an employee of the school district contacted DYFS about this situation.

In this vein, the board's responsibility is to adopt and implement policies and procedures for the reporting and cooperation with the Division of Youth and Family Services (DYFS) in investigations of child abuse. See, N.J.A.C. 6:3-5.2(a). Once this has been done (not an issue in this case), the board's responsibility has been fulfilled. Pursuant to such policies and procedures, school personnel are then required by law to immediately and directly report any probable instances of abuse to DYFS without prior consultation with the board of education itself. See, N.J.S.A. 9:6-8.10, N.J.A.C. 6:3-5.2(a)1 and N.J.A.C. 6:3-5.2(a)1i. Thus, the board does not participate in any DYFS referrals. Furthermore, "referrers" are assured they will not "be discharged from employment . . . as a result of making in good faith a report or causing to be reported an allegation of child abuse" (See N.J.S.A. 9:6-8.13 and N.J.A.C. 6:3-5.2(a)3).

Applying the above blueprint to the case at hand, if the petitioners wanted to prove that the referral by a district employee to DYFS concerning one of their children was not done in good faith, they should have availed themselves of the formal filing procedures provided by N.J.S.A. 18A:6-11. This they did not do, so the board once again was precluded from reaching a substantive determination on the "good faith" issue vis-a-vis the district employee who made the referral. Accordingly, I **CONCLUDE:** (a) that petitioners are entitled to no relief in the circumstances depicted; and (b) that the board's responsibility to evaluate* the conduct of its referring employee was not activated, because the formal filing requirements of N.J.S.A. 18A:6-11 were not preliminarily satisfied.

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* that is, to credit the evidence in support of a charge.

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POINT IV

Concerning whether petitioners' petitions were filed in a timely manner, N.J.A.C. 6:24-1.2(c) provides that a petition shall be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing."

After reviewing the motion papers submitted by both sides, the undersigned has not been persuaded that any definitive, final action by the board concerning petitioners' complaints took place prior to September 13, 1989. On that date however, at a public meeting, the board's position was made clear: It was not going to "hear the matter any longer"* (i.e., the case was closed on petitioners' complaints) and petitioner Purcell was reminded that she had "been advised of the course of action which is available to you and you are free to choose any course you'd like at this point".* [illegible]

From the foregoing, I **CONCLUDE** that petitioners received notice of the board's final action in this matter on September 13, 1989. Since petitioners' petitions were thereafter filed on December 5, 1989 (undisputed), I also **CONCLUDE** that they were filed on the 83rd day from the board's final action and were therefore timely, satisfying the requirements of N.J.A.C. 6:24-1.2(c). Insofar as an amendatory petition which was subsequently filed is concerned, it seems that both equitable considerations and N.J.A.C. 6:24-1.15 allow its relation back to the original filing date on a nunc pro tunc basis, so I **CONCLUDE** that it too, was timely filed.

SUMMARY AND DISPOSITION

As just set forth, the petitioners' petitions were timely filed, so respondent's motion for summary decision in this regard is **DENIED**. However, with respect to the three other bases for respondent's motion, I **CONCLUDE** that the filed papers show there are no genuine issues as to any material facts challenged and that the moving party is entitled to prevail as a matter of law. See, N.J.A.C. 1:1-12.5(b) and Judson v. Peoples Bank

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* from audio-cassette of September 13, 1989 public hearing.

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and Trust Company of Westfield, 17 N.J. 67, 74 (1954). Consequently, I hereby **GRANT** the respondent's motion for summary decision on those grounds and I **ORDER** that petitioners' appeal before the Office of Administrative Law be (and is hereby) **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5-24-91
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

5/28/91
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 2 ? 1991
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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ANNETTE PURCELL AND DIANE SOLLITTO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

Petitioners' exceptions essentially reiterate the arguments set forth in their brief in opposition to the Board's motion for summary judgment submitted to and considered by the Administrative Law Judge. In their brief and exceptions, petitioners aver that the written statement which they provided to the Board regarding the principal should have been deemed sufficient to satisfy the requirements of N.J.S.A. 18A:6-11 in view of the fact that they are lay people and they complied with what they were told by the assistant superintendent. Secondly, they contend that reading excerpts of a transcript is not sufficient to ascertain if they were treated discourteously by the Board and that listening to the tape of the Board meeting is the only proper way to make such a determination. Thirdly, it is petitioners' position that a board of

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education stands vicariously responsible for the intentionally wrongful acts of its employees and, therefore, should not be allowed to shield itself from its failure to insure that its employees do not violate the law in terms of referrals to the Division of Youth and Family Services (DYFS) merely by stating that it has passed a policy.

Upon review of the record in this matter, the Commissioner adopts the recommended decision of the Administrative Law Judge dismissing the Petition of Appeal. Notwithstanding petitioners' arguments otherwise, the precise requirements set forth in N.J.S.A. 18A:6-11 for the filing of tenure charges must be followed whether the filing is being done by lay people or school personnel.

As to the issue of determining whether the Board was discourteous to petitioners, the record reveals that the ALJ did not rely on a transcript to reach his findings and conclusions but actually listened to the relevant portions of the audio-cassette tape of the board meeting in question. (Initial Decision, at p. 3)

Further, in response to petitioners' contention that the Board has an affirmative responsibility to assure that its employees do not violate the laws governing referral of suspected child abuse to DYFS, the Commissioner determines that the ALJ's findings and conclusions are not contrary to that position. The ALJ properly recognized that the statutes and code governing the referrals to DYFS make no provision for the involvement of a board of education in the process and that a board of education's responsibilities relate to the adoption and implementation of policies and procedures for the reporting and cooperation with DYFS in the investigation of child abuse. The ALJ also properly recognized that a board of

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education does have authority to assess a claim of an employee's bad faith referral to DYFS when he states on page 4 of the initial decision that the petitioners should have availed themselves of the formal filing of tenure charges under N.J.S.A. 18A:6-11. As to this, the Commissioner agrees that the filing of tenure charges is one of the avenues available to an individual who believes that a staff member has made a bad faith referral to DYFS. However, it must be pointed out that this is not the only avenue available to petitioners. Petitioners have the right to seek civil remedies in a court of appropriate jurisdiction.

Accordingly, the Petition of Appeal is dismissed for the reasons set forth in the initial decision.

COMMISSIONER OF EDUCATION

JULY 8, 1991

DATE OF MAILING - JULY 8, 1991

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[redacted]

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER DISMISSING APPEAL
OAL DKT. NO. EDU 7692-90
AGENCY DKT. NO. 283-8/90

IN THE MATTER OF THE TENURE HEARING
OF KAI POO CHIN, SCHOOL DISTRICT
OF THE BOROUGH OF KEYPORT,
MONMOUTH COUNTY,

Robert F. Munoz, Esq., for petitioner (Lomurro, Davison, Eastman & Munoz, attorneys)

Thomas W. Cavanagh, Jr., Esq., for respondent (Cahmlin, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: May 28, 1991 Decided: May 28, 1991

BEFORE JOHN R. FUTEY, ALJ:

STATEMENT OF THE CASE

In this matter the School District of the Borough of Keyport (District) certified charges against an assumed "tenured" custodian for unbecoming conduct pursuant to the provisions of N.J.S.A. 18A:6-10 et seq. Respondent, Kai Foo Chin, appealed the decision and the matter was referred to the Office of Administrative Law (OAL) as a contested case, pursuant to the provisions of N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F- 1 et seq. The matter was assigned to this tribunal, which conducted a conference on November 14, 1990. At that time, parameters of the case were

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established. At the same time, however, this tribunal questioned whether or not respondent was a validly tenured employee of the school district. As a result, the parties were invited to further research this matter prior to a full plenary hearing on the merits of the matter. Ultimately, petitioner filed a motion to dismiss based upon it assertion that, although the Board had previously certified charges against respondent as being a tenured employee, he was in fact a non-tenured employee, being on a year-to-year contract basis. Respondent filed an answer in this matter; however, prior to his disposition on the merits of the motion, this tribunal was advised to hold the motion in abeyance pending completion of settlement discussions by and among the parties. This tribunal was ultimately advised that the settlement discussions had not proven successful and that the motion should be now considered by this tribunal.

FINDINGS

After having carefully reviewed the motion and response filed by respective counsel in this case, I **FIND** that respondent has, for some time past, been appointed on a fixed term, yearly contract basis. Accordingly, in accordance with N.J.S.A. 18A:17-3, respondent is not protected under a tenured status with the school district.

Respondent has argued that the district is equitably estopped from denying that the employee has attained tenure as a result of having certified charges against him as a tenured employee, pursuant to a resolution adopted on August 2, 1990. Counsel, however, has presented no legal authority to support that contention. Based upon this tribunal's independent review of the matter, I **FIND** that there is no support for the argument of equitable estoppel. I further specifically **FIND** that although the school board erroneously certified charges on a tenured basis, there is nothing in the regulations which compels the school district to acquiesce to its own error and, in particular, for the betterment of respondent.

In addition, respondent contends that since petitioner has elected to move for a dismissal of the charges, respondent should be given the benefit and protection afforded tenure employees under 18A:6-14, to wit that "should the charge be dismissed, the person

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shall be reinstated immediately with full pay from the first day of such suspension. . ." This tribunal **FINDS** that argument to be specious at best since it presupposes a boot strapping of a non-tenured employee's rights onto an erroneously certified tenure employee case. This tribunal **FINDS** there to be no basis in fact, law or equity to support that contention. Rather, I **FIND** that due to the non-tenured status of this employee, he no longer has any claim pending before the Office of Administrative Law under the charges as cited. Based upon all the foregoing, it is **ORDERED** that the motion to dismiss this matter before the Office of Administrative Law is **GRANTED** due to there being an absence of any justiciable claim or right to appeal the termination notice.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 28, 1991
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

5/30/91
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 4 - 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 7692-90

IN THE MATTER OF THE TENURE	:	
HEARING OF KAI FOO CHIN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
KEYPORT, MONMOUTH COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by respondent and replies by the Board were timely filed pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, respondent contends that the ALJ erred in confining his initial decision to the question of whether respondent was, or was to be treated as, a tenured employee and in summarily dismissing the case upon finding that he was not. By so doing, respondent avers, the ALJ failed to resolve the issue of denying his right to appeal his termination through avenues other than the tenure process, avenues which entail timeliness requirements that he has now been prevented from meeting due to the manner in which the Board chose to proceed and his reliance thereon to his own detriment. According to respondent

> ***[t]o allow the Board to defeat [his] right to a hearing by drawing him into a procedure wherein he is given the right to contest the issue and then having the issue dismissed months later, is both [inequitable] and illogical.
>
> ***Clearly the Commissioner of Education should review the obvious inherent unfairness of this situation and provide direction within a final

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> decision to allow Respondent to contest his rights in a timely fashion either before the Commissioner under N.J.S.A. 18A:6-9 or under the grievance procedure agreed to in the contractual understanding relevant to the parties in question. (Exceptions, at p. 3)

In a reply statement urging affirmance of the ALJ, the Board argues:

> ***Respondent's suggestion that the Board intentionally drew the Respondent into the tenure proceeding as a means to defeat his right to a hearing is patently absurd. In fact the characterization of the Respondent as a "victim" is vitiated by the fact that Respondent and his union representative (who was apprised of the erroneously filed tenure charges at the outset) were fully aware at all times that 1) Respondent was not tenured, 2) the tenure charges were therefore filed erroneously, and 3) Respondent had a finite period of time to file a grievance. Notwithstanding this express knowledge, Respondent purposely chose not to avail himself of the grievance procedure and thus knowingly risked that the Board would not recognize and correct its error. (Reply Exceptions, at p. 1)

Upon careful review, the Commissioner affirms the decision of the ALJ for the reasons expressed therein and declines to provide alternative relief for respondent. It is clear from the record of this case that respondent and/or his representatives were aware of respondent's lack of tenure status at least as early as January 4, 1991 (Response to Board's Motion to Dismiss) and could have at that time preserved respondent's rights before the Commissioner by appealing the Board's decision to dismiss him. In choosing not to file an independent appeal of his termination while settlement discussions and subsequent OAL deliberations were occurring, respondent acted at his own peril in essentially gambling that the erroneously initiated tenure proceeding would somehow either work in his favor or extend his right to pursue alternative means of

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redress. However, it is well established that attempts to resolve disputes through one process do not absolve petitioners from the filing requirements of others they might alternatively seek to use. Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980)

Accordingly, the initial decision of the Office of Administrative Law is affirmed and the instant matter dismissed as a controversy before the Commissioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1991

DATE OF MAILING - JULY 10, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6866-90
AGENCY DKT. NO. 252-7/90

RITA M. EBERHARD,
Petitioner,
v.
BOARD OF EDUCATION OF BOROUGH OF BERGENFIELD, BERGEN COUNTY,
Respondent.

Philip E. Stern, Esq., for petitioner

Sidney A. Sayovitz, Esq., for respondent
(Greenwood, Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: April 25, 1991 Decided: May 30, 1991

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

The position of Rita M. Eberhard, a tenured teaching staff member employed by the Board of Education of the Borough of Bergenfield, Bergen County, as assistant superintendent, administration/personnel, was abolished by action of the Board on May 8, 1990 in an administrative reorganization. On June 5, 1990, the Board reassigned petitioner to the position of middle school principal. In a petition of appeal filed with the Commissioner of the Department of Education on July 20, 1990, she alleged that Board action in abolishing her former position was contrary to and in abridgment of her rights under N.J.S.A. 18A:28-9. She sought judgment reinstating her to her former position together with differential back pay and emoluments. The Board admitted the position abolishment but contended it acted in good faith in furtherance of an administrative reorganization. The Commissioner transmitted the matter to the Office of Administrative Law on August 29, 1990 for

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hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on November 14, 1990, and an order was entered, establishing, inter alia, a hearing date on March 25, 1991. It was heard and concluded then. Thereafter, time for posthearing submissions having been allowed and such submissions having made, the record closed on April 25, 1991.

As established by prehearing order, at issue were the following:

(1) Whether petitioner shall have established by a preponderance of the credible evidence that Board action in abolishing her former position of assistant superintendent, administration/personnel, was arbitrary, in bad faith and/or otherwise in violation of her rights under N.J.S.A. 18A:28-9; and

(2) If so, whether petitioner is entitled to relief as demanded.

ADMISSIONS, STIPULATIONS AND PRELIMINARY FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following preliminary findings of fact:

1. Petitioner Rita Eberhard began service in the Bergenfield school district in 1968 as a Spanish teacher.

2. Petitioner continued serving as teacher until the 1981 school term. She was appointed an assistant principal for the 1981 school term. Petitioner served under a principal/supervisor certificate.

3. In or about August 1983 petitioner was appointed to the position of principal. She served under a principal/supervisor certificate.

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4. Petitioner continued to serve as principal until August 1985 when she was appointed to the position of supervisor of administration/continuing education. Petitioner served under a principal/supervisor certificate from August 1985 to April 1986, when she served under a school administrator certificate.

5. In or about July 1989 petitioner's title was changed from supervisor of administration/continuing education to assistant superintendent for administration/personnel. Petitioner served under a school administrator certificate. The job description for assistant superintendent administration/personnel is R-15. Petitioner has achieved tenure in the position of assistant superintendent.

6. For the period of July 1, 1989 through June 30, 1990, petitioner's salary was $73,200.

7. Petitioner's evaluations as an administrator were consistently excellent.

8. The Board's budget for the 1990-91 school year was defeated by the electorate on April 24, 1990.

9. On May 24, 1990, the Board approved the positions of assistant to the superintendent and administrative assistant to the school business administrator.

10. On or about June 12, 1990, Mary Ellen Bolton was assigned to the position of assistant to the superintendent and Richard Cirelli was assigned to the position of administrative assistant to the school business administrator, effective July 1, 1990.

11. On June 5, 1990, the Board advised petitioner that she was to be assigned to the position of middle school principal. Her salary for the period July 1, 1990 through June 30, 1991 is $73,200.

12. On June 8, 1990, petitioner advised the Board she would assume the position of middle school principal under protest.

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EVIDENCE AT HEARING

Essential facts at hearing were not in dispute. The Board's educational budget for 1990-91 was defeated by the electorate in April 1990. Acting to respond, the Board at an executive work meeting on May 3, 1990 opened discussions to meet necessary budget reductions. Minutes of the meeting reflected the following (R-10 at 4):

> Discussion of options for reductions to the 1990-91 defeated budget--Board discussed various options that had been presented by the administration. President Tarantula presented an option that she had put together, calling for the elimination of several positions. It was a combination of options presented by the administration. It called for the elimination of the two assistant superintendents, the director of activities at the high school, one guidance counselor at the high school, one guidance secretary at the high school, one secretary/clerk at the high school main office/library, elimination of department chairman for vocational education; also elimination of department chairpersons' positions for social studies, science and modern language. Option also called for the creation of new supervisors positions, elimination of director of reading and speech, etc.
>
> It was determined that these reductions in staff size could affect $725,000 reduction to the 1990-91 tax levy. Forty-two thousand dollars was to be appropriated from free balance as part of the overall reduction and tax levy requirements. The Board agreed to present this plan to the mayor and council at the joint meeting scheduled for May 7, 1990.

By roll call vote on May 8, 1990, the Board voted to abolish, effective July 1, 1990, the positions of assistant superintendent of schools-administration/personnel and assistant superintendent of schools-curriculum/instruction, as well as numerous other positions. R-11A. At a special Board meeting on May 24, 1990, the Board voted to create and approve job descriptions for two new positions, assistant to the superintendent of schools and administrative assistant to the school business administrator. R-13B.

The job description for the new position of assistant to the superintendent, with described duties, specified qualifications that the appointee hold a master's degree and a New Jersey school supervisor's certificate, reporting to the superintendent of schools. R-18. The new position of administrative assistant to the

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school business administrator specified the appointee have qualifications of a master's degree and a New Jersey school supervisor's certificate, the appointee to report to the superintendent of schools and the school business administrator. R-17. The Board's request of the Bergen County superintendent of schools, pursuant to N.J.A.C. 6:11-3.6, to use the two unrecognized title positions was approved, with the legal title of each as "supervisor." P-6A. The two abolished positions of assistant superintendent for administration/personnel and assistant superintendent for curriculum/instruction had specified the incumbent in each position hold a New Jersey school administrator's certificate. R-15 and R-16.

Testimony of the superintendent, P. William Goione, and Jeffrey R. Scott, school business administrator/Board secretary since 1985, established that the duties of the former assistant superintendent for administration/personnel were divided and re-divided to the new position of assistant to the superintendent, where possible, or to the school business administrator, to a newly contracted-for professional labor negotiator, to elementary school principals, to various other supervisors, and, where necessary, to the superintendent himself. In all, the superintendent said, he found himself having voluntarily assumed numerous new duties that could not be performed by assistants under supervisor certification or by others.

The result was a massive administrative and supervisory re-organization, employing a division and re-division of individual position employment duties and responsibilities from abolished positions to new positions, prompted by the economic necessity of achieving the electorate-mandated budgetary reductions. The process was open and deliberate; it was a process in which petitioner herself took part as assistant superintendent. See R-19. In the judgment of the superintendent and business administrator, the process successfully achieved the desired economies.

DISCUSSION AND CONCLUSION

Petitioner argued generally that she should be reinstated to her former position as assistant superintendent because the Board did not lawfully abolish the position. She urged the Board merely changed the title to her former position and

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combined her duties into those assigned to the two new assistant to the superintendent or business administrator positions. Petitioner urged, as well, any alleged monetary savings reductions were illusory and fictitious, the district now being required to spend more money as a result of the position abolishment. Petitioner's memorandum of law attempted to track the dollar amounts not saved and new dollar amounts assumed.

The Board argued that N.J.S.A. 18A:28-9 specifically empowered the Board to act to reduce its teaching staff for reasons of economy and for the purpose of administrative or supervisory reorganization; in that effort, Board action enjoys a presumption of regularity, correctness and validity. Evidence is clear Board efforts were successful and accomplished without arbitrariness, capriciousness or bad faith. The Board recalled words of the Commissioner in Stanton and Washington v. Board of Ed., Twp. of Hillside, Union County, 1987 S.L.D. -- (Commissioner's decision May 15, 1987, at 15):

> When a board of education abolishes a position, it does not necessarily follow that the duties associated with that position must be abolished . . . It is well established that the duties of an abolished position may be combined with the duties of another existing position when the consolidation is undertaken for sound educational reasons.

I have reviewed documentary evidence and the testimony of petitioner and witnesses for the Board. I **FIND** Board action in abolishing petitioner's former position as assistant superintendent for administration/ personnel, as well as the other assistant superintendency for curriculum, was part of an open, deliberate and reasonable administrative reorganization involving a division and re-division of labor among duties of the abolished positions and duties of the new positions of assistant to the superintendent and assistant to the school business administrator. I reject petitioner's arguments that economic savings were fictitious or illusory as unfounded and particularly reject such arguments to support a claim the Board acted arbitrarily or capriciously. Ultimate cost-effectiveness of re-organization by position abolishment is not dispositive of the inquiry here so long as purpose and effort were reasonable and well-intended.

Petitioner does not seek appointment to the new positions; she seeks re-creation of and reinstatement to her former position of assistant superintendent.

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Her right to such relief may not be vindicated here on these proofs; whatever rights she has are those of preferred eligibility under N.J.S.A. 18A:28-12.

The petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 30, 1991
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

June 3, 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 05 1991
Date

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LIST OF EXHIBITS

J-1 Stipulations of fact

P-1 Certificate endorsement of petitioner as school administrator, dated April 1986

P-2 Certificate endorsement of petitioner as secondary school teacher of Spanish, dated June 1968

P-3 Certificate endorsement of petitioner as principal/supervisor, dated February 1981

P-4 Evaluation of petitioner as assistant superintendent administration/ personnel, dated February 15, 1990

P-5 List of central administration salaries including that of petitioner at $73,200 for 1989-90 and at $80,200 for 1990-91

P-6 Job description for administrative assistant to school business administrator as of May 24, 1990

P-6A Authorization of county superintendent for position titles of administrative assistant to the school business administrator and assistant to the superintendent, pursuant to N.J.A.C. 6:11-3.6

P-7A Job description for assistant to superintendent and certificate requirement, dated September 1990

P-7B Job description for administrative assistant to school business administrator with certificate requirement, dated September 1990

P-8 Memorandum of superintendent to principals, directors and secretaries, dated August 28, 1990, concerning distribution of duties in central staff

P-9 Minutes of principals' meeting, dated September 12, 1990, concerning appointment of affirmative action officer

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P-10 Superintendent's newsletter, dated December 1990, concerning appointment of affirmative action officer

P-11 Minutes of Board of Education executive work meeting, dated March 7, 1991, concerning proposed administrative intern position for central office

R-1 Minutes of Board Meeting - October 5, 1989

R-2 Minutes of Board Meeting - November 8, 1989

R-3 Minutes of Board Meeting - November 14, 1989

R-4 Minutes of Board Meeting - January 4, 1990

R-5 Minutes of Board Meeting - January 9, 1990

R-6 Minutes of Board Meeting - March 8, 1990

R-7 Minutes of Board Meeting - April 5, 1990

R-8 Minutes of Board Meeting - April 26, 1990

R-9 Minutes of Board Meeting - April 30, 1990

R-10 Minutes of Board Meeting - May 3, 1990

R-11 Minutes of Board Meeting - May 8, 1990

R-11A Resolution abolishing two assistant superintendent positions

R-12 Minutes of Board Meeting - May 16, 1990

R-13 Minutes of Board Meeting - May 24, 1990

R-13A Resolution authorizing filing of budget appeal

R-13B Resolution creating positions of assistant to superintendent and administrative assistant

R-14 Minutes of Board Meeting - June 12, 1990

R-15 Job description - assistant superintendent for administration/personnel

R-16 Job description - assistant superintendent for curriculum/instruction

R-17 Job description - administrative assistant for the school business administrator

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R-18 Job description - assistant to the superintendent

R-19 Memo from R. Eberhard to Board - April 26, 1990

R-20 Memo from R. Eberhard to Board - May 1, 1990

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RITA M. EBERHARD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, RESPONDENT.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and replies by the Board were timely filed pursuant to N.J.A.C. 1:1-18.4.

In her exceptions, petitioner objects to the ALJ's conclusions of both fact and law. With regard to fact, petitioner maintains that she met her burden of demonstrating that the position of Assistant to the Superintendent was in every respect the abolished Assistant Superintendency to which she claims entitlement. The ALJ erred, petitioner contends, in relying on Exhibit R-18 as descriptive of the newly created position of Assistant to the Superintendent, as that document dates from September 1990, four months after the Board's initial submission of a job description for the position (P-6) to the County Superintendent and after the position had undergone "dramatic" change. R-18 and its attendant changes also date, petitioner notes, from after the filing of her appeal in July 1990. These changes

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represent a plain attempt on the part of the Board to minimize similarities between petitioner's prior position and the newly created one, an indication of bad faith erroneously ignored by the ALJ. (Exceptions, at pp. 1-4)

With regard to law, petitioner avers that, contrary to the holding of the ALJ, the ultimate cost-effectiveness of a reorganization must be considered by the trier of fact in ascertaining whether an abolition of position was done in good faith. Herein, the Board was unable to demonstrate any savings, while petitioner presented evidence that the reorganization had actually cost the district additional money. (Exceptions, at pp. 4-5)

In reply, the Board initially objects to petitioner's characterization of the changes between the earlier and later job descriptions as "dramatic," maintaining that the changes that occurred were neither significant nor unusual in terms of normal shifting of duties among administrators, particularly following a reorganization. Moreover, even considering the changes, none of the resulting positions, before or after, was substantially similar to the abolished position held by petitioner. The Board further objects to petitioner's characterization of its testimony on cost savings, indicating that Superintendent Goione clearly testified that an approximate savings of $725,000 was realized by the total reorganization. But, the Board adds, even if a savings had not finally been realized as planned, the absence of proof of bad faith on the part of the Board would still entitle its actions to be upheld.

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Upon careful review of this matter, the Commissioner finds that the arguments raised by petitioner in her exceptions are in their entirety a reiteration of those presented before the ALJ at hearing and in briefing, and that there is no basis in the record on which to disagree with the ALJ's assessment of those arguments. To the contrary, the Commissioner concurs with the ALJ that the Board's reorganization was conducted in a good faith effort to effect economies in staffing while still performing essential duties and that no position resulting from the reorganization was, or is, so substantially similar to the abolished assistant superintendency as to entitle petitioner to seek recreation of and reinstatement to that position.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons well stated therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 16, 1991

DATE OF MAILING - JULY 16, 1991

Pending State Board

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OAL DKT. NO. 04004-91

JOHN A. MULHERN, ASSISTANT COMMISSIONER, DIVISION OF COUNTY AND REGIONAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

Sally Ann Fields, DAG of counsel for petitioner (Robert J. Del Tufo, Attorney General of New Jersey)

Joseph J. Ryglicki, Esq., for respondent (Shulman, Hanly, Ryglicki, Lindsley & Wall)

Whereas, this matter was opened before the Commissioner of Education by petitioner on April 11, 1991 through the filing of a Petition for Administrative Order and Order to Show Cause; and

Whereas, the petitioner seeks the creation of a State-operated school district in the City of Paterson under the provisions of N.J.S.A. 18A:7A-14 and N.J.S.A. 18A:7A-34 et seq. and such other provisions of law which may be found to apply to remedy major deficiencies in the Paterson school district which prevent the district from providing a thorough and efficient system of public schools for the children residing in the district; and

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Whereas, upon review of the verified petition and supportive documentation, the Commissioner did sign on April 11, 1991 the Order compelling respondent to show cause before the Office of Administrative Law why the relief sought in the petition should not be granted; and

Whereas, on April 12, 1991 the matter was transmitted to the Office of Administrative Law; and

Whereas, the matter was set down for plenary hearing before the Office of Administrative for the weeks of July 22, 1991, July 29, 1991, August 5, 1991 and August 12, 1991, Stephen Weiss, Administrative Law Judge, presiding; and

Whereas, on July 11, 1991, respondent Paterson Board of Education did resolve to waive its right to a plenary hearing in the matter as set forth below:

> BE IT RESOLVED, that the Board hereby authorizes the Board Attorney to take all actions necessary, including but not limited to withdrawing its answer, entering into a consent order, or whatever else is necessary in the matter of John Mulhern, etc. vs. the Board of Education, etc., to implement a state operated school district in the City of Paterson; and
>
> BE IT FURTHER RESOLVED, that the Board Attorney is hereby authorized to enter into any consent order or take whatever other action is necessary to provide for interim relief, pending the implementation of a state operated school district; and

Whereas, the matter was returned from the Office of Administrative Law on July 17, 1991 as a result of the above resolution (N.J.A.C. 1:1-3.3); and

Whereas, on July 17, 1991 a Consent Order was entered into by the parties wherein respondent formally agreed to the waiving of a plenary hearing and the creation of a State-operated school

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district and all other relief requested in the Verified Petition for Administrative Order; and

Whereas, on July 17, 1991, another Consent Order was entered into by the parties setting forth broad powers granted to petitioner for the oversight of the operation of the Paterson school district during the pendency of the litigation on the Verified Petition for Administrative Order; and

Whereas on July 18, 1991, the Commissioner signed the above-cited consent orders; and

Whereas, respondent agreed to withdraw its Answer to the Verified Petition and its reply to the Comprehensive Compliance Investigation Report on July 17, 1991; and

Whereas, the Commissioner has thoroughly reviewed the Verified Petition and supportive documents, including the three-volume Comprehensive Compliance Investigation Report issued upon completion of a lengthy and exhaustive investigation conducted by the State Department of Education Office of Compliance Investigation and two independent consulting firms, KPMG Peat Marwick and Cresap; and

Whereas, the Commissioner finds and determines that since 1976 the Paterson school district has never been certified by the State of New Jersey under any system of monitoring as providing a thorough and efficient education to its students; and

Whereas, the Commissioner finds and determines that the record of this matter amply supports the allegations set forth in the Verified Petition for Administrative Order which reads in pertinent part:

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a. Respondent Board lacks governance and management practices reasonably designed to provide a thorough and efficient system of free public schools.

1. The Board has failed to execute its duties in a manner consistent with state law, administrative code, and its own policies and procedures.

2. The Board has failed to demonstrate the ability to work cohesively and cooperatively as a unified body.

3. The Board has not established clear priorities for itself and the district.

4. The Board has spent an inordinate amount of time on insignificant issues at the expense of fully addressing critical issues affecting the education of students.

5. The Board and superintendent have failed to establish the type of relationship that would provide the collaboration needed to correct district deficiencies.

6. The Board has not annually evaluated the superintendent.

7. The Board has acted upon resolutions without sufficiently analyzing relevant information, without thoroughly questioning senior staff members, and without being fully informed about the consequences of the action to the district.

8. The Board has not regularly reviewed its policy manual.

9. The Board has failed to maintain reasonably comprehensible minutes of its meetings; financial reports have not been appropriately filed and recorded; and meeting minutes have failed to contain complete bidding summaries.

10. The superintendent has failed to make timely decisions regarding important matters and, as a result, district

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operations have been negatively affected.

11. There has been an absence of effective management at the top which has precluded the delivery of consistently high quality educational services throughout the district.

12. The district's organizational chart(s) have not accurately represented the organizational structure under which the district operated.

13. Inaccurate advice and insufficient information provided by senior managers have led to significant losses in district finances.

14. A lack of consistent leadership in the business office and poor relationships between the superintendent and various individuals serving as the business administrator have led to inefficient business office practices and procedures.

15. The district has continued to employ individuals who did not possess appropriate certification.

16. District desegregation and affirmative action activities have not complied with administrative code and guidelines.

17. No comprehensive planning process for the district has been established to identify the critical needs and to develop ways to meet them.

18. Poor managerial policies and procedures have negatively affected the educational services delivered to students.

19. Even though significant technical assistance was provided, the district's management staff has failed to fully implement interim action plans designed to correct identified deficiencies.

b. The district does not have a consistently effective and efficient system in place for the delivery of educational programs and services to students.

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1. Curriculum guides have not been current, have not provided an effective mechanism for guiding the delivery of instruction to students, and have not been annually adopted by the Board.

2. Effective staff inservice programs designed to improve the staff's professional performance have not been effectively conducted.

3. A lack of communication between various organizational levels has resulted in separate, independent areas of control among schools and programs which has inhibited implementation of district-wide efforts.

4. Libraries and library services have not been consistently provided within all schools.

5. The district has lacked an efficient system for the ordering and delivery of instructional texts, supplies, and materials.

6. The district has not been in compliance with special education law and has not been implementing programs and services pursuant to regulation.

c. The district does not operate an efficient, effective, and appropriate system of finance which would provide a thorough and efficient system of free public schools.

1. Inefficient administration of district finances has resulted in the considerable loss of district funds.

2. The district's recordkeeping system has failed to provide a clear audit trail.

3. Recommendations made by district auditors regarding necessary improvement in various areas have not been subsequently implemented by the district.

4. Administration of the district's health benefits plan has been mismanaged.

5. The purchasing process has been poorly coordinated.

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6. The Board's budget has not addressed the district's goals and objectives, and district administrators have not been sufficiently involved in the budget development process.

7. The Board has failed to provide adequate safeguards of its liquid assets.

8. Competitive bidding practices have been restricted.

9. The district's facilities have had significant deficiencies even though similar deficiencies had been cited previously; now therefore

In conformity with with the provisions of N.J.S.A. 18A:7A-15, the Commissioner of Education finds and determines that the Board of Education of the City of Paterson has failed to take, and is unable to take, the corrective actions necessary to establish a thorough and efficient system of education and, accordingly, he recommends to the State Board of Education that it issue an Administrative Order creating a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

John Ellis
COMMISSIONER OF EDUCATION

JULY 23, 1991

DATE OF MAILING - JULY 23, 1991

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JOHN A. MULHERN, ASSISTANT COMMISSIONER, DIVISION OF COUNTY AND REGIONAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
PETITIONER,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

Decided by the Commissioner of Education, July 23, 1991

For the Petitioner, Sally Ann Fields, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

For the Respondent, Joseph J. Ryglicki, Esq.

This matter is before us today on recommendation of the Commissioner of Education made pursuant to N.J.S.A. 18A:7A-15. As set forth in his decision of July 23, 1991, based upon his review of the petition in this matter and the supportive documents, including the Comprehensive Compliance Investigation Report (hereinafter "CCI" or "Report") issued pursuant to N.J.S.A. 18A:7A-14(e), the Commissioner determined that the school district of the City of Paterson has failed to take and is is unable to take the corrective actions necessary to establish a thorough and efficient system of education. Therefore, as mandated by N.J.S.A. 18A:7A-15, the Commissioner is recommending that the State Board of Education exercise the authority conferred on us by that statute to issue an administrative order directing the removal of the district board and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

This recommendation results from the issuance of a show cause order by the Commissioner of Education pursuant to N.J.S.A. 18A:7A-14(e) following a comprehensive compliance investigation. Although the matter was transmitted to the Office of Administrative Law for plenary hearing as required by N.J.S.A. 18A:7A-14(e), the Board of Education of the City of Paterson resolved on July 11, 1991, to waive its right to plenary hearing and to consent to interim relief pending implementation of a Consent Order agreeing to such waiver and the creation of a State-operated school district. A Consent Order embodying the Paterson Board's agreement to waive its right to plenary hearing and to consent to recommendation by the Commissioner for the creation of a State-operated school district was entered into on July 17, 1991, and executed on July 18.

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Simultaneously, by separate order, the District consented to oversight of the Paterson School District during the pendency of this matter.

As set forth in his decision of July 23, 1991, the Commissioner found that the District had not been certified since 1976 under any system of monitoring as providing a thorough and efficient education and that the record amply supported the allegations set forth in the petition upon which the Commissioner had issued the Order to Show Cause. As detailed in his decision, those allegations charged that the Paterson Board lacked governance and management practices reasonably designed to provide a thorough and efficient system of public schools; that the District did not have a consistently effective and efficient system in place for the delivery of educational programs and services to its students, and that it did not operate an efficient and appropriate system of finance which would provide a thorough and efficient system of public schools.

Our own review of the Compliance Investigation Report convinces us that intervention is required in this case if the children of Paterson are to be afforded the educational opportunity guaranteed by our State's constitution. The CCI Report shows clearly a picture of long term educational failure, managerial and administrative ineptness, and the failure of the Paterson Board of Education to develop and implement governance practices aimed at addressing the District's myriad of managerial and educational problems. In point of fact, given the substance of the CCI Report, the Paterson Board's resolution to consent to the creation of a State-operated school district could be viewed as equivalent to an admission that it is unable or unwilling to fulfill its ultimate responsibility to provide the District with governance such that the District can provide a thorough and efficient system of education to its students.

As stated, the Report documents the District's long term educational failure. Not only has this district failed to achieve State certification since 1976 under any system of monitoring, but failed even to develop an acceptable Level II remedial plan. Rather than improvement, the CCI Report shows a picture of educational deterioration despite the support for educational improvement that has been provided to this district by the New Jersey Department of Education.

After examining the CCI Report carefully, we have no doubt that this district's educational failure is inextricably linked to its managerial ineptness and the failure of the Paterson Board to address the District's problems through effective self governance practices. Indeed, the CCI shows unambiguously a failure of the Board to work cohesively and cooperatively as a unified body so as to be able to even begin to address those problems.

We recognize fully that it is our responsibility to insure that this situation is rectified. Robinson v. Cahill, 62 N.J. 473 (1973); Robinson v. Cahill, 69 N.J. 479 (1976). Given the educational and managerial failure evidenced here combined with the

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failure of governance, we conclude that it is imperative that we exercise the authority conferred on us by N.J.S.A. 18A:7A-15 and N.J.S.A. 18A:7A-15.1 to insure that the constitutional right of the children of the school district of Paterson to a thorough and efficient education is effectuated. We therefore direct that the President of the State Board of Education immediately execute the administrative order appended to this decision, by which we direct the removal of the district Board of Education of the City of Paterson and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.

August 7, 1991

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STATE OF NEW JERSEY
STATE BOARD OF EDUCATION
STATE BOARD DOCKET #35-91

JOHN A. MULHERN, ASSISTANT COMMISSIONER, DIVISION OF COUNTY AND REGIONAL SERVICES, NEW JERSEY STATE DEPARTMENT OF EDUCATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

ADMINISTRATIVE ORDER

This matter having been opened before the Commissioner of Education by the filing of a Verified Petition and an Order to Show Cause by Robert J. Del Tufo, Attorney General of New Jersey, attorney for petitioner, John A. Mulhern, Assistant Commissioner, Division of County and Regional Services, by Sally Ann Fields, Deputy Attorney General; and an Order to Show Cause having been entered by the Commissioner of Education on April 11, 1991; and the matter having been transmitted to the Office of Administrative Law on April 12, 1991; and said Petition having been answered by Joseph J. Ryglicki, Esq., attorney for respondent Board of Education of the City of Paterson; and the respondent Board of Education of the City of Paterson having resolved on July 11, 1991, to authorize its attorney to take all actions necessary to implement a State-operated school district in the city of Paterson and to provide for interim relief pending implementation of said State-operated School district; and respondent's answer to the Petition having been withdrawn by Joseph J. Ryglicki, Esq., attorney for respondent, on July 17, 1991; and Consent Orders having been entered into by the parties on July 17, 1991, and executed on July 18, 1991, wherein said Board waived its right to a plenary hearing and consented to the creation of a State-operated school district and to recommendation by the Commissioner of Education to the State Board of Education that it issue an Administrative Order creating a State-operated school district and to the terms of interim measures; and the Commissioner of Education having issued a decision on July 23, 1991, recommending the issuance of an Administrative Order; and the State Board of Education having considered the record in this matter and having determined that the school district of the City of Paterson is not providing a thorough and efficient education and

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that determination having been embodied in a written decision issued on August 7, 1991, and the basis of that decision not being solely the district's failure to correct substandard facilities,

It is on this _____ day of August, 1991,

ORDERED that pursuant to N.J.S.A. 18A:7A-15, N.J.S.A. 18A-7A-15.1 and N.J.S.A. 18A:7A-34, the Board of Education of the City of Paterson be removed; and it is further

ORDERED that pursuant to N.J.S.A. 18A:7A-15, N.J.S.A. 18A:7A-15.1 and N.J.S.A. 18A:7A-34, a State-operated school district be created whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.; and it is further

ORDERED that pursuant to N.J.S.A. 18A:7A-35, the Commissioner of Education recommend an individual qualified by training and experience for appointment by the State Board of Education pursuant to N.J.S.A. 18A:7A-15.1 as State district superintendent of schools to direct all operations of the district; and it is further

ORDERED that the Commissioner of Education take all other actions as are necessary to implement the provisions of N.J.S.A. 18A:7A-34 et seq.; and it is further

ORDERED that this Administrative Order shall remain in effect until lifted by the State Board of Education upon application and recommendation of the Commissioner of Education made pursuant to N.J.S.A. 18A:7A-49(b).

John Ellis, Secretary
State Board of Education

Dr. James A. Jones, President
State Board of Education

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RESOLUTION

WHEREAS, on August 7, 1991, the State Board of Education issued an administrative order pursuant to N.J.S.A. 18A:7A-15 directing the removal of the district board of education of the school district of the City of Paterson and the creation of a State-operated school district whose functions, funding and authority are defined in N.J.S.A. 18A:7A-34 et seq.; and

WHEREAS, pursuant to N.J.S.A. 18A:7A-34, this order was effective immediately upon issuance thereof; and

WHEREAS, N.J.S.A. 18A:7A-46 and N.J.S.A. 18A:7A-35(a) mandate that a State-operated school district and the schools of such district be conducted by and under the supervision of a State district superintendent appointed by the State Board of Education upon recommendation of the Commissioner; and

WHEREAS, N.J.S.A. 18A:7A-35(b) requires that the State district superintendent be appointed for an original term not to exceed five years; and

WHEREAS, N.J.S.A. 18A:7A-35(a), requires that the individual selected be qualified by training and experience for the particular district; and

WHEREAS, the Commissioner of Education has recommended to the State Board of Education the appointment of Laval S. Wilson as State district superintendent for the State-operated school district of the City of Paterson for an original term of three years effective immediately; and

WHEREAS, Laval S. Wilson possesses the qualifications to serve as State district superintendent of the State-operated district of the City of Paterson; and

WHEREAS, Laval S. Wilson has distinguished himself as one of the nation's leading urban educators; and

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WHEREAS, Laval S. Wilson has an outstanding record of accomplishment as a school leader; and

WHEREAS, Laval S. Wilson possesses extensive experience as an urban district superintendent; now therefore be it

RESOLVED, that the New Jersey State Board of Education appoints Laval S. Wilson as State district superintendent for the State-operated school district of the City of Paterson; and be it further

RESOLVED, that this appointment is for an original term of three years effective immediately; and be it further

RESOLVED, that by virtue of this appointment Laval S. Wilson possesses all powers conferred by N.J.S.A. 18A:7A-35 et seq. and shall perform all duties as required by N.J.S.A. 18A:7A-35 et seq. for the conduct and supervision of the State-operated school district of the City of Paterson and its schools; and be it further

RESOLVED, that the State Board of Education charges Laval S. Wilson with the responsibility for the immediate implementation of the administrative order issued on this date creating the State-operated school district of the City of Paterson.

Secretary, State Board of Education

President, State Board of Education

August 7, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING PETITION AS MOOT
OAL DKT. NO. EDU 3847-89
AGENCY DKT. NO. 156-5/89

FIRST SCHOOL FOR CAREERS,
Petitioner,
v.
DIVISION OF VOCATIONAL EDUCATION
OF THE NEW JERSEY STATE
DEPARTMENT OF EDUCATION,
Respondent.

Jean-Claude Levy, President, First School for Careers, for petitioner, appearing pursuant to N.J.A.C. 1:1-5.4(a)5

Arlene G. Lutz, Deputy Attorney General for respondent (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: June 6, 1991 Decided: June 18, 1991

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

In May 1989, First School for Careers ("First School"), a private vocational school, petitioned for relief relative to the Department of Education's regulation and approval of its programs. See, N.J.S.A. 18A:54-1 et seq. and N.J.A.C. 6:46-1.1 et seq. In particular, First School demanded that the Department approve certain of its programs.

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The Department points out that, in September 1989, First School "closed its doors and ceased offering instructional programs"; that First School's regulatory one-year period of approval of its programs has expired; that in 1990, First School withdrew its application for approval of its programs; and that, now, First School has no pending application for approval of its programs. See, N.J.A.C. 6:46-4.15(a) and DE-3. Therefore, the Department submits that First School's petition must be dismissed as moot.

First School does not deny the Department's allegation that it ceased operation. However, First School objects to the Department's motion and submits that its claims must be heard "(1) to demonstrate the negligence and nonchalance of the New Jersey Department of Education and its commitment to put First School out of business . . . and (2) [to demonstrate] the fact that [First] School had been offering a sound bilingual program which met the needs of the community." See, FSC-5.

PROCEDURAL HISTORY

The procedural history set forth in my June 28, 1989 order in this case is incorporated here and supplemented as follows:

On June 28, 1989, I entered an order denying First School's motion for interim relief and providing for discovery and plenary hearing. Following the June 28, 1989, order, First School filed an amended petition and the Department filed an answer thereto. On December 29, 1989, the case was conferenced and the petitioner, which represented that it was in bankruptcy, requested and received a period of inactivity for the case. In June 1990, with First School's consent, Giblin and Giblin, its former attorney, withdrew from the case. In June 1990, again in July 1990, and again in August 1990, I wrote to First School and asked whether it was ready to prosecute its case and, by letter dated August 19, 1990, First School responded stating that it had "voluntarily withdrawn from participating as a proprietary school in the State of New Jersey" and that it was "requesting that an order be entered . . . dismissing [its petition] without prejudice." Before such an order could be entered, however, First School notified me that it had a change of plans and it requested another period of inactivity for the case, which was accomplished by way of my August 24, 1990, order.

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By letter dated February 19, 1991, First School announced that it wished to prosecute its case and, on March 19, 1991, the Department filed its papers in support of this motion to dismiss the petition. First School requested and received extensions of time to file its objection and papers responding to the Department's motion and First School's letters in this regard were filed on May 16 and June 6, 1991. The Department's hand-delivered letter was received on June 6, 1991, closing the record.

FINDINGS OF FACT

The factual discussion set forth in my June 28, 1989, order in this case is incorporated here and supplemented as follows:

First School does not dispute the Department's allegation that, since September 1989, it has "closed its doors and ceased offering instructional programs"; its regulatory one-year period of approval of its programs has expired; in 1990, it withdrew its application for approval of its programs; and it has no pending application for approval of its programs. See, FS-3, FS-4, FS-5 and DE-3. See also, N.J.A.C. 6:46-4.15(a).

First School states that, presently, it is awaiting the result of its litigation in the United States District Court for the District of New Jersey, after which, if it is successful, it will "consider offering . . . programs" which are subject to the Department's jurisdiction and approval. See, FSC-4.

LEGAL ISSUES AND CONCLUSIONS

The Department submits that, in the present circumstances, the issues raised by First School's petition need not and should not be determined. That is, since First School is not operating, since it does not presently offer the programs for which it petitioned for approval in 1989 and since it has no pending application for approval of programs, First School's petition must be dismissed as moot.

An OAL (administrative quasi-judicial) determination, such as this one, must be governed by notions of due process and fundamental fairness. See, N.J.S.A. 52:14B-2(b) and (c); N.J.S.A. 52:14B-9 and 10; N.J.S.A. 58:10A-10d; Juzek

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v. Hackensack Water Co., 48 N.J. 302, 314-315 (1966); and State, Dept. of Envir. Protection v. Stavola, 103 N.J. 425, 436n2 (1986). Consistent with these notions, the Department, defending First School's petition's claims, is entitled to certain defenses, e.g., the Department may be entitled to dismissal of the petition for mootness. See, N.J.A.C. 1:1-1.3(a), R.2:8-2, R.4:5-3 et seq., and R.4:6-1 et seq.

A case is moot when circumstances have changed, e.g., by virtue of the passage of time and operation of law such that the relevant controversy no longer exists and there is no real or no great public need for a ruling and determination of the issues in the case. See, Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976), wherein the court noted the two basic reasons for dismissal of a case as moot:

> First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed.

The essential relief sought by First School's petition is approval for programs it no longer offers and to order the Department to approve programs no longer offered would be to compel a fruitless act. See, Vacca v. Stika, 21 N.J. 471 476-477 (1956). Since First School no longer seeks that approval, I CONCLUDE that this case has become moot in fact and in law. See, Handabaka v. Division of Consumer Affairs, 167 N.J. Super. 12 (App. Div. 1979). Further, since First School has no pending application for approval of programs, it would be speculative, conjectural and premature to make a determination relative to what programs may be offered and what approvals (if any) should be given by the Department. Trombetta v. Mayor and Commissioners of City of Atlantic City, 181 N.J. Super. 203, 223 (Law Div. 1981), aff'd 187 N.J. Super. 351 (App. Div. 1982).

If, as First School hopes, it is successful in its federal district court litigation; if First School decides to again operate; if First School decides upon a

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particular program to offer; if First School applies to the Department for approval of the program; if the Department determines that it should not approve the program; and if First School appeals for a hearing relative to the Department's determination, then there will be a concrete controversy upon which a decision may be made. In the absence of such real and definite circumstances and in the absence of any great public need for a determination relative to First School's 1989 programs, however, I **CONCLUDE** that the Department's motion should be granted and the petition should be dismissed. See, Moss Estate, Inc. v. Metal & Thermit Corp., 73 N.J. Super. 56, 67 (Ch. Div. 1962), adhering to the policy of refraining from advisory opinions, from deciding moot cases or from functioning in the abstract.

ORDER

For the reasons set forth above, I **ORDER** First School's petition, amended petition, etc., **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 18, 1991
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

6/20/91
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 26 1991
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

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EXHIBITS

The exhibit list in this case's June 28, 1989, order is supplemented as follows:

For petitioner, First School for Careers:

FSC-3 Letter from First School, dated August 19, 1990

FSC-4 Letter from First School, dated May 12, 1991

FSC-5 Letter from First School, dated June 3, 1991, with letter from Department of Education, dated July 10, 1990

For respondent, Department of Education:

DE-3 Letter from Department of Education, dated July 3, 1990

DE-4 Letter from Department of Education, dated July 5, 1990

DE-5 Affidavit of William R. Smith, dated March 12, 1991

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FIRST SCHOOL FOR CAREERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DIVISION OF VOCATIONAL EDUCATION OF THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record of this case, the Commissioner concurs with the Office of Administrative Law that the instant matter is moot, for the reasons expressed in the initial decision.

Accordingly, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

JULY 23, 1991
DATE OF MAILING - JULY 23, 1991

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IN THE MATTER OF THE TENURE HEARING OF PATRICIA GOLDEN, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Charlotte Kitler, Esq., for petitioner

Whereas, this matter was opened before the Commissioner on June 5, 1991 through the filing of tenure charges by petitioner against Patricia Golden, a tenured teacher employed in the State-operated school district of Jersey City for unbecoming conduct and abandonment of position; and

Whereas, petitioner has documented it was unable to serve the tenure charges on respondent because she moved without leaving a forwarding address; and

Whereas, respondent has been absent from her employment since January 15, 1988 and, as a result, petitioner was unable to serve her the charges at her work site; and

Whereas, the acknowledgement to respondent of the filing of the tenure charges with the Commissioner was returned to the State Department of Education as undeliverable because she had moved and the letter was not forwardable; and

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Whereas, the Commissioner has reviewed the tenure charges and statement of evidence charging respondent with conduct unbecoming a teacher and abandonment of position since she has not reported to work since January 1988; now therefore

IT IS ORDERED this 31st day of July 1991 that Respondent Patricia Golden is DISMISSED from her tenured position as a teacher in the Jersey City school district.

The matter shall, therefore, be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action pursuant to N.J.A.C. 6:11-3.6(a)1.

ACTING COMMISSIONER OF EDUCATION

JULY 31, 1991

DATE OF MAILING - JULY 31, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3564-90
AGENCY DKT. NO. 50-3/90

IN THE MATTER OF THE TENURE
HEARING OF SHEILA GREEN,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,
HUDSON COUNTY

Kathleen S. Johnson, Esq., for the State-operated School District
(Murray, Murray & Corrigan, attorneys)

Philip Feintuch, Esq., for respondent
(Feintuch and Porwich, attorneys)

Record Closed: May 24, 1991 Decided: June 14, 1991

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

The district superintendent of schools of the State-operated school district of the City of Jersey City, Hudson County, filed tenure charges on February 2, 1990, against Sheila Green, a tenured teaching staff member, of unbecoming conduct, chronic and excessive absenteeism, extended unauthorized leave and abandonment of teaching position. Charges and specifications were filed under authority of N.J.S.A. 18A:7A 34 et seq., with supporting evidence as required under N.J.S.A. 18A:6-10 et seq. Absent written response by respondent thereto, the State district superintendent considered and found there to be probable cause to credit the charges and that, as credited, they were sufficient to warrant respondent's dismissal. The determination was certified to the Commissioner of the Department of Education on March 5, 1990. An answer in general

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denial was filed by respondent on April 27, 1990. No procedural irregularity was alleged in the filing, determination and certification of charges, under N.J.A.C. 6:24-5.1 et seq. The Commissioner transmitted the matter to the Office of Administrative Law on May 8, 1990 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on July 3, 1990 and an order was entered. A hearing date of November 7, 1990 was adjourned at request and/or with consent of the parties. The matter was heard and concluded on March 5, 1991. Thereafter, time for post-hearing submissions having elapsed, and such submissions having been made, the record closed on May 24, 1991.

As provided in the prehearing conference order, at issue in the matter is whether the state district superintendent shall have proven by a preponderance of the credible evidence that tenure charges and specifications against respondent are true; and, if so, whether respondent should be reduced in compensation or removed from her employment.

PRELIMINARY FINDINGS OF FACT

Documentary evidence having so established without contradiction, I make the following preliminary findings of fact:

1. Respondent's attendance record as teacher for 1984-85 showed total absences of 23 days and one and a half hours. (J-3).

2. Petitioner's annual performance report for June 1, 1985 specified respondent needed to correct deficiencies in attendance/punctuality and review the past year's attendance and tardiness records. Her increment for 1985-86 was not recommended. (J-4).

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3. The superintendent of schools notified respondent by letter on July 16, 1985, the Board had resolved to withhold her increment for the 1985-86 school year (sic) for unsatisfactory performance evaluation from the school principal. (J-5).

4. Respondent's attendance record for 1985-86 showed 35 personal illness absences. (J-6).

5. Respondent's attendance record for 1986-87 showed personal illness absences of 105 days and three quarters of an hour. (J-7).

6. Respondent's attendance record for 1987-88 showed personal illness absences of 47 days and one quarter hour. (J-8).

7. Respondent's attendance record for 1988-89 showed personal illness absences of 56 days and two and a half hours. (J-9).

8. Respondent was advised by her building principal on March 7, 1989 that she was recommending withholding respondent's increment for 1989-90 for excessive absence, noting this was the third year of excessive absences, repeated excessive absence being unacceptable. (J-10).

9. Observation and evaluation report of petitioner on March 14, 1989 noted that continuing erratic attendance of the teacher has a negative impact on delivery of educational services to the students. (J-11).

10. Petitioner's annual written performance report of June 21, 1989, recommended respondent's increment for 1989-90 be withheld for excessive absenteeism. (J-12).

11. Respondent's principal in a memorandum to the superintendent on January 11, 1990, noted that five social studies classes assigned to petitioner had been devoid of instruction for an excessive period of time and that the school had

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no communication with respondent since December 22, 1989. It was impossible, said the superintendent, to understand the deplorable lack of responsibilty, the most devastating part of the problem being the educational dilemma imposed upon students in the school for lack of instruction.

12. Respondent displayed a lack of professionalism and a total disregard for responsibility, the principal said. A summary of her attendance and tardiness record showed absences of 35 days, tardy 35 days from September 1989 to the then present, January 11, 1990; there was non-notification to the school of absence on nine occasions. Respondent was regarded as unsatisfactory for the entire school year 1989-90. (J-13).

13. Respondent's principal notified her on October 25, 1989 that already she had a total of 14 and one quarter absentee days since start of school. She had been tardy thirteen times since then. She lost approximately 50 percent of the total instructional time allotted in the school calendar. (J-14).

14. On August 2, 1989 an assistant superintendent cautioned petitioner she faced disciplinary action if her unsatisfactory attendance pattern continued. (J-15).

15. Respondent applied for medical leave of absence on November 1, 1989. (J-16).

16. Tenure charges were filed against her on February 2, 1990.

EVIDENCE AT HEARING

I

Called by the Board, Lennon Ross, principal at Snyder High School for the past 15 years, testified he knew respondent during her assignment there in 1989-90 as social studies teacher. Her performance, he said, was marred by an excessive number of absentee days, 35 days in all during the period September 1989 to January 11, 1990. J-13 is her attendance record. He spoke to respondent and wrote her about her bad attendance

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and tardiness. He urged her to improve; no improvement was noted. The effect of her excessive absences, he said, was disruption of student education for want of continuity of instruction.

Ann E. Butler, a principal of Dickinson High School since 1986, knew respondent since 1987. Her attendance in 1986-87 showed 105 and three quarter days personal illness absences. (J-7). Respondent's attendance record for 1987-88 showed an absence of 47 and a quarter days absences for personal illness. Butler said she informed respondent her record was unacceptable. When asked for a reason, respondent replied she had personal problems. In 1988-89, according to Butler, respondent was absent 56 days and two and a quarter hours for personal illness. Butler recommended her increment be withheld. (J-9). Butler's memorandum to respondent of March 7, 1989, noted this was the third year of excessive absenteeism, which was entirely unacceptable. (J-10). Her annual increment was recommended to be withheld. (J-12).

Robert Schaefer, Director of Human Resources for the district since January 2, 1990, testified that respondent had missed three appointments for medical examinations, February 13, 1990, February 27, 1990, and March 15, 1990, which were scheduled because of her request for leave of absence for personal illness. It was standard practice to have a teacher examined by a school physician for any length of absence beyond five days. P-1. The impact of excessive absenteeism by a teacher, Schaefer said, was severe: his office had the duty to supply substitute teachers (there are some 2400 teachers in the district). Principals themselves, he noted, often had to do band-aid work to split classes or to double up on teachers when sudden unexplained absence by regular teachers occurred. Loss of continuity in instruction and drain on administrative facilities were obvious, he said.

II.

Respondent Sheila Green testified she has been employed by the Board since 1979, having started first as a per diem substitute. She gained a regular appointment in 1981. She holds certification in English and social studies and has taught under both. She first

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taught at Snyder High School for two years, transferred to Dickinson High School in 1983 and transferred back to Snyder High School in 1989-90.

Respondent conceded her record of attendance for 1984-85 was accurate. She could not recall all the reasons for her numerous absences but noted she had recurring bronchitis and pneumonia during that school year. She said she received okays from her doctor and supplied them to the Board. She could not recall if she ever saw her annual written performane report of June 1, 1985 (J-4). During 1984-85, she said, she was never counseled about her attendance. She did not know if her increment was ever withheld; she recalled it had been so recommended, however. Concerning her attendance for 1985-86 when her absences for personal illness were 35 days, she could not recall why she was absent, but she was sure all necessary documents for obtaining "leaves" were given to administration.

Concerning her attendance for 1986-87 (J-7), respondent said she was absent because of fracture of the fifth metatarsal bone in her left foot in the summer of 1986, when she fell down a ramp. She stayed overnight at St. Francis Hospital. She was casted to the knee and recast; it was removed in January of 1987. She was out of school from September 1986 to January 27, 1987. She had an official extended leave for that period, she said.

Concerning her attendance for 1987-88 (J-8), one reason for her excessive absence then, she said, was the death of her mother on August 27, 1987. In March of 1988, she was out 10 days because of endometriosis, all details of which for extended LOA were given to administration.

Concerning her attendance for 1988-89 (J-9), when she was out 56 days and two and a half hours, respondent said she had continuing difficulties because of endometriosis and was concerned in two trials, one a breaking and entering into her home in the spring of 1989 and another involving an accident.

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Concerning her absences in 1989-90 (J-13), the record covered September 1989 to January 1990. Respondent said she suffered a school accident when she fell on September 21, 1989, was hospitalized and stayed out a week. She did not recall the name of her doctor. She said next she was attacked by a student on October 11, 1989 and was out a week and a half and treated by a Doctor Sherman. She reinjured her side, pelvis and knee. In November-December, her doctor suggested she undergo a diagnostic laporoscomy test. She had a second operation for residuals of endometriosis and removal of fibroid tumors, the latter on December 7, 1990. She said she is still under treatment.

Respondent insists that she applied properly for all leaves of absences before February 13, 1990. She said she was told by the Board to see the Board's doctor. She couldn't because then, in March 1990, she was still under treatment. She told an unnamed woman in the Board's medical office about her situation. She brought in all necessary papers to the medical center. The last time she was paid was December 23, 1989.

Respondent said her principal Ross could have spoken to her about her lateness or absences but never did and never said she would be subject to disciplinary action. She conceded she spoke to Butler concerning her absences and gave her personal reasons. Butler thanked her, she said. She insisted that she supplied all supplied all necessary documentation to administration. She left all emergency lesson plans. She regularly talked to substitutes. She was never told by the Board disciplinary action would be taken. She is not now able to work. She needs another operation to remove tumors and is in need of three more months of treatment. She could return to work possibly in September 1991. She has applied for State disability benefits.

Hearing in this matter began at 9:00 a.m. on March 5, 1991. Petitioner's attorney was in court ready to proceed. A conference of counsel with the administrative law judge ran from 9:20 a.m. until 10:20 a.m., when hearing commenced. Respondent was not present in court until 10:40 a.m., entering the hearing room as the hearing was in progress. When asked why she was late, respondent replied she cracked a tooth the night before and was trying to get an appointment with her dentist.

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The agreement (P-5) between Jersey City Board of Education and Jersey City Education Association for the period of September 1, 1988 to August 31, 1991, provides under Article 30, Sick Leave, as follows:

> 30-3. A teacher who has served from one to ten years in the Jersey City school system shall be allowed an absence beyond the accumulated personal illness leave and the permissive personal leave not greater than 40 days in any one school year during which period he/shall forfeit one-half substitutes per diem pay.

Article 30-8 details the procedure to be followed for illness requiring a leave of absence. If a completed personal illness leave of absence form is not received, the principal or department head should send a communication indicating failure to comply. If no response is received, a paycheck may be withheld pending disposition of illness leave request by the medical director.

Article 32-5.2 provides that teachers absent for any period of five days or more must on return complete, sign and file with the principal, on forms to be supplied by the Board, a personal certificate as to the necessity of absence.

Article 35-1 provides that leaves of absence for personal business may be granted by the Board for such periods as the Board may decide, the period not to exceed one year. The only application for leave of absence for medical reasons by respondent was one made on the certification of her doctor, Reary Miles Sherman, M.D., for the period October 11, 1989 to October 17, 1989. Respondent had injured her knee. (J-16).

DISCUSSION

Respondent argued Board evidence in this matter fell short of preponderating proof that she was guilty of chronic and excessive absenteeism, unbecoming conduct, or extended unauthorized leave and abandonment of position. It was argued that respondent's testimony was creditable that she had been ill and under doctor's care for a series of maladies including a fracture to a bone of her feet and endometriosis. In addition, it was urged, she was involved in litigation that required her attendance at

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court, and, presumably, was excused from her duties in the classroom. Finally, it was said, respondent had complied with all prerequisites of contract for extended leave of absence as contained in paragraphs 30-3 and 30-4 of the negotiated agreement. P-5 at 30.

But the proofs were barren of any documentary evidence that respondent resorted to or completed application to the medical office of the district for extended sick leave absence under procedures set forth in paragraph 30-8 of the agreement. J-16 is the sole document submitted by respondent seeking medical leave of absence. The absence period sought, however, was October 11, 1989 to October 17, 1989. The medical director approved the leave on December 19, 1989, commenting that respondent suffered a "right knee contusion."

Review of documentary evidence displaying respondent's attendance record for the years 1985-89 showed deplorable abuse of sick leave entitlement (J-4 through J-9). Respondent was more than casually notified that her excessive absenteeism would prompt increment withholding and that her erratic attendance had a negative impact on delivery of educational services to the students in her charge (J-10 through J-15). Respondent's unsupported, uncorroborated conclusory testimony that she properly applied for extended medical leave of absence is simply not worthy of credence.

From the above, and as argued by the Board, the conclusion is inescapable that respondent's chronic and excessive absenteeism to so extreme a degree seriously disrupted continuity of the instructional process in her classroom. The degree and the repetitiveness of such absenteeism of itself is sufficient ground for removal, an example of which is In the matter of Tenure Hearing of Williamson, School District of the City of Trenton, 1986 S.L.D. -- (May 28, 1986). The rationale remains the same, it is said, even where absences might otherwise independently be legitimate. See Trautwein v. Board of Ed. of Boundbrook (N.J. App. Div., April 8, 1980, A-2773-78 unpublished), cert. denied, 84 N.J. 469 (1980); see also, Tenure Hearing of Edna Booth, 1985 S.L.D. -- (May 13, 1985), affirmed, State Board, 1986 S.L.D. —; affirmed, Superior Court, Appellate Division, unpublished opinion, November 13, 1987, Docket No. A-3985-86T8) (slip opinion at 5-6).

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CONCLUSION

Based on the foregoing, I FIND that all tenure charges against respondent have been fully and fairly sustained by the documentary and testimonial evidence adduced by the Board. I FIND petitioner's absences in the degree and repetitiveness indulged were inexcusable in face of consistent prior warning. I FIND, finally, petitioner's testimony in extenuation and excuse may not be credited. Respondent's continued presence on the employment rolls of the district is insupportable. She is removed from her teaching staff position as of date of final agency decision herein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 1991
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

6/18/91
DATE

DEPARTMENT OF EDUCATION

JUN 21 1991
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

EXHIBITS IN EVIDENCE

J-1	November 17, 1978 Board resolution naming respondent to "Pool of Substitute Teachers"
J-2	May 27, 1981, memoranda changing respondent's title from substitute to contract teacher and teacher's contract
J-3	Respondent's 1984-1985 attendance record
J-4	Respondent's June 1, 1985 annual performance report in which it is recommended that respondent's increment be withheld.
J-5	July 16, 1985 letter informing respondent that her increment was being withheld.
J-6	Respondent's 1985-1986 attendance record.
J-7	Respondent's 1986-1987 attendance record.
J-8	Respondent's 1987-1988 attendance record.
J-9	Respondent's 1988-1989 attendance record.
J-10	March 7, 1989 memoranda from Principal Anne Butler informing respondent that a recommendation was made to withhold her increment due to excessive absenteeism.
J-11	March 14, 1989 evaluation which informed respondent that erratic attendance has a negative impact on the delivery of services to the students.
J-12	June 21, 1989 annual performance report in which it is recommended that respondent's increment be withheld due to excessive absenteeism.
J-13	Respondent's 1989-1990 attendance record and January 11, 1990 memorandum from Lennon Ross, Principal, regarding respondent's excessive absenteeism.
J-14	October 25, 1989 memorandum from Lennon Ross to respondent regarding respondent's tardy and attendance problems.
J-15	August 2, 1990 notice to respondent advising her of impending disciplinary action if her unsatisfactory attendance pattern continued.
J-16	Respondent's November 2, 1989 application for medical leave of absence.

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J-17 February 2, 1990 tenure charges

J-18 State district superintendent's March 2, 1990 certification of respondent's tenure charges.

J-19 Respondent's April 27, 1990 answer to tenure charges.

P-1 Memorandum from Dr. Crincoli regarding an examination scheduled to receive approval for a leave of absence.

P-2 Memorandum from Ross regarding tardiness dated September 19, 1989.

P-3 Memorandum from Ross regarding tardiness dated October 27, 1989.

P-4 Memorandum from Ross requesting the transfer of respondent, dated December 11, 1989.

P-5 Agreement, Jersey City Board of Education and Jersey City Education Association, September 1, 1988 to August 31, 1991.

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IN THE MATTER OF THE TENURE HEARING OF SHEILA GREEN, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Respondent Green cites four exceptions made in reliance upon her post hearing submission. Because they are tersely stated, such exceptions are repeated, verbatim below:

> Firstly, there was not one shred of evidence in the Board's case that suggested that the Respondent's absences in any [way] affected the achievements of the students assigned to Ms. Green.
>
> Secondly, except for one disciplinary action taken against Ms. Green, and that being in the 1985-86 school year, there were no attempts by the Board to warn the Respondent that her "continued" poor attendance would result in tenure charges.
>
> Thirdly, the Petitioner did not show by any evidence whatsoever that it had an attendance policy which was violated by this Respondent.

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> Fourth, on all occasions the Board was properly notified of her absences and all of her absences were approved by the Board and no pay was denied her as a result of any days that she was absent and for which she had sick leave time.
>
> For the reasons expressed herein and in combination with those set forth in the brief enclosed herein and which do not bear repeating it is respectfully submitted that the recommendation of Judge Ospenson be rejected and that the Respondent be returned to her duties as a teacher in the Jersey City Public School System. (Exceptions, at pp. 1-2)

The Commissioner has considered the testimony of the witnesses, albeit that the record before him does not include a transcript of the hearing below, the exhibits in evidence and the respondent's exceptions to the findings, conclusion and recommendation set forth in the initial decision. In the Commissioner's view, the Board has carried its burden of proving that respondent's chronic and excessive absenteeism seriously disrupted continuity of the instructional process for her pupils.

The Commissioner notes that respondent sought only one request for medical leave of absence, such period to date from October 11, 1989 to October 17, 1989. The Commissioner finds that in light of the uncontested fact of her abysmal attendance record dating back to the 1984-85 school year, it may not be seriously argued that her absences did not grossly affect the achievements of the pupils assigned to her classes. See, In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403, 414-15 wherein the Commissioner 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

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effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

The Commissioner repeats his position with respect to the protection of tenure as previously articulated In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County, 1966 S.L.D. 77, aff'd State Board of Education 106, aff'd New Jersey Superior Court, Appellate Division (1967 S.L.D. 351):

> ***The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the school is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.*** (at 106)

In the same case, under circumstances remarkably similar to those in this matter, including the fact that Ms. Reilly was an employee of the Jersey City school district, respondent's excessive absences resulted in a finding that she was guilty of conduct unbecoming a teaching staff member. The ALJ in that case also

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recommended Ms. Reilly's dismissal, citing In the Matter of the Tenure Hearing of Paula M. Grossman, a/k/a Paul M. Grossman, School District of the Township of Bernards, Somerset County, 1972 S.L.D. 144, aff'd in part/rev'd in part State Board of Education 1973 S.L.D. 769, aff'd in part/rev. and rem. in part 127 N.J. Super. 13 (App. Div. 1974, cert. denied 65 N.J. 292 (1974), wherein the Commissioner stated,

> ***that a school district has a responsibility to teachers who are plagued with illness and have medical problems*** and ***the overarching responsibility of the Commissioner and the local Board of Education is to the children***.
> (1972 S.L.D. at 161)

See also, James Kochman v. Board of Education of the Borough of Keansburg, Monmouth County, decided by the Commissioner November 15, 1990, decision on remand decided by the Commissioner June 12, 1991 wherein the ALJ cited both Reilly, supra, and Yvonne Meli v. Bd. of Ed. of the Burlington County Vocational-Technical School, 1984 S.L.D. 906, aff'd State Board 921, therein it is stated:

> Common sense dictates that a teacher's continued absences 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 progress. 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

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> 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. (at 913-914)

Accordingly, the Commissioner finds without merit respondent's exception that no evidence in the Board's case suggests that her absences affected student achievement. On the contrary, the Commissioner finds and determines that there are sufficient grounds to remove respondent from her tenured position as a teacher in the State-operated School District of Jersey City due to her prolonged history of excessive absenteeism and tardiness which adversely impacted on the continuity of instruction of her students.

Neither can it be argued in this case that repondent was without notice of the seriousness of her absenteeism and tardiness, in that her increment was withheld for the 1985-86 school year and also was recommended to be withheld again in 1989 for excessive absenteeism, albeit that the testimony proffered by respondent suggests that she was oblivious to such actions. (See Initial Decision, at p. 6.) As noted in another recent decision of the Commissioner concerning tenure charges for excessive absenteeism and conduct unbecoming arising in the State-operated school district of Jersey City, the Commissioner stated:

> ***Increment withholding is the most severe sanction short of dismissal which a board of

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> education may apply to a tenured teaching staff member. To suggest that one can be denied thousands of dollars in salary increases *** and the individual not be aware of the seriousness of the problem underlying the withholdings is simply ludicrous.
>
> (In the Matter of the Tenure Hearing of Lena White, State-operated School District of Jersey City, Hudson County, decided by the Commissioner June 19, 1991, Slip Opinion, at p. 22)

Despite the principal's letter to respondent of March 7, 1989, which noted a third year of excessive absenteeism on respondent's part, and apprising her that her annual increment was recommended to be withheld (J-12), as well as notice in her annual written performance report of June 21, 1989 recommending that her increment for 1989-90 be withheld for excessive absenteeism, petitioner thereafter continued her pattern of excessive absenteeism into the next school year, with a record of 35 days absence, 35 tardies from September 1989 through January 11, 1990, with no notification to the school of absence on nine occasions. As noted by the ALJ below, such "deplorable lack of responsibility, the most devastating part of the problem being the educational dilemma imposed upon students in the school for lack of instruction" (Initial Decision, at p. 4) unquestionably warrants dismissal. See In the Matter of the Tenure Hearing of David Williamson, School District of the City of Trenton, Mercer County, decided by the Commissioner May 28, 1986. See also In the Matter of the Tenure Hearing of Edna Booth, School District of the Township of West Orange, Essex County, 1985 S.L.D. 722, aff'd State Board of Education April 1, 1987, aff'd N.J. Superior Court, Appellate Division, November 13, 1987.

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Accordingly, for the reasons set forth in the initial decision and expanded upon herein, respondent is dismissed from her tenured position as a teacher in the State-operated School District of Jersey City as of the date of this decision. The matter shall be transmitted to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6(a)1 for further action as it deems appropriate.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

JULY 31, 1991

DATE OF MAILING - JULY 31, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9683-90
AGENCY DKT. NO. 360-11/89
(EDU 9725-89 REMANDED)

KATHI L. SAVARESE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

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

Record Closed: March 4, 1991* Decided: June 18, 1991

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

Kathi L. Savarese (petitioner) alleged and the Bernardsville Board of Education (Board) denied that the Board improperly placed a tenured teacher in a position of Family Living teacher for the 1989-90 school year, in derogation of Savarese's tenure and seniority rights.

---

* Time for filing initial decision extended pursuant to N.J.A.C. 1:1-18.8

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PROCEDURAL HISTORY

The petitioner filed a verified petition of appeal with the Commissioner of Education on November 29, 1989. The Board filed its answer on December 19, 1989. The Department of Education transmitted the matter on December 26, 1989, 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 on February 15, 1990. Among other things, it was agreed that the issues to be resolved were:

(1) Whether the Board violated petitioner's tenure and seniority rights and

(2) If so, to what relief she was entitled.

Because no essential facts were in dispute, the matter was ripe for summary judgment. A schedule was established and the Board moved for summary judgment and the petitioner cross-moved for summary judgment. An initial decision issued on October 3, 1990. The decision found that tenure and, hence, seniority do not attach to Family Living teaching assignments irrespective of the certificate or endorsement under which taught. It was concluded the petitioner's claims were without merit and the petition of appeal was dismissed.

On November 15, 1990, the Commissioner of Education remanded the matter

> for the sole and limited purpose of determining if the Board took formal action under N.J.S.A. 18A:28-9 to reduce the actual number of family life positions or if there was merely a transfer of petitioner's family life duties to another staff member qualified to teacher [sic] family life which does not constitute a reduction in force. Slip opinion at 22.

On November 21, 1990, I wrote to counsel, stating:

> I have received the Commissioner of Education decision in this matter dated November 15, 1990. Because the scope of the remand is so narrow, I suggest that the remaining issue can be determined by reference to appropriate Board minutes. If you disagree, please call and arrange a telephone conference.

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> If you agree, submit copies of the pertinent minutes and a short written argument setting forth what you believe the minutes mean to this case.

Thereafter, the Board asked leave of the State Board of Education to appeal that part of the Commissioner's decision that remanded the matter to the Office of Administrative Law for the limited purpose of determining whether the Board took formal action to abolish the petitioner's alleged family life position. The State Board, on March 6, 1991, ruled:

> In that this issue has not been decided by the Commissioner, [the Board] is not appealling from a separable issue upon which the Commissioner has rendered a final decision. . . . [T]herefore, the State Board of Education dismisses this appeal.

The matter thus proceeds on the papers.

PETITIONER'S ARGUMENT

The petitioner maintains that, because the Commissioner in his November 15, 1990 decision stated that "the record is void of documentation that the Board took formal action pursuant to N.J.S.A. 18A:28-9 to abolish the full-time family life position to which petitioner was found entitled for the 1988-89 school year in the Savarese I decision" (slip opinion at 21), and because there was no reduction in force when the Board reduced her employment to part-time for the 1989-90 school year, the Board improperly reduced her employment, violating N.J.S.A. 18A:28-9.

The Board has ignored the Commissioner of Education's decision. The Commissioner demanded documentation that the Board took action to abolish the full-time family life position to which the petitioner was found entitled in her first appeal. As the Commissioner observed, a tenured teacher may be removed or have that position reduced only through the Tenure Employee's Hearing Law, N.J.S.A. 18A:6-10 et seq., or through a reduction in force pursuant to N.J.S.A. 18A:28-9. "The mere transfer of the duties of the tenure teacher to another tenured teacher qualified to assume those duties, verses a bona fide reduction in force, cannot serve to abrogate the right of a tenured teacher to remain employed or not suffer a reduction to his/her position. This is true even when no separate seniority rights

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accrue from the endorsement under which the individual served in assignments such as family life education and in-school suspension." Slip opinion at 21.

The Commissioner directed that a determination be made whether the Board took formal action under N.J.S.A. 18A:28-9 to reduce the actual number of family life positions or if there was merely a transfer of the petitioner's family life duties to another qualified staff member, which does not constitute a reduction in force. Slip opinion at 22.

The petitioner asserts the Commissioner would order her reinstated to a full-time position within the district retroactive to the beginning of the 1989-90 school year, if it were determined that the Board did not take formal action under N.J.S.A. 18A:28-9 to abolish the full-time family life position to which she was found entitled for the 1988-89 school year in her first case. The Board only acted during the 1987-88 school year to RIF the petitioner for the 1988-89 school year. The Commissioner ordered the Board, in the first Savarese matter, to reinstate her retroactive to the start of the 1988-89 school year and to provide her with all salary, benefits and emoluments due her, less mitigation for moneys earned.

The Board did not subsequently go through the RIF process required by N.J.S.A. 18A:28-9 when it reduced her employment to part-time for the 1989-90 school year.

Thus, it is clear that the Board improperly reduced the petitioner's employment from full-time to part-time within the district for the 1989-90 school year and, in doing so, violated N.J.S.A. 18A:28-9. The Board simply transferred the petitioner's duties to another tenured teacher without going through the required reduction in force process. Accordingly, an order must issue reinstating Kathi L. Savarese to a full-time position within the Bernardsville School District retroactive to the start of the 1989-90 school year. Moreover, Kathi L. Savarese should be provided all salary, benefits, emoluments owed her, less mitigation for monies earned during the period.

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BOARD'S ARGUMENT

The Board argues that the Commissioner remanded the present matter only because the record was void of supporting documentation that the Board took formal action pursuant to N.J.S.A. 18A:28-9 to reduce a family life position. However, the Commissioner overlooked the resolution of the Board of April 25, 1988 which implemented the reduction in force in the certificated category of the petitioner's employment. The Board urges that, if employees neither accrue tenure nor seniority in a particular position, but do accrue tenure and seniority in a category by virtue of specific endorsement and State regulation, then an implementing reduction in force must address the recognized category. On April 25, 1988, the petitioner was RIFed from home economics and remains on a preferred eligibility list for recall based upon that certificate and endorsement.

The Commissioner cites Baruffi v. Morris Hills Reg'l Bd. of Ed., OAL DKT. EDU 6538-89 (Mar. 29, 1989), aff'd in part, rev'd in part, Comm'r of Ed (May 16 1990) and Balczun v. Medford Lakes Bd. of Ed., OAL DKT. EDU 8077-86 (June 1, 1987), rev'd, Comm'r of Ed. (July 16, 1987). Baruffi stands for the proposition that a board of education may not set higher qualifications for a position than those set forth in law and then employ nontenured teachers in positions that other qualified, tenured, RIFed teachers could hold. Baruffi also stands for the proposition that a voluntary transfer of a tenured teacher not subject to a RIF may not overcome another teacher's entitlement to a vacant position. Neither of these circumstances obtain in the present case. In Balczun, a tenured elementary teacher was reduced to half-time, the board of education transferred a special education teacher to an elementary position and hired a nontenured person for a special education consortium class. The Commissioner held that a RIF occurred in one elementary position and one special education position. Thus, seniority rights were triggered. The Commissioner stated that at the time the RIF occurred, the Board should have developed a preferred eligibility list for each area effected by the RIF. The case addresses only seniority rights. This does not obtain in the present case.

The Commissioner has agreed in both Savarese I and Savarese II that the petitioner is not tenured as a Family Life teacher. She has not accrued any seniority rights as a Family Life teacher. Furthermore, the Board did implement a

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RIF in a specific position, home economics. The petitioner, being the subject of that RIF was placed on a preferred eligibility list for recall in the area of home economics. She was, in fact, reemployed as a home economics teacher for the courses available, based on enrollment, for the 1989-90 school year.

The Board dissagrees with the Commissioner that a RIF of the Family Life position is relevant. In Savarese I, the Commissioner reinstated the petitioner to employment. It was determined that the other tenured teacher assigned to Family Life instruction was not properly certified to teach at the secondary level. The petitioner should have been retained in that circumstance and the Commissioner so ordered. However, in Savarese II, the Family Life courses are being taught by a properly certificated tenured teacher. The fact-specific decision in a first case is inapplicable to the facts and circumstances of the second. The petitioner was lawfully RIFed from her certificated and endorsed position as a Home Economics teacher. Therefore, an order should be issued concluding that the petitioner's claims are without legal merit.

DETERMINATION AND ORDER

The Commissioner of Education decision dated November 15, 1990 finds and determines that the petitioner is not tenured as a family life teacher nor has she accrued any seniority in that subject area. Slip opinion at 20. The decision directs that the record be supplemented to determine whether the Board took formal action pursuant to N.J.S.A. 18A:28-9 to abolish the full-time family life position to which the petitioner was found entitled for the 1988-89 school year in the Savarese I decision.

The short answer is that no family life positions were abolished because the Board properly thought of itself as not having family life positions. Rather, it had staff in a variety of positions who, to a greater or lesser extent, taught family life classes under the certifications and endorsements appropriate to their primary positions.

Documents submitted in Savarese I indicate that the petitioner wrote to the superintendent sometime in in March 1988, indicating that she would return from maternity leave and resume teaching duties on September 1, 1988.

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The superintendent wrote to the petitioner stating that enrollments at the high school were declining significantly and that this raised "questions about the probability of certain positions existing. Your position as a Home Economics teacher may well be effected, although we are not now certain to what degree. The full-time position may be downgraded to a part-time position because of reduction in force, or it may be eliminated. Since you are the lowest in terms of seniority among tenured Home Economics teachers, you may be the person who will be reduced in force" (J-28).

On the same day, the superintendent wrote a confidential memorandum to the Board concerning personnel (J-27). The memorandum clearly identifies persons who had indicated their intent to return in September 1988. The petitioner is one of four persons in this group. The same memorandum addresses reductions in force. Among other things, it states:

> [T]he reduction in force category is affected by the cuts in the high school, and possible resignations . . . . The following lists reflect that situation:
>
> . . .
>
> Reduction in Force
>
> Collette Wynn - BHS - Part-Time Italian
> Bonnie Stanski - BHS - Home Economics
> Kathi Savarese - BHS - Home Economics (may be reduced to part-time)
> . . .
>
> We do not need to take action on any of these, but rather discuss them. Because of the cuts in the high school, a large number of maternity leaves and pending resignations, this process is more complicated than it normally is. We have structured sufficient time to consider this material before any decisions need to be made.

The minutes of the public Board meeting of April 25, 1988 report:

> Mr. Henderson moved that the following people do not receive contracts for the 1988-89 school year because of a decline in enrollment necessitated reduction in force:
>
> Allen Cherulnik
> Collette Wynn (part-time)

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Robin Egerter
Sue Cutler
Kathy [sic] Savarese

Mr. Williams seconded the motion and it was approved by a role call vote of 7-0.

If there is neither tenure nor seniority as a family life teacher, the Board could not rationally create a seniority list for family life teacher positions. As the Board correctly observes, any implementing reduction in force then must be by recognized category. Thus, the petitioner was RIFed from a home economics position and remains on a preferred eligibility list for recall based on that endorsement.

In Balczun, above, the Commissioner held that a RIF occurred in which one elementary position and one special education position were abolished. Once the positions were abolished, the RIFs were accomplished and seniority rights were triggered. Although the district's needs changed after the RIF occurred, the Commissioner determined that the Board was obligated, at the time of the RIF, to develop preferred eligibility lists for the elementary and special education categories. Another teacher ("O.") asked for and received a transfer from a special education position to an elementary position after the RIF. Balczun was reduced to half-time employment. Subsequently, the Board hired a nontenured teacher for a special education position. The Commissioner resolved a question about the new special education teacher's employer by holding that the Board was her employer despite her assignment as a teacher of "consortium" classes. Assignments to consortium classes came into being as a result of an arrangement among the member districts of the Southern Berlington County Council for Special Education, but the Commissioner found they were paid for by the Medford Lakes Board of Education and, therefore, subject to the board's authority. As Board employees, these teachers had to be considered with all other Board teachers in matters of assignment, reduction, seniority and the like. Then, the teachers' competing rights were addressed.

The Commissioner found that because O. was senior to Balczun, she was not transferred to the new elementary teacher position but was more preferred for recall to a position for which eligible. "No issue of Board discretion was in play." Slip opinion at 21.

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When the consortium positions opened in June 1986, a vacancy occurred in the teacher of the handicapped category, triggering a recall. O. should have reverted to the teacher of the handicapped position, creating a vacancy in the elementary teacher category for which Balczun was eligible by seniority. "Case law has clearly established that there is an obligation on the Board's part to accommodate an individual's tenure and seniority rights so long as it does not require the Board to take extraordinary steps to provide that person with a position in the category within which he or she may have entitlement." Slip opinion at 22. The Commissioner also determined the Board had not demonstrated a sound educational reason for its decision to transfer O., albeit at her request, to the new elementary teacher position. Balczun was ordered reinstated to the full-time elementary position to which she was entitled by tenure and seniority.

Balczun is not analogous to the present case. First, there are no competing categories. Savarese taught under her home economics endorsement on a part-time basis in 1975-76 and on a full-time basis from 1976-77 through 1985-86. Sometimes, because qualified to do so by her home economics endorsement, she taught family living courses. Second, there is no voluntary transfer issue. If the Board had not reduced a home economics position, if the board had transferred a nontenured teacher into the petitioner's position or if the Board transferred a tenured teacher into her position after it released the petitioner, she might rely on Balczun. But that did not happen. What did happen was that the board, after looking at its enrollments, eliminated one home economics position. By law and rule, the least senior home economics teacher was RIFfed. That was Savarese, who, as an assignment within the competence of her endorsement, sometimes taught family life courses.

In the more recent Baruffi, above, the Commissioner held a board of education is prohibited from setting higher qualifications for positions than the qualifications established by statutes and rules. Three tenured teachers complained that their tenure rights were violated when they were RIFfed, the Board assigned nontenured teachers to two "in school suspension/remedial" teacher positions and rejected the RIFfed tenured teachers' applications for the positions—ostensibly because the Board required qualifications beyond those established by statutes and rules. The Commissioner disapproved the qualification eliminating the

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tenured teachers from consideration. Because one of the teachers selected was tenured and had been transferred voluntarily to the new position, the Commissioner held the RIFfed teachers were entitled to the vacant position based on tenure and seniority.

Again, the matter is not analogous. None of those circumstances are present in this case. The Board placed no greater requirements on its family life teachers than those in Chapter 11of New Jersey Administrative Code Title 6. A voluntary transfer of a tenured teacher, not the subject of a RIF, was not used to abrogate another tenured teacher's right to an open position for which qualified. When the petitioner was RIFfed, her position was not given to another—tenured or nontenured. No other position was filled that the petitioner can claim by virtue of tenure and seniority rights.

In Savarese I, the Commissioner ordered the petitioner reinstated because the teacher assigned family life courses was not properly certificated.

> Petitioner, as a tenured teacher, had the legal entitlement under N.J.S.A. 18A:28-5 to be retained to teach a full-time assignment for which she was qualified and had taught, albeit she had no seniority rights to the assignment, when, as under the factual circumstances of this matter, the assignment was given to an individual not authorized to teach the family life courses at the givem grade level. [Emphasis added.]

Slip opinion at 23.

The consequences of a RIF are closely examined where there is an allegation that tenure rights may have been abridged impermissibly by the way in which the otherwise valid RIF has been effected. Capodilupo v. W. Orange Tp. Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987). Tenure is a statutory creature and must be well guarded. Ibid.

The other side of that proposition is that a valid RIF, devoid of arbitrariness, caprice or proscribed motivation, must not be tampered with. Here, I **FIND** the Board effected a RIF based on enrollments. Staff were notified, well in advance, of the possibility. The RIF was effected evenhandedly and affected staff beyond the petitioner.

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I **FIND** the petitioner was properly placed on a preferred home economics eligibility list and was, in fact, recalled as a home economics teacher for the courses available based on enrollment. I further **FIND** none of the circumstances that controlled in Baruffi or Balczun, above. I further **FIND** that a formal Board action to reduce the number of family life positions would have been frivolous in that no such positions exist, it being conceded that neither tenure nor seniority accrue to family life instruction per se. I **FIND** no subterfuge transfer of duties away from the petitioner. The RIF appears to have been motivated by the sound consideration of supply and demand.

Accordingly, I **CONCLUDE** the RIF complained of was real, was effected properly and was in no way a device to sap the petitioner's tenure rights.

Therefore, I **ORDER** the petition **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

18 JUNE 1991
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

June 19, 1991
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 26 1991
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

km

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WITNESSES

None

EXHIBITS

J-26 Letter, Librera to Savarese, May 27, 1988
J-27 Confidential Memorandum, Librera to Board, March 30, 1980, 3 pp.
J-28 Letter, Librera to Savarese, March 30, 1988
J-29 Excerpt, Board minutes, April 25, 1988
J-30 Confidential Memorandum, Librera to Board, May 2, 1988
J-31 Excerpt, minutes of special executive Board meeting, May 24, 1988

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KATHI L. SAVARESE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

Petitioner's exceptions urge that the ALJ has ignored N.J.S.A. 18A:28-9 and the Commissioner's remand decision by recommending the dismissal of the petition. More specifically, petitioner argues:

> It is submitted that after reviewing the Commissioner's November 15, 1990 decision it is clear that your office would order Kathi Savarese reinstated to a full-time position within the district, retro-active to the start of the 1989-90 school year, with full back pay if it is determined that the Board of Education did not take formal action under N.J.S.A. 18A:28-9 to abolish the full-time family life position to which Petitioner Kathi Savarese was found entitled for the 1988-89 school year in the Savarese I decision.

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> It is averred that the facts in this matter clearly establish that the Board of Education only acted during the 1987-88 school year to R.I.F. Kathi Savarese for the 1988-89 school year. The Board of Education was thereafter, in the Savarese I matter, ordered to reinstate Kathi Savarese retroactive to the start of the 1988-89 school year and to provide Ms. Savarese with all salary, benefits and emoluments owing to her less mitigation for monies earned for the period of her improper termination.
>
> Most significantly, the Board of Education did not subsequently go through the reduction in force process, pursuant to N.J.S.A. 18A:28-9, when the Board again reduced Kathi Savarese's employment to a part-time status during the 1989-90 school year.
>
> In sum, it is clear that the Board of Education improperly reduced Kathi Savarese's employment from a full-time position to a half-time position within the district during the 1989-90 school year, in contravention of the prescriptions of N.J.S.A. 18A:28-9, inasmuch as the Board of Education simply transferred Kathi Savarese's duties to another tenured teacher ostensibly qualified to assume those family life duties without going through the required reduction in force process. (Petitioner's Exceptions, at p. 3)

The Board urges affirmance of the ALJ's findings and conclusions, particularly those set forth on pages 10 and 11 of the initial decision. The Board's reply exceptions also aver, inter alia, that:

> It should be particularly noted that family life has been taught by a variety of teachers over the years and further, that Ms. Savarese has not been involved in the family life courses since the 1983-84 school year. This is most critical in light of what the remand requested. The Bernardsville Board of Education could not possibly have been expected to vote on anything concerning the family life courses when it is merely one assignment among many within various departments and areas of endorsement. For example, if a Board of Education has several foreign language teachers who interchangeably can teach various sections, and dependent on

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enrollment, various teachers are needed, when the Board proceeds to condense from three sections of french or spanish into one or two, do they need a Reduction in Force Resolution at the Board level?

If within that same year or even sometime thereafter, after the teacher has been transferred into another area, when the reduction in force is needed to be implemented, should not the Resolution specifically state the area and person involved with the reduction? It only makes sense for Board action to occur when a particular person cannot be employed on a fulltime basis based upon a specific endorsement and a specific recognized category within the Administrative Code as a result of final scheduling and assignments. The Board should not be relentlessly voting on particular assignments within school locations. This is an administrative function. Rather, the Board should vote on those specific circumstances involving particular persons whose employment are specifically affected in terms of termination or reduction in full time schedule as a result of staff reduction in force. Further, in the instant matter, where family life is not a recognized category, a reduction in force cannot be implemented which asserts a reduction in that particular subject matter. See N.J.A.C. 6:3-1.10. In contrast, what must occur is exactly what was done by Bernardsville in the instant case, that being, that the reduction in force must specifically name the legally recognized category of employment which sets up the preferred eligibility list for recall.

It is quite clear, that the reduction in force which affected Ms. Savarese placed her on a preferred eligibility list for recall. In fact, as a result of such placement, she was in fact recalled to part-time employment during the 1989-90 school year. What is significant about the recall to part-time employment is the fact that it occurred prior to the complete disposition of the first case between these same parties which addressed the reduction in force during the 1988-89 school year. The action taken by the Board in April of 1988 was not set aside as an invalid reduction in force action, but rather, the Commissioner activated her rights to re-employment based upon other circumstances. A reduction in force/preferred eligibility list

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> remains in full force and effect until its reason for existence no longer exists. In the current situation, such is not the case. It is respectfully contended that a Board of Education should not have to renew its reduction in force preferred eligibility list each year it is operational. In fact, the Board has continued to re-employ its staff pursuant to the list, including Ms. Savarese, who has been re-employed on a part-time basis in the area of home economics through the 1990-91 school year.
> (Board's Reply Exceptions, at pp.3-4)

Upon review of the record on remand and the parties' exceptions, the Commissioner is unable to accept the recommended decision of the Administrative Law Judge to dismiss the petition. Initially, it must be emphasized that this matter is not a case concerning the tenure and seniority rights of a teacher who was on a preferred seniority list for home economics to bump into a family life assignment held by Charles Preston during the 1989-90 school year. Rather, it deals with the removal of a tenured teacher from a full time 1988-89 family life position to which she was found to have legal entitlement by the Commissioner and State Board on July 24, 1989 and January 3, 1990 respectively.* As indicated by the Commissioner in his November 15, 1990 decision, the only way petitioner could be removed from a full-time position would be through Board action to effectuate a reduction in the number of family life positions for the 1989-90 school year from the 1988-89 level or through dismissal under the Tenure Employees Hearing Act. Contrary to the ALJ's contention that the Board herein properly thought it had no family life positions (Initial Decision, at p. 6)

---

* Given the fact the Commissioner and State Board determined petitioner was entitled to the full-time family life position held by Joel Melitski for the 1988-89 school year, she must be considered as having actually served in that position.

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under the circumstances of this matter, the Bernardsville School District had two family life positions at Bernards High School during the 1988-89 school year, one full-time and one part-time, as seen through the following excerpt of the superintendent's testimony in the Savarese I transcript, which is part of the record on remand, when asked if the staffing for family life education for the 1988-89 school was reviewed.

> Q Now, did you particularly look at the family life courses?
>
> A ***We were certainly looking at that and made the decision fairly quickly, in our whole process, that Joel Melitski was going to be the one person to teach family life, full time.
>
> Q And as a result of that decision, how did it impact on Miss Savarese and why was there that impact on her particular employment?
>
> A Well, we have presently one full-time family life teacher in Bernards High School, and then a part-time position.
>
> So when it came time for us to consider the full-time position, Dr. Froisland's recommendation to me was that Joel Melitski was the person who he not only thought was better suited, but better qualified, and in our whole staffing arrangement, that was the first part of the decision.*** (emphasis supplied) (at pp. 18-20)

It is clear from the record in this matter that the teaching of family life at Bernards High School was not interspersed throughout a variety of teacher assignments during the period at issue in this matter. Rather, it was primarily concentrated in one full-time position held by Melitski.

In Savarese I, Melitski was found to be ineligible to teach family life education, thus, petitioner was found by both the Commissioner and State Board to have entitlement to his full-time 1988-89 position and ordered her reinstated to it. Thus, under the

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circumstances of this matter, the Board would have been required to abolish the full-time family life position in order for there to be a determination rendered that petitioner was properly removed from it. A thorough review of the record on remand reveals no documentation that the Board acted in 1989 to abolish that full-time family life position under the provisions of N.J.S.A. 18A:28-9.

The Board's reliance on the April 1988 action it took to reduce petitioner's home economics position (Exhibit J-29)* has no bearing on the issue of what became of the full-time family life teaching position petitioner was entitled to for the 1988-89 school year. Moreover, contrary to the ALJ's statements otherwise, the Board in the instant matter has in the past taken reduction-in-force action directly with respect to family life staffing. See Exhibit J-27, at p. 3, which specifically identifies the reduction in force of a family life teacher (Allan Cherulnik) in April 1988 and J-29.

Given the above, it is the finding and conclusion of the Commissioner that the full-time family life position for 1988-89 to which petitioner was found entitled in Savarese I was not abolished in 1989 by the Board. Rather, the duties of the position were merely transferred to Charles Preston** for the 1989-90 school year in derogation of petitioner's tenure rights. Removal of petitioner

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* It is noted for the record that Exhibit J-27-31 were not part of the record available for the Commissioner's review in issuing his November 15, 1990 decision in this matter.

** A review of the listing of family life assignments from 1976-77 through 1988-89 indicates Charles Preston never taught family life prior to his assumption of the full-time position for the 1990-91 school year.

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from the full-time position to which she was found entitled was impermissible since it did not result from an abolishment of position/reduction in force under the provisions of N.J.S.A. 18A:28-9 or dismissal under N.J.S.A. 18A:6-10 et seq.

Accordingly, the initial decision is reversed and petitioner is ordered reinstated to the full-time family life position at Bernards High School together with all salary, emoluments and benefits owing to her, less mitigation of monies earned retroactive to September 1, 1989.

ACTING COMMISSIONER OF EDUCATION

AUGUST 1, 1991

DATE OF MAILING - AUGUST 1, 1991

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
INITIAL DECISION
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT NO EDU 9219-90
AGENCY DKT NO 275-8/90

IN THE MATTER OF THE TENURE HEARING OF CARICELLA MAJOR, SCHOOL DISTRICT OF THE CITY OF ORANGE, ESSEX COUNTY

Ray Hamlin, Esq.
(Ashley & Charles, attorneys)

Hardge Davis, Esq. (Davis & Wearing, attorneys) and **Sanford R. Oxfeld**, Esq. (Balk, Oxfeld, Mandell & Cohen), co-counsel for respondent

Record Closed June 10, 1991 Decided June 10, 1991

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2

BEFORE **ELINOR R. REINER**, ALJ:

On July 24, 1990, the Orange Board of Education certified charges of conduct unbecoming a teacher against respondent, Caricella Major. Respondent, a music teacher filed an answer denying the charges. On November 6, 1990, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* After due notice to all parties, a prehearing was scheduled for February 5, 1991. At that time, the issues were isolated and a hearing was scheduled for June 10 through June 14, 1991, at the OAL.

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As outlined in the prehearing order, respondent has moved for summary decision alleging that the Board of Education failed to certify charges against respondent within the 45-day time period required by *N.J.S.A.* 18A:6-13, and requesting dismissal of the charges. Petitioner opposes the motion alleging that there has been no violation of *N.J.S.A.* 18A:6-11 or *N.J.S.A.* 18A:6-13 and requesting that the motion be denied.

STIPULATION OF FACTS

The facts necessary to a determination are essentially undisputed and may be summarized as follows. On May 25, 1990, the Board notified respondent of the receipt of certain charges against her and granted her 15 days in which to submit a written response. Ms. Major responded to the disciplinary charges by letter dated June 12, 1990. The letter also notified the Board that it had failed to serve respondent with a written executed statement of evidence in accordance with *N.J.S.A.* 18A:6-11. Consequently, on July 11, 1990, the Board served her with a written executed statement of evidence. The Board's letter also provided respondent with an additional 15-day period in which to respond if she desired to respond to said statement in a matter different than her earlier response of June 12, 1990 Ms. Major did not submit an additional response. On July 24, 1990, the Board voted to certify tenure charges against respondent. The next day, the Board forwarded the charges and certificate of determination to the Commissioner and sent a duplicate copy of these documents to respondent by regular mail. The Commissioner acknowledged receipt of the certified charges on August 1, 1990 in a letter dated September 18, 1990. This letter also informed the Board that the Commissioner needed proof of service that respondent had been served with the certified charges. The Commissioner also required the Board to submit such proof by September 28, 1990.

On September 25, 1990, the Board notified respondent of the certified charges by certified mail. The letter stated "it is my understanding that you are in receipt of the enclosed documentation; however, since the correspondence was not sent by certified mail, we are sending same a second time by certified mail to ensure service." (Ashley & Charles' letter, dated September 25, 1990.) The Board sent a duplicate copy of this letter to the Commissioner. On October 23, 1990, respondent resubmitted her affidavit of June 13, 1990 in response to the certified charges.

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DISCUSSION

N.J.S.A. 18A:6-11 provides in pertinent part:

> Any charge made against any employee of the Board of Education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, with a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position, and statements of evidence presented to it, the Board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination personally or by certified mail directed to its last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to *N.J.S.A.* 18A:6-16, together with a certificate of such determination. [Emphasis added]

Additionally, *N.J.S.A* 18A:6-13 reads in relevant part

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

A literal reading of *N.J.S.A.* 18A:6-13 would require the Board to make its determination to certify tenure charges within 45 days of receiving the written charge. Case law demonstrates that the Commissioner has not adopted this interpretation.

Prior to the promulgation of *N.J.A.C.* 6:24-5.1(b)(4), the leading case discussing the tolling of the 45 day period in *N.J.S.A.* 18A:6-13 was *In re Tenure Hearing of Marilyn Feitel*, 1977 *S.L.D.* 451, aff'd, State Bd. of Ed., 1977 *S.L.D.* 458. In *Feitel*, the Commissioner harmonized *N.J.S.A.* 18A:6-11, which accords the employee the opportunity to respond to the charges, with *N.J.S.A.* 18A:6-13, which provides the board a 45 day period for its probable cause determination. The Commissioner held

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that the 45 day period in *N.J.S.A.* 18A;6-13 begins to run when the employee files his statement or when the allotted time for the employee to file the statement expires. *Id.* at 455-6, aff'd, State Bd. of Ed., 1977 *S.L.D.* 458. The *Feitel* ruling has been consistently followed. *In re Levitt*, 1977 *S.L.D.* 976, aff'd, State Bd. of Ed., 1978 *S.L.D. 1027,* aff'd as to results, App. Div., 1979 *S.L.D.* 847; In re *Levine*, 1977 *S.L.D.* 1129, aff'd, State Bd. of Ed. 1978 *S.LD.* 1026, aff'd App. Div., 1979, *S.L.D. 846; In re Jackson*, OAL DKT. NO. EDU 3504-79 (Apr. 15, 1980), modified, Comm'n of Ed. (June 2, 1980), aff'd, State Bd. of Ed. (Jan. 22, 1981); *In re Murphy*, 1980 *S.L.D.* 1519; *Paterson Sch. Dist. v. Harrell*, OAL DKT. NO. EDU 2249-85 (July 12, 1985), modified and remanded, Comm'n of Ed. (Aug. 30, 1985), on remand, OAL DKT. NO. EDU 5624-85 (Jan. 6, 1986) aff'd as to results, Comm'n of Ed. (Jan. 12, 1986); *Willingboro Tp. Bd. of Ed. v. Kunz*, OAL DKT. NO. EDU 4587-85 (Nov. 1, 1985), modified, Comm'n of Ed. (Dec. 16,1985); and *In re Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988).

In 1986, the Commissioner adopted the *Feitel* timeliness. See, *N.J.R.* 404(b); 18 *N.J.R. 976(a). N.J.A.C.* 6:24-5.1(b) reads in pertinent part:

> (b) In all instances of the filing and certification of tenure charges, other than for reasons of inefficiency, the following procedures and timelines shall be observed:
>
> . . .
>
> 2. Charges along with the required sworn statement of evidence shall be transmitted to the affected tenured employee within three working days of the date they were filed with the secretary of the district board. Proof of mailing or hand delivery shall constitute proof of transmittal.
>
> 3. The affected tenured employee shall have an opportunity to submit to the district board of education a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within 15 days of receipt of the tenure charges
>
> 4. Upon receipt of respondent's written statement of evidence under oath, or upon expiration of the allotted 15 day time period, the district board of education shall determine by a majority vote of its full membership within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction in salary. (See, *N.J.S.A.* 18A:6-11).

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5. The district board of education shall forthwith notify in writing the affected employee against whom the charge has been made of its determination, in person or by certified mail to the last known address of the employee.

6. In the event the district board of education finds that such probable cause exists and that the charges, if credited, are sufficient to warrant a dismissal or reduction of salary, then it shall file such written charge and the required certificate of determination with the Commissioner together with proof of service upon the employee. [Emphasis added].

Viewing the facts of the present case with the requirements detailed at *N.J.A.C.* 5:25-5.1(b), it is clear that the record is full of procedural defects. On May 25, 1990, the Board mailed respondent the disciplinary charges. It did not, however, submit the required sworn statement of evidence along with the charges in accordance with *N.J.A.C.* 6:24-5.1(b)(2). Nonetheless, Ms. Major responded to the charges on June 12, 1990. On July 11, 1990, the Board forwarded the written executed statement of evidence. The Board's letter also accorded respondent an additional 15 day period in which to respond if she so desired. Respondent did not submit an additional response. Due to the ineffective notice of May 25, 1990, it is unclear when the 45 day period would begin to run. Both parties, however, seem to agree that the 45 day period begins to run from Ms. Major's response of June 12, 1990. Based on this response date, the 45 day period expired on July 28, 1990.

The Board states that it met the July 28 deadline, since it certified the charges on July 24, 1990. Although the Board did vote to certify the charges on July 24, 1990, it did not comply with the requirements of *N.J.A.C.* 6:24-5.1(b)(5) and 6:24-5.1(6). *N.J.A.C.* 6:24-5.1(b)(5) provides that the Board "shall forthwith[1] notify the employee . . . of its determination, in person or by certified mail . . .." [Emphasis added]. Additionally, *N.J.A.C.* 6:24-5.1(b)(6) mandates the Board to file the written charge and the certificate of determination with the Commissioner" together with proof of service upon the employee." [Emphasis added].

1. "Forthwith" is defined as "immediately; without delay; . . . within a reasonable time under the circumstances of the case . . . [citations omitted]. Within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished. The first opportunity offered." Black's Law Dictionary 588 [5th ed. 1979].

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The facts demonstrate that on July 25, 1990, the Board notified the Commissioner of its decision to certify tenure charges against respondent. The Board sent a duplicate copy of this letter to respondent by regular mail. Subsequently, on September 18, 1990, the Commissioner sent a second notice to the Board stating that the Commissioner needed proof that respondent had been served with the certified charges. The Board complied with this request on September 25, 1990 when it notified respondent of the certified charges by certified mail. Thus, the Board properly served respondent with the certified charges two months after the date they had voted to certify the charges. This is a clear violation of the requirement that the Board immediately notify respondent by certified mail. *N.J.S.A.* 18A:6-11; and *N.J.A.C.* 6:24-5.1(b)(5).

Moreover, in *Kunz*, OAL DKT. NO. EDU 4857-85 (Nov. 1, 1985), modified, Comm'n of Ed. (Dec.16, 1985) both the administrative law judge and the Commissioner agreed that the Board's failure to forward the certified charges to the Commissioner in a timely manner warranted dismissal. In that case, the Board determined on April 29, 1985 to certify charges against respondent. Nevertheless, the Commissioner did not receive the charges and certificate of determination until July 12, 1985, more than 70 days after the Board acted upon the certification.

The administrative law judge determined that the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* was designed to ensure a speedy resolution of tenure charges. An unexcusable delay of 70 days in forwarding the charges to the Commissioner thwarted this legislative intent. Consequently, the ALJ found that the Board had failed to complete the certification process by not filing the charges with the Commissioner within 45 days from April 22, the final date the response was due from respondent. *Id.* at 18-19, modified, Comm'n of Ed. (Dec. 16,1985). Thus, the administrative law judge dismissed the charges with prejudice. *Id* at 24, modified, Comm'n of Ed. (Dec. 16, 1985).

The Commissioner adopted the administrative law judge's determination to dismiss the charges based on the procedural defects. However, the Commissioner modified the initial decision to a dismissal without prejudice. The Commissioner held that due to the nature of the charges (possession and distribution of drugs), the Board was "not precluded from curing the procedural defects of the instant Petition of Appeal and properly recertifying the tenure charges against respondent,

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pursuant to *N.J.S.A.* 18A:6-11 with due regard to the specific requirements of said statute." *Id.* at 34, modified, Comm'n of Ed. (Dec. 16, 1985).

Similarly, in the present case, the underlying charges are possession of drugs, namely cocaine. In accordance with *Kunz*, the Board should be given the opportunity to cure the defects and recertify the charges in accordance with the requirements of *N.J.S.A.* 18A:6-11 and *N.J.A.C.* 6:24-5.1(b).

CONCLUSION

The Board of Education did not file the charges or complete the certification process in accordance with the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* and *N.J.A.C.* 6:24-5.1(b). Consequently, the charges are dismissed without prejudice in order to provide the Board with an opportunity to cure the procedural defects and recertify the tenure charges. Respondent's motion for summary decision is **GRANTED.**

This oral decision may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is empowered to make a final decision in this matter However, if the Commissioner of the Department of Education does not so act in forty-five (45) days and unless such time limit is otherwise extended, this oral decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

END OF TRANSCRIPT

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I, Jane R. Pearson, certify that the foregoing is a true and accurate transcript, to the best of may ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter on June 14, 1991.

June 14, 1991
Date

Jane R. Pearson

Receipt Acknowledged:

6/21/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 1991
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF CARICELLA MAJOR, SCHOOL DISTRICT OF THE CITY OF ORANGE, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon review, the Commissioner cannot concur with the ALJ that the undisputed procedural errors made by the Board in its handling of this matter warrant summary dismissal of charges, albeit without prejudice, on that basis alone.

The ALJ's decision turns on the Board's failure, until September 25, 1990, to have notified respondent in person or by certified mail of its July 24, 1990 determination to certify tenure charges to the Commissioner. While the regulation relied upon, N.J.A.C. 6:24-5.1(b)(5), does so require, it is undisputed that respondent was notified of the Board's determination by regular mail dated the very next day (July 25, 1990) and there is no denial on respondent's part that the notice and its attendant documentation were in fact received.

While the ALJ is correct in noting that both the public interest in expedition of tenure matters and substantial decisional

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precedent support strict adherence to the timelines and procedures of the Tenure Employees Hearing Law and its implementing regulations, the Commissioner believes that it would be placing form over substance to require the Board to recertify charges for a technical error that in no way prejudiced respondent's ability to respond to the present charges or compromised her due process rights. Moreover, with respect to both respondent's and the public's interest in expedition of tenure matters, there is nothing, beyond her apparent reliance on the Board's technical oversight in using regular rather than certified mail, to have precluded respondent from answering the charges filed against her within the time prescribed by law (twenty days of her receipt of the July 25, 1990 mailing pursuant to N.J.A.C. 6:24-5.3, referencing 6:24-1.4).

The Commissioner further notes that while there are numerous cases dismissing tenure charges for procedural defects, these dismissals invariably flowed from defects which prejudiced respondents' rights or represented egregious and unwarranted disregard of procedure such as filing charges with the Commissioner months after the Board had determined to certify. Feitel and progeny, as cited in Initial Decision at pp. 3-4. Moreover, the Commissioner has previously noted his refusal to "cause reinstatement of unfit and unworthy persons because of *** technical violations [of the Tenure Employees Hearing Law]" and reserved to himself the right to decide if procedural defects are sufficient to warrant dismissal of charges. In the Matter of the Tenure Hearing of Thomas Puryear, School District of the City of Newark, Essex County, 1977 S.L.D. 934 (quotation at 935); In the Matter of the

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Tenure Hearing of Eddie Lee Harrell, School District of the City of Paterson, Passaic County, decision of August 30, 1985.

Accordingly, for the reasons stated herein, the procedural defects identified in this matter are found insufficient to warrant automatic dismissal of charges and initiation of de novo proceedings by the Board. The decision of the Office of Administrative Law dismissing the tenure charges against Caricella Major without prejudice is therefore reversed and the instant matter remanded for hearing on the charges as certified.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 2, 1991

DATE OF MAILING - AUGUST 2, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 948-90
AGENCY DKT. NO. N/A

SKIP NORCROSS,
Petitioner,
v.
THE BOARD OF EDUCATION OF
THE NORTH HUNTERDON REGIONAL
HIGH SCHOOL DISTRICT,
HUNTERDON COUNTY,
Respondent.

Russell J. Schumacher, Esq., for petitioner (Rand, Algeier, Tosti & Woodruff, attorneys)

Richard A. Friedman, Esq., for respondent (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: May 17, 1991 Decided: June 21, 1991

BEFORE CHRISTOPHER DIETZ, ALJ:

INTRODUCTION

Skip Norcross (petitioner) is employed by the North Hunterdon Regional High School District (respondent) in Hunterdon County as a tenured teaching staff member. For the school year 1989-90, the respondent posted vacancies for two (2) positions as assistant girls basketball coach. Petitioner, claiming qualification, applied for each of these positions and was denied. Respondent hired an individual who was not a full-time teaching staff member within the district without first obtaining authority from the

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Hunterdon County Superintendent of Schools, pursuant to N.J.A.C. 6:29-6.3. Petitioner appeals this action and seeks a determination appointing him assistant coach with compensation retroactive to the commencement of the 1989-90 school year.

The matter was transferred to the Office of Administrative Law (OAL) on February 5, 1990 as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing was conducted with an order issuing June 18, 1990. The hearing was scheduled to commence September 21, 1990 at the OAL facility in Mercerville but adjourned to convene October 15, 1990 in Flemington, New Jersey. Witness unavailability caused the matter to continue until November 29, 1990. Thereafter, additional time was granted to explore ammicable resolution. These efforts failed and, at a status conference April 15, 1991, provision for final submissions was made. The record closed May 17, 1991.

ISSUES

A. Whether under N.J.A.C. 6:29-6.3, petitioner was inappropriately denied appointment to the position of assistant girls basketball coach; and

B. If so, what remedy is available, reasonable and appropriate.

FINDINGS OF FACT

Having heard the testimony, determined the credibility of the witnesses, reviewed the stipulation of facts (J-11), exhibits and submissions, and then considered the arguments of counsel, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

1. Petitioner is employed by respondent Board of Education of North Hunterdon Regional High School District since September 1, 1964 as a teacher of business.

2. Petitioner holds the following certifications issued by the State Board of Examiners:

   a. Teacher of Business
   b. Education Media Specialist
   c. Principal

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3. Petitioner has held several coaching positions within the respondent school district over a period of almost two decades.

4. Petitioner served as head girls basketball coach at Voorhees High School for the 1982-83 season through the 1988-89 season.

5. Petitioner also held the coaching positions of assistant boys basketball coach for almost seven years, assistant girls track coach in 1974, and head girls track coach between 1975 and 1981.

6. In March of 1989, petitioner sought re-appointment as head girls basketball coach for the 1989-90 season with the recommendations of the Superintendent of Schools, the Principal and Athletic Director of Voorhees High School.

7. The respondent did not renew petitioner as head girls basketball coach for that 1989-90 season.

8. On July 21, 1989 and again on September 15, 1989, the respondent posted openings for both the head coach and assistant coach positions for girls basketball. These documents were posted with the approval of the Board.

9. Petitioner then applied for the position of assistant girls basketball coach for the 1989-90 season accompanied with the same recommendation from the same administrators.

10. The respondent also denied petitioner's application for the assistant girls basketball coaching position.

11. Ann Kelly who was employed as a substitute teacher and not as a full-time teaching staff member in the North Hunterdon Regional High School District was appointed to the assistant girls basketball coaching position.

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12. Petitioner was appointed to the assistant girls track coach position for the 1989-90 season and re-appointed for the 1990-91 season.

13. During the time period under review, Board policies #350 and #351 were in effect and addressed the duties of head athletic coach and assistant athletic coach respectively.

14. Respondent never sought a waiver from the County Superintendent of Schools pursuant to N.J.A.C. 6:29-6.3 for authority to hire Ann Kelly, who was not then nor is now a full-time member of its teaching staff.

15. Petitioner has received favorable evaluations for all his previous coaching assignments.

16. The duties of the assistant basketball coach position differ substantially from the duties of the varsity position since the assistant is responsible for coaching the freshman squad. These games are less intense and emotional than the varsity program. Disruptive incidents rarely occur. The freshman program also has a greater focus on teaching the fundamentals of the sport.

17. Petitioner was not re-appointed to the head basketball coaching position or the assistant coaching position, because of two incidents of unsportsman-like behavior.

18. In one incident, petitioner used profanity in addressing an opposing coach within the hearing range of student athletes. He subsequently sent a letter of apology to the offended coach.

19. Although these two teams played again that season, there were no problems in the later game. In fact, petitioner coached fourteen (14) more games that season, without any other incidents or difficulties.

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20. The other incident occurred just before half-time, at a state championship qualifying game between Voorhees and North Hunterdon High School, at a site in Middlesex County. After substantial provocation, the petitioner turned to the crowd and made an obscene finger gesture. He admits this was inappropriate conduct.

21. Except for these two incidents, petitioner's lengthy athletic coaching and teaching career is without blemish.

22. The North Hunterdon Regional and Voorhees High Schools are in the same regional district. At the time of the state playoffs, an intense rivalry existed. The petitioner was in an untenable position. He had taught at both schools and those supporting his opposing team that evening, questioned his loyalty with derrogatory taunting.

23. As a result of that incident, the petitioner was reprimanded. The Superintendent believed this to be a "very adequate" sanction. No further action was taken against petitioner until his renewal application as head girls basketball coach was denied in 1989-90 by the Board.

24. Although no obligation exists, petitioner was never given the opportunity to present his explanation for the circumstances of both incidents to the full Board. The record reflects Board member testimony that the non-renewal as head coach and assistant coach for girls basketball was intended to be a disciplinary sanction for petitioner's past unsportsmanlike conduct.

25. Not all the Board members who voted on whether petitioner should be retained in a girls basketball coaching position reviewed his coaching evaluations before their decision. There was a consensus among the members that petitioner was an improper role model for the girls basketball athletic program.

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26. Notwithstanding this "improper role model" opinion, the Board thereafter, did appoint petitioner to a position as assistant track coach. Respondent's explanation for this inconsistent conduct is not at all convincing.

DISCUSSION

It is well settled that tenure does not attach to a coaching position. Furlong v. Kearny Bd. of Ed., 1980 S.L.D. 1420; Koslick v. Bd. of Ed. of The Twp. of Edison, State Board, April 3, 1987. The employment of coaches and staff in a school district is an authority reserved to local Boards of Education pursuant to N.J.S.A. 18A:11-1.

A teacher has no right to employment in a coaching position. Koslick, supra. Boards of education have virtually unlimited discretion in such hiring. Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982). Unless there is evidence of arbitrary or capricious or unreasonable judgment, the Board, in exercising its discretionary authority with respect to nontenured extra curricular athletic staff, must be sustained. Dore, supra.

Boards of education are not bound by the recommendations of administrators and may draw upon personal observations or information obtained by others. Dore, supra.; Guerriero v. Bd. of Ed. of The Borough of Glen Rock, State Board, February 5, 1985; Scaturro v. Bd. of Ed. of Montague Township, 79 S.L.D. 427.

The Appellate Division recognized that a board's decision regarding a nontenured position need not be based upon the evaluations or recommendations of the administration when it stated that a board has a:

> "right to reach its conclusion about a non-tenured teacher on a broad base of input received from a variety of people, including members of the public; parents of students and/or board members' own knowledge of a teacher even if that knowledge is acquired through having a child in a teacher's class." Dore, supra. at 454.

There is no question that respondent's decision to employ Ann Kelly, a substitute teacher in the district, was not in accordance with N.J.A.C. 6:29-3.3. It was effected without the concurrence of the County Superintendent of Schools.

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Notwithstanding the Board's position, with regard to the petitioner's application as assistant girls basketball coach, nothing in the record excused or relieved the Board from its responsibility to first obtain authority from the County Superintendent of Schools to hire outside the full-time district teaching staff. The record clearly demonstrates that at the time of such appointment continuing to the present, the petitioner was and is the only interested and qualified candidate.

I am further impressed that with the absence of the professional judgment of the County Superintendent of Schools, there is no way to speculate as to whether seasoned reasoning might have prevailed to the benefit of petitioner.

It is not only inappropriate but fundamentally unfair for a board of education to manipulate its appointing authority as a sanction to circumvent the due process safeguards afforded in the traditional Civil Service disciplinary process. Although such conduct is deplorable, it does not rise to that level of egregiousness to justify intervention in the appointment process by the Commissioner of Education. The respondent is noticed and cautioned that any future manipulation of the appointing process solely to effect disciplinary sanction may well result in the abrogation of such conduct. The respondent should admonish itself and resolve never to allow or tolerate such mechanations again.

Under the traditional view, the Board decision not to employ the petitioner would not be disturbed, although the Board would be reprimanded for its failure to conform to the process of N.J.A.C. 6:29-3.3. However, the record clearly demonstrates that the Board action, not to hire the petitioner, was intended to be punitive. Had the decision been made without reference to punitive effect, the decision would be insulated from any form of intervention. The record is void of any authority for the proposition that non-renewal to an extra curricular assignment can be effected to achieve a disciplinary purpose. Yet, there is also nothing in the record to challenge this tainted reasoning.

DISPOSITION

The respondent's action to hire a substitute teacher to be the assistant girls basketball coach is without legal authority, and I **CONCLUDE** that such action must be declared **NULL** and **VOID**. However, the facts of this case do not support a finding that the Commissioner of Education should intervene to direct the appointment of petitioner to the assistant coaching position.

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The Board decision, not to employ petitioner to the extra curricular assistant girls basketball coaching position, was taken for proscribed reason and I **CONCLUDE** is also **NULL** and **VOID**. However, there is sufficient support to also **CONCLUDE** that petitioner is entitled to the compensation allocated for the assistant girls basketball coaching position from the commencement of 1989-90 school year until the Board purges itself of: (a) its regulatory violation and appoints an individual consistent with the existent mandate; and, (b) reconsiders its original determination as to petitioner's application and then takes whatever action it will for reasons appropriate and not inconsistent with this decision. I fully expect the Board to maintain a fair and open mind during its deliberations in this regard.

The respondent's determination not to employ petitioner as an assistant girls basketball coach is **VACATED** and **REMANDED** for de novo consideration. Respondent's appointment action of Ann Kelly is in violation of N.J.A.C. 6:29-6.3 and is **VACATED**. Finally, respondent is **ORDERED** to pay petitioner the sum allocated to compensate an assistant girls basketball coach for the 1989-90 and 1990-91 seasons and thereafter, until the regulatory violation is purged and such de novo consideration of petitioner's application, which is the subject of this appeal, is completed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 21, 1991
DATE

CHRISTOPHER DIETZ, ALJ

Receipt Acknowledged:

6/24/91
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 26 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

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WITNESS LIST

On behalf of Petitioner:

Raymond Mammano, Principal, Voorhees High School as of March 1, 1989; prior assistant principal at Millburn High School

Robert Cavo, Director of Athletics, Voorhees High School, now Mt. Olive Assistant Principal for past year

John Quinn, Math Teacher, West Morris/Mendham

Robert Neumann, Superintendent N. Hunterdon Regional; 12 years

Harold Norcross, petitioner

On behalf of Respondent:

Ronald I. Anderson, Somerville Girls Athletic Coach

David Pitfield, Member North Hunterdon Board of Education since 1987

Louis Eacovalle, Member Board of Education since 1987

Robert Hopek, Director Athletics, N. Hunterdon, since 1974 to present

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EXHIBIT LIST

On behalf of Petitioner:

R-1 Memo, dated May 12, 1989 from Raymond Mammano to Dr. Robert E. Neumann

P-2 Norcross Evaluation, dated June 8, 1988, signed by Chris Goffi

P-3 Norcross Evaluation, dated June 3, 1990, signed by Chris Goffi

P-4 Norcross Evaluation, dated June 10, 1986, signed by H. Vandermark

P-5 Norcross Evaluation, dated March 6, 1984, signed by H. Vandermark

On behalf of Respondent:

R-1 Letter of Apology from Norcross to Ronald I. Anderson, dated October 15, 1990

Joint Exhibits:

J-1 Coaching History of Petitioner, undated

J-2 Policy #350 - Head Athletic Coach, adopted January 3, 1984

J-3 Policy #351 - Assistant Athletic Coach, adopted January 3, 1984

J-4 Job Posting, dated July 21, 1989, Head Girls Basketball Coach at Voorhees High School

J-5 Job Posting, dated September 15, 1989, Assistant Girls Basketball Coach at Voorhees High School

J-6 Letter from Norcross to Hopek, dated March 12, 1987

J-7 Letter from Hyde to Norcross, dated March 13, 1987

J-8 Narrative Evaluation/Observation of Skip Norcross - prepared by Robert A. Cavo, dated March 3, 1989

J-9 Letter from Cavo to Neumann, dated March 10, 1989

J-10 Narrative Evaluation/Observation of Skip Norcross - prepared by Robert Cavo, dated March 3, 1988

J-11 Stipulation of Facts, dated September 21, 1990

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SKIP NORCROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4 as did petitioner. Petitioner also filed timely reply exceptions.

The Board first notes the ALJ erroneously inverted the attorneys representing the parties on the face page of the initial decision. It is noted for the record that Mr. Friedman of Zazzali, Zazzali, Fagella & Nowak represented petitioner in this matter and that Mr. Schumacher of Rand, Algeier, Tosti and Woodruff represented the Board.

Petitioner concurs with the substance of the decision below. He notes that the ALJ's conclusion is bolstered by his proposed findings of fact and conclusions of law previously submitted, which are attached to the exceptions filed. Petitioner claims the Board's actions were improper because it did not obtain the approval of the county superintendent, and because the facts and regulation required that he be hired, regardless of whether the county superintendent was contacted.

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Petitioner refers to the ALJ's Finding of Fact No. 26, and argues that the ALJ properly concluded that respondent's refusal to appoint him was not based upon its negative role model claim. He avers that because the Board appointed him to the position of assistant track coach, in which position he performed admirably, the Board's claim that he was an unsuitable role model "falls of its own weight." (Petitioner's Exceptions, at p. 2) Petitioner avers that the Board's action was based on disciplinary reasons, not whether he was qualified or a proper role model. Yet, petitioner contends because the Board failed to seek the county superintendent's approval, it is unnecessary for the Commissioner to consider respondent's actual motivation.

Finally, petitioner concurs with the ALJ's remedy.

The Board's first exception avers the ALJ erred in his findings of fact. It asks that the Commissioner incorporate its findings of fact as set forth in its proposed findings of fact as submitted to the ALJ by letter dated April 1, 1991. The Board submits that several of the ALJ's findings of fact are not supported by a preponderance of the credible evidence. In particular, it excepts to Finding of Fact No. 16 regarding the duties of an assistant basketball coach position as compared to those of a varsity coach. It cites the transcript of the testimony of Mr. Cavo, the Athletic Director at Voorhees, and that of Mr. Hopek, the Athletic Director at North Hunterdon, that there are substantial similarities between the duties of the two.

The Board also submits that the ALJ's Findings of Fact Nos. 18, 20, and 22 do not represent the record accurately. It claims Finding No. 18 ignores the testimony of the Somerville High School

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coach, who testified that he had not seen in twenty years of coaching the type of conduct demonstrated by petitioner following the game between the Somerville and Voorhees High Schools, and it cites the transcript in support of its contention in this regard. As to Findings of Fact Nos. 20 and 22, the Board objects to the conclusion of the ALJ that petitioner had substantial provocation for making an obscene gesture to the crowd, averring instead that there is no evidence that any remarks which provoked such action were directed at petitioner as suggested by the ALJ. Rather, the Board claims petitioner was placed on notice by a written reprimand (Exhibit J-7) that his conduct at the game "was inappropriate and *** that such unsportsmanlike conduct would not be tolerated in the future." (Board's Exceptions, at p. 3)

The Board also challenges Finding of Fact No. 24, suggesting in exceptions that more than one Board member testified concerning the action of the Board not to renew petitioner's coaching position in the girls' basketball program, citing the transcript referring to Board Member Eacovalle's belief that petitioner was an improper role model in the program. The Board also challenges that statement in Finding of Fact No. 24 suggesting that petitioner was never given an opportunity to present his explanation to the circumstances of both incidents to the full Board. To this the Board submits that the record does not reflect that petitioner requested that he be given an opportunity to make such explanation.

Thereafter at Point II, the Board cites the following exception:

> THE ALJ FAILED TO APPLY THE APPROPRIATE STANDARD IN REVIEWING THE BOARD'S ACTION.

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The Board submits that the ALJ failed to apply the arbitrary, capricious or unreasonable standard he enunciated as bearing on this matter. The Board suggests that the ALJ provides no reasons supported in the school laws as to why the Board's action should not be sustained. It challenges the ALJ's statement that the Board violated petitioner's civil service rights, in that teachers are not civil service employees. The Board further claims that the due process rights of petitioner are not at issue in this matter as there is no contention that the Board violated petitioner's due process rights. Rather, the Board avers that

> ***on two occasions petitioner engaged in blatantly unsportsmanlike and inappropriate conduct. The Board's decision not to appoint petitioner to an assistant girls basketball coaching position after he demonstrated that he was unable to conduct himself properly as the head coach was clearly a reasonable decision which must be upheld.(Board's Exceptions, at p. 6)

Point III of the Board's exceptions states:

> THE ALJ ERRED IN FINDING THAT THE BOARD'S ACTION WAS INVALID BECAUSE IT WAS INTENDED TO BE "PUNITIVE."

The Board contends the ALJ's conclusion that the full Board's action was intended to be "punitive" should be rejected, even if all of the Board members who voted against hiring petitioner to the assistant girls' basketball coaching position testified that "their decisions were intended to be 'punitive' [because] there is no basis for the ALJ's determination that a Board cannot decide to non-renew an individual for an extracurricular position for 'disciplinary' reasons." (Board's Exceptions, at p. 7)

The Board submits that it acted within its discretionary authority when it determined not to appoint petitioner to assistant girls' basketball coach based upon his prior misconduct.

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At Point IV the Board submits:

THE BOARD'S ACTIONS WERE IN ACCORDANCE WITH N.J.A.C. 6:29-3.3 IN THAT PETITIONER WAS AN "UNQUALIFIED" CANDIDATE ON THE BASIS OF HIS CONDUCT AS HEAD GIRLS BASKETBALL COACH.

The Board avers that notwithstanding that the superintendent, Dr. Neumann, failed to follow the procedures set forth in N.J.A.C. 6:29-3.3, the record reflects that the Board had determined that petitioner was unqualified to serve as a girls' basketball coach on the basis of his improper conduct as evidenced by the two incidents in which he displayed unsportsmanlike conduct. It claims the ALJ's decision contains no analysis of the Board's policy, J-3, which sets forth the duties of an assistant coach, among which duties includes that the coach "enforces discipline and [sportsmanlike] behavior at all times***." (Exceptions, at p. 9, quoting J-3) Thus, the Board submits, petitioner had not fulfilled the aforementioned duty as head girls' basketball coach, and therefore, its determination that his conduct made him unsuitable for an assistant position in the girls' basketball program was warranted and consistent with the written standards established by the Board. The Board requests that the Commissioner reject the ALJ's decision and affirm the Board's action not to employ petitioner as an assistant girls' basketball coach.

Petitioner's reply exceptions rebut the exceptions to the findings of fact raised by the Board by asking that the Commissioner adopt his proposed findings of fact and conclusions of law. He also rebuts each specific exception with his version of the testimony and accompanying transcript citation. In summary of his response to the Board's exceptions concerning the ALJ's findings of fact, petitioner

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asserts that the ALJ's findings are accurate and should be adopted by the Commissioner.

Point II of petitioner's reply exceptions asserts that this matter is governed by N.J.A.C. 6:29-6.3, and that but for the regulation, perhaps the arbitrary and capricious standard would apply. Petitioner claims the issue is whether the Board complied with the regulation. Submitting that it did not, petitioner concludes that it is irrelevant what standard applies. Moreover, he avers that under any standard the Board did not apply for the county superintendent's approval. Thus, petitioner argues, the Board's complaints regarding burden of proof, civil service principles, and disciplinary motivation are irrelevant, and that the ALJ's conclusion that the Board was obligated to apply, but did not apply, to the county superintendent must be affirmed.

Point III of petitioner's reply exceptions claims that under the plain language of N.J.A.C. 6:29-6.3, regardless of the county superintendent's potential input, petitioner was entitled to the position because he was a teaching staff member regularly employed by the district and met all written qualifications. Thus, the Board was obligated to appoint him to the position, and any other action, since violative of the regulatory scheme, is by definition arbitrary, capricious and unreasonable. Petitioner cites Dore v. Bedminister Twp. Bd. of Ed., 185 N.J. Super. 477 (App. Div. 1982) in support of this proposition.

Point IV of petitioner's reply exceptions concedes that to the extent that the ALJ refers to the civil service law, it does not apply to this matter. He reiterates his argument that the arbitrary, capricious and unreasonable standard does not apply,

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however, and that regardless, under any test, he has proven that he was qualified for, and should have been appointed to, the position.

Point V of petitioner's reply exceptions avers that the Board's action, taken as a disciplinary sanction after he had already been disciplined, was improper and unfair. He cites his post-hearing brief to support this claim and adds that there is nothing in N.J.A.C. 6:29-6.3 which suggests that in assessing the rights of in-district compared to out-of-district applicants, discipline is a proper motive.

Point VI of petitioner's reply exceptions avers that the Board's attempt to shift the blame for its failure to comply with N.J.A.C. 6:29-6.3 by shifting culpability to the superintendent must be rejected. Petitioner claims that the Board has cited no authority for the proposition that it is excused when its employees or administrators fail to take appropriate action.

Lastly, petitioner finds the Board's reliance on Wagner v. Old Bridge Twp. Bd. of Ed., decided by the Commissioner March 2, 1990 misplaced, for three reasons. First, Wagner did not include the extensive factual record extant in this matter, and petitioner avers he has demonstrated fitness and qualifications for the position. Second, Wagner had been the subject of numerous student complaints and had been disciplined in a tenure proceeding related to those complaints. Third, neither the ALJ nor the Commissioner considered the case law regarding the role of the county superintendent in Wagner. Petitioner also contends that it is significant that in Wagner the ALJ found that the Board did not act improperly. Petitioner suggests that each case turns on its own facts, and that this matter does not include the ingredients Wagner did, thus, rendering that case not relevant to this one.

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By way of summary, petitioner reiterates that it is not necessary to reach the many issues raised by the parties. He claims that because he met all of the written qualifications for the position, that he was and is a regularly employed teaching staff member, and because the Board failed to apply to the county superintendent, he must prevail. Petitioner adds that should the Commissioner consider the other arguments, the ALJ's decision should be affirmed.

Upon a careful and independent review of this contested matter, the Commissioner affirms the initial decision rendered by the Office of Administrative Law with the following clarifications.

The Commissioner is in accord with the ALJ that tenure does not attach to coaching position, and that the employment of coaches and staff in a school district is a board prerogative. The Commissioner also concurs with the ALJ that a teacher has no right to employment in a coaching position. See Joseph V. Koslick v. Bd. of Ed. of the Twp. of Edison, decided by the Commissioner August 20, 1986, rev'd State Board April 1, 1987, aff'd N.J. Superior Court Appellate Division November 18, 1987. In selecting coaches, a district board of education must be guided by N.J.A.C. 6:29-3.3. Therein it is stated:

> 6:29-3.3 Athletics personnel
>
> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.
>
> (b) School districts shall be permitted to employ any holder of a New Jersey teaching

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certificate to work in the interscholastic athletic program provided that the position has been advertised.

(c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:

1. The district chief school administrator demonstrated to the county superintendent that:

i. The vacant coaching position had been advertised; and

ii. There was no qualified applicant based on the written standards of the district board of education;

2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(i) shall not apply to such coaching situation.*

The Commissioner has set forth a careful discussion of the application of this regulation in the case captioned John H. Chambers, Jr. v. Board of Education of the Township of Neptune, 1985 S.L.D. 1379. Therein, the Commissioner set forth the two threshold criteria in a board's choice of a coach, that is, that he or she be a certified teacher and, second, that he or she be employed by the board as a teacher. "Only after it is determined that the hiring priorities established in N.J.A.C. 6:29-6.3(a) cannot be met does

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* The Commissioner notes that the State Board of Education has approved readoption of N.J.A.C. 6:29-3.3 without significant modification, effective March 5, 1990.

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the priority shift to selecting a candidate 'employed' not as a teacher, but as a coach." (Chambers, at 1382) Having determined that the individual teacher applicant meets the two threshold criteria, the Board is left with one other inquiry, that is "***whether the Board had written policy regarding qualifications for the position." (Id.) It was in failing to properly establish such qualifications for the instant coaching positions in question that the Board initially fell short in its obligations in the instant matter.

Submitted to the record are two job descriptions for the coaching positions in question, Exhibits J-2 and J-3. Neither of these constitutes candidate qualifications; rather, they are an explanation of the duties to be performed in the coaching positions. Had the Board of Education developed written candidate qualifications such as standards of experience, conduct, etc., for coaches, its argument that petitioner was not an appropriate role model might have survived scrutiny under the standard of review by which board actions are reviewable by the Commissioner, that is, whether such action or decision was arbitrary, capricious or unreasonable. As it stands, however, the Board lacked any such standards upon which to gauge petitioner's performance as a coach, and, thus, in failing to hire a teacher within the district for such position who otherwise met the two threshold criteria in favor of a substitute, violated N.J.A.C. 6:29-3.3. The Commissioner so finds.

The Commissioner also agrees with the ALJ that there is no question that the Board's decision to employ Ms. Kelly, a substitute in the district, was not in accord with N.J.A.C. 6:29-3.3, in that it was effectuated without the concurrence of the county

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superintendent. However, the above discussion renders secondary any inquiry beyond the Board's failure to hire petitioner when he met the threshold criteria in the absence of written qualifications against which to measure petitioner's performance.

In so finding, the Commissioner notes that the Civil Service disciplinary process has no bearing on this matter. Thus, the Commissioner rejects that language in the initial decision referring to such "safeguards" and to the reference to due process afforded via such process mentioned at page 7 of the initial decision. Similarly the Commissioner rejects the ALJ's language labeling the Board's error as a "disciplinary" "mechanation," although he concurs that the Board's decision was fatally flawed for the reasons expressed herein.

Accordingly, for the reasons expressed in the initial decision as clarified herein, the initial decision of the Office of Administrative Law is affirmed.

In accepting that the Board's action appointing Ann Kelly is in violation of N.J.A.C. 6:29-3.3, the Commissioner concurs with the ALJ that the Board be directed to pay petitioner the sum allocated to compensate an assistant girls' basketball coach for the 1989-90 and the 1990-91 seasons. However, the record is unclear whether petitioner's appointment as assistant girls' track coach ran concurrent to the position as an assistant girls' basketball coach. Petitioner's prehearing brief suggests on page 2 that the Board's appointment of petitioner to a position as assistant girls' track coach occurred "simultaneously, or shortly thereafter" to the Board's denial of the position of head girls' basketball coach to petitioner. However, it is not clear whether the track position was

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for winter track, or spring track. If the girls' basketball season was the same as the track season for which petitioner was appointed, payment of the coaching stipend for assistant girls' basketball coach shall be mitigated by the stipend petitioner received as assistant girls' track coach. If the seasons did not occur at the same time, petitioner shall receive both stipends.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 8, 1991

DATE OF MAILING - AUGUST 8, 1991
Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3565-90
AGENCY DKT. NO. 88-4/90

IN THE MATTER OF THE TENURE CHARGES AGAINST THELMA BETHEA

Melvin Randall, Esq., for petitioner
(Love & Randall, attorneys)

Nancy I. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 26, 1990 Decided: June 21, 1991

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

Statement of the Case

This is a teacher tenure proceeding under *N.J.S.A.* 18A:6-10 et *seq.* Tenured teaching staff members hold employment in the public school system "during good behavior and efficiency." The only issue is whether the facts justify dismissal or reduction in compensation of a tenured teacher on the ground of "inefficiency." Before filing charges of inefficiency, a local district must serve 90-day written notice on the teacher, specifying the nature of the alleged misconduct with sufficient

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particularity to furnish the employee an opportunity "to correct and overcome the inefficiency." *N.J.S.A.* 18A:6-11.

Procedural History

On December 20, 1989 petitioner East Orange Board of Education ("Board") served written notice on respondent Thelma Bethea ("Bethea") of alleged inefficiencies in her job performance. On the next day, school administrators provided Bethea with a modified "professional improvement plan" containing recommendations to improve her performance. Supervisory staff also met personally with her and offered their "on-going assistance, guidance and support." At the expiration of 90 days, the superintendent of schools reported to the Board that the identified areas of Bethea's inefficiency remained uncorrected. Consequently, on April 4, 1990, the Board accepted for filing a set of written tenure charges, together with supporting statements of evidence, and gave Bethea 15 days within which to respond. Bethea promptly filed her written denial.

Subsequently, on April 17, 1990, the Board voted to certify tenure charges to the Commissioner of Education ("Commissioner") and to suspend Bethea with pay. One week later, on April 24, 1990, the Board filed the tenure charges with the Commissioner. On May 8, 1990, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") as a contested case. The OAL held hearings on November 7, 13, 14 and 20, 1990. Witnesses and exhibits are listed in the appendix. Both sides filed legal briefs by December 26, 1990. Time for preparation of the initial decision has been extended to June 27, 1991.

Findings of Fact

General Background Facts

Many of the background facts are undisputed. Thelma Bethea has excellent academic qualifications, including a college baccalaureate degree in education as well as two masters-level degrees. She possesses teaching certificates as an elementary teacher and a teacher of the handicapped. Before coming to the East Orange school district, she worked for nearly ten years in the City of Newark as a public school teacher and later as child study team member. After an extended absence caused by illness, she resigned from the Newark school system in April 1982.

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In October 1982 she was hired by the East Orange school district. For her first year, she was assigned to teach a special education class at Clifford Scott High School. Between 1983-84 and 1986-87, she taught a special education class at Columbia Elementary School. Because of another bout of illness, she took a leave of absence for the entire 1987-88 school year.

Upon her return in 1988-89, she was transferred to teach a self-contained special education class at the John L. Costly Middle School. Her small class, limited by law to a maximum of 16 students with a classroom aide or 12 students without an aide, was composed exclusively of children with perceptual impairments. By mid-March, Bethea had been officially reprimanded for "abruptly leaving [her] class unsupervised and going home" on several separate dates. Again, Bethea was absent on temporary leave from late April through June 1989. As a result of her poor performance ratings during 1988-89, the Board voted to withhold Bethea's salary increment for 1989-90.

When she came back in September 1989, Bethea resumed the same teaching duties at the Costly Middle School. The school administration's dissatisfaction with her lack of improvement continued, however, culminating in the bringing of these tenure charges. Criticisms dealt not with any deficiencies in Bethea's knowledge of the course content, but rather with her inability to convey information to her students; her total loss of control over the classroom environment; and her uncooperative attitude and resistance to constructive suggestions. For convenience, the specific charges and the supporting evidence may be grouped under four general headings: (1) Quality of Instruction; (2) Classroom Management; (3) Professional and Personal Qualities; and (4) Interpersonal Relations with the School and the Community.

(1) Quality of Instruction

This broad topic encompasses lesson planning and preparation, teaching strategies and techniques, and sensitivity to student needs. Several qualified Board witnesses expressed similar views regarding the intractable nature of Bethea's teaching problems. Ralph Milteer, an assistant principal with 30 years of professional experience, pinpointed Bethea's major weakness as an unwillingness to individualize instruction for each student. Bethea's failure was especially damaging

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in a special education context, where the students display a wide range of achievement levels and class size is purposely kept low so that the teacher can pay more attention to slower learners.

Instead, Bethea persisted in giving lectures to the whole class and ignored Milteer's frequent recommendations to break the class down into smaller groups with different assignments. During one classroom visit in October 1989, Milteer observed a disorganized session in which the objectives of the lesson were obscure, the instructional explanation by the teacher was unclear and the children "didn't seem to understand what was going on." As the year progressed, conditions got worse. In the beginning, Bethea had at least received favorable ratings for her use of materials and her neat classroom. Later that year, "the room was no longer attractive" and wall posters were "pulled down or missing."

Even after service of the inefficiency notice in December 1990, Bethea still refused to teach in smaller groups. In a repeat visit to the classroom in March 1990, Milteer noted the same reluctance to plan separate activities for different learners, the same absence of clear objectives for the lesson, and the same confusing explanation of the teaching activity. Bethea seemed to be "talking in isolation" and the children were not listening to her. Children complained about being unable "to keep up with her" or that her class was "boring."

Other educators independently corroborated Milteer's observations and evaluation. Pearl Klausner, the district's head of special education services and Bethea's immediate supervisor, testified that Bethea merely lectured to her students en masse and made no genuine effort to follow the individual educational programs developed to address each child's unique learning style. Moreover, Bethea refused to follow the district's prescribed format for lesson plans, because she considered the district-wide requirement to be "insulting." Consequently, her lesson plans failed to identify precisely what "behavioral objective or skill" was supposed to be taught or how the particular lesson related to the overall curriculum.

Often the work which Bethea assigned to her students was well above the grade level that children in her class could reasonably be expected to attain. Illustratively, Bethea prepared an ornate set of papers with pictures of geometric shapes drawn closely together for children known to have perceptual difficulties.

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On another occasion, she designed her own "overly detailed" worksheet on mortgage payments, described by the building principal as clearly "too advanced" for handicapped fourth-grade level youngsters and beyond the intellectual capacity of regular eighth graders.

Teacher's aide Gloria Peters was placed in Bethea's classroom for 1988-89 and 1989-90, and thus was in daily contact with her over this period. While not certified as a teacher herself, Peters has received special training, has three children of her own, and has successfully worked as a teacher's aide for 20 years. Peters confirmed that Bethea never planned lessons for individual students. Every child in the class learned from identical materials. If a student appeared to be struggling with a particular task, Bethea would not provide any support and would not allow Peters to intervene. School administrators faulted Bethea for not effectively using her classroom aide to reinforce regular instruction or using her to tutor the children in smaller groups.

Repeated efforts to help Bethea overcome her teaching deficiencies have been unproductive. Assistant principal Milteer actually went into her classroom and demonstrated how to teach a model lesson. Unfortunately, Bethea was unreceptive to trying new methods or approaches Supervisor Klausner offered specific recommendations and personally modeled appropriate classroom behaviors, but Bethea disregarded her advice and insisted that she already knew better. Despite the urging of her supervisors, Bethea refused to attend in-service training sessions or staff development programs. Her excuses included not wanting to participate in after-school meetings, not wanting to take too many courses at once, and not wanting to repeat similar courses she had taken in the past.

The administrative hearing also afforded an opportunity to assess Bethea's demeanor and credibility. Soft-spoken, well-educated and intelligent, Bethea gave the impression of being deeply troubled and distraught. In the course of otherwise lucid testimony, Bethea interspersed an occasional irrational or bizzare comment. At one point, she made an incoherent remark about "someone coming to [her] house" and "putting things in [her] food and water" and leaving "green build-up" in the pipes. She complained of hearing "peculiar sounds," which she likened to "telecommunications" or "thought transference." However, she did not know how adequately to describe her experience without sounding "like a lunatic."

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At another point in her testimony, Bethea expressed feelings of persecution and confided that she sensed "animosity directed at [her]." Items seemed to be "removed" from her home" or "missing" from her classroom, although often the lost items would mysteriously reappear near where she had left them. She suspected a student plot to make her look absentminded, and later wondered aloud why students would misbehave with her and not with anyone else. At times, she appeared anxious to unburden herself, as when she volunteered her reluctance to be fingerprinted in New York or explained that "no one goes into education [purposely] to cause harm to children."

I FIND that Bethea failed to prepare adequate lessons keyed to the individual needs of her students, that she did not use appropriate teaching strategies and techniques, and that she was insensitive and unresponsive in her dealings with the children in her class. Before and during the 90-day improvement period, school administrators made numerous sincere efforts to help Bethea sharpen her skills and overcome her inefficiencies. Bethea refused to listen and was unwilling or unable to correct her inefficiencies.

(2) Classroom Management

Classroom management was one of Bethea's greatest weaknesses. Typically, the first week or two of school would go well, and Bethea would be able to maintain discipline. As early as October 1989, however, Milteer noticed that Bethea, while facing the blackboard, "would never turn her head" or "give a side glance" to check what was going on behind her. The presence of the classroom aide "was the only thing which saved the day." In a written observation dated October 17, 1989, Milteer wrote that students in Bethea's class were "talking to each other constantly, sleeping in class and getting up out of their seats to walk around without permission." By March 1990, student behavior was "really out of control." Youngsters would yell out, call each other names and throw pencils or papers across the room. Bethea "did not respond" and never showed the children that such behavior was unacceptable.

Klausner encountered similar occurrences during her visits to the classroom. On October 25, 1990, for example, Bethea was "lecturing" one or two students while the rest were "walking around unsupervised." Due to the disruptive

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atmosphere,"no education was going on." Similarly, on February 9, 1990, students "shouted, walked around and were generally disruptive." Bethea simply ignored the behavior and "did not use any method to control the class." Peters reported that students "did what they wanted, when they wanted." Bethea's students would walk out of the classroom and roam the hallway or wander into the adjacent mailroom. Once when a fight broke out in front of the class, Bethea "just continued to teach" without trying to stop it.

School policy encourages teachers "to handle their own disciplinary problems in the class area." Before escalating to more serious disciplinary measures, a teacher should consult with the child's parent or refer the child to the guidance department for counseling. Under district guidelines, teachers are supposed to send disruptive students to the office "only as a last resort." Nevertheless, Bethea routinely sent students to the office as her sole strategy for dealing with minor infractions. Frequently she would send ten or more students to the office, virtually emptying out most of her classroom. In October 1989 alone, this happened four times. Habitually, a group of her students would be "lounging around" the office or roving the building "disturbing other classes." It was fairly common to see several of Bethea's students "sitting outside her classroom door" or "drift[ing] down to the basement level."

Ultimately, building principal R. Leonard Moore became directly involved. He tried unsuccessfully to convince Bethea that excessive reliance on this one form of punishment would lessen its effectiveness, but she kept sending students to the office. Special education supervisor Klausner said that Bethea showed her "piles of referrals" and once produced a referral "every three minutes." Teacher's aide Peters recalled that Bethea would direct her to photocopy 20 blank referral forms available for use on the following Monday. On one memorable occasion in January 1990, Bethea filed 23 disciplinary referrals to the office in one day, including one child who happened to be absent from school on that date.

Significantly, Bethea acknowledged her inability to control the class and the deterioration of the situation over time. Denying personal responsibility, however, she blamed the problem on "willful misconduct" by the children themselves. She perceived her students as engaging in acts aimed "mostly at [her]," such as turning off the classroom lights, taking things from her desk and knocking over books.

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Although she had tried other disciplinary techniques like issuing a set of written rules, the student "just chose not to follow it." While admittedly Moore had asked her not to write so many office referrals, she continued doing so even though she knew "it annoyed him."

Originally Bethea had objected that her classroom, located near a busy hallway and within earshot of a constantly ringing telephone, was too noisy for a group of easily distractible children. Yet she declined an offer to switch to a quieter room. She stopped short of claiming that her disciplinary problems were attributable to the undesirable location, since the students deliberately misbehaved only with her and not with other teachers using the same room.

I FIND that Bethea was unable to maintain proper classroom discipline or gain the respect of her students. Chaos reigned in her classroom, and the atmosphere was not conducive to learning. Bethea resisted her supervisors' constructive suggestions to turn the situation around. Gradually she lost all semblance of control by [illegible] excessive numbers of students to the office. As time went on [illegible] got better.

[illegible]nal and Professional Quality

[illegible] exhibited [illegible] outright refusal to perform [illegible]gned duties [illegible]

Every teacher at the Costly Middle School is expected to escort his or her students to the bus stop. Bethea was well aware of this requirement, but chose not to comply with it. In September 1989, principal R. Leonard Moore "reminded" Bethea about her obligations to supervise students at the bus stop. In November 1989, he sent a reminder that her professional duties include the supervision of [her] class between 3:00 and 3:15 p.m. as they wait bus transportation." Additionally Moore would himself directs traffic opposite the bus stop, pleaded with her that "we all must do this together and your colleagues are pitching in." Moore sent a second memo in January 1990, reflecting that there had been no change in Bethea's attitude regarding bus duty. Thereafter, in February 1990, a teacher was [illegible] breaking up a fight at the bus stop between two of Bethea's [illegible] students.

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At the hearing, Bethea contended that her poor health prevented her from waiting outside in cold weather or that she had been given a conflicting assignment. No medical evidence supports her contention that she was too ill to perform bus duty. Nor did anyone substantiate the alleged conflict in assignments. Evidently, Bethea's real reason for not carrying out her assignment was her insistence that bus duty "is not my responsibility."

Another instance involved Bethea's unwillingness to supervise her students on the way to and from lunch. Principal Moore monitored the cafeteria daily, and personally witnessed Bethea's students "running upstairs" to the cafeteria, without any adult supervision, while Bethea would "take the elevator." After lunch, some of her students would wander the hallways. Bethea told Moore that the elevator was "for her use." According to Peters' testimony, Bethea "never" accompanied the children to lunch. Bethea herself was unrepentant about not walking her students to lunch, insisting that her students were not "babies" in need of supervision and that lunch supervision was someone else's job. Further, Bethea relies on her alleged "contractual right" to a duty-free lunch, but the contract creating such right is not in evidence. In any event, the inadequate supervision occurred immediately before and after rather than during lunch.

I FIND that Bethea was deliberately insubordinate in refusing to perform certain required duties which she disliked or considered demeaning. She refused the building principal's direct orders to supervise students at the bus stop or enroute to the school cafeteria. These important tasks are a regular part of a classroom teacher's assigned responsibilities rather than voluntary activities. Other classroom teachers had similar assignments which they managed to perform.

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(4) School and Community Relations

Numerous incidents were cited in which Bethea demonstrated an inability to get along well with people. Bethea's own colleagues complained about her discourteous treatment of them. One morning Bethea, standing at the coffee machine, refused to speak with principal Moore because it was before sign-in time. On a different occasion, in the presence of young children, Bethea "repeatedly shouted and pointed her index finger" at her supervisor Peal Klausner. Bethea admitted that she "raised her voice" and "may have pointed her finger", but sought to justify her behavior by saying that she had been upset over a disagreement with Klausner. Peters recounted a separate event where Bethea's voice "got louder" and she "shook her finger" at a child study team member.

Parents of children in Bethea's class complained about Bethea's antagonism and unresponsiveness. Her conferences with parents were often counterproductive. Klausner attended some of these conferences and testified from firsthand knowledge. For example, in January 1990 Bethea had a meeting with a mother who had expressed concerns about physical touching of her daughter by boys in Bethea's class. Instead of addressing the mother's concerns, Bethea began blaming the victim and the other children for the teacher's classroom difficulties and then launched into a litany of her own unrelated personal problems. The mother's reaction was that Bethea should "take [her] personal life out of [her] teaching."

Bethea seriously mishandled another parent conference in February 1990, when a mother had requested a meeting because her son had been accused of misbehaving in Bethea's classroom. An uncle with a Spanish surname had complained of threats by Bethea that "someone was going to get hurt because [the child] will hit her or she will hit [the child]." In the course of the meeting, the mother was critical of Bethea's lack of "love, respect and patience." Bethea made a highly inflammatory mention of a social worker's confidential report that the child had attempted to sodomize his brother. She also made an ominous reference that "a Spanish-looking man" had been fixing her telephone wires at home, that the "Spanish do not all look alike," and that "people do get hurt." Eventually, Klausner was forced to intercede or the mother would have stormed out of the meeting. Klausner characterized the encounter as "neither effective, positive nor professional."

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Also in February 1990, the mother of a hardworking and obedient student complained about constant classroom disruptions which were preventing her child from learning. Bethea's response was to gripe about not getting sufficient administrative support and to accuse Mrs. Klausner of telling lies about her. The mother then requested that her child be transferred to another class. Unhappily, this was not an isolated occurrence. Assistant principal Milteer confirmed that various parents who had a chance to observe Bethea's classroom performance became "confrontational" and demanded to have their children assigned to a different teacher.

I FIND that Bethea antagonized both staff and parents. She treated her supervisors and coworkers rudely and disrespectfully. Similarly, she provoked and alienated parents. Contacts between Bethea and parents achieved the opposite of what was intended. Parents who visited the school to talk with her about particular problems left the meeting more dissatisfied and less supportive. Over time, Bethea failed to make any improvement in this area.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board has sustained its tenure charges against Bethea and that the appropriate penalty is dismissal.

Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers 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). Toward that end, *N.J.S.A.* 18A:6-10 provides that no tenured individual shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence, and an impartial hearing, are written directly into the law.

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Special notice requirements apply to charges of "inefficiency." *N.J.S.A.* 18A:6-11 provides that,

> [I]f the charge is inefficiency, . . . the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.

Such language has been authoritatively construed by the Commissioner to impose a "heavy responsibility" on the administration "to render positive assistance to the teacher in an effort to overcome his inefficiencies." *Rowley v. Manalapan-Englishtown Bd. of Ed,* 205 *N.J. Super.* 65, 72 (App. Div. 1985). The State Board of Education has concurred with this interpretation, adding that a local board of education is "duty bound" to assist a teacher charged with inefficiency "in improving his teaching performance before removing him from his teaching position." *Rowley,* at 73. A teacher whose effectiveness is called into question after many years of meritorious service "must be afforded an opportunity of demonstrating that he is still capable of effective teaching." *Id.*

East Orange school officials bent over backward to provide meaningful support and assistance to Bethea, but were consistently rebuffed by a teacher set in her ways who made no serious effort to cooperate. As envisioned in *Rowley,* at 74, the Board provided a "yardstick" against which to measure improvement, but Bethea's performance fell sadly short of the mark. Moreover, the efforts to improve Bethea's performance did not suddenly arise within the final 90 days, but are the culmination of continuing attempts over two years to encourage her to accept offers of help. The Board's reluctance to file formal tenure charges until lesser remedies had failed should not be held against it, and "forbearance" must not be mistaken as "acquiescence." *In re Cowan,* 224 *N.J. Super.* 737, 742 (App. Div. 1988).

In determining what penalty is warranted, factors to be considered include the nature and gravity of the offense; any extenuating or aggravating circumstances; and the effect on the maintenance of discipline and the proper administration of the school system. *In re Fulcomer,* 93 *N.J. Super.* 404, 420-422 (App. Div. 1967). Although Bethea's conduct was not intentionally vicious or cruel, the harm she caused to the school system was truly devastating. Youngsters in her classes were deprived of their right to a thorough and efficient education. Youthful enthusiasm for learning and respect for teachers were seriously undermined, if not totally destroyed. Parental

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confidence in public education was diminished. Aggravating circumstances include Bethea's nastiness to parents and staff, her negative attitude and her stubborn rejection of all reasonable offers of assistance. Most damning of all, there remains no reasonable hope for any improvement on Bethea's part in the near future. Under the totality of the circumstances, she should no longer be permitted to teach in East Orange.

Order

It is **ORDERED** that the tenure charge of inefficiency is sustained.

And further **ORDERED** that Thelma Bethea is dismissed from her teaching position in the East Orange school district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 21, 1991
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 25, 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1991
Date

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Pearl Klausner, supervisor of special education, East Orange school district

2. R. Leonard Moore, middle school principal, East Orange school district

3. Dr. Kenneth Douglas King, assistant superintendent for personnel, East Orange school district

4. Gloria Peters, instructional aide, East Orange school district

5. Ralph N. Milteer, assistant principal, East Orange school district

6. Thelma Bethea

List of Exhibits

No.	Description
P-1	Copy of teacher evaluation for 1988-89, dated March 31, 1989
P-2	Copy of teacher observation, dated January 5, 1989
P-3	Copy of teacher observation, dated March 6, 1989
P-4	Geometry work paper, dated March 25, 1989
P-5	Copy of memorandum to Thelma Bethea from Pearl Klausner, dated September 29, 1989
P-6	Teacher observation, dated October 6, 1989

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P-7 Copy of memorandum to Thelma Bethea from R. Leonard Moore, dated October 6, 1989

P-8 (a) Copy of a memorandum to Thelma Bethea from R. Leonard Moore, dated October 17, 1989

(b) Copy of a teacher evaluation, dated October 17, 1989

P-9 Copy of a memorandum to T. Bethea from R. Milteer, dated October 24, 1989

P-10 (a) Teacher observation, dated October 25, 1990

(b)id. Sample of a letter to parents from Thelma Bethea, dated March 17, 1989

P-11 Copy of a memorandum to Wendy Fleming from Thomasina McBride, dated November 3, 1989

P-12 Copy of a memorandum to Thomasina McBride from Pearl Klausner, dated November 3, 1989

P-13 Copy of a teacher evaluation, dated November 28, 1989

P-14 Copy of a memorandum to Thelma Bethea from R. Leonard Moore, dated December 6, 1989

P-15 Copy of a memorandum to Thelma Bethea from Kenneth D. King regarding professional improvement plan, dated December 21, 1989

P-16 Copy of teacher observation, dated January 5, 1990

P-17 Copy of memorandum to Thelma Bethea from R. Leonard Moore regarding student discipline, dated January 8, 1990

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P-18 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding lesson plan format, dated January 8, 1990

P-19 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding computer in-service training, dated January 8, 1990

P-20 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding weekly meeting with teacher aide, dated January 8, 1990

P-21 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding bus supervision, dated January 8, 1990

P-22 Copy of a memorandum to Thelma Bethea from Pearl Klausner regarding professional and personal qualities, dated January 18, 1990 (redacted)

P-23 Copy of a memorandum to Thelma Bethea from Pearl Klausner regarding community relations, dated January 18, 1990 (redacted)

P-24 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding classroom management, dated January 23, 1990 (redacted)

P-25 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding weekly meeting with teacher aide, dated January 25, 1990

P-26 Copy of a teacher evaluation, dated January 29, 1990

P-27 Copy of a memorandum to Thelma Bethea from Pearl Klausner regarding professional development, dated February 7, 1990

P-28 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding computer training, dated February 7, 1990

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P-29 Copy of a memorandum to Thelma Bethea from Pearl Klausner regarding professional improvement plan, dated February 8, 1990 (redacted)

P-30 Copy of a teacher evaluation, dated February 9, 1990

P-31 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding weekly meeting with teacher aide, dated February 12, 1990

P-32 Copy of a memorandum to Thelma Bethea from Pearl Klausner regarding community relations, dated February 16, 1990 (redacted)

P-33 Copy of a teacher evaluation, dated March 5, 1990

P-34 Copy of a teacher observation, dated March 19, 1990

P-35 Copy of a memorandum to T. Bethea from R. Milteer regarding outside supervision, dated March 5, 1990

P-36 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding professional improvement plan, dated March 20, 1990

P-37 Copy of a teacher evaluation, dated March 27, 1990

P-38 Copy of a teacher evaluation, dated March 29, 1990

P-39 Copy of a memorandum to Thelma Bethea from R. Leonard Moore regarding unsatisfactory performance, dated March 15, 1989

P-40 Copy of a memorandum to Nilkanth Patel from Kenneth D. King, dated December 19, 1989

P-41 Copy of a letter to Thelma Bethea from Nilkanth Patel, dated December 20, 1989

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P-42 Copy of a memorandum to Thelma Bethea from Kenneth D. King regarding modification of professional improvement plan, dated December 20, 1989

P-43 Copy of a memorandum to Nilkanth Patel from Kenneth D. King regarding status of charge of inefficiency, dated April 2, 1990

P-44 Copy of a letter to Thelma Bethea from Nilkanth Patel, dated April 4, 1990

P-45 Copy of a letter to Dr. Kenneth D. King from Thelma Bethea, dated April 4, 1990

P-46 Copy of a letter to Dr. Saul Cooperman from Nilkanth Patel, dated April 22, 1990

P-47 id. Log book of Gloria Peters, covering the period from October 1989 to February 1990

P-48 Copy of worksheet on business/home mortgage management plan, undated

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IN THE MATTER OF THE TENURE	:	
HEARING OF THELMA BETHEA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4.

Respondent addresses her exceptions according to the categories outlined in the ALJ's determination, the first of which dealt with quality of instruction. Respondent excepts to the ALJ's conclusion that "[she] failed to prepare adequate lesson plans keyed to the individual needs of her students, that she did not use appropriate teaching strategies and techniques, and that she was insensitive and unresponsive in her dealings with the children in her class." (Exceptions, at p. 2, quoting the Initial Decision, at p. 6) Respondent believes these conclusions do not take into account the facts and surrounding circumstances of her classroom. Respondent claims she prepared her daily classroom instruction and thoroughly reviewed the IEP of each pupil in determining appropriate curriculum. She claims she made every effort to develop many of her own materials for the varying IEP's.

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Moreover, respondent claims she was falsely accused of not providing small group instruction, stating that she would initially instruct the class in a large group then break into smaller units. She believed this was the most effective way of approaching a class which was attempting to learn similar material with varying abilities. Admitting that at times her lesson plans were not completely successful, Mrs. Bethea contends this was due to disobedient children and an administration that was not fully supportive.

Respondent further excepts to the ALJ's determination that she was unable to maintain proper classroom discipline or to gain the respect of her students. Respondent contends that this determination fails to take into account the exceptionally poorly behaved children in her classroom, despite her attempts to stem such disobedience. She claims the rules she made up were met with constant disregard from her students, and that the administration "turned its back" (Exceptions, at p. 4) on her. She claims that what was demonstrated to the students was the sense that why should they be cooperative with her if the administration was not going to be cooperative. Thus, respondent avers, if her classroom often appeared chaotic, it was due to the poor behavior of disobedient children, and the indifferent behavior of an unsupportive administration.

In response to the ALJ's finding that respondent was "deliberately insubordinate" (Exceptions, at p. 5, quoting the Initial Decision, at p. 9), by refusing to supervise students at the bus stop or enroute to the school cafeteria, Mrs. Bethea contends that the latter duty is one specifically designed for a teacher's

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aide. Moreover, respondent contends that she felt it important for her students to feel responsible and not helpless. Toward that end, she did not escort them so that they would not get the impression that they could not handle "such perfunctory tasks as getting themselves to and from the lunchroom." (Exceptions, at p. 5) Also, Mrs. Bethea adds in exceptions that she had a contractural right to a duty free lunch which entitled her to take the elevator to and from her lunch. Thus, she avers, it was the teacher's aide's responsibility to escort the students.

Finally, in rebuttal to the ALJ's findings that respondent "antagonized both staff and parents" (Exceptions, at p. 6, quoting the Initial Decision, at p. 11) by treating supervisors and co-workers rudely and disrespectfully and by provoking and alienating parents, respondent denies such findings. Occasionally, she concedes, she had disagreements with either her supervisors or her co-workers, but this is hardly an uncommon occurrence in any workplace and is certainly not one warranting dismissal, she argues. She further submits that she sent notes home to parents to open lines of communication, and met with them personally, if the situation warranted. She adds that parents "***bring a biased and often uninformed viewpoint to conferences with teachers, who are in the classroom every day to witness student behavior. This often [leads] to disagreements between the two." (Exceptions, at p. 6) She denies however, that she either provoked or antagonized the parents of any students.

Relying on Zimmerman v. Newark Bd. of Ed., 38 N.J. 65 (1962) and Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), respondent submits that the charges of inefficiency remain unfounded

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and, consequently, she requests the initial decision be reversed and that she be reinstated forthwith.

Upon a careful and independent review of the record of this matter, which, it is noted, does not include transcript citations (See In re Morrison, 216 N.J. Super. 143 (App. Div. 1987), the Commissioner affirms the initial decision below for the reasons expressed in the initial decision. In so deciding, he accepts the credibility determination as assessed by the ALJ below, in the absence of transcript citation required before he can establish credibility determinations independently. See Morrison, supra, at 159.

Moreover, the Commissioner's review of the record indicates that respondent was fully aware of the district's concern with her performance, as evidenced by the increment withholding effected against her and the numerous memoranda, evaluations and observation reports filed in the district's attempts to help Mrs. Bethea improve her efficiency as a teacher in East Orange. (See Board's Exhibits P-1 through P-48) The Commissioner concurs with the ALJ that the Board "bent over backward" (Initial Decision, at p. 12) to provide support and assistance to respondent both before and during her 90-day period to improve inefficiency. He also agrees that the record supports a finding that respondent resisted all attempts to improve and support her, as evidenced by her shallow excuses proffered in exceptions and at hearing for why responsibility for her poor performance should be laid at the feet of the pupils, parents and administrators in the district.

Accordingly, for the reasons expressed in the initial decision, as augmented here, the Commissioner finds and determines

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that respondent is guilty of inefficiency warranting removal from her tenured employment as a teaching staff member in the East Orange Public Schools. He further directs that the matter be forwarded to the New Jersey State Board of Examiners for further action as it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 8, 1991

DATE OF MAILING - AUGUST 8, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 697-91
AGENCY DKT. NO. 367-11/90

ANNE MARIE COOKER,
Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF BRIGANTINE, STEVEN VAN
NOTE, CAROL CALLOWHILL,
DR. ROBERT BRAY, PHILIP GUENTHER, JR.,
RUTH HANEMAN, HANCE JAQUETT and
DR. EMERSON TRACY,
Respondent.

Dennis M.Toughy, Esq., for petitioner, (McGahn, Friss & Miller, attorneys)
Maurice Y. Cole, Jr., Esq., for respondents (Cole & Cole, attorneys)

Record Closed: June 10, 1991 Decided: June 21, 1991

BEFORE LILLARD E. LAW, ALJ :

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Anne Marie Cooker, alleges that she was illegally removed from her employment position as a Speech Teacher by the Board of Education of the City of Brigantine (Board) and, as a consequence of such illegal removal, petitioner avers she was denied a tenure status. The respondent Board denies the allegations contending, among other things, that at all times relevant, respondents complied with all applicable laws, regulations and standards and demands judgment dismissing petitioner's Petition of Appeal.

Petitioner originally filed a Complaint in lieu of prerogative writ before the Honorable Michael Winkelstein, J.S.C., on or about September 5, 1990. Subsequent to oral argument heard on October 26, 1990, Judge Winkelstein transferred the matter to the jurisdiction of the Commissioner of Education (Commissioner); under *R.* 1:13-4, the exhaustion of administrative remedies doctrine, and pursuant to the Commissioner's authority under *N.J.S.A.* 18A:6-9.

On December 6, 1990, petitioner filed an Amended Petition of Appeal before the Commissioner, pursuant to *N.J.A.C.* 6:24-1.6. Thereafter, respondents filed their Answer and separate defenses, dated December 19, 1990, and issue was joined. On January 17, 1991, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 *et. seq.* and *N.J.S.A.* 52:14F-1 *et. seq.* On March 29, 1991, a prehearing was held at which, among other things, the issues to be determined by this administrative tribunal were agreed upon. The parties requested and were granted leave to cross-move for summary decision under the provisions at *N.J.A.C.* 1:11-12.5. The last submission was received by the undersigned on June 10, 1991, which constitutes the close of the herein record.

ISSUES

The issues to be resolved by this tribunal, as agreed upon by the parties, are these:

1. Whether the Board violated the provisions of the Open Public Meetings Act (Act), *N.J.S.A.* 10:4-6, *et. seq.*, when it determined not to reemploy petitioner for the 1990-91 school year at a closed session held on August 30, 1990?

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a. If so, what relief, if any, may be granted petitioner?

2. Whether the Board violated *N.J.S.A.* 18A:27-10 when it did not reemploy petitioner, notwithstanding that it gave her notice of her reemployment on or about before April 30, 1990, and again in or about May 1990?

3. Whether petitioner has acquired a tenure status with the Board pursuant to the provisions under *N.J.S.A.* 18A:28-5?

STIPULATIONS OF FACTS

The parties have stipulated to the relevant and material facts of this matter, together with exhibits, as follows:

1. Petitioner, Anne Marie Cooker, is a speech therapy teacher and has been employed by the Brigantine Board of Education since 1980.

2. Respondent, Brigantine Board of Education, is a public body organized and existing under the laws of the State of New Jersey having its principal place of business at North School, Lafayette and Evans Boulevard, Brigantine, New Jersey.

3. The Board Members of the Respondent, to wit Steven Van Note, Carol Callowhill, Dr. Robert Bray, Philip Guenther, Jr., Ruth Haneman, Hance Jaquett and Dr. Emerson Tracy are public officials appointed by the Mayor of the City of Brigantine.

4. The Brigantine Board of Education is a public body as defined by *N.J.S.A.* 10:4-8 (a) and the individual members are public officials subject to the requirements of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et. seq.*

5. On or about September 1, 1987, the petitioner entered into a contract whereby Respondent hired the petitioner to teach speech therapy within the Brigantine School District. Subsequently, petitioner's contract was renewed for the academic years 1988-89 and 1989-90. On both occasions notice of renewal was sent on or before April 30th of the prior year pursuant to *N.J.S.A.* 18A:27-10.

6. In March, 1990, the petitioner was informed by Mr. Lawrence Winchell, then Superintendent of the Brigantine school system, that she did not have a teaching certificate which was required for the position of a speech teacher.

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Mr. Winchell spoke with Mrs. Cooker on this issue and was assured that she would successfully take a test and get her certification.

7. At the Brigantine Board of Education regular meeting on April 5, 1990, the Board unanimously approved the reappointment of Anne Marie Cooker.

8. Subsequent to her conversation with Mr. Winchell in March, a letter dated April 6, 1990, was sent to petitioner giving notice by the Brigantine Board of Education that at its meeting held on April 5, 1990, the petitioner had been reemployed for the 1990-91 school year. The aforementioned notice was given in accordance with *N.J.S.A.* 18A:27-10.

9. On May 7, 1990, Gustav H. Ruh, Atlantic County Superintendent of Schools, informed both the petitioner and the Brigantine Public School District of the petitioner's current status with regard to obtaining her certificate for teaching speech therapy.

10. Subsequently, on or about May 17, 1990, Petitioner was again informed for a second time by Dr. Daniel Loggi, the new Superintendent of the Brigantine Public School District, that in accordance with the negotiated agreement, petitioner had been assigned to the position of speech teacher for the 1990-91 school year.

11. On or about July 19,1 990, Gustav H. Ruh, Atlantic County Superintendent of Schools, informed both the petitioner and the Brigantine Public School District of the current status in regard to petitioner's certification.

12. Sometime between August 1, 1990 and August 15, 1990, Anne Marie Cooker received her certification for speech therapy from the New Jersey Department of Education. On or about August 16, 1990, Gustuv H. Ruh advised Dr. Daniel Loggi that petitioner's permanent certification as a speech/language specialist was issued as of August/1990.

13. On August 30, 1990, petitioner by and through her attorney, hand-delivered a letter to Dr. Daniel G.Loggi, Superintendent, stating that as of August 30, 1990, she was still employed by the Brigantine Public School District and it was her position that tenure would be given as of September 5, 1990.

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14. On or about August 30, 1990, the Brigantine Board of Education held a meeting at the North School, Lafayette and Evans Boulevard, Brigantine, New Jersey.

15. On or about August 31, 1990, petitioner was informed by the Solicitor for the Respondents that "This will confirm the decision of the Brigantine Board of Education made in closed session last evening not to rehire your client, Mrs. Cooker, for the 1990-91 school year."

16. On August 31, 1990 and September 4, 1990, counsel for each party exchanged further correspondence setting forth their particular positions or objections with regard to the present matter.

17. The Brigantine Board of Education did not send any notices before April 30, 1990, pursuant to *N.J.S.A.* 18A:27-10.

18. On or about July 27, 1990, when the Board of Education approved the hiring of Linda Gormley as the speech therapy teacher for the 1990-91 school year, Mrs. Cooker was not certified as a Speech/Language Specialist (speech correctionist teacher).

19. Omitted.

20. During petitioner's employment by the Brigantine Board of Education, she was on sick leave and/or maternity leave on the following dates:

- 1980 through 1/15/83 worked part-time
- 1/15/83 - 4/16/83 sick leave
- 4/16/83 through rest of year - unpaid leave
- 10/16/84 - 6/30/85
- leave of absence 1985-86 school year
- 4/9/86 resignation effective September 1986
- did not work 1986-87 school year
- worked 2-3 days/week during 1987-88 school year
- worked 2-3 days/week during 1988-89 school year
- worked 3-4 days/week during 1989-90 school year

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21. On August 20, 1990, petitioner wrote to Dr. Loggi and Board members requesting "to meet with the Board members during the closed session of the next Brigantine Board of Education meeting dated August 23, 1990. I would like to discuss my status in the Brigantine Public School System before anything is voted upon."

22. On August 30, 1990, Mr. and Mrs. Thomas Cooker, Gene McCann of the NJEA, Nancy Rhodes, BEA Representative and Dennis M. Tuohy, Esquire, attorney for Anne Marie Cooker met with the Board in closed session at which time:

> "Mr. Tuohy presented their position concerning Anne Marie Cooker's employment status. After his presentation the Cooker party left the closed session. The Board discussed their presentation. Mr. Van Note asked for individual opinions. Mrs. Callowhill read a letter that had been given to her by Mrs. Haneman, who was unable to be in attendance. Mrs. Callowhill (and Mrs. Haneman by "proxy") position was in support of Anne Marie Cooker. Dr. Bray, Mr. Van Note, Mr. Guenther and Mr. Jaquett were in agreement with Dr. Loggi to remain with the appointment of Linda Gormley as Speech Therapist at the July 27, 1990 Board of Education Meeting.
>
> 9:25 p.m. Cooker party returned. Mr. Cole gave the determination that no vacancy exists for a Speech Therapist at this time. Should a vacancy occur, Anne Marie Cooker, now certified as of August, 1990, would certainly be considered to fill the position."

The minutes of the public portion of the Board Meeting do not reflect the passing of a resolution memorializing the deliberations or discussions reached by the Board.

Pursuant to the rules of the OAL under *N.J.A.C.* 1:1-12.5 and the New Jersey Supreme Court's holding in *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67 (1954), setting forth the criteria for summary judgment, I **FIND** there exists no genuine issues of material fact and, therefore, the herein matter is ripe for summary decision.

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LEGAL ARGUMENTS OF THE PARTIES

Petitioner first contends the Board did not send her any notice of termination of her employment contract before April 30, 1990, therefore, the Board violated the provisions of *N.J.S.A.* 18A:27-10. The purpose of the statute, *N.J.S.A.* 18A:27-10, is to provide nontenure teaching staff members with timely notice of their non-reemployment in order that they may seek employment elsewhere. *Sarah Armstrong v. Board of Education of the Township of East Brunswick, Middlesex County,* 1975 *S.L.D.* 112. The statutory elements of the statute cannot be conditioned or modified by the Board to effectuate a conditional offer of employment by it. *Joanne Sieja v. Board of Education of the East Windsor Regional School District, et. al,* 1975 *S.L.D.*, 823, 826, 829. It is clear, however, that failure of the Board to provide notice of termination to a non-tenured teaching staff member prior to April 30th shall be deemed an offer to the staff member to continue employment for the succeeding school year, pursuant to *N.J.S.A.* 18A:27-11.

Petitioner argues that the Board's offer of an employment contract to her for the 1990-91 school year is supported by other actions and representations, upon which petitioner justifiedly relied: *i.e.*, the Board's unanimous approval of petitioner's reemployment on April 5, 1990; interim Superintendent Winchell's confirmation letter of April 6, 1990; and, Superintendent Loggi's letter dated May 17, 1990, giving notice to petitioner of her assignment for the 1990-91 school year. Petitioner argues that because she received her certification on or about August 15, 1990, does not legally justify the termination of a non-tenured teaching staff member without proper notice or compliance with the applicable statutes.

First, she argues, as a matter of law, teachers who served part of their time without regular certificates may count that time toward tenure upon procurement of regular certification while serving the same employing boards: *Ruth E. Sydnor v. Board of Education of the City of Englewood, Bergen County,* 1976 *S.L.D.* 113, 116. Second, petitioner contends that even though interim Superintendent Winchell discussed with her in March 1990, that her certificate had not been issued, the Board nevertheless proceeded to reemploy petitioner in open public session on April 5, 1990 for the 1990-91 school year. Petitioner was not provided any notice of termination subsequent to March 1990 and remained employed as a non-tenured part-time teacher for the remainder of the 1989-90 school year. Third, even after the Board voted in open public session to reemploy petitioner, the only official actions it

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initiated were letters from Superintendents Winchell and Loggi confirming petitioner's employment and assignment as speech teacher for the 1990-91 school year. Since March 1990, the Board was fully aware that petitioner made a commitment to obtain her regular certificate subsequent to the close of the 1989-90 academic year and during the summer recess. Superintendent Winchell acknowledges, in his Affidavit, a conversation with petitioner in March 1990, where petitioner assured the Superintendent "she would successfully take a test and get her certification." (Exhibit A, Stipulation #6). In addition, the Atlantic County Superintendent of Schools forwarded correspondence to the Board concerning petitioner's lack of certification, the requirements she was required to meet and the subsequent issuance of the certificate on August 16, 1990.

Petitioner asserts the Board took no formal action until August 30, 1990, in a closed session only five days before petitioner would have received tenure. She contends the Board's action to terminate here in a closed session was unreasonable, arbitrary and capricious. Moreover, as of the present date, the Board has not provided petitioner with a statement of reasons for her termination as required by *N.J.S.A.* 18A:27-3.2. Petitioner contends that because the Board violated the terms of *N.J.S.A.* 18A:27-10, she is entitled to all of the contractual terms and conditions as though she had been employed for the 1990-91 school year. Petitioner also claims the Board violated her right to procedural due process by terminating her without cause, notice or justification. She avers that a school teacher's contractual entitlement to employment constitutes a "property right" which is afforded procedural due process protection. *Perry v. Sinderman,* 408 *U.S.* 593 (1972); *Board of Regents v. Roth,* 408 *U.S.* 564 (1972). Petitioner contends that since the Board failed to provide her with proper notice pursuant to *N.J.S.A.* 18A:27-10 (b) or exercise the termination provision of the contract, she was improperly and illegally terminated.

The Board argues that its failure to give petitioner notice, pursuant to *N.J.S.A.* 18A:27-10, does not create a contract of employment. The Board cites the provisions of *N.J.S.A* 18A:27-2, which states:

> Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for

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> such employment, notwithstanding that the term of such employment shall not then have expired."

The Board concedes that interim Superintendent Winchell should have suspended petitioner immediately upon his learning in February or March 1990, that petitioner did not possess an appropriate certificate issued by the Board of Examiners. Superintendent Winchell's failure to terminate petitioner was premised upon petitioner's assurance that she only had to successfully take the test and, thus, obtain her certification. It subsequently appeared, however, that petitioner was required to engage in additional course work and undertake at least 300 clock hours of supervised practicum, in addition to successfully passing the National Teacher Education test in Speech-Language Pathology. (Exhibit D, Stipulation #9). The Board contends that interim Superintendent Winchell's failure to follow the provisions of *N.J.S.A.* 18A:27-2 when he learned of petitioner's non-certification status, his improper submission of petitioner's name on the employment list for the Board's approval on April 5, 1990 and his subsequent notification of petitioner's reemployment on April 6, 1990, were all illegal pursuant to *N.J.S.A.* 18A:27-2 and, therefore, null and void. The same may be said of Superintendent Loggi's pro forma letter to petitioner dated May 17, 1990.

Petitioner takes the contrary view that her reemployment was established by Board action on April 5, 1990, and confirmed by way of letters to her from Superintendents Winchell and Loggi. In addition, she argues, no official action was initiated by the Board to terminate petitioner's employment or redacting the Board's open public vote employing her. Petitioner asserts she was terminated by the Board as the result of a "decision" and "vote" by the Board in a closed session held on August 30, 1990. Petitioner further contends that the action to terminate her employment was taken without a formal vote or resolution exercised at the public portion of the Board meeting. Petitioner also asserts that a member of the Board who was absent from the closed session on August 30,1990, was permitted to submit a vote by proxy.

Petitioner argues that the Board's action to terminate her employment at the closed session on August 30, 1990, is void pursuant to the Open Public Meetings Act. *N.J.S.A.* 10:4-6 *et. seq.* Petitioner cites the Legislative findings and declarations found at *N.J.S.A.* 10:4-7, and asserts that under these declarations, public bodies are bound to publicly account for formal actions taken during public and private portions of meetings. Petitioner also recognized the Board's right to meet in closed

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session pursuant to to the exceptions permitted under *N.J.S.A.* 10:4-12 (7) and (8), for matters involving litigation, personnel, discipline, among others. Nevertheless, these statutes have been liberally construed to favor public involvement in almost every aspect of government *Polillo v. Dean,* 74 *N.J.* 562, 569 (1977). And, the exceptions have been strictly construed. *Rice v. Union City Reg. H.S. Bd. of Ed.,* 155 *N.J. Super.* 64, 70 (App. Div. 1977).

Petitioner observes that the purpose of the exceptions is to protect the privacy interests of public employee, such as petitioner's, from having personal matters discussed in public session. *Serra v. Mountainside,* 188 *N.J. Supra.* 134 (L. Div. 1983). Petitioner further observes that private sessions are limited to discussions and deliberations, not decisions, and the exceptions permitted under *N.J.S.A.*10:4-12 must be strictly construe requiring any formal action by the Board to be conducted during the public session. *Houman v. Mayor & County. Boro. Pompton Lakes,* 155 *N.J. Super,* 129 (L. Div. 1977); *Kramer v Bd. of Adj., Sea Girt,* 80 *N.J. Super.* 454 (L. Div. 1963).

Petitioner observes that the Commissioner has also required strict and literal compliance with the provisions of the Open Public Meeting Act. *Doris Buff v. Board of Education of North Bergen, Hudson County,* 1981, *S.L.D.* 340, which relies upon *Bickford v. Board of Education of the Boro of Elmwood,* 1978 *S.L.D.* 855, and which cites *Cullum v. Board of Education of Township of North Bergen,* 15 *N.J.* 285 (1954). In both *Buff* and *Bickford,* the boards of education action to terminate teaching staff members in private sessions were held to be in violation of the Open Public Meetings Act, *N.J.S.A.* 10:4-6.

The Board contends it did not violate the Open Public Meetings Act based upon the facts of this matter. It asserts that the only formal action by the Board occurred on July 27, 1990, at a special public meeting, where it appointed a certificated speech correctionist teacher, other than petitoner, for the 1990-91 school year. There was only one speech correctionist teacher position available at that time and the successful candidate was the only certified speech correctionist available to fill the vacant position. The Board contends it was important to have all teaching staff members certificated and appointed prior to July 31, because the School District was scheduled to be monitored by the Department of Education in October 1991.

The Board asserts that on August 20,1990, petitioner wrote to Superintendent Loggi and the Board requesting a closed session with the Board to discuss her

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employment status. A Board meeting was held on August 30, 1990, at which the Board passed a resolution in open public session to retire into closed session to discuss personnel matters. *N.J.S.A.* 10:4-12 b (8). The Board, in closed session, heard a presentation by petitioner's attorney, who was accompanied by petitioner, petitioner's husband, a representative of the New Jersey Education Association and a representative of the Brigantine Education Association, concerning petitioner's employment status. The Board discussed the petitioner's presentation, out of the presence of petitioner and her representatives. Subsequently, petitioner's party returned to the closed session where they were advised by the Board's attorney that no vacancy existed for a Speech Therapist at that time. However, should a vacancy occur, petitioner, now certified as of August 1990, would be considered to fill the position.

The Board maintains that neither petitioner nor her attorney made a request to announce to the general public that petitioner could not be rehired because no vacancy existed. Nor was there any reason to make such an announcement since only petitioner was affected by the Board's inaction. The Board asserts that the instant matter can not be distinguished from the case of *Cole v. Woodcliff Lake Board of Education,* 155 *N.J. Super.* 398 (L. Div. 1978), which has not been reversed or overturned to date. In *Cole,* the board of education discussed the reasons for petitioner's termination in closed session where it refused to change its decision and took no further action in open public session to affirm its prior decision. The *Cole* inaction is similar, the Board argues, to its inaction in the instant matter.

The Board further argues that in the event this tribunal finds there was a violation of the Open Public Meetings Act; the Board's inaction would only be voidable, not void, and no useful purpose would be served by voiding the final result. *Jamison v. Morris School District Board of Education,* 198 *N.J. Super.* 411, (App. Div. 1985).

Petitioner asserts she was ready, willing and able to return to duty on September 5, 1990, and perform as a certified teaching staff member. Petitioner contends she was regularly employed by the Board for three consecutive years and held a position which required certification. On or about August 15, 1990, petitioner received her certification and, she argues, a teaching staff member may count time towards tenure if they receive certification while still serving under the same employing board. *Sydnor, supra.*

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Petitioner observes that in order to acquire tenure, a teaching staff member must comply with *N.J.S.A.* 18A:25-5. Petitioner cites the holding of the New Jersey Supreme Court in *Spiewak v. Rutherford Board of Education,* 90 *N.J.* 63 (1982), where it said:

> ... all 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, are eligible for tenure unless they come within the explicit exceptions in *N.J.S.A.* 18A:28-5 or related statutes such as *N.J.S.A* 18A:16-1.1 (*Id.* at 81).

Petitioner observes that the statutory period that must be served in order to acquire tenure is three consecutive calendar years, three consecutive academic years or the equivalent of more than three academic years within a period of four consecutive academic years. *N.J.S.A.* 18A:28-5. Tenure attaches and cannot be denied to a staff member who is regularly employed in a part-time position. *DeSimone v. Board of Education of the Borough of Fairview,* 1966 *S.L.D.* 43.

Petitioner contends that the Board's motive or reasons for terminating her in private are inherently suspect, since petitioner was a teaching staff member of high regard as reflected by her evaluations. Petitioner urges this tribunal to find and determine she acquired a tenure status.

The Board maintains that petitioner has not acquired tenure under *N.J.S.A.* 18A:28-5. It contends that *N.J.S.A.* 18A:1-1 defining a teaching staff member and *N.J.S.A.* 18A:28-5 setting forth the requirements for tenure provide that employees of boards of education are entitled to tenure if: (1) they work in a position for which a teaching certificate is required; (2) they hold the appropriate certificate; and (3) they have served the requisite period of time. *Spiewak, supra.* at 74.

The Board cites *N.J.S.A.* 18A:28-4, which states, in pertinent part, that:

> No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued

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> by the state board of examiners, in full force and effect . . .

The Board observes that petitioner concedes she was not certified as a speech correctionist until August 15, 1990. Prior thereto, on July 27, 1990, the Board appointed a certificated speech correctionist, other than petitioner, to the only position available for the 1990-91 school year. Subsequently, the Superintendent advised petitioner of the appointment to the speech correctionist position, other than petitioner, and that no vacancy existed for petitioner to fill. The Board contends that this action was tantamount to a *de facto* termination of petitioner's employment. It is the Board's position, moreover, that petitioner's employment, albeit illegal, terminated as a matter of law at the end of the 1989-90 school year at which time she was neither tenured nor certificated. No contract of employment was offered or accepted for the 1990-91 school year. In the event such a contract had been offered to petitioner, it would be deemed illegal, null and void under *N.J.S.A.* 18A:27-2.

The Board observes that our courts have long held that to acquire a tenure status, the teaching staff member must comply with the precise conditions articulated in the statute. *Ahrensfield v. State Board of Education,* 126 *N.J.L.* 5 42 (E. & A. 1941); *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1962); *Canfield v. Board of Education of Pine Hill Borough,* 51 *N.J.* 400 (1968).

In the *Canfield* case, *supra*, the Supreme Court held that the burden of proving the right to tenure was on the teacher and ordinarily such right must be clearly proved. In that case petitioner had a contract which ran for a period which if not breached would have given tenure to the teacher. The Board terminated the teacher before he acquired tenure in breach of the contract and the Board was upheld by the Court.

The Board asserts that *Canfield* is similar to the present case wherein the Board filled the only vacancy for a speech correctionist before the present petitioner was certificated and/or acquired tenure. Even if this could be construed as a breach of contract, which is denied, under *Canfield* the action of the Board must be upheld.

The Board observes that petitioner contends that once she was certificated as a speech correctionist on August 15, 1990, she could count all the time she spent as a noncertified teacher toward her tenure. The Board contends that nothing could be further from the truth for the following reasons: (1) As of August 15, 1990,

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petitioner was not an employee of the Brigantine Board of Education; (2) she never accepted the alleged employment by the Board by June as required by *N.J.S.A.* 18A:27-12; *George Delli Santi v. Board of Education, City of Newark, Essex County,* 1977 *S.L.D.* 1211 (May 18, 1977) aff 1978 *S.L.D.* 1003; (3) employment of a noncertified teacher is prohibited under *N.J.S.A.* 18A:27-2; (4) noncertified teaching staff members can not obtain tenure pursuant to *N.J.S.A* 18A:28-4 and 5; and (5) her failure to obtain certification in her field was due to her own failure to make a timely application and was not caused by administrative delay. On the contrary, her progress through the certification process was unusually fast.

The Board contends, among other things, that the cases petitioner cites for the proposition that noncertificated teaching time counts toward tenure are clearly distinguishable from the instant matter. In *Sydnor, supra.*, the Commissioner held that although the petitioner was not notified prior to April 30th that she was not going to be employed for the ensuing school year, petitioner failed to accept employment pursuant to *N.J.S.A* 18A:27-12 and, as a consequence, had no claim for continued employment. The Commissioner further denied petitioner's claim for tenure for lack of timely certification, pursuant to *N.J.S.A.* 18A:26-2. The Commissioner distinguished *Sydnor* from the matter of *Mildred Givens v. Board of Education of the City of Newark,* 1974 *S.L.D.* 906, where petitioner was employed between February 3, 1969 and June 1972; and between February 1969 and June 1969, petitioner did not hold an appropriate teaching certificate. However, Givens had filed for certification on January 29, 1969, at which time she possessed all the requirements for a permanent certificate. Givens did not receive her permanent certificate because of administrative delay until June 1969. The Commissioner held that the delay was not of petitioner's doing and she should not be penalized because of administrative delay. The Board contends that in the instant matter, petitioner did not possess all the requirements for certification when she applied for the certificate and the delay in filing was her own doing and can not be attributable to administrative delay. See also; *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd in part, rev. in part 1973 *S.L.D.* 777; *Thomas Smith, Jr., v. Board of Education of Egg Harbor,* 1974 *S.L.D.* 430; *Veronica Smith, et. al. v. Board of Education of Borough of Sayreville,* 1974 *S.L.D.* 1095, aff'd 1975 *S.L.D.* 1160; *North Bergen Federation of Teachers,* AFL-CIO, *et. al. v. Board of Education of North Bergen 1977 S.L.D., 1125; Joann' K' Burg. v. Board of Education of Township of Lower Alloways Creek, 1973 S.L.D.* 636.

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The Board finally argues, among other things, that the individual respondents in the instant matter acted within their official capacities as members of the Board; relied upon the advise of the Superintendent of Schools and legal counsel for the Board; acted within the scope of their duties as members of the Board and, therefore, cannot be held responsible in an individual capacity in the herein action. *Moss v. Jones,* 93 *N.J. Super.* 179 (App. Div. 1966).

DISCUSSION AND CONCLUSIONS

"The procuring of certification is the primary responsibility of a teacher." Commissioner of Education in *Sydnor, supra.* 1976 *S.L.D.* at 117. In the instant matter, petitioner Cooker neither possessed nor was she the holder of any teaching certificate issued by the Board of Examiners or the Atlantic County Superintendent of Schools during the entire period she was employed by the Board. The Commissioner has also held that, "It is also the responsibility of the Superintendent to insure that all teaching staff members are either certified or apply in timely fashion for appropriate certification." *Sydnor, supra.* at 117. Notwithstanding the error of interim Superintendent Winchell's failure to immediately terminate petitioner and the oversight by Superintendent Loggi with regard to petitioner's lack of certification, the fact remains, that petitioner did not possess the appropriate teaching certificate prior to August 16, 1990. Nor was her application for an appropriate certificate completed on or before July 16, 1990.

The law in this regard is quite clear, where it states at *N.J.S.A.* 18A:26-2, that:

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

Here, a dual obligation exists. The teaching staff member is required to disclose to the employing board the existence of the appropriate teaching certificate before assuming the duties of the teaching position and, the Superintendent is required to validate such certificate before assigning the teaching staff member to the teaching position. Petitioner failed to produce a valid teaching certificate to the Board and/or its agents in 1980 or thereafter. Interim Superintendent Winchell's predecessor failed to validate that petitioner was, in fact, the holder of an appropriate certificate.

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Consequently, I **CONCLUDE** that, as a matter of law, petitioner's employment as a teaching-staff member with the Board was at all times *ultra vires*.

Under the provisions of *N.J.S.A.* 18A:27-2, interim Superintendent Winchell was required to immediately advise the Board of petitioner's lack of certification when Superintendent Winchell first learned of the oversight. *N.J.S.A.* 18A:27-2 provides that :

> Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment, notwithstanding that the term of such employment shall not then have expired.

Interim Superintendent Winchell's failure to advise the Board of petitioner's lack of certification in February or March 1990 did not invalidate the statute. When the Board subsequently learned of petitioner's circumstances, it had no choice but to cease petitioner's employment contract under the law.

I **CONCLUDE,** therefore, that pursuant to *N.J.S.A.* 18A:27-2, the Board was compelled to cease any and all contract terms entered into between it and petitioner when it ascertained that petitioner was not the holder of an appropriate certificate required for her employment.

I **CONCLUDE** that the Board's employment of petitioner for the 1990-91 school year at its April 5, 1990, regular meeting was improper and *void ab initio* under *N.J.S.A* 18A:26-2 and *N.J.S.A.* 18A:27-2.

As to petitioner's tenure claim, I **CONCLUDE,** under the circumstances of this matter, that tenure does not attach. This is so because at no time during petitioner's employment with the Board did petitioner possess or hold any type of certificate issued by the Board of Examiners or the Atlantic County Superintendent of Schools. In those instances, where the Commissioner has allowed a teaching staff member to count time toward tenure where the staff member did not hold an appropriate

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certificate, he did so under clear and uncontroverted facts which demonstrated that the teaching staff member either; (1) had previously been employed by the Board for the requisite number of years under some type of teaching certificate (emergency); and/or (2) had applied for the teaching certificate and its issuance had been administratively delayed. In this matter, petitioner did not meet either of these conditions. During the period of her employ with the Board she neither had an appropriate teaching certificate nor had she applied for one. Petitioner did not fulfill her primary responsibilities of procuring her required and necessary teaching certificate. *Sydnor, supra.* Petitioner herein did not, therefore, meet the precise conditions set forth by the statutes to acquire a tenure status, which provides, among other things, that she hold an appropriate certificate *N.J.S.A* 18A:28-5.

I **FINALLY CONCLUDE** that the Board did not violate the provisions of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et. seq.* When the Board convened in closed session on August 30, 1990, it did so by way of a duly adopted resolution in open public session. The Board, at the request of petitioner, met in closed session to hear from petitioner's representatives concerning her employment status under *N.J.S.A.* 10:4-12b(8). Petitioner was not an employee of the Board on August 30, 1990, having been terminated from the Board's employ as a matter of law. *N.J.S.A.* 18A:27-2. Petitioner was, at that time, a private citizen represented by legal counsel and former employee representatives. The Board took no action with regard to petitioner's employment status because she had none. Consequently, the Board did not violate any provision of the Open Public Meetings Act.

ORDER

Having carefully considered the entire record in this matter, including petitioner's reply brief, it is hereby **ORDERED** that petitioner's motion for summary decision be **DENIED** and that **SUMMARY DECISION** be **ENTERED** on behalf of respondent **BRIGANTINE BOARD OF EDUCATION.**

IT IS **FURTHER ORDERED** that petitioner's complaint against individual members of the Brigantine Board of Education named herein be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

21 June 1991
Date

Lillard E. Law
LILLARD E. LAW,.ALJ

Receipt Acknowledged:

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1991
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

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DOCUMENTS IN EVIDENCE

A. Affidavit of Lawrence R. Winchell, Jr.; Stipulation #6
B. Minutes of Regular Meeting, Brigantine Board of Education, April 5, 1990; Stipulation #7
C. Letter to Anne Marie Cooker, April 6, 1990 from Winchell; Stipulation #8
D. Memorandum to Anne Marie Cooker, May 7, 1990, from Gustav H. Ruh; Stipulation #9
E. Letter to Anne Marie Cooker, May 17, 1990, form Daniel G. Loggi; Stipulation #10
F. Memorandum to Anne Marie Cooker, July 19,1990, from Gustav H. Ruh; Stipulation #11
G. Letter to Daniel Loggi, August 16, 1990, from Gustav H. Ruh; Stipulation #12
H. Letter to Daniel Loggi, August 30, 1990, from Dennis M. Tuohy; Stipulation #12
I. Minutes of Regular Meeting, Brigantine Board of Education, August 30, 190; Stipulation #14
J. Letter to Dennis Tuohy, Esquire, August 31, 1990, from Maurice Y. Cole, Jr.; Stipulation#15
K. Letter to Maurice J. Cole, Jr., Esquire August 31, 1990, from Dennis Tuohy, Esquire; Stipulation #16
L. Minutes of Special Meeting of the Brigantine Board of Education, July 27, 1990; Stipulation #18
M. Handwritten Letter to Dr. Loggi, August 20, 1990, from Anne Marie Cooker; Stipulation #21
N. Closed Session Minutes, Brigantine Board of Education, August 30, 1990; Stipulation #22

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ANNE MARIE COOKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, STEVEN VAN NOTE, CAROL CALLOWHILL, DR. ROBERT BRAY, PHILIP GUENTHER, JR., RUTH HANEMAN, HANCE JAQUETT AND DR. EMERSON TRACY, ATLANTIC COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and replies by respondents were timely filed pursuant to N.J.A.C. 1:1-18.4.

In her exceptions, in addition to reiterating arguments raised before the ALJ, petitioner contends that the standard contract utilized by the Brigantine school district called for employment to begin in early September and that on September 1, 1990 she was ready, willing and able, as well as properly certificated, to so serve. She further notes that the explicit language of this contract required procurement of certificate before beginning service, which she did. In view of this, together with N.J.A.C. 6:11-3.1(b) which states that "the chief school administrator*** shall require each newly employed or reassigned teaching staff member to exhibit an appropriate certificate before the teaching

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staff member assumes responsibility for the performance of regulated duties," petitioner asks the Commissioner to construe the statutes relied upon by the ALJ to require a teacher to be certificated at the time he/she will begin service under the terms of the contract rather than at the time the contract is offered. Petitioner further argues that irrespective of N.J.S.A. 18A:27-2 or any education law, she had been hired by vote of a public body and therefore that body was obliged, under her constitutional right to substantive and procedural due process and under the intent of the Open Public Meetings Act, to undo its prior action by public vote.

In reply, in addition to objecting to petitioner's failure to raise this new line of argumentation before the ALJ, the Board contends that neither contract nor regulation can, or can be interpreted so as to, alter the clear terms of statute. The ALJ's conclusion that no employment relationship existed between petitioner and the Board is therefore correct, as is his concomitant holding that no public action was required to undo it.

Upon a careful review of this matter, the Commissioner concurs with the ALJ that petitioner's employment in the Brigantine school district was at all times ultra vires by reason of her failure to hold the required certificate for her position. This being so, petitioner has no entitlement to the benefits and privileges that would have attached to such employment had she been properly certificated and cannot rely on her prior service either to argue for acquisition of tenure or to claim that she has a contract for 1990-91 employment by operation of N.J.S.A. 18A:27-10 et seq.

In the first instance, it is now well settled that regardless of circumstances or absence of fault, persons found to

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have been teaching without proper certification cannot acquire tenure, or receive credit toward tenure acquisition, by virtue of such service. Stephen Jennings v. Board of Education of the Borough of Highland Park, Middlesex County, decided by the State Board of Education December 6, 1989 This decision reversed the Commissioner and voided prior holdings, including those cited by petitioner and the ALJ at pp. 9 and 16 ff. of the initial decision, that persons eligible for, but not in actual possession of, appropriate certification could receive tenure credit under certain circumstances.

In the second, because petitioner's employment in Brigantine was at all times null and void by operation of N.J.S.A. 18A:27-2, the offer of reemployment extended her by the Board on April 5, 1990 was likewise ultra vires and therefore of no force and effect. This being so, petitioner had neither a binding agreement with the district that would require termination by action of the Board nor a right to claim that employment had been offered her for 1990-91 by operation of N.J.S.A. 18A:27-11. Here it must be emphasized that the offer made to petitioner was an offer of reemployment, made to an existing staff member under the terms of N.J.S.A. 18A:27-10, on the assumption that she was fully and properly certificated and that she had been validly employed in the district during the past year. Since this offer was null and void ab initio, in that petitioner had no employment status at the time of its extension, petitioner cannot rely on it now to claim entitlement to reinstatement or due process as a result of its "termination," i.e., the Board's closed-session articulation of its stance that petitioner was not employed for 1990-91.

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Accordingly, with the clarification noted above regarding prohibition of employment credit in the absence of actual possession of certificate, Jennings, supra, the Commissioner affirms the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal for the reasons stated therein.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1991

DATE OF MAILING - AUGUST 12, 1991

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* The Commissioner takes notice of petitioner's request, unopposed by the Board, that a late addition to the record be added to the stipulations of fact contained in the initial decision: On or about May 8, 1990, petitioner advised the Board that "I hereby notify you in writing pursuant to Chapter 436 of the Laws of 1971 [N.J.S.A. 18A:27-10 et seq.] that I accept your offer of employment for the coming school year." (Exceptions, at pp. 1-2) The Commissioner adopts this addition and hereby incorporates it into the recitation of facts in this matter.

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ANNE MARIE COOKER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIGANTINE, ET AL., ATLANTIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, August 12, 1991

For the Petitioner-Appellant, McGahn, Friss & Miller
(Dennis M. Tuohy, Esq., of Counsel)

For the Respondent-Respondent, Cole & Cole
(Maurice Y. Cole, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. We note, however, that, as reflected in his decision, the Commissioner has failed to properly understand our decision in Jennings v. Board of Education of the Borough of Highland Park, decided by the State Board of Education, December 6, 1989. Contrary to the Commissioner's perception, that decision was strictly limited to the particular facts presented by that case. We did not hold therein that equitable grounds could never be considered in assessing whether the statutory conditions of N.J.S.A. 18A:28-5 had been satisfied.

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McAneny v. Board of Education of the School District of the Chathams, decided by the State Board of Education, October 2, 1991, slip op. at 3. In this case, however, Petitioner has failed to demonstrate such circumstances as to provide a basis for crediting her period of service without appropriate certification towards the achievement of tenure.

December 4, 1991

Date of mailing DEC 06 1991

Pending Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4953-91
AGENCY DKT. NO. 99-5/91

IN THE MATTER OF THE
ANNUAL SCHOOL ELECTION HELD
IN THE CONSTITUENT DISTRICT
OF BORDENTOWN TOWNSHIP IN THE
BORDENTOWN REGIONAL SCHOOL DISTRICT.

Maureen S. D'Angelo, petitioner, pro se

Record Closed: June 20, 1991 Decided: June 24, 1991

BEFORE BRUCE R. CAMPBELL, ALJ:

Pursuant to a letter complaint filed by candidate Maureen S. D'Angelo, the Commissioner of Education determined to conduct an inquiry in the annual school election held on April 30, 1991, in the constituent district of Bordentown Township in the Bordentown Regional School District.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. An inquiry was conducted by the undersigned on June 18 and 20, 19991. Three persons were heard and two documents were admitted in evidence.

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One seat, for a full term of three years, was to be filled at the annual school election held on April 30, 1991 in the Bordentown Regional School District. The announced results were:

	AT POLLS	ABSENTEE	TOTAL
Nicholas G. Binder	164	0	164
Maureen D'Angelo	162	2	164
Heather Sue Slack	139	0	139
Michael Lovero	6	0	6
Nancy Lieberman	1	0	1
Joseph Rubnicki	1	0	1

By letter dated May 1, 1991, candidate D'Angelo requested a runoff election. She alleged improprieties in conduct of the election sufficient to affect the outcome. On the same day, the superintendent of schools requested that a representative of the Commissioner conduct a recount of the ballots cast. The recount was conducted on May 7, 1991 at the Office of the Burlington County Superintendent of Elections in Lumberton.

As a result of the recount, 25 write-in votes for D'Angelo were disallowed because the candidate's name was not written or pasted in a slot corresponding to the office of board member. In addition, two voters each wrote D'Angelo's name twice in the same column. Each of these double entries was treated as a single vote for D'Angelo, however.

After the 25 votes were discounted, the tally, including absentee votes, was Binder 164 and D'Angelo, 139. If the 25 votes were allowed, D'Angelo would have tied Binder.

The Commissioner's representative asked several questions at the recount and learned from the voting machine custodian that lines one and two in each voting machine were designated for the vacant three-year position to be filled. Line three was vacant and line four was for the current expense vote. Each machine bore instructions that write-in votes should be placed in lines one or two.

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Other lines, however, were not locked. Thus, it was possible for a person to vote for a candidate on the printed ballot and also write-in or paste-in names on lines 3-30. Furthermore, a voter could write in a name in the slot by the current expense question.

The Commissioner's representative made several findings of fact, including:

1. The direction given to election workers by the County Board of Elections was to count only the write-in votes corresponding to or opposite the office being sought; that is, on lines one or two.

2. The instructions posted on the machine state the write-in vote should be cast "in line with the corresponding office for which you desire to write-in."

3. N.J.S.A. 18A:14-42 requires that voting machines shall be prepared for use and shall be used in the same manner, and the superintendent of elections or the county board of elections, as the case may be, and all election officers of the district shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19, Elections.

4. N.J.S.A. 19:49-5 requres that a write-in ballot must be cast in the appropriate place on the voting machine or it shall be void and not counted.

5. As the machines were set up, it was possible to vote for a candidate for the three-year seat and to write in the name or names of others.

Among other things, the Commissioner's representative concluded that any write-in votes inappropriately written in or pasted on lines three though fifty should not be counted. The Commissioner agreed, finding the two statutes cited above quite clear. He therefore determined that the 25 write-in ballots identified by his representative should not be counted. Nicholas Binder was determined elected to a term of three years on the Bordentown Regional School District Board of Education.

Ms. D'Angelo testified that she declared herself a write-in candidate in mid-April. She called local newspapers, ran advertisements and pursued what she referred to as a serious campaign. She circulated fliers that carried peel off labels

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bearing her name and instructions as to how to cast a write-in vote.

Prior to election day, she visited the County Superintendent of Election's office. Among other things, she reviewed the write-in procedure. She was assured that voters could ask questions of poll workers concerning any aspect of the write-in process.

On election day, she called the Board secretary to assure that poll workers knew the write-in process. She specifically told her followers to ask poll workers for help, if necessary.

During the day, she received many telephone calls, the gist of which was that something was going wrong and that there was more than some confusion at the polls. When persons asked for help, poll workers were giving incorrect information.

The candidate later learned that at least three persons placed the sticker on the outside of the machine; that is, on the door over the slot in which the name sticker should have been pasted. The election judge consulted the County Board, was instructed to remove those stickers and did so. In addition, at least one person wrote D'Angelo's name on the door over the slot. The election judge erased the writing.

At least two voters' names did not appear in the registration books. These persons were referred to the municipal clerk. However, the time was after 5:00 p.m. and the municipal building was closed. An elderly couple had difficulty exercising the write-in process. When they sought help, an election worker told them to turn the red lever. This opened the booth curtains, locked in whatever votes they had cast, and most importantly, completed their voting.

D'Angelo concedes that most of the 25 contoverted votes were written or pasted in at or near the 13th line on the voting machines. However, many voters followed poll workers' instructions, believing them to be correct, and voted improperly.

The candidate believes that setting up the machines as at present, that

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is, not locking doors that cover spaces that should not be used, invites error. County election personnel told her, however, that it would be too costly to set up machines so that only one or two doors could be opened.

The Board secretary testified that he made arrangements for voting machines to be delivered to the polling places, requested registration books from the county office and, with custodial staff, set up two voting machines at the Muschal School. He selected all workers from a list provided by the County Superintendent of Elections. He selected one judge, one inspector and two clerks. He assumed, because their names were placed on a list of persons certified to so work that they had taken a general election course provided by the county board. On April 26, two poll workers informed the secretary they would not be available on April 30. He went through the county list again and secured two other persons. Both of them served as clerks. Edna Payne, who had three years' experience, was asked to serve as judge of the election.

On April 30, prior to 2 p.m., the secretary made sure that registration books and voting machines were present, told election workers to expect a write-in vote and told poll workers that a flyer was circulated in the community carrying a sticker bearing a candidate's name. The secretary declared polls open at 2 p.m. by reading the legally prescribed statement. Ms. Payne opened the voting machines.

No problems with the machines occurred between 2 and 9 p.m. The secretary visited the polls four times during the seven-hour stand.

Difficulties were brought to his attention concerning write-in votes. He was shown a sticker affixed to a metal piece of the voting machine. A poll worker removed the sticker before the next voter entered.

Each voting machine had a button at position 13 to open the column door so that write-in votes could be cast. However, all 50 slots in the column were opened when the button was activated.

The secretary was present at ballot counting. Poll workers counted votes, recounted and recounted again. All votes for D'Angelo regardless of position on the paper roll from the machine were counted. Tally sheets were filled out and

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signed by election clerks and the judge. They were given to the Board secretary. He made results known in the township and the district. He called the office of the County Superintendent of Schools and reported the results. D'Angelo was present at this time.

The Board secretary received several complaints during evening voting hours about the write-in process. Stickers were placed not on the paper roll but on the face of the voting machine. At least one voter opened the curtain to get instructions, thereby clearing the machine. The Board secretary also testified as to the apparent tie and the recount conducted on May 7. The Board received a copy of the Commissioner's decision on May 16. The Board secretary believes that if 25 persons voted twice that could have clouded Binder's total also.

At continued hearing held on June 20, 1991, Edna Payne testified. She stated she received a letter from the Board asking her to serve at the April 30 election and replied by telephone that she would. She had worked at two prior school elections.

On April 30, Ms. Payne arrived at the polling place at approximately 1:30 p.m. She waited for registration books to arrive. She opened two voting machines. The Board secretary came into the polling place and declared the polls open at 2 p.m. The witness stated the turnout was heavy for a school board election.

At first, things were "going as they should." The witness learned there would be a write-in campaign. She was asked by the Board secretary to assist voters who requested help with the write-in process. The witness recalled that many voters, perhaps 50 asked for help.

When asked for help, the election judge did not enter the poll booth. She told voters what to do. She recalls telling them to push the lever in the middle column to open the machine. She then instructed voters to put in the sticker or write in the name "and you're finished." The witness also stated, "If it were me, I'd use the large window—its easiest to get to."

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The witness knows at least one voter opened the machine to get instructions. She told the voter to reenter the booth although she now realizes that was incorrect. The voter did reenter the booth and closed the curtains. One number on the machine tally, therefore, did not count. The witness wrote a note concerning the incident and turned it in with her blue book to the County Superintendent.

That is the only incident concerning a voter tally number that she can recall.

While serving as election judge, the witness saw stickers and written names in wrong places on the voting machines. This happened perhaps three times. Voters often asked questions from inside the booth. Some voters asked before entering the booth what the write in procedure was and the witness instructed them. In essence, what she told voters to do was to go halfway down the column and find a little lever. That would open the machine. Directions for casting a write-in vote were on a small card over the red knob that controls booth curtains.

Voting became quite heavy after 5 p.m. Meals were brought in for election workers but not eaten.

The witness recalls that someone declared the polls closed at 9 p.m. She then set the machines to read tallies. She opened the doors to the paper rolls, loosened and removed the paper rolls until no more write-in votes were observed. She laid out the rolls on tables. Election workers, not she, counted the votes. There were write-in votes "all over the page." The witness assumed that there was nothing wrong with this.

When all had been tallied, the witness, with assistance from the election workers, closed the machines, closed registration books, signed the blue book and gave all materials to the Board secretary at approximately 9:30 p.m. The witness learned the next day that there would be a recount. The Board secretary advised her of the time and place. The witness attended the recount. Maching use was demonstrated first. It was at this time the witness learned that only the top three lines "count for write-in votes." She was also told she should have been aware of this. She had been an election worker before and had been to classes conducted

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by the County Board of Elections perhaps two or three times. She still does not recall that specific instruction, however. The classes were mostly about how to take off the paper roll. The witness also believed that if a voter appeared whose name was not in a registration book, that the person was properly referred to the Township clerk. The witness again stated that she believed on April 30 that she was doing everthing properly.

The witness also conceded that she or other poll workers may have told voters to "just write in any slot that opens." The witness saw D'Angelo's name written in pencil on one machine, not inside on the paper roll. She erased it. She also removed from the outside of the machine the two yellow stickers bearing the candidate's name.

Candidate D'Angelo also expressed some concern about the handling of absentee ballots. This, however, is a matter within the purview of the county clerk. The candidate certainly is free to bring the matter to the clerk's attention. However, it cannot be addressed here because it lies beyond the Commissioner's authority and, hence, mine.

DETERMINATION

Elections with voting machines are conducted as far as possible in the same manner as general and municipal elections. N.J.S.A. 18A:14-40. The superintendent of elections and the county board of elections perform the same duties as they perform in general and municipal elections, but they may not be required to prepare, challenge or strike out lists for use at school elections. N.J.S.A. 18A:14-42. At a regular meeting at least 40 days before the election, the Board must appoint such election officers as are necessary. The officers must be chosen from the members of the district election boards comprised within the boundaries of the polling districts insofar as practicable. N.J.S.A. 18A:14-6. The secretary must furnish official ballots for use in voting machines to the officers having control and custody of the machines at least seven days before the election. N.J.S.A. 18A:14-41.

Polls must be opened between the hours of five and nine p.m. and during any additional time which the Board may designate between the hours of seven

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a.m. and nine p.m. and as much longer as is necessary to permit those present to cast ballots. N.J.S.A. 18A:14-45. A Board member, or in the absence of a board member the judge of the election or in the absence of both, the secretary of the Board declares the polls open at each polling place at the time fixed. Voting continues without recess from then until the time the polls close. N.J.S.A. 18A:14-46.

N.J.S.A. 19:49-5 provides:

> Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office or for a delegate or alternate to a national party convention; any irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. [Emphasis added.].

N.J.A.C. 19:15-28 provides:

> Nothing in this Title shall prevent any voter from writing or pasting under the proper title of office in the column designated personal choice the name or names of any person or persons for whom he desires to vote whose name or names are not printed upon the ballot for the same office or offices, and who shall mark a cross X , plus + or check√in the square at the left of such name or names . Such writing shall be in black ink or black lead pencil. All pasters shall be printed with black ink on white paper. [Emphasis added.]

This statue has been construed strictly. In Petition of Keogh-Dwyer, 85 N.J. Super. 188 (App. Div. 1964), rev'd on other grounds 45 N.J. 117 (1965), the court held that statutes providing that a personal choice candidate may be voted for by writing or pasting his name in the column designated "personal choice" and placing a mark in the square to the left of the name are mandatory, not directory. Personal choice votes would not be counted where voters wrote or pasted in the candidate's name on the ballot but failed to make a proper mark in the square to the left of the candidate's name. Ibid.

In the present case, there clearly was some confusion at the polls. If all the irregular ballots voters attempted to cast for the petitioner had been

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acceptable, it is likely her total would have exceeded 164. However, as described above, some attempts went awry. Even more unfortunately, however, any of the 137 creditable votes the petitioner received that were cast by way of the peel off label she supplied with a flier would have to be disallowed. Exhibit 1, submitted by the petitioner and admitted into evidence, carries a yellow peel off label bearing the candidate's name and, to the right of the name, a box in which there is an X. These pasters fail to pass the requirements of N.J.S.A. 19:15-28 which requires that a mark be placed to the left of the write-in candidates's name and requires that all pasters shall be printed on white paper.

Inasmuch as our highest Court has construed the statute strictly, Keogh-Dwyer, above, I am constrained to determine that it was not possible for the petitioner to receive even 137 valid votes. I must also **CONCLUDE** that the will of the electorate was not thwarted.

In consideration of the foregoing, I **FIND** and **CONCLUDE** as a result of this inquiry that the petitioner did not receive and could not have received a plurality of the valid votes cast in the April 30, 1991 election held in the Bordentown Regional School District.

It is presumed that the Board will ensure that poll workers at future elections are adequately prepared to deal with write-in situations. Since no statutes of a penal nature were violated and because the petitioner could not have received a plurality of the valid votes cast, this inquiry is **ADJOURNED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 JUNE 1991
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 1 - 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

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WITNESSES

Maureen S. D'Angelo
Dennis Hurley
Edna Payne

EXHIBITS

Exhibit 1	Campaign flyer bearing message of Maureen D'Angelo and peel off label bearing the candidate's name
Exhibit 2	Commissioner of Education decision, recount, April 30, 1991 school election held in the Bordentown Regional School District, May 16, 1991

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

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

To briefly reiterate the history of this matter, a recount of votes cast in the annual school election was requested by the Board of Education as the result of an apparent tie between Petitioner D'Angelo and Nicholas Binder, each of whom received a total of 164 votes according to the announced results of the election. In his decision on recount dated May 16, 1991, the Commissioner found that 25 of the 162 write-in votes credited to D'Angelo were invalid because they were improperly written or pasted, and that Nicholas Binder had therefore been elected to the contested Board seat by a vote of 164 to 139 (137 write-in and 2 absentee ballots). Concurrently, D'Angelo wrote to the Commissioner requesting the within inquiry based on allegations of errors and improprieties in the conduct of the election.

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The ALJ herein, after reviewing this matter, determined that while there had been some confusion regarding casting of write-in votes, there was no evidence of wrongdoing or indication that the will of the voters had been thwarted by the result of the election. Accordingly, he dismissed the inquiry, thereby declaring Nicholas Binder to have been duly elected to the Board of Education. In the course of his discussion, however, the ALJ concluded that even the 137 votes credited to D'Angelo in the Commissioner's decision on recount should have been voided due to technical deficiency.

While the Commissioner concurs with the ALJ that the will of the electorate herein was not thwarted by the ultimate outcome of this election, he cannot concur with the ALJ that the 137 write-in votes previously counted for Petitioner D'Angelo were void by reason of being cast with yellow rather than white pasters and by reason of these pasters having the required box and "X" mark printed to the right of the candidate's name rather than to the left.

It is well established that election laws are to be liberally construed so as to effectuate their purposes and so as not to deprive voters of their franchise for technical reasons. Wene v. Meyner, 13 N.J. 185 (1953). Further, even when the technical requirements of law are clear on their face and can properly serve to prevent a vote from being cast, these same requirements do not constitute an appropriate basis, absent malconduct or fraud, for disqualifying an otherwise valid vote once it is cast. Friends of Jim Usry v. Matthews, 187 N.J. Super. 176 (App. Div. 1982) Nor does the Commissioner find Keogh-Dwyer, supra, dispositive of the matter herein as argued by the ALJ, in that that case dealt specifically

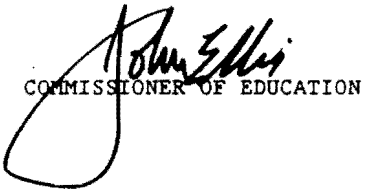
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and exclusively with the requirement that the voter make a proper mark along with the name of his candidate of choice, a requirement which was held to be mandatory rather than directory based on its specific legislative history.

Because the votes discounted by the ALJ herein were properly cast in all respects save the use of pasters that did not meet the precise technical specifications of statute, the Commissioner believes that the spirit and intent of the State's election laws would be poorly served by endorsing the strict construction espoused by the ALJ above.

Accordingly, while adopting the ALJ's recitations of fact and ultimate conclusions, the Commissioner modifies the initial decision of the Office of Administrative Law to hold that Maureen D'Angelo received 137 valid write-in votes as reckoned in the Commissioner's prior decision on recount. In so doing, he reaffirms that Nicholas G. Binder has been duly elected to a full term of three years on the Bordentown Regional Board of Education.*

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

---

* The Commissioner further notes that Exhibit 1 (D'Angelo's campaign flyer) includes a block of instructions on casting of write-in votes which appears to be a replication of sample ballot or voting machine instructions. These directions and the mock slots printed below them consistently show the square in which voters are to place their mark as being at the right of the space in which the candidate's name is to be written or pasted, suggesting at least the possibility that D'Angelo's pasters were prepared consistent with local practice notwithstanding the requirements of N.J.S.A. 19:15-28. If true, this would constitute yet another reason not to disqualify her 137 valid votes solely on the basis cited by the ALJ.

AUGUST 12, 1991

DATE OF MAILING - AUGUST 12, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9988-90

DONALD C. OEHLKE,

Petitioner,

v.

TERRENCE HOFFMAN, BOARD MEMBER,
AND THE TEWKSBURY TOWNSHIP
BOARD OF EDUCATION,
HUNTERDON COUNTY,

Respondents.

Donald C. Oehlke, the petitioner, pro se

Boyd Harbourt, Esq., for the respondent Terrence Hoffman

Russell J. Schumacher, Esq., for the respondent Tewksbury Township Board of Education (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: June 10, 1991 Decided: June 25, 1991

BEFORE **CHRISTOPHER DIETZ**, ALJ:

STATEMENT OF THE CASE

Petitioner alleges that respondent, Terrence Hoffman, a member of the Tewksbury Township Board of Education (Board) has involved himself in a conflict of interest, contrary to N.J.S.A. 18A:12-2, because he has actively participated in Board actions relating to school bus transportation while he was employed as a school bus driver by the company who provided school bus services under contract to the Board pursuant to N.J.S.A. 18A:18A-1 et seq. Petitioner demands relief, including (1) declaratory judgment holding that the respondent Terrence Hoffman was in a conflict of interest, (2) an

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order removing respondent from the Board; and, (3) a determination that the respondent Board negligently failed to request a formal opinion from the New Jersey Commissioner of Education concerning Board member conflicts.

PROCEDURAL HISTORY

On September 24, 1990, petitioner's letter motion petitioning declaratory judgment was filed with the Commissioner of Education. On December 5, 1990, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case and assigned January 24, 1991 for disposition pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

On February 21, 1991, an in-person prehearing was conducted and the petitioner verbally indicated his consent to dismiss his appeal against the respondent Board. The attorney for the Board was excused and the remaining parties agreed to exchange proposed stipulations of fact and submit them prior to the hearing scheduled for May 9, 1991. A prehearing order issued February 26, 1991. Thereafter, petitioner withdrew his consent to dismiss respondent Board. Since a formal consent order had not been executed and no transcription made of the prehearing conference, it was mutually agreed the Board would remain a party. The Board then filed a motion for summary disposition which was reserved for determination in this decision.

On May 9, 1991, the hearing convened at the Hunterdon County Court House in Flemington. Prior to commencement, the parties conferred and stipulated to a number of facts. The hearing concluded the next day, at the same location. The parties were invited to make submissions appropriate to their positions and allowed to file written opening and closing statements. The last submission was received June 5, 1991, whereupon the record closed five days later.

THE ISSUES

1. Whether N.J.S.A. 18A:12-2 prohibits:

    a. the hourly employment of a board of education member as a school bus driver by the successful bidder of that board's student transport contract; and

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b. the storage, without compensation, of those buses on private property owned by that board member.

2. Whether any special significance arises from:

a. a member holding the position of president of the board of education while employed as a school bus driver; and

b. a member participating in board actions concerning his hired farm hand also receives supplemental income as a school bus driver.

3. If a violation of N.J.S.A. 18A:12-2 is established, what is the appropriate remedy?

FINDINGS OF FACT

Having heard the testimony, determined the credibility of the witnesses, reviewed the stipulation of facts submitted May 9, 1991, exhibits and submissions, and considered the arguments of the parties, I **FIND** the following **FACTS** by a preponderance of the credible evidence:

1. Petitioner, Donald C. Oehlke, was elected to the Tewksbury Board of Education in April of 1989 and continues to serve to date.

2. Respondent, Terrence Hoffman, was also elected to the Tewksbury Board of Education in April of 1989 and continues to serve. He is the holder of a valid New Jersey State license to operate school buses.

3. The petitioner and respondent Hoffman ran for election to the Board along with Noel Kappus as a team and they were all elected in April of 1989.

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4. Respondent, Terrence Hoffman, is an employee of Fleming's Transportation, Inc. He held this employment during his campaign for election to the Board in April of 1989.

5. Respondent Hoffman never served as a member of the Board prior to April of 1989.

6. For the 1990-91 school year, respondent Hoffman was assigned by his employer, Fleming's Transportation, Inc., to drive school bus Route #5 within the respondent Board's district.

7. At the organization meeting in April of 1990, Terrence Hoffman was placed in nomination for the presidency. His nomination was duly seconded. During discussion, Elsie Murray, a Board member, objected to the nomination because she felt Mr. Hoffman had a conflict of interest because he drove for Fleming's Transportation, Inc. Mr. Hoffman was elected by a majority vote, which included the affirmative vote of petitioner Oehlke.

8. As a result of the discussion of the alleged conflict of interest which occurred during the election process of the Board presidency, the Superintendent of Schools, Kenneth Gross, sought a legal opinion from the Board's attorney, David B. Rand, concerning the conflicts of interest issue. An opinion was received May 23, 1990.

9. Prior to receiving the Board Attorney's opinion, the respondent, as Board president, pursuant to N.J.A.C. 6:21-13.1, appointed a transportation committee to review and revise, as necessary, the 1989-90 school bus routes for 1990-91. The transportation coordinator for the district, Glenda Fulcher, resigned in January of 1990. She was not replaced until August 8, 1990, when Marsha Parker was hired as Assistant Board Secretary with responsibilities for transportation coordination and route planning.

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10. In May 1990, the Board's Transportation Committee was responsible for transportation coordination and route planning until it was later disbanded.

11. The petitioner, voted "yes" on the motion to establish this committee and was appointed a member by respondent Hoffman. The other members were Mary Kohlar, who was named Chairperson, Nancy Fox, and Pat Rist.

12. Because of respondent's familiarity with school bus driving and school bus routes in the Township since 1970, various members of the committee asked him questions and sought his advice and suggestions concerning route alignments, including the petitioner. The advice essentially dealt with safety issues which involved the children of the district.

13. Some of the routing suggestions of respondent Hoffman were in fact incorporated in the final routing realignment recommended by the committee and adopted by the Board. Some were not.

14. Respondent abstained from voting on the route revisions recommended by the transportation committee which were approved by a majority of the Board. The petitioner voted in the affirmative to adopt the Committee's recommendations.

15. The revised routes were submitted to public bid as recommended by the Transportation Committee.

16. All contracted bus route bids were awarded by the Board to Fleming's Transportation, Inc. as low bidder for the 1990-91 school year. Respondent Hoffman is an employee of this contractor.

17. After the initial bid was accepted, an extension to Route 7 was designed and the route supplemented in September 1990.

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18. This change resulted in an increase in the number of students riding bus route #7. Students added as a result of this change were no longer required to cross Rt. 512.

19. This extension to Route #7 was adopted by a majority of the Board. The motion was seconded by the petitioner who also voted for it; but, respondent Hoffman abstained from this vote.

20. Respondent Hoffman disagreed with this extension and communicated his opinion to those Board members who sought his input. Mr. Hoffman believed that the extension would increase the cost to the Board and benefit the successful bidder, his employer, Fleming's Transportation, Inc.

21. Respondent Hoffman answered fact questions posed to him by Transportation Committee members, including petitioner Oehlke and other Board members based on safety considerations on a "one-to-one" basis and did not take part in Board discussions dealing with transportation unless specific questions regarding route alignments and safety issues were directed to him.

22. Routes were changed and revised by the Board on November 19, 1990, but never implemented. Respondent Hoffman also abstained from voting on this change.

23. The Board disbanded the Transportation Committee on motion of the Committee's chairperson, Mary Kohlar, sometime prior to the end of October 1990, because the committee's functions had been assumed by the newly hired Assistant Board Secretary. Her duties included transportation coordination.

24. The petitioner voted "yes" and respondent Hoffman abstained from voting on the motion to disband the Transportation Committee.

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25. The latest student transportation revision, dated December 3, 1990, was approved by the majority of the Board, to assure that no student would be required to cross a county road to enter or exit any school bus within the district.

26. The petitioner voted in favor of this motion. Respondent Hoffman abstained. On March 18, 1991, after realizing the complications and expense involved, the Board agreed that the Superintendent should not implement the November 19, 1990 and December 3, 1990 actions, but rather voted to continue the existing promulgated routes.

27. There is an ordinance in Tewksbury Township restricting the parking of school buses within the Township limits.

28. James Connor is employed by respondent Hoffman at Hoffman's farm as a part-time employee. Mr. Conner is also employed as a school bus driver within the district.

29. Prior to May 1990, respondent Hoffman participated in official discussions with Township officials regarding the parking of school buses within the Township. It was determined that the two district-owned buses could be stored at the Township garage adjacent to the old Turnpike School.

30. The anticipated consequence was that if a private contractor's school buses were not allowed to be stored within the Township but required to return to the contractor's garage, in this case West Portal, New Jersey, a distance of approximately 20 miles, district transportation costs would increase.

31. Respondent Hoffman allowed the utilization of his farm property within the Township for the storage of contractor-owned school buses servicing the district over the past two decades.

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32. During that period, there were at least two other independent bus contractors, who enjoyed this advantage.

33. During that period, respondent Hoffman was employed by each of the successful bidders for the Tewksbury School bus routes. These contractor school buses, serving the Tewksbury School district, were always stored on respondent Hoffman's farm.

34. Prior to May 1990, respondent Hoffman discussed and suggested to his fellow Board members, including the petitioner, resolutions for the bus parking problem to avoid an adverse impact on the district's budget and the safety of its students.

35. Respondent Hoffman's employment as a bus driver for Fleming's Transportation, Inc. consists of one district route, a.m. and p.m., and one regional high school route, a.m. and p.m. He is paid for four and one-half hours each day for all four of these runs. The employer's share of FICA and SUI/SDI is included in his compensation. Any extracurricular bus usage assignments to him results in additional hourly supplemental payment.

36. The opinion letter of the Board attorney, dated May 21, 1990, concerning "The Potential Conflict of Interest - Board Member/Bus Driver" was distributed to the full Board on September 10, 1990.

37. The petitioner's motion to request a formal ruling from the Commissioner of Education regarding respondent Hoffman's alleged inconsistent interest was defeated by a six (6) to three (3) vote on September 10, 1990.

38. At the May 6, 1991 reorganization meeting of the Tewksbury Board of Education, Mary Kohlar was elected President of the Board of Education. Tespondent Hoffman no longer holds an officership on that body, but continues in membership.

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39. Dorothy Hoffman, a local citizen, also drives for Fleming Transportation, Inc. and stores her assigned bus on her private property. There is a distant, inconsequential family relationship between Dorothy Hoffman and respondent Hoffman.

DISCUSSION

The Legislature has specifically provided the Commissioner with the authority to hear and determine, without costs to the parties, any controversy concerning the operations of local school districts. See, N.J.S.A. 18A:6-9.

It is a fundamental axiom that members of boards of education hold positions of public trust and must at all times faithfully discharge their functions with this public trust as their polestar. See, Cullum v. Board of Education, Township of North Bergen, 15 N.J. 285 (1959). The concepts of inconsistent and conflict of interest, as they relate to this public trust, are interchangeable for the purposes of this discussion.

All members of boards of education must discharge their duties with undivided loyalty. This is formalized in N.J.S.A. 18A:12-2 which specifically addresses inconsistent interests. A potential conflict exists even when an individual has a business or personal interest which may only occasionally compete with official duties. The statutory prohibition is unambiguous.

The doctrine of "inconsistent interest" holds that one cannot hold a public office and maintain any business interest where performance in public office could be subordinated to the business interest, or subject to suspicion that an advantage could obtain from public office in favor of that business interest. Each situation must be analyzed to determine if circumstances rise to bar the office holder from participation because of conflict. See, Jones v. MacDonald, 33 N.J. 132 (1960); Dunn v. Froehlich, 155 N.J. Super. 249 (App. Div. 1978); Kaufman v. Pannuccio, 121 N.J. Super. 27 (App. Div. 1972); and Visotcky v. City Council of Garfield, 113 N.J. Super. 263 (App. Div. 1971).

A potential conflict for board members can be avoided by: (1) abstention from official board actions relating to matters from which a special economic interest can derive; or, (2) withdrawal from any business activity involving the official body (Board.) See, Salerno v. Old Bridge Board of Education, 6 N.J.A.R. 405, 412 (1984). In this way,

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possible violations of N.J.S.A. 18A:12-2 are avoided. That statute clearly mandates that no member of any board of education shall be interested directly or indirectly in any contract with the board.

Respondent Hoffman works as a school bus driver for the company who is the successful bidder for his Board's transportation contract. The record is clear that the respondent, during his Board membership, did receive some economic benefit, as a school bus driver, resulting from the contract his Board had with his employer. He did participate in discussions which no doubt influenced colleague votes, especially as they related to school transportation issues.

Public bidding for services to a board of education is required so that services can be obtained at the lowest reasonable cost. See, N.J.S.A. 18A:18A-1 et seq. Even when an advantageous contract for the public is obtained, it does not excuse a member from the prohibitions of N.J.S.A. 18A:12-2. There is no strict formula which can be applied to identify such official conflict. The determination must always be based upon a careful evaluation of the circumstances of each case. This examination must forthrightly concentrate on whether the relevant circumstances have a likely capacity to create the perception of temptation for a public official. Anything which could give rise to such suspicion or that a departure from sworn public duty might occur, is prohibited. A public official must not participate in any matter where any potential to favor or promote a special interest exists. See generally, Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958).

In the circumstances at bar, the school bus company, by whom respondent Hoffman is employed, did in fact successfully bid on the Board's transportation contract. At that time, respondent Hoffman additionally held the significant position of power as President of the Board. He neither withdrew from his employment nor totally abstained from all participation in deliberations which affected his employer. The respondent not only violated the spirit but the very letter of the law embraced in the statutory prohibition.

The Legislature has limited the number of causes to allow for the removal of a member of a board of education. They are enumerated in N.J.S.A. 18A:12-3 and the inconsistent interest, as set forth in this case, is not provided as a cause for removal.

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The record demonstrates that the formal Board Attorney opinion, on the issue of conflict of interest, which is the subject matter of this appeal was dated May 27, 1990, and received by the administration shortly thereafter. There has been no reasonable explanation as to why it was not distributed to the full Board until September 10, 1990.

The same day the opinion was distributed, petitioner requested the Board to seek a formal ruling on the issue of conflicts from the Commissioner of Education. The Board rejected this request by a vote of six (6) to three (3). It is noted that respondent Hoffman did not abstain.

FINDINGS AND CONCLUSIONS

Based upon the above, I **FIND** and **CONCLUDE** that the respondent Hoffman did involve himself in a conflict of interest in prohibition of N.J.S.A. 18A:12-2.

As to the petition for removal, I **FIND** and **CONCLUDE** that the petitioner has failed to state a claim upon which relief can be granted, and the Petition for Removal of respondent Hoffman is **DENIED**. I further **CONCLUDE** that respondent Hoffman must abstain from all Board deliberations and actions concerning student transportation as long as respondent Hoffman is an employee of a school bus contractor for the Board and all Board consideration in James Conner. I further **CONCLUDE** that respondent Hoffman may not hold the office of President or any office which gives him authority over other members while he continues in his school bus driver employment.

ORDERS

Having made the Findings and Conclusions above, I **ORDER** respondent Hoffman to: (1) refrain from participation in Board actions relating to any school transportation issues unless he withdraws from any business activity involving school transportation as a school bus driver for a private carrier; (2) refrain from holding any official officership, such as president, within the hierarchy of the Board while this conflict exists; and (3) refrain from participating in any Board action concerning James Connor.

I **GRANT** respondent Board's motion for summary disposition for the reasons set forth in the application.

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I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 1991
DATE

CHRISTOPHER DIETZ, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 1 - 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

Joint Exhibits:

J-1 Auto Bus License - Terrence Hoffman

J-2 1990-91 School Bus Route Board Documents

J-3 Board Attorney Opinion Letter, dated May 21, 1990, re: Potential Conflict of Interest - Board Member - Bus Driver

J-4 Extract (page 6) of Board Minutes, dated May 15, 1989

J-5 Letter from Beagle to Tewksbury Township Committee, dated July 11, 1989, concerning recommendation for enforcement of School Bus Ordinance

J-6 Extract (page 6) of Board Minutes, dated December 4, 1989

J-7 Extract (page 3) of Board Minutes, dated April 9, 1990

J-8 Extract (page 4) of Board Minutes, dated October 2, 1989

J-9 Extract (page 4) of Board Minutes, dated August 28, 1989

For Petitioner:

None

For Respondent Hoffman:

None

For Respondent Tewksbury Township Board of Education:

None

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WITNESSES

For Petitioner:

Donald C. Oehlke
Noel D. Kappus
Ellsie Murray
Patricia E. Rist
Kenneth J. Gross

For Respondent Terrance Hoffman:

Terrance Hoffman
Nancy Foxx

For Respondent Tewksbury Township Board of Education:

None

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DONALD C. OEHLKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TERRENCE HOFFMAN, BOARD MEMBER, AND THE TEWKSBURY TOWNSHIP BOARD OF EDUCATION, HUNTERDON COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner Oehlke and Respondent Hoffman filed timely primary exceptions pursuant to N.J.A.C. 1:1-18.4. The Board's primary exceptions concurring with Respondent Hoffman's exceptions were untimely received, however, in that they were incorporated in the Board's timely reply exceptions to the exceptions filed by Petitioner.

Petitioner, who is appearing pro se in this matter, filed exceptions requesting that Respondent Hoffman be discharged from the Tewksbury Township Board of Education. He relies on N.J.S.A. 18A:12-2 and 18A:12-2.1 and cites Carolynn A. Pauze v. Willard R. Young III, decided by the Commissioner June 11, 1990 for the proposition that Respondent Hoffman remains a nonqualified member in clear violation of the laws he took as oath to uphold under N.J.S.A. 18A:12-2.1. He claims that Respondent Hoffman's membership "remains prohibited." (Exceptions, at p. 1)

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Petitioner also excepts to the granting of respondent Board's motion for summary decision with regard to the charge of negligence. In this regard, petitioner states:

> I take this to mean that because there is no provision in law for Board negligence charge, that it may be permissible for a Board President and School District Superintendent to request Board Attorney's legal opinion at the expense of the taxpayers, and to withhold said opinion from Board members and public for 111 days (as perpetrated here).
>
> In addition, that the laws do not specify that a Board of Education shall police itself, allows a member to remain seated without seeking an authoritative ruling when requested by 3 fellow Board members who requested same from the Department of Education as was presented in the form of a motion at a scheduled Board of Education meeting on the 10th day of September, 1990, the night that the 111 day-old original Board Attorney opinion was brought forth.
> (Petitioner's Exceptions, at p. 2)

Petitioner affixes to his exceptions his post-hearing submission, and asks that the Commissioner "***at least censure this Board of Education, the then President Hoffman (respondent), and Chief School Administrator Kenneth Gross. This miscarriage must not be permitted to pass without reprimand." (Id.)

Petitioner Hoffman's exceptions aver that insofar as the ALJ determined that he is not disqualified from being a Board member, he should be allowed to be president of the Board so long as he does not partake of any decisions which may involve a potential conflict of interest such as transportation decision. He does suggest, however, that he should yield any appointive or other powers that he may have as president to the vice president in dealing with transportation matters.

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The Board's reply exceptions to petitioner's primary exceptions address petitioner's second argument concerning the Board attorney's legal opinion. The Board submits that such issue was not the subject of his petition. It claims that the issue of when the full Board received the written opinion letter of the Board attorney related to the Board's decision not to seek an official ruling from the Commissioner on whether Respondent Hoffman had a prohibited inconsistent interest is not relevant to this matter. Claiming that notwithstanding the inconsistent testimony of Board members as to when they received a copy of the Board attorney's opinion, it is clear that all the Board members had a copy of the opinion before voting on whether to seek an official ruling on Respondent Hoffman's alleged inconsistent interest.

The Board avers that the timing of the Board members' receipt of the Board attorney opinion letter cannot now be raised to support petitioner's claim that the Board acted in a "negligent" manner. (Quotation in Board's Reply Exceptions, at p. 2) It argues that the sole issue pertaining to the Board in this matter is whether the Board's decision not to seek an official ruling constitutes "negligence" (Id.) for which it should be censored. It submits that it is clear the Board's motion for summary decision should be granted as petitioner has failed to demonstrate any basis for the Commissioner's declaring the Board "negligent." (Id.)

It states:

> In support of its motion for summary decision, the Board submitted the annexed letter memorandum (Exhibit A) to the Administrative Law Judge ("ALJ"). The ALJ accepted the Board's argument in granting its motion. The Board submits that the reasons set forth in its letter memorandum there is no demonstrated basis for the Commis-

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> sioner to rule that the Board acted in a "negligent manner." Furthermore, there is no basis to censure the Board or its Superintendent of Schools. The Board notes that the petitioner did not request any censure of the Superintendent. (Board's Exceptions, at p. 3)

Upon a careful and independent review of the record of this matter, the Commissioner adopts in part and rejects in part the recommended initial decision of the Office of Administrative Law.

The Commissioner concurs with the ALJ that Respondent Hoffman is in significant and material conflict of interest with the Board of Education of the Township of Tewksbury as proscribed by N.J.S.A. 18A:12-2 for the reasons expressed by the ALJ at page 9-11. However, contrary to the ALJ, the Commissioner finds and determines that removal from service as a Board member as a result of his ineligibility to serve as a Board member due to such conflict is required. More specifically, the Commissioner disagrees with the ALJ's conclusion that because a conflict of interest is not included among the statutory causes for removal of a board member pursuant to N.J.S.A. 18A:12-3, the petitioner fails to state a claim for relief relative to petitioner's demand for removal of Mr. Hoffman from the Board. See Pauze, supra, wherein the Commissioner stated:

> ***the matter before him concerns the disqualification of a board member pursuant to N.J.S.A. 18A:12-2, not removal of a board member pursuant to N.J.S.A. 18A:12-3. Consistent with N.J.S.A. 18A:6-9, the Commissioner's authority to hear and determine controversies and disputes, whenever a challenge arises concerning whether an inconsistent interest exists involving a board member under N.J.S.A. 18A:12-2, the Commissioner is obliged to resolve the dispute and to act to disqualify any such individual found to be in conflict with his or her duties as a board member. It cannot seriously be argued in the face of well-established case law such as Edgar Brown and Oliver Brown et al. v. Board of

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> Education of the City of Newark, 1984 S.L.D. 671, aff'd State Board 683 that the Commissioner lacks authority to disqualify board members in violation of N.J.S.A. 18A:12-2.
> (Slip Opinion, at p. 10)

To suggest in the case now at hand the because the conflict of interest in which Respondent Hoffman is engaged is not one of the three grounds for removal specified in N.J.S.A. 18A:12-3 he may not be disqualified from service on the Board, would be to permit the conflict of interest to continue uncorrected. Such an absurd condition cannot seriously be argued. The record establishes that Respondent Hoffman has held his employment at Fleming's Transportation, Inc. during his campaign for election to the Board in April of 1989. (See Finding of Fact No. 4, p. 4 Initial Decision.) In light of such fact, Mr. Hoffman was not qualified for service as a member of the Board of Education of Tewksbury Township from the outset of his campaign and, thus, remains ineligible to serve on said Board pursuant to N.J.S.A. 18A:12.2 and N.J.S.A. 18A:12-2.1 so long as he remains an employee of a bus company bidding for contracts with said Board. The Commissioner so finds. See also Board of Education of the Township of Holmdel, Monmouth County v. Stephen O'Connell, decided by the Commissioner May 10, 1990.

As to petitioner's exception asking for a determination that the Board negligently failed to request a formal opinion from the New Jersey Commissioner of Education concerning board member conflicts, having obtained such an opinion from its own Board attorney, the Board was under no obligation to seek an opinion from the Commissioner on the question. Moreover, had the Board done so, the Commissioner would have dismissed such request in that the

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Commissioner does not render advisory legal opinions with the exception as prescribed by statute pursuant to N.J.S.A. 18A:28-11, which deals with advisory opinions regarding seniority determination.

Accordingly, for the reasons expressed in the initial decision, Respondent Hoffman is hereby determined to be in conflict of interest with the Board of Education of the Township of Tewksbury. The initial decision is reversed as to that conclusion and finding that Mr. Hoffman must abstain from voting on transportation matters, but may remain on the Board. The Commissioner finds and determines that Mr. Hoffman is ineligible to sit as a Board member so long as he remains in conflict with his role as a Board member as a result of his employment as a bus driver for a bus company competing for contracts with said Board. Therefore, the Commissioner directs that Respondent Hoffman either give up his position as a bus driver under contract with the district or forfeit his seat on the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 12, 1991

DATE OF MAILING - AUGUST 13, 1991

Pending State Board

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DONALD C. OEHLKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TERRENCE HOFFMAN AND THE TEWKSBURY TOWNSHIP BOARD OF EDUCATION, HUNTERDON COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

This matter has come before the Commissioner of Education upon Notice of Motion and Certifications in support of an Order for Stay filed by Respondent Hoffman on September 12, 1991 pursuant to N.J.A.C. 6:2-2.2(a) regarding the Commissioner of Education decision in the above-captioned matter dated August 12, 1991. Respondent Hoffman seeks a stay of that portion of the Commissioner's decision which would affect his ability to continue as a Board member with the Tewksbury Township Board of Education (hereinafter Board) until the appeal process is completed and a final decision rendered.

Respondent Hoffman contends it is inherently unfair to remove him from the Board prior to the exhaustion of his remedies before the State Board of Education and the courts. He further alleges that it is contrary to the statutory scheme to so remove him before exhaustion of the appeal process.

Respondent Hoffman argues that the Commissioner of Education has exceeded his statutory authority in attempting to remove him from the Board or ruling that he was ineligible to run for the Board based upon all of the circumstances developed and set

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forth as findings of fact and in the record of testimony of this case. He avers that there is no foundation in statute or case law for the Commissioner to remove a board member under the circumstances of this case.

Respondent Hoffman notes in his request for stay that since May 27, 1990, the date when he received the Board attorney's opinion regarding this matter, he has partaken in no action concerning transportation and has been advised by his own attorney to take no action, to partake in no discussion, or in any way to be involved, concerning Board actions relative to transportation.

He claims the harm to him and his case by failing to grant this stay would be irreparable because there is no established or statutory process to remove an appointed Board member or to reinstate him. On the other hand, Respondent Hoffman contends the harm to the Board if the stay is granted is not irreparable, nor is there any chance that the Board could in any way be harmed by his continued presence on the Board, barring some other unforeseen eventuality or unless the routes are changed, because the bus contracts are not due to be rebid for several years. He adds that even if bus routes are changed and contracts rebid, he will have no part in any action or discussion concerning the same.

Respondent Hoffman contends this matter is a case of novel disseisin in that an ALJ ruled in favor of him with regard to his continuation on the Board. He contends there is no reason to justify denying him a stay of the Commissioner's decision insofar as it relates to his continuing to be a Board member.

Finally, Respondent Hoffman cites Assembly Bill #4593, introduced March 4, 1991, under which he would not be barred from

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being elected and/or seated on a board under these circumstances but, rather, would merely be barred from participating in any action dealing with matters of transportation.

Respondent Hoffman avers that the above facts and mitigating circumstances are reasons why a stay should be granted.

In response to said stay, Petitioner Oehlke (hereinafter petitioner) filed a letter on September 23, 1991 asking that the Commissioner deny the request for stay by reason of the preponderance of the evidence that Respondent Hoffman was never qualified for Board membership pursuant to N.J.S.A. 18A:12-2, N.J.S.A. 18A:12-2.1 and N.J.S.A. 18A:14-10 "Contents of Petitions." Petitioner requests that the Commissioner consider amending the last sentence of his decision of August 12, 1991 wherein Respondent Hoffman was permitted the alternative of either forfeiting his position on the Board or giving up driving a bus for a company under contract with the Board. Petitioner finds said alternative not in keeping with the finding on pages 18 and 19 of the decision where the Commissioner found "***Mr. Hoffman was not qualified *** and, thus, remains ineligible to serve***." He queries if Respondent Hoffman elected to give up driving a bus for a company under contract with the Board, whether he would remain a possible agent of the contractor.

Petitioner Oehlke expressed his belief that Respondent Hoffman has no reasonable defense for his position or action. He stated that "this divisive situation" (Petitioner's Letter dated September 23, 1991, at p. 2) has gone on for a year and that the matter can only be resolved by Respondent Hoffman's complete severance from the Board. Petitioner seeks closure of the matter.

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Upon a careful review of the record of this matter, the Commissioner grants a stay solely of that part of his decision of August 12, 1991 dealing with the remedy of removal of Respondent Hoffman from the Board, should he continue in his employment with a bus company under contract to said Board. In so finding, the Commissioner is bound by those standards enunciated for the granting of the extraordinary relief of pendente lite restraints, as articulated in such cases as Crowe v. DeGioia, 90 N.J. 126 (1982).

In so deciding, the Commissioner is particularly cognizant of that prong of the Crowe standards which requires consideration of the relative hardship to the parties in granting or denying relief. (Crowe, supra, at 134) In balancing the hardship in this matter, it is clear that were the stay denied, respondent's removal would require that a vacancy be declared and the seat filled by the County Superintendent of Schools. See N.J.S.A. 18A:12-15(a). The Board would be plummeted into a state of flux and disruption as a result of such action, and would be subject, because of the appeal of the case to the State Board, to another disruption were the Commissioner's decision to be reversed.

However, the Commissioner remains convinced that Respondent Hoffman is in substantial and material conflict of interest with the Tewksbury Board of Education as a result of his employment as a driver of school buses under contract to the Board. See Commissioner's Decision at page 18. See also, initial decision at pages 9-11. Accordingly, he finds that Respondent Hoffman makes no showing of a likelihood of success on the merits of his claim in seeking a stay.

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While the Commissioner firmly believes that the decision and the remedy afforded in this case are appropriate in light of the facts of this matter applied to the case law and statutes cited in the Commissioner's decision, his concern for the disruption to the Board's operation must prevail. Permitting Respondent Hoffman to remain as a Board member during the pendency of any appeals, with the constraint imposed upon him that he is to refrain from any interaction or participation in any decision making whatsoever or discussion concerning transportation matters, satisfies the Commissioner also that the public's interest is not being harmed pending appeal of this case to the State Board of Education.

Accordingly, for the above reasons, the Commissioner grants a stay of solely that portion of his decision of August 12, 1991 regarding the remedy appropriate during the pendency of Respondent Hoffman's appeal of this case.

In so deciding, the Commissioner does not address petitioner's concerns mentioned in his letter of September 23, 1991 regarding Respondent Hoffman's indemnification, a matter separate from this case and not before the Commissioner. Moreover, the Commissioner determines that petitioner's argument relating to remedy is not reviewable by way of opposing papers filed in response to a motion for stay. Had petitioner sought to challenge the merits of the Commissioner's decision or the remedy ordered, petitioner's recourse was to file an appeal before the State Board of Education pursuant to N.J.A.C. 6:2-1.1 et seq.

OCTOBER 1, 1991

DATE OF MAILING - OCTOBER 1, 1991

John Ellis

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 0385-91
AGENCY REF. NO. 397-12/90

JANET G. BAPTIST,

Petitioner,

v.

JOSEPH M. TRACHTENBERG,

Respondent.

Janet G. Baptist, *pro se*

David Ruben, Esq., for respondent
(Rubin, Rubin, Malgran & Kuhn, attorneys)

Record Closed: June 25, 1991 Decided: June 25, 1991

This is a transcript of the Administrative Law Judge's Oral Initial Decision rendered pursuant to *N.J.A.C.* 1:1-18.2

BEFORE **ELINOR R. REINER**, ALJ:

On December 17, 1990, petitioner filed a petition of appeal before the Commissioner of Education for decision of a controversy and dispute arising under the school laws between her and respondent, Joseph Trachtenberg, alleging that respondent had violated a conflict of interest law and seeking that Mr. Trachtenberg be declared disqualified or removed as a member of the North Hunterdon Regional Board of Education.

On December 31, 1990, respondent filed an answer to the petition demanding that the petition be dismissed. On January 10, 1991, the Department of Education,

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Bureau of Controversies and Disputes, transmitted this dispute to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

After notice to all parties, a telephone prehearing conference was held in this matter. At that time, the issues were isolated. The issues were stated as follows:

1. (a) Did Joseph Trachtenberg violate *N.J.S.A.* 18A:12-2 by allowing his son to be employed by the school district?

   (b) If so, what is the proper remedy?

2. Is this action moot in light of the fact that respondent's term as a Board member expired as of May 1991?

3. Should the petition be dismissed pursuant to the 90-day rule?

It was indicated at that time by counsel for respondent that respondent would move for dismissal of this action. Respondent filed a motion on May 20, 1991, to dismiss the matter pursuant to *N.J.A.C.* 6:24-1.2 and, in the alternative, that the petition should be dismissed as moot and for failure to state a claim on which relief could be granted. Petitioner replied to that motion by letter dated May 30, 1991, filed with this judge on June 3, 1991.

Today is the date scheduled for hearing and I have indicated to Mr. Ruben, counsel for respondent, and to petitioner, Janet G. Baptist, who is representing herself, that I would entertain oral argument on that motion. I have, in fact, heard their arguments and have determined to grant counsel for respondent's motion to dismiss the petition as untimely filed. I am not granting respondent's motion to dismiss the matter as moot or for failure to state a claim on which relief could be granted. The following will indicate the reasons why.

The parties have today signed a stipulation of facts, and it is clear that for purposes of this motion the facts are essentially not in dispute:

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1. Respondent, Joseph M. Trachtenberg, is, and at all relevant times herein was, a member of the North Hunterdon Regional High School Board of Education (Board).

2. Trachtenberg's term of office expired in May 1991.

3. Petitioner, Janet G. Baptist, is a citizen and taxpayer of Annandale, a constituent municipality of the regional school district operated by the Board.

4. Joshua Trachtenberg, respondent's son, was a student at North Hunterdon Regional High School and resided with Trachtenberg at their home in Clinton.

5. The Board has adopted a policy, entitled *Conflict of Interest*, which was in effect at all relevant times herein. That policy has been submitted by both parties

6. At a regular Board meeting on May 16, 1989, the Board unanimously adopted a resolution approving summer work - Printing. Two students were appointed at that meeting to perform the work, neither of whom was related to respondent.

7. At all relevant times, the Board had a policy entitled *Employment of Students*. That policy has also been submitted.

8. At a regular Board meeting on June 20, 1989, the Board adopted a resolution approving Joshua Trachtenberg for summer work. Respondent was present at that meeting but abstained from the vote.

9. Joshua Trachtenberg performed 84 hours of summer work during 1989, pursuant to the Board resolution, and was paid $378.

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10. At a regular Board meeting on May 15, 1990, attended by Trachtenberg, the Board voted unanimously to approve certain summer work. No individuals were appointed to perform the work at that meeting.

11. At a regular Board meeting on June 19, 1990, which Trachtenberg did not attend, the Board unanimously adopted a resolution approving the employment of certain students by name for summer work. The pertinent text of the resolution is as follows:

> Approval of the following students for the summer work program at North Hunterdon High School:
>
> * * *
>
> Josh Trachtenberg Graphics
>
> * * *
>
> These students will work on an hourly basis to complete summer printing project prior to the closing of North Hunterdon High School for asbestos removal on or about July 20. Total hours not to exceed 232 at a rate of $4.50 per hour. Half of each salary is funded by the State.

12. Joshua Trachtenberg did perform 74.3 hours of summer work, pursuant to the Board resolution, and was paid $334.34 by Board check dated July 27, 1990.

13. Petitioner filed a petition for declaratory judgment on December 31, 1990.

Based upon these essentially uncontroverted facts, the issue is whether the instant petition of appeal was untimely filed and, in the alternative, whether petitioner's action is moot and, in addition, whether the petition failed to state a claim upon which relief can be granted.

Respondent's basic argument, in regard to the first issue -- whether the petition is untimely -- is that petitioner's appeal is barred because of her failure to comply with *N.J.A.C.* 6:24-1.2. That regulation reads, in pertinent part, as follows:

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relaxation of *N.J.A.C.* 6:24-1.2, pursuant to *N.J.A.C.* 6:24-1.19. Thus, I am **GRANTING** respondent's motion to dismiss based upon the 90-day rule.

Respondent also argues, as noted above, that the petition should be dismissed as moot. Respondent argues that the petition seeks a declaratory judgment that Mr. Trachtenberg be declared disqualified as a member of the North Hunterdon Regional Board of Education due to a conflict of interest and/or that he be removed from the North Hunterdon school board immediately. Since Mr. Trachtenberg's term of office ended with the May 1991 Board reorganization meeting, there is nothing to "disqualify" or "remove" him from at this point and, thus, the petition should be dismissed as moot.

In response, petitioner argues that there is a principle involved in this case and that that principle ought to be heard. I am in agreement with respondent that the actual relief requested by petitioner cannot be granted at this point. Obviously, Mr. Trachtenberg cannot be removed from the Hunterdon Regional High School Board of Education since he no longer sits on it. However, I am in agreement with petitioner that what she is really seeking here is a declaratory judgment, a statement that what Mr. Trachtenberg did was improper and, for that reason, I am not going to declare the petition to be moot. Therefore, I am not granting respondent's application to dismiss the petition as moot.

In regard to respondent's last point that the petition, on its face, fails to state a claim on which relief can be granted, similarly, I am not going to grant that motion. I think that there are certain facts which would have to be brought out if a hearing were to take place before I could make a determination on whether or not there was any inappropriate action. I do not believe that I have all of those facts before me at this point in time (not all pertinent facts have been stipulated) and, therefore, cannot grant a motion for summary decision. So, what I have done at this point is that I have concluded that petitioner's action is barred under the 90-day rule as untimely and have granted respondent's motion in that regard.

It is therefore **ORDERED** that summary decision be **GRANTED** for respondent and that petitioner's appeal be and is hereby **DISMISSED WITH PREJUDICE.**

END OF TRANSCRIPT

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I, Jane R. Pearson, hereby certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter.

June 25, 1991
Date

Jane R. Pearson
Jane R. Pearson

This oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.* 52:148-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/3/91
Date

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUL 08 1991
Date

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

jrp/e

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JANET G. BAPTIST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOSEPH M. TRACHTENBERG,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were not filed pursuant to the timeline set forth in N.J.A.C. 1:1-18.4.

Upon review of the record in this matter, the Commissioner finds and determines that the ALJ erred in recommending dismissal of the petition on the basis of its being untimely filed under the provisions of N.J.A.C. 6:24-1.2, the pertinent part of which bears repeating

> (c) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. (emphasis supplied)

The record in this matter supports petitioner's contention that she did not learn of respondent's alleged conflict of interest until October 1990 when the Board's policy with respect to conflict of interest was under revision by the Board. Thus, it was not until

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that time that petitioner had notice of the Board action which is the subject of the controversy herein. Given that the petition was filed on December 17, 1990, the 90-day filing requirement was properly met by petitioner.

However, given the relief sought in the petition, namely respondent's removal from membership on the North Hunterdon Regional Board of Education, the Commissioner determines that the petition shall be dismissed as the matter has been rendered moot by the fact that respondent no longer serves on that board of education.

Notwithstanding the above, the Commissioner does note that (1) given the language of the Board's conflict of interest policy (Article IX) which expressly prohibits the employment of any person who is the father, mother, son, daughter or specifically designated in-law of a board member and (2) the undisputed fact that the Board did employ respondent's son, albeit on a part-time basis for two summers, it is clear the Board acted in contravention of its own duly adopted policy. Consequently, the Commissioner does admonish the Board for its failure to strictly adhere to its own conflict of interest policy and directs that in the future it conduct itself consistent with that duly adopted policy.

COMMISSIONER OF EDUCATION

AUGUST 19, 1991

DATE OF MAILING - AUGUST 19, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3720-91
AGENCY DKT. NO. 32-2/91

GEORGE A. WILSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE VOCATIONAL-TECHNICAL SCHOOL OF SUSSEX COUNTY,
Respondent.

Philip E. Stern, Esq., for petitioner

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: May 31, 1991 Decided: July 8, 1991

BEFORE EDITH KLINGER, ALJ:

On February 14, 1991, petitioner, George A. Wilson, filed a verified petition of appeal with the Commissioner of the Department of Education alleging that respondent had violated his tenure rights under *N.J.S.A.* 18A:28-5 when it arbitrarily and capriciously reduced his compensation in violation of his employment contract with the Board of Education of the Vocational-Technical School of Sussex County (Board). The Board filed an answer on March 6, 1991, and at the same time filed a motion for summary decision Petitioner filed his answer to respondent's motion on March 28, 1991, and on April 11, 1991, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter, including the motion for summary decision, 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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The matter was assigned to the undersigned on May 23, 1991. As a result of a telephone conference with the parties, it was determined that respondent's motion for summary decision would be heard before any further proceedings were held in this matter.

For purposes of this motion, it will be assumed that all facts in this matter are as alleged by petitioner; the following statement of facts is based directly upon his petition.

STATEMENT OF FACTS

George A. Wilson was employed since 1980 as the Superintendent of Schools in the respondent district pursuant to an employment agreement between the parties. On February 9, 1988, an Employment Agreement, designated in the petition as an Amended Contract, was signed by the parties, in which the respondent district agreed to continue to employ Wilson in his position for a 36-month period commencing the first day of July 1987

In this Amended Contract, the Board agreed to pay to an insurance carrier the annual premiums required to provide Wilson with a disability insurance policy in the amount of 60 percent of his annual salary commencing after 90 calendar days of disability.

Wilson received an Equitable Life Insurance disability policy dated April 3, 1987, which would provide him with a monthly disability income of $3,500 representing 60 percent of petitioner's 1987-88 salary of $70,000. Although the petition states that this policy was purchased pursuant to the amended contract, it antedates the contract and presumably was purchased in accord with the prior agreement between the parties.

On April 3, 1989, the Board paid the premium for Wilson's disability insurance policy covering the period from April 3, 1989 to April 3, 1990. On August 16, 1989, Wilson sustained permanently disabling injuries from an automobile accident. At the time he became disabled, Wilson's annual salary was $92,242. Under the terms of his employment contract, his yearly disability income should have been 60 percent of that amount. However, the Board had only purchased a policy sufficient to provide him with a monthly disability income based upon his 1987-88 salary of $70,000.

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Wilson's petition alleges that the Board violated its contractual and statutory obligation to him by neglecting to upgrade his disability income insurance policy to reflect his salary at the time of his disabling injury. He therefore seeks in this action to recover from the Board the difference between what he receives from the disability insurance policy and what he would have received had the policy been upgraded to reflect his salary at the time of his injury, multiplied by his present life expectancy of 30 years. This amounts to $400,356.

Respondent has filed a motion for summary decision dismissing the petition on the grounds that the Commissioner of Education lacks subject-matter jurisdiction over the contractual claims asserted by petitioner. It alternatively requests summary decision because the petition was filed later than the 90th day from the day Wilson became aware of the amount of coverage provided under his disability insurance policy. Petitioner opposes this motion, arguing that his claims are cognizable in the present forum because the Board's failure to adequately fund his disability insurance policy is in violation of *N.J.S.A.* 18A:28-5, which states that tenured employees shall not be reduced in compensation except for inefficiency, incapacity, or unbecoming conduct and that there are factual issues in dispute; specifically, that the Board has no contractual obligation respecting the disability policy in issue.

Respondent denies contractual liability based upon a 1988-1991 Employment Agreement Addendum, dated April 11, 1989, signed by Wilson and approved by the Board, in which it is agreed that the Board-paid disability insurance should be deleted and that Wilson should receive $725 per month for costs incidental to his employment, effective July 1, 1989, which sum could be converted to base yearly salary for the duration of his employment by Wilson at his option. Petitioner argues that the addendum does not affect the present claims since the Board renewed the disability policy on April 3, 1989, and the addendum was not executed until April 11, 1989.

The first issue to be resolved in this matter is whether the present matter is a controversy or dispute arising under the school laws and, therefore, within the subject-matter jurisdiction of the Commissioner.

The subject-matter jurisdiction of the Commissioner of Education is defined by statute. *N.J.S.A.* 18A:6-9 confers upon the Commissioner "jurisdiction to hear and

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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."

The Commissioner has jurisdiction of a dispute only where there is no contractual agreement between the parties, where the matters in dispute are not negotiable, where the dispute is subject to the school laws, *Newark Teachers Union v. Bd. of Ed. of Newark*, 149 *N.J. Super.* 367, 372 (Ch. Div. 1972), or where it concerns major educational policy, *So. Orange-Maplewood Educ. Ass'n v. Bd. of Ed. of So. Orange*, 146 *N.J.* Super. 457, 462 (App. Div. 1977).

The dispute in the present case involves the failure of the Board to fund petitioner's disability retirement plan at a level equal to 60 percent of his current salary. Petitioner contends that this is a reduction in salary in violation of his tenure rights under *N.J.S.A.* 18A:6-10, because, under the statute, the compensation of a tenured employee may be reduced only for cause and only after a hearing. Based upon the facts as alleged by petitioner, no reduction of Wilson's compensation occurred nor was any increment withheld from him for cause. The allegations of the petition, if true, show only that the Board violated the employment agreement by not making an increased benefit payment A failure to increase compensation does not constitute a reduction in compensation in violation of *N.J.S.A.* 18A:6-10. *Kopera v. W. Orange Bd. of Ed* , 60 *N.J. Super.* 288, 297 (App Div. 1960); *Newark Teachers Ass'n v. Bd. of Ed.*, 108 *N J. Super.* 34, 48 (Law Div. 1969).

Petitioner's allegations raise questions of contractual interpretation, not "a matter which would be significantly aided by the Commissioner's administrative expertise." *Newark Teachers Ass'n, supra*, 149 *N.J. Super.* at 372. The addendum to Wilson's employment agreement with the district to terminate payment of the premiums for his disability insurance policy is ignored here, since petitioner argues that it had no effect on the actions of the parties at the relevant time.

Based upon the above, I **CONCLUDE** that the matter brought before the Commissioner of Education by petitioner does not arise under the school laws and, pursuant to *N.J.S.A.* 18A:6-9, is not within the jurisdiction of the Commissioner of the Department of Education. Consequently, it cannot be heard in this forum.

Even if the issues could be raised before the Commissioner, the petition was not brought in a timely manner. Wilson filed his petition with the Commissioner on February

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15, 1991. Petitioner's brief in opposition to this motion asserts that he was negotiating the level of his disability coverage with the Board from June 1990 until late November 1990. Therefore, he had reason to know, at least since June 1990, whether the Board had failed to honor its contractual commitment.

N.J.A.C. 6:24-1.2(c) requires that a petition be filed no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the Board which is the subject of the requested contested case hearing. I **FIND** that the action of the Board occurred on April 4, 1989, when it allegedly did not fund petitioner's disability insurance policy at the required level. I further **FIND** that petitioner received notice of this action by June 1990, when he did not receive disability insurance benefits at the anticipated level of payment, not when the Board informed him in November 1990 that it would not alter its prior action; negotiations between the parties do not toll the running of the period of limitation. I therefore **CONCLUDE** that even if the Commissioner has jurisdiction over the present dispute, the petition was filed out of time and should be dismissed for that reason.

To summarize, I **CONCLUDE** that respondent is entitled to summary decision in this matter since the Commissioner of the Department of Education does not have jurisdiction over the subject matter of this dispute and, even if such jurisdiction exists, the petition was not filed within the 90-day limit of *N.J.A.C.* 6:24-1.3(c).

It is therefore **ORDERED** that the petition of George A. Wilson be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey**

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08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 12 1991

DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

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GEORGE A. WILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL-TECHNICAL SCHOOL OF SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions and the Board filed timely reply exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner's exceptions first suggest that the matter is one arising under school laws and is properly before the Commissioner of Education. He asserts that the Board's failure to upgrade his disability insurance policy does constitute a reduction in compensation pursuant to N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5. He cites William Love et al. v. Board of Education of the City of Trenton, decided by the Commissioner October 12, 1988, aff'd State Board August 2, 1989 for the proposition that "***Dr. Wilson's disability insurance policy may be viewed as a 'fringe benefit' which, pursuant to Love, is considered salary.***" (Exceptions, at p. 2) Thus, petitioner claims the Board's failure to upgrade his disability insurance policy is a reduction in salary in violation of the above-stated statutes.

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Petitioner next excepts to the ALJ's determination that this matter was not timely filed. Relying on Stockton v. Bd. of Educ. of the City of Trenton, 210 N.J. Super. 150 (App. Div. 1986), petitioner reasserts his argument raised in opposition to the Motion for Summary Decision. He claims the court's statement that "receipt of a salary check for less of an increase than one anticipates cannot provide notice that a decision has been made to correct an error allegedly made three years before." (Exceptions, at p. 3, quoting Stockton, at 157) He claims that pursuant to Stockton, he received notice of respondent's action concerning his disability insurance policy in late November.

Accordingly, petitioner seeks reversal of the ALJ's decision.

The Board's reply exceptions seek affirmance of the initial decision. In rebuttal to petitioner's first exception, the Board submits that Love, supra, has no application to this matter in that Love involved a dispute of salary guides. The Board notes that N.J.S.A. 18A:29-4.3 expressly excludes the position of superintendent of schools from the requirement that salary guides be established for administrative positions.

The Board further argues that even if petitioner's disability policy were considered part of his compensation, there was no reduction in his compensation at any time. It claims, therefore that the statutory provisions in school laws pertaining to reduction in salary have no bearing on this matter. Thus, the Board submits petitioner has presented no factual or legal basis which supports his exception to the ALJ's determination that the Commissioner lacks subject matter jurisdiction over this matter.

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In reply to petitioner's second exception, the Board avers the ALJ ruled correctly in determining that the petition was untimely filed. The Board agrees with the ALJ that petitioner received notice no later than June 1990 that his disability insurance coverage had not been increased and, further, that the ALJ correctly noted that settlement negotiations between the parties do not toll the running of the period of limitations.

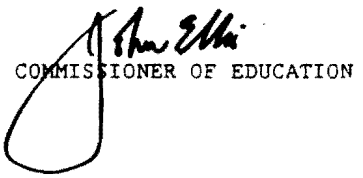
Thus, the Board asks that the initial decision be affirmed.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the ALJ that the contract questions raised by petitioner, a former superintendent, do not arise under school laws and are more properly decided in the courts of the State of New Jersey. See Paladino v. Lacey Township Board of Education, decided by the Commissioner July 1, 1988, State Board rev'd February 1, 1989, quoting Salley v. Board of Education of the City of Newark, decided by the Commissioner November 8, 1984. "In determining jurisdiction, we note that a contractual dispute does not arise under the school laws." Paladino State Board, at p. 5 Insofar as the superintendent is the sole individual in such position, salary guides do not apply to his employment. See N.J.S.A. 18A:29-4.3. Hence, as noted by the Board in its reply exceptions, Love, supra, has no application to this matter because that case involved a dispute over salary guides. Accordingly, the Commissioner adopts the conclusion of the Office of Administrative Law that the instant petition is not one cognizable before him and, thus, the Petition of Appeal is dismissed. In so determining that the instant petition does not arise under education law, the

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Commissioner does not reach the issue of timeliness of the petition. He makes no comment on the conclusions of the ALJ below concerning N.J.A.C. 6:24-1.2 in that the ALJ failed to provide sufficient finding of fact and conclusions of law to arrive at a considered judgment on the issue of timeliness.

Accordingly, the instant Petition of Appeal is dismissed with prejudice.



COMMISSIONER OF EDUCATION

AUGUST 19, 1991

DATE OF MAILING - AUGUST 19, 1991

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INITIAL DECISION
GRANTING RESPONDENT'S MOTION
TO DISMISS
OAL DKT. NO. EDU 2602-91
AGENCY DKT. NO. 52-3/91

SCHOOL DISTRICT OF THE CITY
OF NEWARK, ESSEX COUNTY,
Petitioner,
v.
JAMES ANDREWS,
Respondent.

Samuel M. Manigault, Associate Counsel, for petitioner
(Marvin L. Comick, General Counsel, attorney)

Irving C. Evers, Esq., for respondent
(Giblin & Giblin, attorneys)

Record Closed: May 22, 1991 Decided: July 3, 1991

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner seeks respondent's removal based upon tenure charges of unbecoming conduct and for other just cause for reasons of absenteeism, tardiness, insubordination, failure to perform duties, and arrest for possession of a controlled dangerous substance. Certified tenure charges were filed with the Commissioner of Education on March 6, 1991, and an answer on behalf of respondent was filed with the

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Commissioner on March 13, 1991. The matter was transmitted to the Office of Administrative Law (OAL) on March 14, 1991, for hearing 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. The matter was then scheduled for a telephone prehearing conference on May 22, 1991, and a notice to this effect was forwarded by the OAL to the attorneys for the respective parties on April 18, 1991. On April 18, 1991, attorney for respondent filed a Notice of Motion to Dismiss and on May 2, 1991, attorney for petitioner filed a letter memorandum in opposition thereto. Thereupon, the administrative law judge (ALJ) converted the telephone prehearing conference scheduled for May 22, 1991, to a telephone oral argument on respondent's motion. On May 22, 1991, the ALJ heard the arguments of counsel, whereupon the record was closed with regard to the Motion to Dismiss.

NATURE OF RESPONDENT'S MOTION

Attorney for respondent moves to dismiss tenure charges filed against respondent on the basis of alleged procedural irregularities and defects which may be summarized as follows:

1. The charges are defective and contrary to N.J.S.A. 18A:6-11 and N.J.A.C. 6:24-5.1 because they were not filed by a knowledgeable individual but rather by counsel on behalf of petitioner.

2. The charges were defectively processed because they were filed with petitioner on behalf of petitioner by its counsel and, therefore, petitioner is both the charging and the processing party.

3. The charges have not been executed under oath by the person instituting such charges contrary to the requirement of N.J.A.C. 6:24-5.1(b)(1).

4. The statements of evidence are defective because they do not recite that the information which is contained in the listed documents is true.

5. Various portions of the charges are vague, indefinite, and do not properly inform respondent of what he has been charged with.

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PROCEDURE APPLICABLE TO MOTION

I have reviewed the regulations setting forth the procedures to be followed by the OAL in conducting contested cases, N.J.A.C. 1:1-1.1 et seq., and I have been unable to locate any specific provisions dealing with a motion to dismiss such as has been made in this case by attorney for respondent. Motion practice is found at N.J.A.C. 1:1-12.1 to 12.7. N.J.A.C. 1:1-12.5(b) provides in relevant part as to a motion for summary decision:

> The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

I **FIND** that the above-quoted language dealing with motions for summary decision is sufficiently expansive to include motions to dismiss based upon alleged procedural irregularities. Accordingly, I **CONCLUDE** that the procedures set forth in N.J.A.C. 1:1-12.5, as well as the time limits applicable thereto, apply to the within Motion to Dismiss.

LEGAL DISCUSSION

The statutory procedures applicable to the filing of charges against a tenured employee of a district board of education are set forth in N.J.S.A. 18A:6-11, which provides in relevant part:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such

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probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S.A. 18A:6-16, together with a certificate of such determination.

With certain exceptions, which shall be pointed out and dealt with, the applicable regulation found at N.J.A.C. 6:24-5.1(b) mirrors this statute, and provides:

(b) In all instances of the filing and certification of tenure charges, other than for reasons of inefficiency, the following procedures and timelines shall be observed:

1. Charges shall be filed in writing with the secretary of the district board of education, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person or persons instituting such charges.

2. Charges along with the required sworn statement of evidence shall be transmitted to the affected tenured employee within three working days of the date they were filed with the secretary of the district board. Proof of mailing or hand delivery shall constitute proof of transmittal.

3. The affected tenured employee shall have an opportunity to submit to the district board of education a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within 15 days of receipt of the tenure charges.

4. Upon receipt of respondent's written statement of evidence under oath, or upon expiration of the allotted 15 day time period, the district board of education shall determine by a majority vote of its full membership within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction of salary. (See N.J.S.A. 18A:6-11.)

5. The district board of education shall forthwith notify in writing the affected employee against whom the charge has been made of its determination, in person or by certified mail to the last known address of the employee.

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6. In the event the district board of education finds that such probable cause exists and that the charges, if credited, are sufficient to warrant a dismissal or reducation of salary, then it shall file such written charge and the required certificate of determination with the commissioner together with proof of service upon the employee.

7. All deliberations and actions of the district board of education with respect to such charges shall take place at a closed meeting.

The language of the statute simply requires that any charge shall be filed with the secretary of the Board in writing, and a written statement of evidence under oath to support such charge shall be presented to the Board. The regulation at N.J.A.C. 6:24-5.1(b)1, in addition to the statutory requirements, requires that both the written charges and the supporting statement of evidence shall be executed under oath by the person or persons instituting such charges.

It has not been disputed for purposes of this motion that written charges and a written statement of evidence were filed with the secretary of the Board. Whether the written charges and the written statement of evidence are sufficiently specific in content and otherwise meet the requirements of the statute is another issue to be resolved. However, petitioner does not dispute respondent's contention that the written charges were not executed under oath but were supported by a certification of associate counsel for the Board. In addition, the supporting statement of evidence was not executed by the person who instituted such charges.

Petitioner argues that it is obligated only to comply with the requirements of the statute. It takes the position that a regulation which contravenes the statutes which created it lacks legal efficacy, citing Kamienski v. Bd. of Mortuary Science, 80 N.J. Super. 367, 370 (App. Div. 1963). Petitioner argues that when statutes deal with a specific issue or matter, they are the controlling authority as to proper disposition of that issue or matter and that an administrative regulation may not narrow or restrict the scope of an otherwise specific and clearly worded statute, citing Terry v. Harris, 175 N.J. Super. 482, 496 (Law Div. 1980).

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However, petitioner's arguments are best addressed to a court of law. The Office of Administrative Law and its administrative law judges are not courts and do not possess the authority of the courts to invalidate duly adopted regulations. See, Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 486-487 (App. Div. 1989). The exclusive means of challenging an administrative agency's action in adopting and enforcing a regulation is to appeal that action to the Appellate Division of the Superior Court. Equitable Life Mortgage v. New Jersey Division of Taxation, 151 N.J. Super. 232 (App. Div. 1977), certif. den. 75 N.J. 535 (1977). Thus, it is not within the province of either the Commissioner of Education or, derivatively, of the Office of Administrative Law to disregard the specific procedural requirements of the regulations applicable in this matter.

However, that being said, the crucial issue is whether failure to comply with the procedural mandates of the regulations is a sufficient basis for dismissal of tenure charges in a situation where the procedural requirements of the statute have been fully complied with. There is no question that in the event the statutory requirements were not met, the Commissioner of Education would lack jurisdiction to hear and decide these tenure charges. See, E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 224 (App. Div. 1971). That dismissal of the charges is an appropriate remedy for noncompliance with the requirements of N.J.S.A. 18A:6-11 was recognized in Rowley v. Bd. of Ed. of Manalapan-Englishtown, 205 N.J. Super. 65, 76 (App. Div. 1985).

While there is no court decision on whether charges should be dismissed for failure to comply with procedural requirements of the regulations, there are a number of decisions of the Commissioner of Education which so hold. By way of background, a 1975 amendment to N.J.S.A. 18A:6-11 required for the first time that the Board give an employee against whom charges have been filed an opportunity to respond before it considers whether there is probable cause to dismiss him or reduce his salary. Soon after the adoption of the amendment, the Commissioner of Education, in a case entitled In the Matter of the Tenure Hearing of Marilyn Feitel, 1977 S.L.D. 451, affirmed by State Board of Education, (August 3, 1977), held that a local Board secretary must serve a copy of the filed charges upon the employee within three days and give the employee 15 days to file his statement of position and statement of evidence in opposition. Subsequent to the

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decision in Feitel, but before adopting the Feitel timelines by regulation in 1986, now found at N.J.A.C. 6:24-5.1(b)2 and 3, the Commissioner of Education dealt with a situation in which the Feitel timelines were not complied with by a Board of Education.

In Bd. of Ed. of the Borough of Dunellan v. Barry Hamlin, 1982 S.L.D. 687, the Board of Education complied with the mandatory procedures set forth in N.J.S.A. 18A:6-11, but failed to comply with the Feitel timelines as to providing notice to the teacher and providing the teacher the opportunity to respond. The teacher moved to dismiss the charges and the ALJ denied the motion on the basis that the nonstatutory time limits and procedures described in Feitel cannot provide a basis for dismissing a case on jurisdictional grounds until such time as they are properly promulgated as rules. The Commissioner of Education reversed, taking the position that Feitel was stare decisis and constituted an appropriate exercise of the Commissioner's adjudicatory authority as agency head to interpret the inherent principles necessary to achieve those regulatory aims in compliance with the provisions of the statute as amended.

In the present case, it appears that the main objection of the ALJ in the Hamlin case to dismissing the charges because of the failure to comply with timelines which had not been adopted by regulation has now been met by the subsequent adoption of the timelines by regulation. Duly adopted regulations have the force and effect of law within their alloted sphere. State v. Atlantic City Electric Co., 23 N.J. 259, 270 (1957); Cox v. Bond Transportation Inc., 53 N.J. 186, 201 (1969); Howe v. Strelecki, 98 N.J. Super. 513, 519 (App. Div. 1968); 73 C.J.S., Public Administrative Law and Procedure, §97. Therefore, it is clear, based upon the foregoing principles, that the failure of a Board of Education to comply with the procedural requirements enunciated either by statute or by regulation is a sufficient basis or reason for dismissing tenure charges.

It is now necessary to focus on the specific bases relied upon by respondent for his motion to dismiss.

Respondent takes the position that the charges were defectively processed because they were filed with the Board on behalf of the Board and were signed by its associate counsel and, therefore, the Board is both the charging and the processing party. I am

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unable to find authority for respondent's contention that the Board, through its attorney, cannot be both the charging and the processing party. Respondent relies on In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). However, Fulcomer does not deal with the specific issue in this case. Indeed N.J.S.A. 18A:6-10 specifically provides that the written charges may be signed by a member or members of a board of education. In view of the lack of legal authority for this contention, I **FIND** that the charges were not defectively processed because they were filed with the Board on behalf of the Board and signed by its associate counsel.

Respondent also takes the position that the charges have not been executed under oath by a person instituting such charges, contrary to the requirement of N.J.A.C. 6:24-5.1(b)1. Petitioner responds by relying on Matter of Tenure Hearing of Cowan, 224 N.J. Super. 737, 747 (App. Div. 1988), wherein it is stated that "(f)or purposes of criminal prosecution an oath, an affirmance and a certification are treated the same." In this matter, the charges were signed by petitioner's associate counsel and a certification conforming with the requirements of R. 1:4-4(b) was executed by the charging party. However, R. 1:4-4(b) provides that:

> In lieu of the affidavit, oath or verification required by these rules, the affiant may submit . . . [a] . . . certification. [Emphasis added]

In the present matter, the execution of the charges under oath is not required by the rules of court, but is required by the controlling statute and regulation. Where there is a statutory oath requirement, compliance with the certification requirements of R. 1:1-4-4(b) is not sufficient. See, Matthews v. Deane, 196 N.J. Super. 428, 436-437 (Ch. Div. 1984); N.J.S.A. 41:2-1. Accordingly, I **FIND** that petitioner has failed to conform to the requirement of N.J.A.C. 6:24-5.1(b)1 by failing to have the charges executed under oath by the person instituting such charges.

Respondent's further basis for his motion is his allegation that the statements of evidence are defective because they do not recite that the information which is contained in the listed documents is true. In Cowan, supra, 224 N.J. Super. 737, a similar situation confronted the Appellate Division. In that case, two sworn statements were submitted.

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However, neither affiant witnessed the events described, but simply recited the names of people having personal knowledge of the facts reported to the affiant. Appellant contended that the statute requires that the affiant have personal knowledge of the facts recited in the statement. However, the Appellate Division disagreed and indicated that the evidence may be hearsay and that the local board is reviewing the evidence to find whether probable cause exists before the matter may proceed to a hearing before the Commissioner. Under these circumstances, I **FIND** that the statements of evidence are not defective on the basis that they do not recite that the information contained in the list of documents is true.

The final basis for respondent's motion to dismiss is that various portions of the charges are vague, indefinite, and do not properly inform respondent of what he has been charged with. There is no New Jersey court decision that has been brought to my attention which deals with this issue. However, in 78 C.J.S., Schools and School Districts, §204, it was indicated that while the filing of charges need not follow the strict practice of the courts with respect to the form and language of complaints, the charges should not be ambiguous or general. The notice must set forth the grounds or charges which form the basis and although they need not be stated with the nicety of a criminal indictment a detailed specification of incidents and dates has been required. Id. at 1090-1091 and 1094-1095.

Similar principles have been enunciated by the courts and other authorities when dealing with public officers and employees having civil service protection. In West New York v. Bock, 38 N.J. 500 (1962), it was stated that "properly stated charges are a sine qua non of a valid disciplinary proceeding. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority." Id. at 522. See also, Dept. of Law and Public Safety v. Miller, 115 N.J. Super. 122 (App. Div. 1971). In 67 C.J.S., §149, Officers, at 544-545, it was indicated that such a notice must be framed in a manner which enables the employee to discern the nature of the charges but it need not be drafted with the certainty of an indictment in a criminal prosecution, and absolute specificity of a charge is not necessarily required. The test is whether the employee was sufficiently appraised of the charges against him so as to enable him to prepare his defense.

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I have reviewed the tenure charges in this matter. While these charges contain certain conclusionary statements and assertions, I FIND that respondent has been provided with notice of the charges which has been framed in a manner which enables respondent to discern the nature of the charges against him so as to enable him to prepare his defense.

DECISION AND ORDER

Based upon the finding that petitioner failed to conform to the requirement of N.J.A.C. 6:24-5.1(b)1 by failing to have the charges executed under oath by the person instituting such charges, it is hereby **ORDERED** that said charges are hereby **DISMISSED** without prejudice, and petitioner is directed to pay respondent his full salary as of the date it certified tenure charges against him and suspended him without pay.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 3, 1991
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7/8/91
DATE

DEPARTMENT OF EDUCATION

JUL 10 1991
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF JAMES ANDREWS, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by the Board, having been filed one day beyond the period prescribed by N.J.A.C. 1:1-18.4, were deemed untimely and are not considered herein. Reply exceptions by respondent correctly challenged the timeliness of the Board's exceptions, but otherwise relied on the arguments presented to the ALJ and urged affirmance of the initial decision.

Upon careful and independent review of the record, the Commissioner cannot concur with the ALJ that the within tenure charges must be dismissed for procedural deficiency, specifically for failing to have been executed under oath by the person(s) filing as required by N.J.A.C. 6:24-5.1(b)1.

Initially, the Commissioner notes that, as an officer of the court subject to penalty for misrepresentation or falsification and a notary public in his own right, the Board attorney need not have taken any oath over and above the personal certification he provided in his filing of charges on behalf of the Board, wherein he clearly attested that these charges were based on appended statements of evidence under oath and supporting documentation.

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Moreover, even if the attorney's certification were to be judged deficient, the Commissioner would still not deem this defect to rise to the level of requiring dismissal of charges in the present instance. It is well established that the Commissioner will not automatically dismiss tenure charges on procedural grounds, and has declined to do so where the defect at issue did not prejudice respondent's rights or represent an egregious and unwarranted disregard of tenure proceeding law. In the Matter of the Tenure Hearing of Thomas Puryear, School District of the City of Newark, Essex County, 1977 S.L.D. 934; In the Matter of the Tenure Hearing of Eddie Lee Harrell, School District of the City of Paterson, Passaic County, decided August 30, 1985; In the Matter of the Tenure Hearing of Charles Apkarian, School District of the City of West New York, Hudson County, decided September 27, 1985, affirmed State Board September 3, 1986, affirmed Superior Court November 20, 1987, certification denied May 24, 1988; In the Matter of the Tenure Hearing of Caricella Major, School District of the City of Orange, Essex County, decided August 2, 1991

It is clear from the totality of materials presented with the Board's filing herein that the charges in this matter are clear, duly articulated and attested to by school administrators and supported by evidence, whatever its ultimate value or admissibility upon full hearing before the Commissioner, sufficient to satisfy the statutory purpose of protecting tenured employees from baseless, frivolous or irresponsible allegations. Under such circumstances, no good purpose would be served by forcing the Board to initiate de novo proceedings to remedy absence of a jurat on the actual statement of charges, even if its attorney's certification had not been deemed sufficient for purposes of N.J.A.C. 6:24-5.1(b).

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Accordingly, the initial decision of the Office of Administrative Law dismissing the tenure charges against James Andrews without prejudice is hereby reversed and the instant matter remanded for hearing on the charges as certified.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 19, 1991

DATE OF MAILING - AUGUST 19, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9308-90
AGENCY DKT. NO. 369-11/90

COMPUTER PROCESSING INSTITUTE,
Petitioner,
v.
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION; DR. MICHAEL G. KERN, JR., ACTING ASSISTANT COMMISSIONER OF EDUCATION; CHARLES O. KUNKEL, MANAGER, BUREAU OF POST-SECONDARY AND SPECIAL SERVICES; AND JOHN AND JANE DOE(S),
Respondents.

ON MOTION TO DISMISS
PETITION OF APPEAL

Gerald L. Dorf, Esq., for petitioner

Arlene G. Lutz, Deputy Attorney General, for respondents
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: July 9, 1991 Decided: July 12, 1991

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

Computer Processing Institute is a private vocational school subject to N.J.S.A. 18A:54-1 et seq. and implementing rules and regulations under N.J.A.C. 6:46-1.1 et seq. and is required as an approved school that collects tuition 30 or more calendar days in advance of instruction to post a tuition performance bond payable to the Commissioner of the Department of Education, under N.J.A.C. 6:46-4.5(f). On May 17, 1990, the Department of Education ordered petitioner to cease enrollment of all

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new students and to cease all student starts after notification by petitioner's bonding company of cancellation of its performance bond. After negotiations between petitioner and the Department resulted in a settlement agreement, the Department on November 5, 1990 rejected petitioner's settlement performance and again issued its order to cease doing business or to cease to recruit, enroll, start, and instruct students. On November 14, 1990, pursuant to N.J.S.A. 18A:6-9, petitioner filed a petition in the Department of Education, together with an accompanying motion for preliminary restraints, for judgment invalidating the directives of May 17, 1990 and November 5, 1990 and directing full compliance by the Department with N.J.A.C. 6:46-1.1 et seq. "prior to interfering with the beneficial use and enjoyment of petitioner's right to operate its business in the State of New Jersey."

The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on November 14, 1990 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. On November 20, 1990 an administrative law judge denied petitioner's motion for immediate preliminary restraints against Department action. The Commissioner affirmed. Thereafter, the matter was set down for plenary hearing, adjourned once, and ultimately scheduled for July 24, 1991.

Before hearing, the Department moved on May 29, 1991 for judgment of dismissal of the petition as moot. Accompanying exhibits disclosed petitioner had sold its assets to other interests and had ceased operation as a private vocational school in the State of New Jersey. The motion procedure was in accordance with N.J.A.C. 1:1-12.2, was unopposed and is ripe for determination. The record on motion is closed. See, N.J.A.C. 1:1-12.2(c).

CONCLUSION

For reasons advanced in moving papers, namely, that no judgment by way of permanent injunctive or declaratory relief is tenable, that petitioner as an approved private vocational school is no longer in business in the State of New Jersey, that any pre-existent controversy between the parties no longer exists and has become academic, and that there is no issue of great public importance, the motion is **GRANTED**. The petition of appeal is **DISMISSED**. Cf., Oxfeld v. New Jersey State Board of Education, 68 N.J. 301, 303-4 (1975).

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I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 12, 1991
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

7/15/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 1991
Date

OFFICE OF ADMINISTRATIVE LAW

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COMPUTER PROCESSING INSTITUTE, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY DEPARTMENT OF EDUCATION; DR. MICHAEL B. CURRAN, ACTING ASSISTANT COMMISSIONER, CHARLES O. KUNKEL, MANAGER, BUREAU OF POSTSECONDARY AND SPECIAL SERVICES; AND JOHN AND JANE DOE(S),	:	DECISION
RESPONDENTS.	:	

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

Upon review of the record, the Commissioner adopts the Administrative Law Judge's recommended decision granting respondents' Motion to Dismiss the Petition of Appeal on the grounds that the matter has been rendered moot since petitioner no longer conducts business in the State of New Jersey.

COMMISSIONER OF EDUCATION

AUGUST 19, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 17-90
AGENCY DKT. NO. 354-11/89

JOSEPH ZARRO,
Petitioner,
v.
BOARD OF EDUCATION OF PARAMUS, BERGEN COUNTY,
Respondent.

Harold M. Weiner, Esq., member of the New York bar, admitted pro hac vice pursuant to N.J.A.C. 1:1-5:2, for petitioner. New Jersey Attorney of Record: **Elaine Harris**, Esq.

Lester Aron, Esq., for respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Record Closed: June 17, 1991 Decided: July 9, 1991

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

PROCEDURAL HISTORY

This case was transmitted to the Office of Administrative Law (OAL) by the Department of Education on January 2, 1990, pursuant to N.J.S.A. 52:14B-1 et seq., and N.J.S.A. 52:14F-1 et seq. It concerns a challenge by petitioner, Joseph Zarro, to the determination made by his employer, the respondent Board of Education of Paramus (Board), to withhold his 1989-90 employment and adjustment increments

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pursuant to N.J.S.A. 18A:29-14, and to place a letter of reprimand in his personnel file.

A telephone prehearing conference was conducted by the undersigned administrative law judge on June 7, 1990, during which it was agreed that the following two issues were to be resolved:

(1) Was the Board's determination to withhold petitioner's increments arbitrary, capricious and unreasonable?

(2) Should the written reprimand placed in petitioner's personnel file be ordered removed?

Subsequent to the prehearing conference, Board counsel by letter requested that I dismiss the second issue, arguing that it was not cognizable by this tribunal. I denied the request, without prejudice, and suggested that the appropriateness of my consideration of the issue could be addressed at the hearing.* A plenary hearing was conducted on January 28 and 29, 1991, and posthearing findings of fact and conclusions of law were submitted in accordance with an agreed schedule. The following constitutes my initial decision recommending to the Commissioner that Zarro's petition of appeal be dismissed

INTRODUCTORY DISCUSSION

In his petition Zarro alleges that his 1989-90 salary and adjustment increments were withheld improperly, and that he was reprimanded unfairly, as the result of false accusations leveled against him by his colleagues that he had participated in a scheme engineered by another tenured employee, Ann Charlton, to discredit the school district's assistant superintendent of schools, Dr. Janice L. Dime, by gathering and publicly disseminating information pertaining to Dime's alleged homosexuality. Zarro categorically denied any involvement in such an effort by Charlton or other

*The reprimand letter, dated June 6, 1989, was annexed as Exhibit "B" to Zarro's petition of appeal. Neither at the hearing nor in the post-hearing submission did the Board further press its objection to my jurisdiction to consider the issue.

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staff members and he therefore petitioned the Commissioner to set aside the Board's decision to withhold his increments, and to order the removal of the written reprimand from his personnel file.

To place this case in context, it is appropriate therefore first to review briefly the tenure removal case which the Board pursued against Ann Charlton. That matter was initiated in July 1989 when the Board certified several charges to the Commissioner of Education. The allegation pertinent to the instant case asserted that Charlton, a tenured supervisor of music in Paramus, had undertaken contrary to the best interests of the district to accuse Dime of being a lesbian in order to damage, if not destroy Dime's career in Paramus. During OAL hearings held in May-June 1990, before Judge James A. Ospenson, testimony was elicited that as part of this scheme Charlton and three others, a teacher named Carolyn Straka, her husband Frank Straka (a former teacher), and Joseph Zarro had formed a committee for the purpose of collecting and distributing information about Dime's alleged homosexuality. Zarro testified as a witness for Charlton and denied ever having been asked by her to spread rumors that Dime was a lesbian.

Judge Ospenson issued his initial decision on October 26, 1990. In it, he found that the Board had proved by a preponderance of the evidence that Charlton, as charged, conducted herself in a manner unbecoming a tenured employee by embarking upon an insidious campaign to vilify Dime. As he put it, her " plainly stated purpose was to force Dime from the district and to assure she never became superintendent of schools. . . . The record is clear also that respondent's aspersive and defamatory comments about Dime were not limited to non-school time affairs; her vituperations echoed in school meetings, social affairs involving school personnel and retirement dinners attended by Board members, administrators and teachers." See, In the Matter of the Tenure Hearing of Ann Charlton, OAL Dkt. Nos. EDU 7495-89 and EDU 9262-89 (consolidated), Initial Decision, page 32 (Exhibit R-2). Thus, Judge Ospenson recommended to the Commissioner that Charlton be dismissed from her tenured employment.

In a final decision, dated December 12, 1990, the Commissioner affirmed Judge Ospenson, ordered Charlton's dismissal and transmitted the file to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)1 for it to consider revocation of her certificate. In reaching his determination, the Commissioner found that, " [t]he

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truly ugly, vindictive and persistent nature of [Charlton's] actions and the disruption, disrepute and divisiveness they have brought to the district, have made it effectively impossible for her to continue as a credible teaching staff member in Paramus notwithstanding her undisputed excellence as a music teacher." See, Charlton, supra, page 56 (Exhibit R-2).

Thus, in light of the Board's belief that Zarro, too, participated in Charlton's efforts to discredit Dime, and the harmful consequences such conduct wrought, Zarro was made the subject of the withholding of increment and reprimand actions from which the instant appeal was taken.

TESTIMONY FOR PETITIONER

Petitioner's first witness, Michael J. Carluccio, is a school psychologist employed by the Board and is a friend of Zarro. He maintained that at no time while in petitioner's company was Dime's private life, marital status or sexual preferences ever discussed. The next witness, Dolores M. Lowry, has been a business teacher employed in Paramus for 22 years. Lowry, too, observed that she never heard Zarro make any statements about Dime's sexual orientation or her marital status, and as far as Lowry is aware, petitioner has a good reputation for honesty.

Zarro then testified on his own behalf. He is certified to teach English and has been employed in Paramus since 1968. During both the 1987-88 and 1988-89 school years he taught drama at Paramus High School and in that capacity had occasion to work with Charlton in casting high school musical plays. One day during May 1989, Zarro was directed to report to the Superintendent of Schools, Dr. Harry A. Galinsky, where he was told the purpose of their meeting was to discuss matters pertinent to certain of his activities allegedly involving Dr. Dime. Present at the meeting, in addition to Zarro and Galinsky, was the Board's attorney, Mr. Aron, and Zarro's NJEA representative, Mr. Pieroni. Galinsky informed Zarro that he had learned that petitioner had been involved in gathering information to discredit Dr. Dime. Zarro denied it. Thereafter, in a conversation Zarro had with an NJEA attorney, petitioner was advised that his alleged activities consisted of: (1) a claim that Zarro mentioned that he had known a homosexual hairdresser in Englewood who had been to parties at Dr. Dime's home; and (2) claims that Zarro allegedly made certain comments about Dime's sexuality to one Marie Hakim, a teacher in the district. Zarro also

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learned that he was charged with having referred to a prospective candidate for a supervisory position in the district as "gay," and that another employee, Beverly Barbour, had accused Zarro of being part of a committee to gather evidence about Dr. Dime's alleged homosexuality.

With respect to the allegations against him, Zarro vehemently denied all of them, i.e., that he ever discussed Dime's marital status, her sexual orientation or her reputation among her peers with Charlton or anyone else.

On cross-examination, Zarro agreed that in addition to working with Charlton on school musicals during 1987-88 and 1988-89, he sometimes would lunch with her, and they occasionally would go to dinner together after a rehearsal. However, he denied that Charlton ever discussed Dime's divorce with him, or that she showed him either any divorce documents or copies of any deed or mortgage to Dime's home. Moreover, he insisted he had never discussed candidates for the English department chairmanship with Beverly Barbour, who was head of guidance.*

With respect to the accusations of Marie Hakim, Zarro maintained that he had little professional contact with her and did not converse with her in school. In particular, he denied ever having spoken to her outside her classroom during the spring of 1989, at which time he allegedly made specific references to Dime's sexual preferences.

During his cross-examination a partially inaudible tape recording of a conversation between Hakim and Zarro was played for Zarro (Exhibit R-1), and a transcript of that conversation, typed by a school secretary, which attempted to relate what was on the tape simultaneously was presented to him to read (Exhibit R-1A). Although Zarro recognized his voice on the tape, as well as that of Hakim, he maintained he had no independent recollection of the conversation at all.

*Barbour, who later testified for the Board, told Galinsky that Zarro was spreading word that a potential candidate for that supervisor position was favored by Dime because the candidate was "gay."

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Petitioner then called Dr. Dime as his witness in order to attempt to demonstrate that she suffered no damage until after the Board brought the matter into the public limelight by bringing tenure charges against Charlton. Dime holds a doctorate in education administration and has been Assistant Superintendent of Schools in Paramus for the past five and one-half years. Previously, she had served as both Assistant Superintendent and Acting Superintendent in Englewood, and had also been a principal in the North Hunterton Regional School District. Dime, who is now 40 years old, observed that it is extremely unusual for a woman to have held those types of high level positions at her age.

According to Dime, when she first became aware that rumors about her private life were circulating in the school system, Zarro was mentioned as one of the persons involved in the dissemination of that information. Rather than speak directly to Zarro, she brought the matter to the attention of Dr. Galinsky for him to investigate. Dime told Galinsky that she heard that Charlton, Zarro and others had embarked upon a campaign to block her from becoming the superintendent by making allegations about her sexuality and her ethnicity. According to Dime, the entire series of events have caused her great personal anguish and have impacted adversely upon her professional career.

TESTIMONY FOR THE BOARD OF EDUCATION

The Board's first witness was Dr. Galinsky, who has been the Superintendent of Schools since August 1985. Dr. Dime has been Assistant Superintendent for the past five and one-half years and was recommended for that position by Galinsky's predecessor, Paul Shelly.

Galinsky recalled that in late November 1988, Charlton came to see him on an "emergent" basis. She related that there was a rumor in the district that he was going to retire and she told him that if Dime then became superintendent, she (Charlton) would be "dead." He was surprised by Charlton's perception that Dime had a negative attitude toward her since Charlton's tenure as music supervisor had been recommended to him for approval by Dime. Nevertheless, since Charlton insisted that Dime was, "out to get her," Galinsky suggested the three of them meet to discuss the matter, which they did about one week later. At that meeting Charlton complained that Dime was attempting to block her in carrying out an

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effective music program, and was trying to thwart her efforts generally. Dime denied the accusation.

In February 1989, Galinsky had another meeting with Charlton, at which time the music supervisor displayed a great deal of anxiety. Galinsky was so concerned about Charlton's emotional state that he recommended she seek counseling and also offered to ease her course load if her schedule permitted.

In April 1989, Galinsky received a telephone call from Dime who explained that she recently learned that covert activities were taking place in the district to harm her. Galinsky met with the informant, Marie Hakim, who told him that Charlton had formed a committee consisting of Charlton, Carolyn Straka, Frank Straka and Joseph Zarro, whose main purpose was to gather information about Dime's private life in order to prompt Galinsky to seek to remove her because of alleged homosexuality. Hakim told Galinsky that Charlton claimed to have an incriminatory "dossier" on Dime which she threatened to make public if Galinsky did not act appropriately. As a result of his receipt of this information from Hakim, Galinsky contacted both the Board president and the Board attorney to look into the matter further. They determined that as to Zarro there was sufficient credible evidence to recommend to the Board that by virtue of his participation in the unsavory scheme his salary and adjustment increments be withheld for 1989-90. Regrettably, said Galinsky, the entire matter has had a very negative impact both on Dr. Dime personally and on the school community at large.

On cross-examination, Galinsky noted that when he met with petitioner in May 1989, Zarro refused to provide any specifics regarding his alleged participation in the "committee," or in the effort to gather information about Dime's private life. Also, although Hakim never told Galinsky that she secretly had taped a conversation with Zarro, she did say that Zarro told her that other faculty members and he were investigating Dime's private life.

The Board's next witness, Joy A. Perraudin, has been a music teacher in Paramus for 16 years and knows Charlton and Zarro. She spoke with Charlton on various occasions during which Charlton referred to Dime as a "dike" or a "lesbian." In March 1989, Charlton told Perraudin about an "investigation" she was carrying out to gather information about Dime's private live in an attempt to discredit her

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and thereby prevent lesbians and homosexual men from being employed or retained in the school district. Charlton, she said, told her she had gathered information on Dime with the cooperation of others, including the Strakas and Zarro.

The next witness, Beverly Barbour, Supervisor of Guidance, grades 5 through 12, has been employed in Paramus for over 24 years. She had been a friend of Charlton and had socialized with her. Beginning in the 1988-89 school year, Charlton began to complain to Barbour that if Dime ever became superintendent this would cause a problem for Charlton because Dime did not like her. Charlton also told her that Dime was a lesbian and was hiring "gays," such as Dr. Barbara Hyde, principal of a middle school.

In April 1989, Charlton told Barbour that she had formed a committee, together with Zarro and the Strakas, to gather information about Dime's private life. Charlton mentioned she had obtained copies of Dime's divorce papers, her college yearbook, and the deed or mortgage to her house, as well as the license plate numbers of cars visiting Dime's house. Charlton also told Barbour that Zarro was going to attend meetings and conferences outside the district in an effort to gather information there as well Barbour said she told Charlton to stop these activities since it seemed to her that Charlton was "obsessed" over Dime.

Barbour testified that Zarro, too, complained that because of Dime's sexual preference, only lesbians and homosexuals would be hired in Paramus. For example, he mentioned that one Helen Poole, a candidate favored by Dime for the supervisory position in the English department , was Dime's former college roommate and also a lesbian. Zarro also mentioned that he understood that Hyde , principal of a middle school, was Dime's "lesbian friend." On another occasion, Zarro told Barbour he had met a beautician from Englewood who said that he had friends who had attended a "second" or "lesbian" wedding involving Dime.

Marie Hakim, the Board's last witness, has worked as a health education teacher in Paramus for more than 29 years and knows Charlton, Dime and Zarro. Hakim said she was told by Charlton that one Joanna Rogers, Dime's roommate, was a lesbian and that Zarro, too, told her that Rogers was Dime's "lesbian roommate"

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and would get the English supervisor's position. Charlton later told Hakim that Zarro was mistaken about Rogers--she was a physical education teacher, not an English teacher. Hakim also asserted that Zarro attempted to enlist her help in order to spread stories about Dime because he knew that Hakim previously had some sort of a disciplinary problem and he probably assumed she therefore would be inclined to help the "committee."

In early May 1989, Zarro called Hakim at her home and left a message on Hakim's answering machine asking that she speak with him. Hakim removed the mini-cassette from the machine and put it in a tape recorder which she had in her pocket when she next saw Zarro in school. They had a conversation which Hakim secretly taped. During that conversation Zarro told her that another staff member, one Rita Sgro, was having a party and that Hyde would be sleeping there. According to Hakim, Zarro suggested that she call the house and asked to speak to "the dike."*

Hakim explained that she decided on her own to tape Zarro without having been solicited to do so by Galinsky or anyone else because she was upset over the "witch hunt" and felt Zarro and others were trying to use her to spread rumors about Dime. As she put it, she wanted, "to protect myself."

Hakim then reviewed the typed transcript of the tape and made the following observations concerning portions of it:

(1) The comment by Zarro at Section 008 that, " She was at Nutley. From there I hear she went to Bask . . . . Glen Ridge or Glen Rock," referred, she said, to Helen Poole, the candidate for the English position;

(2) The mention at Section 013 by Zarro to Englewood and, "traveling in the same circles," etc., referred, she said, to Zarro's observations that Poole traveled in lesbian circles;

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*The transcript of the tape indicates that Zarro made the following comment to Hakim: "People say she (Rita Sgro) is, I'm sorry. But at any rate, so I want, so I said too bad we couldn't get someone to call up Rita and ask for the dike" (Exhibit R-1A).

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(3) The comment at Section 022 by Zarro to a "dean of students" also being a "dike," referred, she said, to Zarro's assertion that Dime's roommate, Rogers, who he originally thought was a dean of students in Nyack, was a lesbian;

(4) The comment at Section 036 where Zarro refers to Barbara Hyde as, ". . . She's a dyke to me. People say she is."

FINDINGS OF FACT

Based, then, upon my review and consideration of the evidence in this matter, including the testimony related above, I make the following findings of fact:

1. Petitioner, Joseph Zarro, was employed by the Paramus Board of Education beginning in 1968. He is certified in English and during the 1987-88 and 1988-89 school years taught drama at Paramus High School.

2. During both of those school years Zarro worked with the music department supervisor, Ann Charlton, on the production of school plays.

3. In November 1988 the Paramus Superintendent of Schools, Dr. Harry A. Galinsky, learned that Charlton wanted to see him on an emergent basis. He met with her and learned that she was apprehensive over the fact that Galinsky might leave the school district and that the assistant superintendent of schools, Dr. Janice L. Dime, would succeed him. Charlton told Galinsky that if he left and Dime took his place, she would be "dead" and that Dime was "out to get her."

4. Approximately one week later Galinsky met with Dime and Charlton during which meeting Dime expressed concern that Charlton was "spreading rumors"; particularly with respect to her personal life.

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5. In April 1989, Dime complained to Galinsky that she had information to the effect that Zarro, Charlton and others were embarked upon a campaign to discredit her and that their activities involved spreading allegations regarding her sexuality and ethnicity.

6. Dime informed Galinsky that one of the persons from whom she had received this information was a health education teacher in Paramus, Ms. Marie Hakim.

7. Galinsky thereafter met with Hakim, who informed the superintendent that she understood from Zarro that a committee composed of Charlton, Zarro and Carolyn and Frank Straka had been formed for the purpose of gathering information about Dime's private life.

8. Thereafter, Galinsky conducted an investigation concerning the activities described to him by Hakim. As a result of the information he gathered, Galinsky concluded that Zarro was a participant in a scheme to spread allegations about Dime's private life and that Zarro and others were raising the specter that Dime would recommend or make future appointments based upon the sexual preference of candidates.

9. Joy A. Perraudin, a music teacher at Paramus High School, was approached by Charlton who referred to Dime as a dike and a lesbian.

10. In March 1989, Charlton told Perraudin that an "investigation" was underway in order to obtain information about Dime's private life and to discredit her in her employment in the school system. Charlton told Perraudin that if Dime were removed, the school district would not be run by lesbians and homosexuals.

11. Charlton also told Perraudin that information was being gathered about Dime's private life, including her mortgage and divorce papers. Charlton mentioned that Zarro was one of the persons with whom she was working in this endeavor.

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IN THE MATTER OF THE TENURE HEARING OF JAMES ANDREWS, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by the Board, having been filed one day beyond the period prescribed by N.J.A.C. 1:1-18.4, were deemed untimely and are not considered herein. Reply exceptions by respondent correctly challenged the timeliness of the Board's exceptions, but otherwise relied on the arguments presented to the ALJ and urged affirmance of the initial decision.

Upon careful and independent review of the record, the Commissioner cannot concur with the ALJ that the within tenure charges must be dismissed for procedural deficiency, specifically for failing to have been executed under oath by the person(s) filing as required by N.J.A.C. 6:24-5.1(b)1.

Initially, the Commissioner notes that, as an officer of the court subject to penalty for misrepresentation or falsification and a notary public in his own right, the Board attorney need not have taken any oath over and above the personal certification he provided in his filing of charges on behalf of the Board, wherein he clearly attested that these charges were based on appended statements of evidence under oath and supporting documentation.

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Moreover, even if the attorney's certification were to be judged deficient, the Commissioner would still not deem this defect to rise to the level of requiring dismissal of charges in the present instance. It is well established that the Commissioner will not automatically dismiss tenure charges on procedural grounds, and has declined to do so where the defect at issue did not prejudice respondent's rights or represent an egregious and unwarranted disregard of tenure proceeding law. In the Matter of the Tenure Hearing of Thomas Puryear, School District of the City of Newark, Essex County, 1977 S.L.D. 934; In the Matter of the Tenure Hearing of Eddie Lee Harrell, School District of the City of Paterson, Passaic County, decided August 30, 1985; In the Matter of the Tenure Hearing of Charles Apkarian, School District of the City of West New York, Hudson County, decided September 27, 1985, affirmed State Board September 3, 1986, affirmed Superior Court November 20, 1987, certification denied May 24, 1988; In the Matter of the Tenure Hearing of Caricella Major, School District of the City of Orange, Essex County, decided August 2, 1991

It is clear from the totality of materials presented with the Board's filing herein that the charges in this matter are clear, duly articulated and attested to by school administrators and supported by evidence, whatever its ultimate value or admissibility upon full hearing before the Commissioner, sufficient to satisfy the statutory purpose of protecting tenured employees from baseless, frivolous or irresponsible allegations. Under such circumstances, no good purpose would be served by forcing the Board to initiate de novo proceedings to remedy absence of a jurat on the actual statement of charges, even if its attorney's certification had not been deemed sufficient for purposes of N.J.A.C. 6:24-5.1(b).

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18A:29-14 was neither arbitrary, capricious nor unreasonable, it should be upheld. Indeed, even if I disagreed with the severity of the Board's sanction, it is not within my prerogative to substitute my judgment for that of the Board so long as it was arrived at fairly. See, Kopera, supra.

Sadly, this episode apparently has wrecked the career of Charlton and also done damage to the professional reputations of Zarro and Carolyn Straka. Beyond that, of course, as the Commissioner observed in his final decision in Charlton, the misconduct disrupted the entire school community. Hopefully, the turmoil and anguish which occurred will continue to subside, and the Board again permitted to devote its full time, attention and resources to providing the best possible education it can to its students. While I doubt that Charlton or Zarro anticipated the full extent of the harmful consequences which their activities caused, this cannot excuse it. Their conduct vis-a-vis Dime transcended propriety and clearly went beyond that sort of activity which is constitutionally protected. See, e.g., Pietrunti v. Brick Tp. Bd. of Ed., 128 N.J. Super. 149 (App. Div. 1974), certif. den., 65 N.J. 573 (1974), cert. den., 419 U.S. 1057, 42 L. Ed. 654 (1974).

CONCLUSION AND ORDER

Accordingly, for the reasons set forth herein, I **CONCLUDE** that since the petitioner, Joseph Zarro, has failed to carry his burden of establishing by a preponderance of the credible evidence that the respondent's actions were arbitrary, capricious, unreasonable or otherwise contrary to law, the petition of appeal should be **DISMISSED.** I therefore **ORDER** that the Board's determination to withhold petitioner's 1989-90 employment and adjustment increments, and to place a letter of reprimand in his personnel file, should be **AFFIRMED.**

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I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 9, 1991
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

July 11, 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1991
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

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WITNESS LIST

Called by Petitioner:

Michael J. Carluccio
Dolores M. Lowry
Joseph Zarro
Janice L. Dime

Called by Respondent:

Harry A. Galinsky
Joy A. Perraudin
Beverly Barbour
Marie Hakim

EXHIBIT LIST

R-1 Tape recording of conversation between Marie Hakim and Joseph Zarro

R-1A Uncertified transcript of portions of tape recording

R-2 Final Decision of the Commissioner, and Initial Decision of Administrative Law Judge James A. Ospenson, In the Matter of the Tenure Hearing of Ann Charlton, OAL Dkt. Nos. EDU 7495-89 and EDU 9262-89 (consolidated), decided by the Commissioner, December 12, 1990, appeal to the State Board of Education pending

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JOSEPH ZARRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent consideration, the Commissioner concurs with the ALJ that the weight of evidence in this matter supports the factual allegations on which the Board's increment withholding decision was based, and that petitioner has failed to carry his burden of demonstrating that the Board's action was in any way arbitrary, unreasonable or contrary to law. This being so, the Commissioner may not substitute his judgment for that of the Board in determining that petitioner's actions, specifically his participation in a concerted effort to discredit the assistant superintendent through collection and dissemination of sensitive information about her private life, warranted the sanction of withholding 1989-90 employment and adjustment increments. Kopera, supra

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Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 19, 1991

DATE OF MAILING - AUGUST 20, 1991

Pending State Board

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K.L., by his parents R.L. and J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, J.L., Pro Se

For Respondent, Peter R. Knipe, Esq.

This matter was opened before the Commissioner of Education by way of a Petition of Appeal with Motion for Emergent Relief filed on June 11, 1991. Therein, petitioner sought 1) amendment of district policy governing penalties for possession of alcohol, under which he had been assigned to attend alternative school for a period of time and suspended from participation in extracurricular activities for 45 school days, and 2) an injunction preventing the Board of Education from applying the provision of this policy requiring that he carry over the time remaining from his 45-day extracurricular suspension (which occurred on May 13, 1991) into the following school year.

Because the alternative school assignment had already been served and the requested injunction would not have taken effect

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until September 1, 1991, the Commissioner requested an answer from the Board of Education prior to determining whether the matter at hand warranted emergent relief. Said answer, together with brief in opposition to granting of emergent relief, was filed by the Board on June 26, 1991. Upon review of the record to that point, the Commissioner determined that no material facts were in dispute and that the entire matter was amenable to prompt disposition by summary judgment. Accordingly, a briefing schedule was established, and submissions in support of their respective positions were filed by the parties, followed by reply briefs at the designated time thereafter.

The essential facts of this matter, as ascertained from the filings of the parties, are as follows:

> 1. The Hopewell Valley Regional School District has an established policy on sanctions for students found to be in possession, or under the influence, of alcoholic beverages on school property or at school functions. For first offenses, minimum sanctions are: immediate internal suspension, mandatory hearing before the Board, assignment to the district's alternative school program for ten days after hearing, required participation in a student assistance program and/or community service, and loss of privileges for participation in extracurricular activities for one marking period (45 school days).
>
> The policy also states that sanctions are "consecutive and continuous from one academic year to the next" and that "[a]lthough attempts have been made to equate specific situations with specific sanctions, it must be understood that the Board of Education reserves the right to administer sanctions including suspension and expulsion with a range of penalties depending on: 1. the student's previous record; 2. the total effects of the student's actions on the school community; 3. the student's attitude and parent willingness to learn from the incident reviewed; and 4. multiple offenses or repetition of the same offense or the severity of the individual offense."

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2. On Friday, April 26, 1991, K.L. was found in possession of alcoholic beverage containers on school property, his first offense of this nature. A conference was held with his parents and, pursuant to district policy, he was assigned to the district's alternative school program pending a hearing before the Board of Education. He was also subjected to a urine test, the results of which were negative.

3. On Monday, April 29, 1991, K.L. reported to the alternate school as assigned. The disciplinary hearing before the Board was held on May 6, 1991. Petitioner and his parents were duly notified of this meeting and were present to offer testimony, witnesses and arguments. These centered on the extent of the possible penalty to be imposed and the appropriateness of carrying over its extracurricular aspect into a new school year.

4. After K.L. presented his case, the Board considered the matter and ultimately determined that, pursuant to the clear provisions of established policy, K.L. would continue in the alternative program through May 20, 1991 (ten school days from the date of hearing) and be ineligible for school-sponsored extracurricular activities for a period of 45 days extending over the balance of the 1990-91 school year and continuing to September 16, 1991.

5. By letter dated May 9, 1991, petitioner sought reconsideration of the Board's decision in light of further argument submitted on his behalf. In view of this request, the superintendent researched past Board actions in response to violations of district policy on alcohol abuse and reported to the Board that 1) in 1987-88 one student was assigned to in-school suspension for 14 days and two others for five days each, the lesser penalties arising from a single incident and being in response to the students' cooperative and positive attitudes, and that 2) based on this precedent, the Board had discretion to grant credit for suspension time served prior to hearing.

6. At its meeting of May 13, 1991, the Board considered the additional materials submitted on behalf of K.L. and the information provided by the superintendent, and after said review determined that its previous decision should stand without modification.

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PETITIONER'S POSITION

In stating his case in chief before the Commissioner, petitioner does not argue that he was not treated in accord with established district policy. Rather, he argues that the policy itself is arbitrary and unreasonable in that 1) unless read with its framer's true intent that time served in alternate school prior to hearing be credited toward the ten-day post-hearing assignment, the Board's discretion to determine the time of hearing will inevitably result in some students spending more time in alternative school than others charged with the same offense; and 2) the provision for 45-day suspension from extracurricular activities punishes students who participate in such activities more than those who do not, and its extension over summer vacation for offenses committed late in the marking period acts to vitiate any rehabilitative or constructive disciplinary value by distancing the penalty from the offense and harming the student's potential to make a fresh start in the new school year.

In subsequent submissions, petitioner reiterates that the Board has consistently failed to deal with its evidence that "carry over" penalties are harmful to children, which evidence included letters from duly accredited social workers, as well as petitioner's own statements. He further raised the 1987-88 precedent for five-day suspension noted at No. 5 above as an indication that the Board had wide latitude in meting out punishment, and charged that the Board had failed in his case to similarly consider the mitigating factors that would have justified a lesser penalty than the prescribed minimum in his case.

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BOARD'S POSITION

In its primary submission, the Board argues that there are no material facts in dispute in this matter, nor are there any allegations of denial of due process. Rather, petitioner simply seeks to replace a duly adopted Board policy with one that better reflects his own beliefs about discipline and its effects on students. However, in the absence of any showing of unlawfulness, bad faith or abuse of discretion, the Commissioner cannot substitute his judgment for that of the Board either in adoption of the contested policy or in its application to petitioner. In the present instance, it is beyond dispute that the Board's actions were lawful; over and above the Board's established authority to discipline, the very policy at issue herein was previously judged by the Commissioner to be "consonant in carrying out the intendment of the Legislature that the public schools of the State of New Jersey will act to [help control drug and alcohol abuse among youth]." (at p. 16) G.L.H., by his guardians ad litem G.H.H. and G.R.H., v. Board of Education of the Hopewell Valley Regional School District et al., Mercer County, decided April 20, 1987, affirmed State Board September 2, 1987 Moreover, there is neither allegation nor proof of bad faith. To the contrary, petitioner was apprised of district policy and continually kept informed of the district's decisions and the reasons for them, as well as given every opportunity to state his case. Finally, there is no evidence that the Board abused its discretion in applying its policy to petitioner, and mere disagreement with the underlying philosophy of the policy cannot serve as a basis to overturn the Board's lawful and well-considered determination.

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In response to petitioner's further submissions, the Board reiterates that the "only issue raised by Petitioner is that he believes that he can draft a better policy for the Board of Education" (at p. 4) and argues that the existence of one case in 1988 when the board elected, due to unique circumstances, to impose less than the prescribed minimum penalty in a student alcohol violation matter does not mean that the present Board was obliged to so treat petitioner or that it abused its discretion in imposing the sanctions set forth in policy.

COMMISSIONER'S DETERMINATION

Upon careful review, the Commissioner must concur with the Board that petitioner has made no showing of arbitrariness, capriciousness or impropriety in the Board's handling of this matter. To the contrary, petitioner's own filings show the Board to have acted properly and in accord with student due process rights and pertinent district policy at all times. That petitioner does not agree with the philosophical and behavioral assumptions of the Board's disciplinary policy, or that divergent opinions on the validity of those assumptions exist among researchers, educators and social service practitioners, cannot serve as a basis for the Commissioner to substitute his judgment for that of the Board and overrule the result of its lawfully exercised discretion. Differences of opinion, notwithstanding the sincerity or conviction with which they are held, do not rise to the level of controversies justiciable before the Commissioner so long as the Board determinations at issue are within the parameters of accepted practice in the fields from which they arise. G.L.H., supra, citing Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7

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(1946), aff'd State Board 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948); E.C., on behalf of his minor child, R.C. v. Board of Education of the Township of Mahwah, Bergen County, decided February 11, 1991; P.V. and U.V., on behalf of their minor child, S.V. v. Board of Education of the Township of Hillsborough, Somerset County, decided March 15, 1991

In this particular instance, the Commissioner has already examined the policy at issue and found it to be a reasonable expression of the Legislature's directive to school districts in matters of substance abuse control. G.L.H., supra No evidence was presented herein that the Board abused its discretion in applying the policy to petitioner or in electing not to exercise its prerogative to set the policy aside and administer a lesser sanction, notwithstanding that a prior board had in one instance in the past opted to do so. Finally, the Commissioner finds no merit in petitioner's arguments that the Board's policy, and its application to petitioner, are inherently arbitrary in that, due to variations in hearing dates, different students may receive effective penalties of different lengths for the same offense, and in that participants in extracurricular activities are punished disproportionately in comparison to other students. In the former instance, the practicalities arising out of student due process rights would militate against variations of more than a few days in scheduling student hearings, and while those hearings are pending, the policy's provision for attendance at alternative school ensures that affected students lose no educational rights whatsoever. In the latter, it is well established that participation in extracurricular activities is a privilege which can be forfeited as

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a result of engaging in proscribed behavior, and any student--not just those currently participating in such activities--would lose that privilege by violating the policy at issue; thus, there is no question of disparate treatment among students.

Therefore, for the reasons set forth herein, the Commissioner finds and determines that petitioner has provided no basis on which the Board's actions in this matter could reasonably be set aside. Accordingly, the Petition of Appeal is dismissed in its entirety, and petitioner's request for emergent relief thereby rendered moot.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 26,1991

DATE OF MAILING - AUGUST 26, 1991

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BOARD OF EDUCATION OF THE TOWN OF DOVER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
for Petitioner (Lester Aron, Esq., of Counsel)

Pennella & Claps for Respondents
(David C. Pennella, Esq., of Counsel)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board of Education of the Town of Dover on June 5, 1991 appealing a $330,000 reduction in its tax levy for current expense for school year 1991-92, restoration of which it contends is necessary for the district to provide a thorough and efficient system of education for its students.

The aforestated reductions were imposed by the Mayor and Board of Aldermen of the Town of Dover after consultation with the Board pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following the voters' rejection of the Board's proposed budget for current expense on April 30, 1991. The proposed 1991-92 budget and reductions are set forth below:

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	BUDGET PROPOSED BY BOARD	BUDGET AFTER CERTIFICATION BY GOVERNING BODY	TAX LEVY REJECTED BY VOTERS	TAX LEVY CERTIFIED	DIFFERENCE IN CONTENTION
CURRENT EXPENSE	$19,320,385	$18,990,385	$8,847,242	$8,517,242	$330,000

The Mayor and Board of Aldermen filed an Answer to the petition with the Commissioner on June 20, 1991 and, thus, the pleadings were joined. Said Answer admitted the amounts as stated above but denied the Board's allegation that such $330,000 reduction in the current expense budget would prevent the Board from fulfilling its constitutional obligations to provide a thorough and efficient education program.

The Mayor and Aldermen's reduction in tax levy is to be accomplished by an appropriation of $150,000 into the current expense budget from the district's unappropriated free balance; a $162,371 reduction from line item 108(c) taken from a $180,000 amount designated by the Board in the budget to make the first payment required under the proposed lease purchase agreement; and reductions from two salary line items, a $5,857 reduction from line item 110, administrative salaries, and $11,772 from line item 211, principals' salaries.

Through the filing of position papers, responses to such position papers, and final summations, the Commissioner will now consider individually each of the reductions and the arguments of the parties. In so undertaking this budget appeal, the Commissioner notes that the standard of review that prevails is whether the amount of monies available to the Board as a result of the Mayor and Aldermen's actions are sufficient for the provision of a thorough

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and efficient education to the pupils of that school district for the 1991-92 school year. Board of Education, East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966)

I. APPROPRIATION FROM FREE BALANCE IN THE AMOUNT OF $150,000

The Mayor and Aldermen suggest in their Detailed Statement that the balance appropriated adjustment in the amount of $150,000 stems from a review of the surplus of the school board. They suggest that they have the authority to review both anticipated income and surplus figures, citing Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super. 540, 545 (App. Div. 1983). Relying upon the certification of their accountant, David H. Evans, the Mayor and Aldermen recommended that revenues be increased by $150,000 drawing such amount from surplus. Mr. Evans states:

> 10. The first area adjusted by the municipality was that of fund balance anticipated. It was my recommendation, which was accepted by the Mayor and Board of Aldermen, to increase the anticipated revenues by $150,000. This is line 6 of the advertised budget. The reason for this recommendation was that in June of 1990 the Board of Education had a [$600,858] current expense fund balance. Of this amount, $134,434 was utilized in the 1990-91 budget. This left a balance of [$466,424] available for further appropriation. It must be clearly understood that this was before [emphasis added] any excess in operations that the Board may experience in the fiscal 1990-91 year. Line 261 of the advertised budget anticipates an additional excess of $225,000 for fiscal 1990-91. This together with the past history of surplus of the school, led to the inescapable conclusion that some of these funds could be utilized as revenue and thereby reduce the school budget.. The Board has experienced excesses in operations for the past three (3) years. Based upon the history of the district, this should provide more than sufficient reserves for use in emergent situations. (emphasis in text)
> (Certification of David H. Evans, Mayor and Aldermen's Position Paper, at pp. 3-4)

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The Board response to such reduction in its surplus bespeaks its concern in being in Level II status due to facilities deficiencies, and its proven need for funds to extract itself from such position. Further, it contends that although the Mayor and Board of Aldermen state that $466,424 remains in Current Expense Free Balance, such is not the case. It argues that as of June 30, 1991 only $371,435 which represents only 1.9% of the 1991-92 school budget, is anticipated to remain in the Free Balance. It claims that with the condition of the facilities, that amount might be reduced at any time to cover an emergency. It submits:

> In ever increasing amounts, the Current Expense Free Balance has been expended for critical facilities needs. Recently the District was notified that $25,000 worth of unbudgeted boiler repairs would have to be undertaken. After testing, extensive amounts of Radon were reported in certain areas of the Academy Street School and in the Board office. Roofs are leaking and hot water heating systems are breaking down. All of the aforementioned must be addressed. Funding has come from Current Expense Free Balance Appropriation throughout the 1990-91 school year.***
>
> At the close of the 1989-90 school year, the District had a Current Expense Free Balance of $600,858.10 which was only equivalent to 4% of the total budget. It was fortunate that the District had such funds available to meet the unforeseen needs of the 1990-91 school year.
>
> The transfers made in 1990-91 were only a stop-gap measure. Other underlying problems could require further expensive solutions in the coming school year.***
>
> (Board's Position Paper, at p. 2)

II. REDUCTION IN LINE ITEM 108(c) IN THE AMOUNT OF $162,371.

Again citing its Level II status relative to deficiencies in all four of its school buildings, the Board notes that an agreement was reached between the Mayor and Aldermen and the Board

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on April 25, 1991 to jointly support a $3,200,000 lease purchase agreement to renovate and repair a number of school district facilities needs. It submits that the $162,371 cut from this line item is required to make the first payment under the proposed lease purchase agreement dated September 1, 1991, a payment needed, the Board claims, in order to obtain the funds to begin project work in the Fall of 1991. It submits:

> The Board of Education immediately planned measures to proceed with the Lease Purchase transaction, setting a goal to have funds available by early Fall 1991 and anticipating work to commence as soon as possible after the release of funds. A timeline for the renovations and repairs was established. In order to obtain the Lease Purchase funds, the sale of certificates was planned for August 1991. Our financial advisor, CFM, Inc., as well as our special counsel and our underwriters, Butcher and Singer, Inc., strongly recommended that the first lease payment should be made prior to July 1, 1992. Our consultants have estimated an annual payback of $280,000 and recommended that we plan to initiate our repayment with slightly more than half of the projected annual outlay. Deferring payback until the next fiscal year would increase total payback/interest cost and be more costly to the Board of Education and, ultimately, to the residents of Dover. Removing the $162,371 from the FY92 current expense budget will mean an increase in the total Lease Purchase payback of approximately $350,000 via a capitalized interest plan.
>
> Using such a capitalized interest plan would require the Board to either:
>
> 1. Increase the cost of the issue. (Under our current agreement with the Mayor and Board of Aldermen this is not possible.)
>
> 2. Reduce the scope of the number of projects. (This is not a sound alternative due to the critical nature of these desperately needed projects.) (Board's Position Paper, at p. 4)

It claims it should not be forced to choose between two alternatives which are neither thorough nor efficient.

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By way of response, the Mayor and Aldermen contend that the first phase of improvement would not be undertaken until the summer of 1992, and that the only cost to be incurred during fiscal year 1991-92 would be engineering, architectural and other incidental costs. They submit that such costs should not exceed $250,000 and will probably not begin to be incurred until after January 1, 1992. Accordingly, the Mayor and Aldermen argue that interest costs on $250,000, if it is drawn from the lease purchase project, should total no more than $10,000. They state:

> The original budget appropriation was $180,000 but contemplated a larger amount of money being utilized for a longer period of time. The Town exceeded the $10,000 estimate and recommended $17,629 or a change of $162,371. In addition, the Board of Education's original budget of $180,000 recognized ten (10) months worth of interest payments on the lease/purchase plan but they did not recognize the interest income on funds that will not be spent until the latter part of 1992.
> (Mayor and Aldermen's Position Paper, at p. 4)

The Mayor and Aldermen suggest that, in the alternative, if the interest payments are to be kept in that line item, a concurrent line item in the revenue side should be included to provide for income that would be derived as a result of drawing down on the monies at an earlier date than needed.

III. LINE ITEM 110. ADMINISTRATIVE SALARIES $5,857 AND PRINCIPALS SALARY CUTS $11,772 - TOTALING $17,629.

The Board proffers the following information in challenging the Mayor and Aldermen's limiting administrative salaries to 6%:

A. History and Current Staffing

> In the school district there are a total of nine administrators responsible for approximately 2,400 students. The Administrators fall into the following categories:

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2 Central Office - Superintendent and 1 Asst. to Superintendent
7 Building Level - 4 Principals and 3 Vice Principals
9 Total Administrative Staff

The per pupil ratio of building administrators to students is about 350:1, which is considerably higher than that found in the surrounding Morris County Districts. Due to the myriad needs of our ethnically diverse student population (52% Hispanic, 10% Black, 35% White, 3% Other), we are barely adequately staffed, with no plans, in the foreseeable future, to add any new administrative positions.

For many years the district benefitted from great stability in its administrators. However, in the last three years, the district has experienced a significantly high percentage of administrative staff turnover. Five of the nine administrators have left, thereby creating a 55% turnover rate. Three administrators have retired and two younger administrators have resigned to accept higher paying positions elsewhere.

B. Comparative Salary Data

By all measures, administrators in Dover are among the lowest paid in Morris County. Their salaries rank in the lowest quartile and, in some cases, dead last in county-wide rankings.

1. Central Office - The Dover School Superintendent's salary ranks fourteenth lowest of the fifteen K-12 districts in Morris County.***

   The Assistant to the Superintendent's salary ranks the lowest of twelve comparable central office positions in Morris County.***

   The Board Secretary's salary ranks the lowest of fifteen comparable central office positions in Morris County.***

2. Building Administrators - In a salary ranking of 20 Morris County High School Principals, the Principal of Dover High School ranked last.***

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> In a similar ranking of Morris County elementary school principals, Dover ranked in the bottom quartile, being in the 50 and 59 positions of 64 elementary positions.***
>
> Based on the above comparative data, the Board of Education cannot limit its increase for administrators to 6%, when the rest of Morris County is offering increases of 6% to 10% and Dover is already in the lowest ranking position.
> (Board's Position Statement, at pp. 5-6)

The Board adds that it intends to make every reasonable effort to maintain the current nine member administrative staff and has just finalized negotiations at the percentages stated as follows:

> Central Office - 9% increase
> Building Administrators - 8.9% increase.

Schedule A attached to the Answer indicates that the Mayor and Aldermen made the following cuts in the administrators'/ principals' salaries:

	ORIGINAL BUDGET	RECOMMENDED BUDGET	CHANGE
SALARIES-ADMINISTRATION	$384,923	$379,066	$ 5,857
SALARIES-PRINCIPALS	$427,743	$415,971	$11,772

The Commissioner takes official notice, from the above, that the dollar amount in question for this line item, combining the administrators' and principals' salary cuts, is $17,629.

The Mayor and Aldermen's response to its salary reductions states that the budget proposed by the Board was in the area of 9 1/2% increases in both administrators' and principals' salaries. They argue that the Town's experience in dealing with the Teamster's Union representing the white collar, blue collar and water department was that a 6% increase was more in keeping with current labor market conditions. They claim that while considering the educational process, the consumer price index and comparing the

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latter to the labor market conditions, they felt it reasonable to limit salary increases for only those administrators and principals earning in excess of $40,000 to a 6% increase. (See Detailed Statement, at pp. 9-10.)

In its final summation, the Board adds to its argument concerning its facilities problems particularly in regard to radon testing and the district's boiler repairs. It contends, regarding the radon issue:

> Preliminary testing dated August 27, 1990 showed high readings in two boys' bathrooms at the Academy Street School. (See Exhibit 2) Further testing of the entire building by Karl and Associates, Inc., environmental consultants, on November 30, 1990, confirmed an even greater concern in numerous classrooms where readings ranged from 4.6 to 16.6. (See Exhibit 3)
>
> A "consistency check" was implemented with further follow-up testing in December 1990 and January 1991. At that point, the Board of Education directed immediate correction to be implemented. Due to excessively high contractor costs, our maintenance department will begin these repairs in two weeks. To date, our costs for consultants, testing, and the engineering plan have exceeded $15,000.00. This does not include the actual remediation costs.
> (Board's Final Summation, at p. 2)

Regarding the boilers, the Board submits:

> A second area challenged by the governing body is the need for boiler repairs in the amount of $25,550.00. Support for these repairs is evidenced in the affidavit of Supervisor of Buildings and Grounds Vincent Mariotta and attached estimate for repairs which are slowly being performed. (See Exhibit 4)
>
> A thorough and efficient education requires that students be housed in safe facilities free from such hazards. Once such high readings of life-threatening radon were uncovered, the Board of Education wisely authorized all costs necessary for remediation to be transferred from all already depleted free balance. (Id.)

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On the matter of the postponement of the lease purchase, the Board's final summation acknowledges that interest income will be generated from investment of the funds received from the sale of certificates of participation which it anticipates will take place in September 1991. It claims that the sale of said certificates in September 1991 will provide for a great financial benefit to the Dover taxpayers, based on current market conditions. It submits:

> According to State Department accounting procedures, it is not acceptable to include as revenue in the 1991-92 school budget interest income for Certificates of Participation funds which, in fact, have not yet been sold. This statement has been verified by Mrs. Shirley Clement, Morris County School Business Administrator and Mr. Bernard Steinfelt, Director of School Business Management for the Department of Education, Division of Finance.
>
> Because the Commissioner and the local Finance Board have approved the lease purchase, the option to increase the cost of the lease purchase beyond the $3.2 million agreed upon by the Board of Aldermen and the Board of Education is no longer viable. The only alternatives to financing the lease purchase within budget are to have the funds cut by the Aldermen from the 1991-92 budget restored or to reduce the scope of the projects due to the need to capitalize interest on the investment which, in turn, decreases the funds available for projects. To reduce the project scope would require those projects to be included in upcoming budgets.
>
> (Board's Final Summation, at p. 3)

The Board adds that the County Superintendent believes that all projects required for monitoring will be completed with the lease purchase funds. It argues that reducing the available funds will negatively impact on the district's ability to provide the students a thorough and efficient education in safe and healthy school facilities.

On the matter of salary increases to administrators, the Board submits that while it is the 8th highest district in size of

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the 15 Morris County School Districts in enrollment, four of its top leadership positions are paid at the very bottom of all 15 Morris County K-12 schools. It adds:

> Since the time of the Town's original cuts, negotiations for the 1991-92 school year with the Dover Public School Administrators have already been finalized at 8.9%. It would now be an Unfair Labor Practice for the Aldermen's cut to overturn the settlement and reduce the increases to their "suggested 6.0%."
>
> As clearly demonstrated in the Board's written response to the Town's Position Statement, the Town has awarded enormous double digit increases to 11 employees ranging from 12.5% to 33.4%.*** It is disingenuous for them to spend so freely and then attempt to reduce the Board's award of 8.9% increases to its Administrators.
>
> (Id., at p. 4)

The Board seeks restoration of all monies reduced by the Mayor and Aldermen.

By way of Final Summation, the Mayor and Aldermen reiterate their contention that their decisions in regard to the school budget were made based on what is believed to be necessary for a thorough and efficient education, and that no other goal or standard was used in reaching the budget adjustments.

Concerning the administrators' and principals' salaries line item, the Mayor and Aldermen submit a rebuttal to the Board's objections to comparisons drawn between salaries for other town employees and the district board's employees. They speak to the requirement of compulsory interest arbitration awards for such employees as police officers and fire fighters and state that although the Town of Dover fought the union demands for increased raises, the statute requiring interest arbitration and PERC forced them to pay the salaries they did to such employees.

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Concerning the Board's contention that because of the size of the Board's proposed issue it will be able to invest the proceeds at interest rates exceeding the yield on the Certificates of Participation resulting in a cost benefit to the Board, the Mayor and Aldermen submit that if it is going to sell a participation share early and not use it, the income to be received should be identified in the budget. The Mayor and Aldermen's counsel states in his final summation at p. 4:

> ***The Board of Education, anticipating this statement by the Mayor and Board of Aldermen, submits the affidavit of its auditor, Mr. Montanino, wherein he flatly indicates that the Town of Dover's municipal auditor is merely incorrect on the exclusion of interest monies from the budget. He implies that you cannot insert the interest monies because the certificates have not been actually issued. I have spoken with Mr. David Evans, the Municipality's Auditor, and he indicated to me that he knows of no accounting standards which would prohibit the interest earned being included in the revenue portion of the school budget. In addition, it is inconsistent for Mr. Montanino to say that the interest earned on the sale of certificates of participation cannot be included in the budget when they include the interest expense on the same certificates of participation which have not yet been sold.

Finally, in regard to the surplus issue, the Mayor and Aldermen suggest that analysis of the Board's surplus does not take into effect the surpluses that will be accruing after the date of the free balance stated of June 30, 1991. They claim that based on the information supplied by the Board in its position statement, as Exhibit 3, which is incorporated below, the Board should have a current expense fund balance of approximately $596,120 on June 30, 1991. The Mayor and Aldermen suggest that surplus is more than enough to insure a thorough and efficient education for the children of the Town of Dover.

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They conclude by suggesting that using the standard of deciding what amount would be necessary for a thorough and efficient education for the children of Dover, "***no educational programs were touched, no teachers will be removed, no school supplies will be eliminated and no jeopardy will come to the educational quality of [their] schools" as a result of their cuts. (Mayor and Aldermen's Final Summation, at p. 5) They add that the remedy for the facilities problems has already been handled through an appropriate lease purchase program, and that the budget contains all the funds necessary for the Board to meet its mission. Thus, the Mayor and Aldermen request that the Commissioner sustain the budget adjustments proposed by the Mayor and Board of Aldermen of the Town of Dover.

The Commissioner has carefully considered the arguments of the parties as expressed in their written submission and the portions of the budget relative to the issues presented. Such review leads to the following determinations:

I. Appropriation to Current Expense From Surplus - $150,000

It is well established in law that a board of education is empowered to maintain a reasonable surplus to meet unforeseen contingencies. Fair Lawn Bd. of Ed. v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Division 1976) Further, the Commissioner has held, as a general proposition, that a 3% surplus for such unforeseen contingencies is reasonable. See N.J.A.C. 6:20-2.14. See also Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, decided by the Commissioner December 2, 1987. The Commissioner's review of the record convinces him that the Mayor and Aldermen have failed to

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justify reducing an already slim margin in reserve against contingencies in the Dover budget. The Mayor and Aldermen relied on the expertise of their municipal auditor's review of previous budget surpluses and accepted his recommendation to move $150,000 out of surplus into anticipated revenue. However, Mr. Evan's certification makes it plain that he made such recommendation, and that the Mayor and Aldermen accepted it before any excess in operations that the Board may have experienced in the fiscal 1990-91 school year. (See Certification of David Evans, at p. 3.) The Board's written response to said certification (at p. 5) indicates that the free balance on June 30, 1991 on the preliminary financial statement was $385,659, representing 1.9% of the proposed 1991-92 school year budget. The Commissioner finds and determines that such percentage is insufficient to sustain the Board against unforeseen contingencies.

In so deciding, the Commissioner notes that even if the Mayor and Aldermen had not reduced the surplus by $150,000, and the anticipated free balance on July 1, 1991 as noted on Ex. 3 was $596,120, such amount represents 3.08% of the total budget of $19,302,756 (current expense budget after certification plus restoration of $162,371),* a percentage the Commissioner has already established in previous case law as being a reasonable surplus. See Fairlawn, supra. He therefore restores the $150,000 to the surplus account reduced by the Mayor and Aldermen.

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*See discussion of restoration at II below.

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II. Lease Purchase 108c - $162,371

Interest profits on the sale of the Certificates of Participation on the projected lease purchase are suppositional, not capable of being precisely determined.

The Commissioner finds the Mayor and Aldermen's rationale unpersuasive because of the volatile nature of the market in which the Certificates of Participation are to be sold. Thus there arises an uncertainty about the actual profit to be gained. Hence, he finds that the amount in question, $162,371 must be restored. In so directing, the Commissioner notes that if the Board does recognize a significant surplus in 1991-92, the Board may use said surplus to reduce the tax levy or use such excess funds against future capital project, insofar as the revised Quality Education Act (QEA) authorizes local boards to transfer funds from current expense to capital outlay. See N.J.A.C. 6:20-2.14(b) and (c)

III. Administrative and Principals' Salary Reductions

The record makes plain that even after the Mayor and Aldermen reduced the line item for raises for administrators and principals earning over $40,000 to not exceed 6%, the Board, with full knowledge of the reduced state of its budget agreed to a percentage raise of 8.9% for building administrators, and 9% for central office administrators, a figure in serious variance with the budgetary reduction effected by the Mayor and Aldermen. In reviewing the Board's arguments for its decision which were predicated upon comparative salaries for administrators in other Morris County Schools, the Commissioner finds that the Board of Education has failed to demonstrate that such action was necessary

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to ensure a thorough and efficient education for the school children of Dover or that such comparative figures from other districts are relevant in establishing that thorough and efficient education requires such increment percentages. He further finds that in so negotiating, the Board acted at its own peril.

In so stating, it bears emphasizing that the Commissioner is not directing the Board of Education to change its contract accords. Rather, he finds that the reduction amount established by the Mayor and Aldermen is sustained. The Commissioner finds no merit in the Board's argument that approval of the reduction would result in forcing the Board to commit an unfair labor practice. The Commissioner's determination does not interfere with any agreement made between the Board and administrators, but merely fails to direct a restoration of such funds for that purpose. The Board is not precluded from transferring such amount from other sources including free balance.

Accordingly, for the reasons expressed herein, the Commissioner restores the $150,000 to free balance, and the $162,371 cut in current expense for lease purchase. However, he sustains the $17,629 cut in administrative salaries established by the Mayor and Aldermen.

Consequently, the Morris County Board of Taxation is hereby directed to strike a tax rate which shall add an additional $312,371 to the 1991-92 current expense tax levy for the Town of Dover. The aforestated increase shall raise the 1991-92 tax levy for current expense as set forth below:

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	TAX LEVY CERTIFIED BY GOVERNING BODY	AMOUNT RESTORED	TAX LEVY AFTER RESTORATION
CURRENT EXPENSE	$8,517,242	$312,371	$8,829,613

AUGUST 26, 1991

DATE OF MAILING - AUGUST 26, 1991

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7545-90
AGENCY DKT. NO. 287-8/90

MARY ANN GAINER,
Petitioner,
v.
WAYNE TOWNSHIP BOARD OF EDUCATION,
Respondent.

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

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Alfred F. Maurice, Esq., for intervenor Lorraine Weinbrock

Record Closed: June 11, 1991 Decided: July 8, 1991

BEFORE **EDITH KLINGER**, ALJ:

On August 10, 1990, petitioner filed a verified petition with the Commissioner of the Department of Education alleging that the respondent Board violated her tenure, seniority, and preferred eligibility rights under *N.J.S.A.* 18A:28-5, *N.J.S.A.* 18A:28-9 *et seq.*, *N.J.S.A.* 18A:28-12, and *N.J.A.C.* 6:3-1.10 when it failed to appoint her to the position of full-time English teacher and appointed a nontenured teacher to fill the vacancy instead. The Board filed its answer to the petition on August 28, 1990, and on September 19, 1990, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law for hearing 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 November 30, 1990, at which time it was determined to give notice to the potential intervenor, Lorraine Weinbrock, and give her the opportunity to intervene.

It was further determined that the issues to be resolved at hearing were the following:

1. Were petitioner's tenure and seniority rights violated when the district failed to appoint her to a vacant full-time position as a teacher of English for the 1990-91 school year where

   (a) in April 1990, she received notice that her position as part-time supplemental teacher for the 1990-91 school year was abolished;

   (b) a nontenured teacher was appointed to the vacant full-time position; and

   (c) she was appointed to a part-time supplemental position for the 1990-91 school year?

2. To what relief, if any, is petitioner entitled?

The parties agreed that the facts were not in dispute and could be jointly stipulated. Following the completion of discovery, a stipulation of facts was prepared by the parties and a briefing schedule was established. The record closed on June 11, 1991, following receipt of the final submission of the parties.

STIPULATED FACTS

1. Petitioner, Mary Ann Gainer, has been employed by respondent, Wayne Township Board of Education, as a part-time supplemental teacher on a regular and continuous basis since February 1985.

2. Petitioner possesses an Instructional Certificate with an endorsement as a teacher of English (grades 7 to 12).

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3. As a result of her certifications and employment service, petitioner gained tenure pursuant to *N.J.S.A.* 18A:28-5.

4. By letter dated April 10, 1990, petitioner was notified that her employment situation for the 1990-91 school year would be discussed by the Board at its April 12 and 23, 1990 meetings. It was "anticipate[d] that the board [would] not renew [her] employment for the 1990-91 school year (Reduction in Force)."

5. Intervenor, Lorraine Weinbrock, a nontenured certified full-time high school English teacher, was also notified in April 1990 that her position of employment would be abolished as part of a reduction in force effective with the end of the 1989-90 school year.

6. By letter dated April 30, 1990, petitioner was notified that she would not be reemployed for the 1990-91 school year.

7. As a result of the untimely death of Fred Sharkey on June 12, 1990, a vacancy existed in respondent's English Department. Mr. Sharkey had been employed by respondent as a high school English teacher.

8. Respondent's Superintendent of Schools asked petitioner if she wanted to be employed in the vacant full-time English position, and petitioner notified him that she did want such position.

9. Petitioner signed and returned a written notice sent to her by respondent's personnel manager on July 6, 1990, regarding her interest in the vacant full-time English position. Respondent never took action to employ or approve a contract for petitioner in the position of full-time English teacher for the 1990-91 school year.

10. At its meeting of July 19, 1990, respondent appointed petitioner as a part-time supplemental teacher for the 1990-91 school year. At the same meeting, respondent appointed intervenor to the vacant full-time English position.

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11. Petitioner was not provided with notice of respondent's July 19, 1990 meeting and the fact that her employment status would be discussed and/or voted upon at that meeting.

12. By letter dated July 25, 1990, petitioner was notified that she had been reemployed as a supplemental teacher for the 1990-91 school year.

13. Respondent subsequently realized that petitioner was not provided with notice of its July 19, 1990 meeting and the fact that petitioner's employment status would be discussed and/or voted upon at that meeting.

14. Respondent took corrective action by acting *de novo* at a subsequent public meeting held in conformity with the Open Public Meetings Act on August 23, 1990.

15. Prior to the 1990-91 school year, petitioner was assigned to teach in the supplemental instruction program at the high school level (grades 9 to 12). Her instruction duties were based upon the English curriculum for the pupils in question.

16. For the 1990-91 school year, petitioner is assigned to teach in the supplemental instruction program for grades 7 and 8. As part of this assignment, she has been called upon to teach study skills in science, social studies, mathematics, health, and other areas of instruction.

The documents evidencing the stipulation of facts were attached by the parties to the stipulation and admitted into evidence by consent.

POSITIONS OF THE PARTIES

Petitioner claims that once the Board took action to terminate her employment in its letter of April 10, 1990, her seniority rights were triggered so that she should have been placed immediately on a preferred eligibility list according to her seniority for reemployment whenever a vacancy occurred in a position for which she was qualified. Weinbrock, a nontenured teacher, she argues, had no such rights and, therefore, when the

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full-time position of teacher of English became available, it should have been Gainer and not Weinbrock who received the appointment.

Both the Board and Weinbrock contend that Gainer's rights were, in fact, never triggered because she was reemployed in her position and that the offer to her of the vacant full-time position as English teacher by the district Superintendent of Schools was not binding upon the Board since only the Board is vested with such employment authority under law. Weinbrock points out that although both she and petitioner received notices of termination as required by *N.J.S.A.* 18A:27-10 on or before April 30, 1990, they were both reemployed during the 1990-91 school year in the same status they held for the 1989-90 school year. Consequently, since Gainer did not suffer either a reduction in rank or in her compensation for the 1990-91 school year, her seniority rights were never triggered as she claims. Weinbrock also argues that her employment as full-time English teacher in 1990-91 is based upon sound educationally based reasons and, therefore, the decision to award her the position was within the discretion of the Board.

DISCUSSION OF LAW AND CONCLUSIONS

The underlying question in this matter is clearly whether petitioner was subject to a reduction in force as she alleges. If this is not the case, then the provisions of *N.J.S.A.* 18A:28-12 are not triggered, and petitioner is not entitled to a determination of seniority or placement upon a preferred eligibility list at this time.

Pursuant to *N.J.S.A.* 18A:28-9, a board of education may reduce the number of teaching staff members employed in the district for reasons as set forth in the statute. There are no allegations in this matter that the Board improperly attempted to abolish petitioner's position at the end of the 1989-90 school year.

The law is settled that petitioner has failed to state a claim upon which relief can be granted unless she is actually subject to a loss of position and reduction in pay pursuant to a reduction in force. In *Andreula v. Bd. of Ed. of the City of Hoboken*, OAL DKT. EDU 6537-84 (Dec. 18, 1984), aff'd Comm'r of Ed. (Jan. 31, 1985), the claim of a physical education teacher was declared moot because, although the teacher, like petitioner, was notified that his position would be abolished for the next school year, he was subsequently rehired before the start of that year. *See also, Fazan v. Bd. of Ed. of Boro. of Manville,* Comm'r of Ed. Decision (Oct. 24, 1984); *Micciche v. Bd. of Ed. of the Tp. of Mt. Holly,* State Bd. of Ed

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Decision (June 2, 1982); and *D'Alonzo v. Bd. of Ed. of the Tp. of W. Orange,* Comm'r of Ed. Decision (Nov. 10, 1987).

I therefore **CONCLUDE** that there was no reduction in force which triggered petitioner's rights under *N.J.S.A.* 18A:28-12. Consequently, I **CONCLUDE** that there is no reason to make a determination of seniority between petitioner and intervenor.

I **CONCLUDE** that there was no violation of petitioner's tenure rights under *N.J.S.A.* 18A:28-5 since she was neither dismissed nor reduced in compensation.

Further, I **CONCLUDE** that petitioner has no contractual right to the position of full-time English teacher since the position was never offered to her by the Board; at most, she was given the opportunity to be recommended to the Board by the Superintendent of Schools of the district to fill the vacancy. *N.J.S.A.* 18A:27-1 provides that only the Board possesses the statutory authority to enter into an employment contract with a teaching staff member. Petitioner could not rely upon any representations made by the Superintendent to be binding upon the Board. *Brennan v. Bd. of Ed. of Pleasantville,* 77 *S.L.D.* 1059 (Comm'r of Ed. 1977).

As a result, I **CONCLUDE** that there is no relief that can be granted to petitioner since she has no entitlement to the high school English teaching position and she suffered no loss by virtue of the reduction in force which was never implemented in her case. She lost no income and was returned to precisely the same position during the following school year.

Accordingly, I **CONCLUDE** that, based upon the facts as stipulated by the parties, petitioner is entitled to no relief, and it is **ORDERED** that her appeal hereby be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

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otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

July 10, 1991
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties

JUL 12 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

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APPENDIX

EXHIBITS

J-1 Employee record card of Gainer
J-2 Letter, April 10, 1990
J-3 Agenda for the regular meeting of the Board of April 23, 1990
J-4 Minutes of the regular meeting of the Board of April 23, 1990
J-5 Letter, April 30, 1990
J-6 Notice of vacant full-time English teacher position, July 6, 1990
J-7 Agenda for the regular meeting of the Board of July 19, 1990
J-8 Memorandum of the regular meeting of the Board of July 19, 1990
J-9 Minutes of the regular meeting of the Board of July 19, 1990
J-10 Letter, July 25, 1990
J-11 Letter, August 14, 1990
J-12 Agenda of the regular meeting of the Board of August 23, 1990
J-13 Minutes of the regular meeting of the Board of August 23, 1990
J-14 Employee record card for Weinbrock
J-15 Job Description, Teacher of Supplementary Instruction
J-16 Letter, March 30 1990
J-17 Letter, April 16, 1990
J-18 Reduction in force recall listing, 1990-91
J-19 Memorandum, June 27, 1990
J-20 Memorandum, July 19, 1990
J-21 Letter, August 1, 1990
J-22 Proposed form of resolution

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MARY ANN GAINER, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions and both the Board and Intervenor Weinbrock filed timely reply exceptions pursuant to N.J.A.C. 1:1-18.4.

Petitioner filed a lengthy brief in support of her exceptions, which is a near verbatim recitation of her post-hearing submission. Her specific exceptions object to the conclusions issued on page 6 of the initial decision:

1. that there was no reduction in force, despite her assertion that her employment was terminated by the Board because of a reduction in force;

2. that her tenure rights were not violated;

3. that petitioner has no contractual right to a full-time position, a claim, she submits was never raised or argued by petitioner yet is given significance in the initial decision; and

4. the conclusion that petitioner is not entitled to any relief.

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Petitioner avers that once the Board took action to terminate her employment and that of the intervenor, she, unlike Weinbrock, who was not tenured, was immediately covered by the guarantees set by N.J.S.A. 18A:28-12 which states:

> 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***.

Petitioner argues that because of her employment under an instructional certificate with an endorsement as a Teacher of English, she was entitled to placement on the preferred eligibility list in the category of secondary English. She cites N.J.S.A. 18A:28-12; N.J.A.C. 6:3-1.10(1)(19) and West Orange Supplemental Instructors Association v. Bd. of Ed. of the Town of West Orange, Essex County, decided by the Commissioner February 23, 1984, State Board rev'd July 1, 1987. When a vacancy was created in English on June 12, 1990, petitioner argues she had a statutory entitlement to reemployment in the full-time English position. She cites Baruffi et al. v. Bd. of Ed. of Morris Hills Regional School District, Morris County, decided by the Commissioner May 16, 1990 for the proposition that in the meaning of N.J.S.A. 18A:28-12 a vacancy comes into being at the moment it is created. Among other cases, petitioner cites Bednar v. Westwood Regional Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), cert. den. 110 N.J. 512 (1988) and Capodilupo v. West Orange Tp. Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), cert. den. 109 N.J. 514 (1987) and Grosso v. Bd. of Ed. of the Borough of New Providence, Union County, decided by the

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Commissioner May 22, 1989, rev'd State Board March 7, 1990 for the proposition that local boards of education must continue the employment of a tenured teacher over a nontenured teacher even if the tenured employee has no actual experience in the position in question. Petitioner summarizes by stating:

> The initial decision never truly deals with or examines the petitioner's arguments in this case. Instead, a fiction is established and this fiction is then used as the basis for deciding Gainer's rights. Obviously, she has no claim if there was no reduction in force. Yet the Board very clearly terminated her employment as the result of a reduction in force. Given the fact that the vacancy opened on June 12, 1990, the Board's subsequent attempts to shuffle positions are of no importance whatsoever. Petitioner was terminated, she should have been placed on a preferred eligibility hiring list and placed in the vacant full time position. Her rights should not be defeated by the erection of a fictional barrier in the initial decision. This is particularly true in light of Baruffi, supra, and its conclusions regarding reductions in force and the existence of vacancies.
>
> (Exceptions, at pp. 10-11)

The Board's reply exceptions note that petitioner's exceptions are a "verbatim 'version' of its original full length brief" (Reply Exceptions, at p. 1) but, nonetheless it elaborates on each of those exceptions. The Board contends the ALJ is correct in her conclusion that there was no reduction in force and that petitioner's tenure rights were not violated. It avers that petitioner's claim to a full-time position is not justiciable because it rehired her to her former position before the 1990-91 school year. It further claims that the Commissioner has declined to render advisory opinions regarding such controversies. The Board adds that while the Commissioner may render determinations in situations involving interested persons who are directly affected by controversies, he has declined to render advisory opinions on

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nonjusticiable claims or controversies which no longer involve interested persons. It cites Victoria v. Woodbridge Twp. Bd. of Ed., 1982 S.L.D. 1, among other cases in support of this claim.

Relying on the joint stipulation of facts submitted by the parties, the Board suggests that while petitioner was notified that she would not be reemployed for the 1990-91 school year (Joint Stipulation of Facts, para. 8, J-5), she was reemployed for the start of that year. Citing Frank Andreula v. Board of Education of the City of Hoboken, Hudson County, decided by the Commissioner January 31, 1985 among other cases, the Board, thus, contends that such reemployment renders her claim nonjusticiable.

Further, the Board agrees with the ALJ that only a board of education may employ an individual. Thus, it finds misplaced petitioner's contention that because the superintendent offered her a position, she was entitled to that position as a full-time English teacher. It cites Brennan v. Bd. of Ed. of the City of Pleasantville, 1977 S.L.D. 1059, among other cases in support of this position. The Board adds that because it never took action to employ or approve a contract for petitioner in the position of a full-time English teacher for the 1990-91 school year, citing the joint stipulation of facts at paragraph 11, J-6, that the ALJ properly decided that the Board did not appoint petitioner to such position and that she is not entitled to such a position on the basis of any representations made to her regarding the full-time English position.

The Board further counters petitioner's exception that she is entitled to the full-time English position by arguing that she seeks extraordinary relief which would afford her an upgrade of her

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existing position, which would transcend any rights which have been provided by the Legislature and the courts. The Board concedes that the law is well settled that it may not terminate or reduce petitioner's employment while continuing a nontenured teacher. However, the Board submits that petitioner is attempting to take this concept yet one step further to provide her with a full-time position, giving her a substantial increase in salary and benefits. The Board claims such extraordinary relief has no support in school law. Thus, the Board is in accord with the ALJ in refusing to grant the extraordinary relief petitioner seeks.

Finally, the Board contends that the ALJ properly dismissed petitioner's claim for relief as to not abridge respondent's already limited flexibility. It states in reply exceptions:

> ***[R]espondent sought merely to continue the employment of two valued employees, within the realm of flexibility which has been provided by the Commissioner, and within the protection afforded by law. The petitioner's position, if acknowledged, would have clearly extinguished the rights of a board of education to simply rehire, without interruption, valuable staff members in order to seek continuity in its school program. Such erosion of respondent's flexibility was not contemplated or mandated by the legislature in providing a thorough and efficient education. Accordingly, petitioner's claim was properly dismissed by the administrative law judge.
> (Reply Exceptions, at p. 5)

Intervenor's reply exceptions generally concur with the position of the Board as presented in its reply exceptions. Intervenor contends that the essence of petitioner's position is that the clerical act of adopting a resolution terminating employment has the same effect as if the termination of employment actually took place. Intervenor submits that petitioner's exceptions seek to

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exalt the form of the Board's personnel determinations over the substance of its acts. She states:

> In the case at bar, the Wayne Township School Board reasonably anticipated that both petitioner and intervenor would not be rehired for the 1991 school year. As a consequence, each was mailed a notice of termination after appropriate Board action.
>
> Subsequent to that time, circumstances changed so as to permit the reemployment of both petitioner and intervenor in the same capacity and at the same salaries with adjustments as had existed in the prior year. As a consequence, there was no break in service for either the petitioner or intervenor.
>
> No reduction in force was ever accomplished as a result of the Board's initial determination. Petitioner received no reduction in rank or compensation for the year in which she filed her complaint. Consequently, as no reduction in force was ever implemented, no cause of action ever accrued to the benefit of the petitioner.
> (Intervenor's Reply Exceptions, at p. 2)

In addition, intervenor submits that petitioner's claim is to receive an upgrade in, rather than the maintenance of, her existing position. Intervenor argues that because no harm has befallen petitioner, she is not entitled to any relief.

In sum, intervenor advances the position that to sustain petitioner's position would be to deny the Board the flexibility needed to appropriately discharge its duties. It cites Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) for the proposition that flexibility in staffing and the opportunity to select staff members for the positions for which they are best suited, subject to the tenure law, are the essence of administrative prerogatives confirmed by the Supreme Court.

Upon a careful and independent review of the record of this matter, the Commissioner adopts the initial decision with the following clarifications.

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The Commissioner concurs with the conclusion of the ALJ that petitioner has failed to state a claim upon which relief can be granted. However, in reaching that conclusion the Commissioner disagrees with the ALJ's conclusion that there was no reduction in force which triggered petitioner's rights under N.J.S.A. 18A:28-12. The parties have stipulated the fact that there was indeed a reduction in force invoked by the Board of Education as evidenced by the letter dated April 30, 1990 whereby petitioner was notified that she would not be reemployed for the 1990-91 school year. See Initial Decision, at p. 3, Stipulation of Fact No. 6. The clarification that explains why petitioner enjoys no right to the vacant full-time English position lies in the fact that she was recalled from the preferred eligibility list in the secondary category, to a position under her English endorsement as a part-time supplemental teacher in English, the same type of position from which she had been riffed the previous spring. See Stipulation of Facts Nos. 19 and 20. See also N.J.A.C. 6:3-1.10(i) which states:

> (i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

Thus, petitioner has been saved harmless by virtue of such recall. She may not lay claim to any other position when she has suffered no reduction in compensation, has had no reduction in duties, and has not been dismissed. As mentioned by intervenor,

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"flexibility in staffing and the opportunity to seek select staff members for the positions for which they are best suited, subject to the tenure law, are at the essence of administrative prerogatives confirmed by the Supreme Court in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978)." (Intervenor's Reply Exceptions, at p. 2) That petitioner would prefer a full-time position as an English instructor is understandable, but the facts herein confer no tenure or seniority entitlement to such a position. The Commissioner so finds, and in doing so, concurs with the ALJ that petitioner could not rely upon any representations made by the superintendent to be binding upon the Board. See Brennan, supra. See also, N.J.S.A. 18A:27-1, which provides that only the Board holds the authority to enter into an employment contract with a teaching staff member.

Accordingly, the Commissioner adopts the initial decision for the reasons expressed by the ALJ, with the clarification that a reduction in force actually occurred, but that petitioner's restoration to a part-time supplemental position in the secondary category for which she held proper certification and endorsement renders her petition to be one for which no relief can be granted. The instant Petition of Appeal is hereby dismissed, with prejudice.

AUGUST 26, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 26, 1991

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4957-91
AGENCY DKT. NO. 111-5/91

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,

---

Donald T. Donofrio, petitioner, pro se
Eugene A. Iadanza, Esq., for the Board (Tucci, Iadanza & Reisner, attorneys)

Record Closed: July 15, 1991 Decided: July 16, 1991

BEFORE **DANIEL B. McKEOWN**, ALJ:

Donald T. Donofrio (petitioner), a defeated candidate for an election to the Eatontown Board of Education at the annual school election held April 30, 1991, alleges in a letter dated May 2, 1991, to the Commissioner of Education certain irregularities occurred which were to have affected the election outcome. Petitioner requested an inquiry into his allegation. After the matter was transferred May 14, 1991 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 July 12, 1991 at the Eatontown Borough Hall, Eatontown. The Board filed a trial memorandum at that time.

Findings are reached in this initial decision petitioner failed to establish as true that irregularities occurred which affected the outcome of the election. Therefore, the conclusion is reached that the election results as announced must be affirmed.

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BACKGROUND FACTS

The facts are not in dispute between the parties and they are as follows. Five persons announced their candidacy for election to one of three seats available at this election. Two polling districts were used, one at the Meadowbrook School and one at the Memorial School. Each polling district was opened at 3:00 p.m. the election was conducted until 9:00 p.m.

When the election was announced open at the Meadowbrook School at 3:00 p.m., there was a 15 minute delay to the actual casting of ballots because the key used to activate the machine was not in proper position on the machine. After the Monmouth County Election Board was notified at about 3:05 p.m. that the machine was not operating, a voting machine mechanic from the County appeared on the scene at approximately 3:15 p.m. He discovered the problem with the key, inserted the key properly, opened the machine and that machine at the Meadowbrook School functioned properly throughout the entire election.

The machine used at the Board's Memorial polling place malfunctioned at approximately 5:27 p.m. and a voting machine mechanic arrived on the scene within 12 minutes. The mechanic discovered a fuse on the machine was blown and that an extension cord which had been connected to the machine by the election workers was very hot. The mechanic removed the extension cord, replaced the blown fuse, and the machine began working properly. The voters then continued to cast their ballots.

At approximately 7:20 p.m., the machine at the Memorial School once again broke down. The mechanic arrived at the scene within five minutes and again found a blown fuse. Although the mechanic replaced the blown fuse again, the machine again blew that replacement fuse. Consequently, the mechanic put the machine in manual operation which meant that the curtains in the front of the machine which provides the voter with secrecy were operated by hand and the casting of ballots were also accomplished by hand. In order to insure that nothing more untoward happened to the machine in its mannual mode, the mechanic remained at the Memorial School until the polls closed at 9:00 p.m.

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At both the Memorial School polling place and at the Meadowbrook School polling place voters who could not immediately then cast their ballots were advised to either wait until the respective machines were either activated or repaired or they could return at a later time and cast their ballots. There is no evidence in this record to show that any ballots which had been cast at the Memorial School polling place were eliminated from the automatic counters on the machine at the times the machine fuse had blown. Nor is there any evidence to show that any voter who may not have been able to cast their ballots at the time they first appeared at either the Memorial or Meadowbrook polling places at the time the machines were either inoperable or malfunctioning, and who then left, were prohibited from returning at a more opportune time to cast their ballots. While such voters may have been inconvenienced, the point is that no one of them were prohibited in fact from returning.

DISCUSSION AND CONCLUSION

Based on the facts in this case, there is no competent evidence to show that the announced election results in the Eatontown Board of Education Annual School Election were affected by the improper insertion of the machine key at the Meadowbrook School or because of the blown fuses on the machine at the Memorial School polling places. Moreover, there is no evidence other than hearsay from petitioner Donofrio that any voter left the polling place because of machine malfunctions and, even if his hearsay testimony that some voters did leave is accepted here, there is no evidence to show that any one of the voters who may have left were unable to return. Finally, there is no evidence to show that the Meadowbrook polling place was not declared opened promptly at 3:00 p.m. on April 30, 1991 to commence the school election. Consequently, it is assumed absent evidence to the contrary that the election was properly opened at 3:00 p.m. at the Meadowbrook polling place but that the election workers, through an improper key insertion into the machine, could not get the machine operating. That situation is entirely different than concluding the opening of the election was improperly delayed.

In light of the facts established in this record, there is no basis to show that the annual school election conducted in the Borough of Eatontown was in anyway tainted by improprieties or irregularities. Consequently, the petition for the inquiry is hereby **DISMISSED** on the basis that no evidence exists to show the outcome of the election was affected.

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It is so **ORDERED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 16, 1991
DATE

DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

7/18/91
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 23 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

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DOCUMENTS IN EVIDENCE

R-1 Repair Records

R-2 Election Results

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF EATONTOWN, MONMOUTH COUNTY.	:	

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

Upon careful review, the Commissioner concurs with the ALJ that the difficulties experienced with certain machines at the Meadowbrook School and Memorial School polling places in no way constituted irregularity or impropriety, and that there is no evidence whatsoever of any votes being lost or of any voters being deprived of their ability to vote as a result of these difficulties. This being so, the will of the electorate cannot be found to have been thwarted and the results of the election must stand as originally announced.

Accordingly, the within inquiry is hereby dismissed and the election of Kathleen G. Ruffino, Fredric D. Naimoli and Gale P. Lackner to full terms of three years each on the Eatontown Board of Education affirmed.

IT IS SO ORDERED.

AUGUST 30, 1991

DATE OF MAILING - AUGUST 30, 1991

COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7157-90
AGENCY DKT. NO. 257-7/90

JO ANN HOLMES & SHARON ROMANOSKI,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioners
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Yale L. Greenspoon, Esq., for respondent

Record Closed: May 31, 1991 Decided: July 12, 1991

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioners, Jo Ann Holmes and Sharon Romanoski, were nontenured teachers employed by respondent, Board of Education of the Township of Springfield (Board). On April 30, 1990, at its regular meeting, the Board voted not to renew the contracts of Holmes and Romanoski and the Board also dispatched two employees to hand deliver the notifications of nonrenewal. Petitioners allege that they received the notifications on May 1, 1990, rather than on April 30, 1990.

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Petitioners argue that the Board violated *N.J.S.A.* 18A:27-10, which requires notifications of nonrenewal of employment by April 30, 1990, and maintain that the Board's failure to give timely notice resulted in an offer of continued employment. Also, petitioners argue that they are entitled to 30 days pay because the Board's conduct violated their employment contract requiring 30 days notice of intent to terminate the contract.

The Board argues that the petitioners were properly served on April 30, 1990. If, however, petitioners received the notices on May 1, 1990, the Board substantially complied with the statutory notice requirements. Thus, petitioners are not entitled to 30 days pay.

On September 11, 1990, the matter was transmitted to the Office of Administrative Law for hearing 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 December 6, 1990, a telephone prehearing conference was held before Administrative Law Judge Elinor R. Reiner. The issue set forth in the Prehearing Order was "does respondent owe each petitioner 30 days pay for failing to give petitioners timely notification or nonrenewal?" At the hearing scheduled on March 27, 1991, before the undersigned, an additional issue raised was "did petitioners receive notice by April 30, 1990?" The parties filed post hearing briefs on May 31, 1991, on which date the record closed

STIPULATED FACTS

The parties stipulated to the following facts (J-1) which are herein adopted as **FACT**:

As to Jo Ann Holmes:

1. On or about April 28, 1989, Holmes signed an employment contract with the Board pursuant to which her salary as a nontenured teacher for the 1989-90 school year was $38,427. Said contract also required 30 days notice in writing of intention to terminate the contract.
2. By letter dated April 26, 1990, Holmes was notified by Gary Friedland, Superintendent of Schools, that the questions of the renewal of her

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employment contract would be discussed by the Board at its regular meeting on April 30, 1990.

3. At its April 30, 1990 meeting, the Board voted not to renew Holmes' contract for the 1990-91 school year and wrote her a letter of its action, dated April 30, 1990.
4. Holmes did not attend the April 30, 1990 Board meeting.
5. By letter dated May 1, 1990, Holmes wrote the Board and accepted its statutory offer of employment.
6. By letter dated May 11, 1990, the Board advised Holmes of the reason for her nonrenewal.
7. Holmes has sought employment, however, she is currently unemployed.

As to Sharon Romanoski:

1. Romanoski was employed as a nontenured teacher for the 1989-90 school year and received a salary of $25,500.
2 By letter dated April 26, 1991, Romanoski was advised that the question of the renewal of her employment contract would be discussed by the Board at its regular meeting on April 30, 1990.
3. At its April 30, 1990 meeting, the Board voted not to renew Romanoski contract for the 1990-91 school year and wrote her a letter of its action, dated April 30, 1990.
4. Romanoski did not attend the April 30, 1990 Board meeting.
5. By letter dated May 1, 1990, Romanoski wrote the Board and accepted its statutory offer of employment.
6. By letter dated May 1, 1990, the Board contended that Romanoski was notified prior to April 30, 1990 of the Board's decision.

TESTIMONY

Holmes testified that on April 27, 1990 she received a letter dated April 26, 1990, informing her that on April 30, 1990, at its regular meeting, the Board intended to vote on whether to renew her employment contract. Further, the letter indicated that she would not be recommended for reemployment. On April 28, 1990, she spoke with the Springfield Education Association (SEA) representative

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regarding her contract and the Board's April 30th meeting. She did not attend the Board's meeting that night, but instead attended a class at Kean College where she was enrolled as a graduate student. The class met from 5:00 to 6:30 p.m. Holmes remained at the college until about 9:00 p.m. and arrived home at 9:30 p.m.

It was not until the next morning at 7:45 a.m., May 1, 1990, that she found the notice in her mailbox. When she arrived at school, she found a second notice in her school mailbox. Thereafter, she submitted a letter dated May 1, 1990, accepting employment.

Under cross-examination, Holmes stated that she could have attended the Board's meeting after class but instead chose to work on a paper which was due in a few weeks . Holmes' mailbox is affixed to her home approximately three feet from her front door. Holmes also stated that when she read the letter, dated April 26, 1990, which informed her that Superintendent Friedland would recommend that her contract not be renewed, she hoped that he would "reconsider" his decision and instead recommend that her contract be renewed for the next school year. Based upon the above I **FIND** the above testimony as **FACT**.

Romanoski did not testify.

Gary Friedland, Superintendent of Schools, testified that on April 30, 1990, the Board voted not to renew the petitioners' employment contracts. Between 9:00 p.m. and 9:30 p.m. he instructed two employees to hand deliver to the petitioners the letters containing the Board's decision. The testimony was undisputed and I **FIND** the above as **FACT.**

Robert Marshall testified on behalf of the Board. On April 30, 1990 at 9:15 p.m. he and another employee, Joe Zuppala left the Board's office to deliver to petitioners, letters given to him by Dr. Friedman. Between 9:30 p.m. and 9:45 p.m., Marshall arrived at Holmes residence. When no one responded to the bell or his knock at the door, Marshall checked the garage. He found no parked vehicles nor did he observe any activity inside the house. He then placed the letter into the mailbox, leaving a portion of the envelope overlapping the top of the box before closing the lid.

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Next, the two Board employees went to Romanoski's residence in Dunellen, arriving between 10:30 p.m. and 10:45 p.m. Marshall rang the doorbell and knocked on the door but received no response. He did observe, however, a TV on inside the house. Thereafter, he inserted the letter addressed to Romanoski, into the mail slot. The testimony was undisputed and straightforward and thus, I **FIND** the above as **FACT**.

DISCUSSION AND CONCLUSION

Counsel for petitioners argues that the statutory requirement that written notice must be made by April 30 is to be strictly construed. *N.J.S.A.* 18A:27-10. Failure to give notice by April 30 shall be deemed as an offer to continue employment for the next academic year. *N.J.S.A.* 18A:27-11. Here, petitioners received notice on May 1, 1990, rather than April 30, 1990, and thus invoked their statutory right to accept continued employment under *N.J.S.A.* 18A:27-12. Counsel also contends that the Board violated the employment contract which provided that the parties "may at any time be terminated by either party giving to the other thirty days notice in writing of intention to terminate the same." (J-1) Accordingly, petitioners are entitled to 30-days pay pursuant to the contract agreement.

In contrast, counsel for respondent argues that petitioners were served with notice on April 30, 1990. If, however, they received the notices instead on May 1, counsel maintains the Board substantially complied with *N.J.S.A.* 18A:27-10..

N.J.S.A. 18A:27-10, provides in pertinent part:

> 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 a least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or
>
> b. A written notice that such employment will not be offered.

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The primary purpose of the statute is to provide teachers with timely notice when they are not going to be reemployed so that they may seek other employment. *Wachstein v. Burlington Cty. Bd. of Ed.*, 1976 *S.L.D.* 928, 931. As such, written notice of a decision by the Board not to offer a contract for the succeeding year must be unambiguous and unconditional. *Burgin v. Avalon Bd. of Ed.*, 1974 *S.L.D.* 396, 401; *Siderio v. Riverside Tp. Bd. of Ed.*, 1975 *S.L.D.* 569, 572.

Thus, the real issue here is whether *N.J.S.A.* 18A:27-10 requires strict adherence or substantial compliance. In *Klein v. Leonia Bd. of Ed.*, 1981 *S.L.D* 1156, adopted, N.J. Comm. of Ed. 1981 *S.L.D* 1168, notice of nonrenewal sent by the Board on April 22, 1980, was not actually received by *Klein*, a nontenure teacher, until May 5, 1980. Similar to the situation in the present case, *Klein* was aware, prior to April 30, 1980, that the Superintendent of Schools would recommend to the Board that his contract not be renewed. *Id.* at 1157. Also, similar to the present situation is the suggestion that *Klein* may have attempted to avoid receipt of the notice. *Id.* at 1160. Despite the Board's attempts to deliver timely notification, the administrative law judge concluded that *Klein* did not receive notice as required by *N.J.S.A.* 18A:27-10.

Other cases decided prior to *Klein* applied the strict compliance approach. In *Roy v. Middle Tp. Bd. of Ed*, 1976 S L D 569, aff'd. State Bd of Ed. 1976 *S.L.D.* 574, the Commissioner concluded that informing the petitioner orally of his nonrenewal prior to the statutory deadline is insufficient.

Also, the Commissioner, in *Armstrong v. East Brunswick Bd. of Ed.*, 1975 *S.L.D.* 112, rev'd, St. Bd. of Ed., for reasons of termination pay, 1975 *S.L.D.* 117, found notice, sent in time but to the wrong address and which was thereafter received by the petitioner after the statutory deadline, in violation of *N.J.S.A.* 18A:27-10.

In contrast, in *Moses v. Newark Bd. of Ed.*, N.J. Comm. of Ed. (Oct. 13, 1981), the Commissioner adopted the hearing examiner's findings that no violation of *N.J.S.A.* 18A:27-10 occurred where petitioner received notification of nonrenewal of employment, dated April 26, 1976, after the statutory deadline. The notice was sent by certified mail, return receipt requested and had been delivered to petitioner's address prior to the April 30 deadline. *Id.* at 9. However, petitioner was not present to accept the letter nor did he respond to postal service notification that it was

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attempting to deliver mail requiring his signature for delivery. *Ibid.* The administrative law judge concluded:

> In the hearing examiner's judgment the Board used standard procedure to deliver petitioner's terminating letter but was frustrated by petitioner's absence from his residence for a protracted period without leaving a forwarding address . . . .
>
> Nor can the Board be faulted on meeting the time constraints of *N.J.S.A.* 18A:27-10 by sending an undeliverable letter by certified mail to petitioner announcing his termination. Service of notice by mail is deemed complete when the letter is deposited in the Post Office, properly addressed, and with the proper amount of postage. (*Id.* at 9 and 10)

The Commissioner again modified its policy of strict adherence to the statutory requirements of *N.J.S.A.* 18A:27-10 in *White-Stevens v. Rumson-Fair Haven Bd. of Ed.*, OAL DKT. NO. EDU 5432-85 (Dec.3, 1986) aff'd by Comm. of Ed. (Jan. 16, 1987) In that case, the Commissioner viewed the Board's failure to provide timely written notice, in light of petitioner's personal knowledge prior to the statutory deadline of his nonrenewal of employment for the following academic year, a mere technical violation of *N.J.S.A* 18A:27-10. *Id.* at 18. The Commissioner further concluded that the board had substantially complied with the statutory provisions:

> Moreover, petitioner was advised in writing . . . on April 26, 1985 that his employment status would be discussed in executive session as he had previously requested.
>
> Petitioner was then advised in writing by the Superintendent on May 1, 1985 that the Board had acted on April 30 to rescind its offer of employment to him. At petitioner's request the Board's reasons for its non-reemployment were given to him in writing by the Superintendent on June 10, 1985 . . . and he was further advised that he was entitled to an informal appearance before the Board regarding its decision. Consequently, the Commissioner finds and determines that the Board had substantially complied with the provisions of *N.J.S.A.* 18A:27-10 and that its action shall not be set aside on these grounds. (*Id.* 18, emphasis added)

Based upon a careful and principled review of the whole of the record I **FIND** that no violation of *N.J.S.A.* 18A:27-10 occurred where petitioners received the notice on May 1, 1990, rather than April 30, 1990. With respect to Holmes she not

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only was aware that her employment would be discussed at the Board meeting, she also was informed in writing that Dr. Friedland would recommend nonrenewal. Indeed, she hoped he would reconsider his decision but nevertheless, sought guidance from her union representative and was prepared to respond to the contemplated adverse action of the Board on April 30, 1990. Finally, the record reflects that Holmes had returned home from her class on April 30, 1990, by 9:30 p.m. The record also reflects that Marshall delivered the letter between 9:30 p.m. and 9:45 p.m. I am persuaded by the Board's argument that Holmes may have deliberately planned not to accept the notice when it was delivered to her home on April 30, 1990, but instead waited until May 1, 1990, to retrieve the letter. Petitioners have the burden of proof by a preponderance of the evidence. Here, the petitioners have not met that burden.

Accordingly, I **CONCLUDE** that if the petitioners received notice of nonrenewal on May 1, 1990, the Board was in substantial compliance with *N.J.S.A.* 18A:27-10. Therefore, petitioners all not entitled to 30 days pay.

ORDER

Based upon the above, it is hereby **ORDERED** that this matter be **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

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July 12, 1991
Date

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged.

7/16/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 18 1991
Date

OFFICE OF ADMINISTRATIVE LAW

tw/e

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APPENDIX

WITNESS LIST

For Petitioner Jo Ann Holmes:
Jo Ann Holmes

For Respondent:
Gary Friedland
Robert Marshall
Joe Zuppala

EXHIBIT LIST

J-1	Stipulation of Fact
R-1	(Not in Evidence)
R-2	(Not in Evidence)

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JO ANN HOLMES AND SHARON ROMANOSKI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

Petitioners except to the initial decision which recommends dismissal of the petition averring that there is nothing in N.J.S.A. 18A:27-10 which speaks to the issue of "substantial compliance." Therefore, they argue that if the board of education does not give notice on or before April 30 of nonrenewal, the nontenured employee may notify the board of acceptance of reemployment pursuant to N.J.S.A. 18A:27-11 and 12 as occurred in the instant matter. More specifically, they urge that the factual circumstances in this matter differ from Moses, supra, and White-Stevens, supra, the cases which the ALJ relied upon to reach her determination that substantial compliance with N.J.S.A. 18A:27-10 is adequate. It is petitioners' position that the ruling in Klein, supra, should be applied to the matter herein and they should receive thirty days' pay.

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The Board's reply urges affirmance of the ALJ's recommended decision but it takes exception to the petitioners' and the ALJ's setting forth as fact that Romanoski did not receive notice by April 30. As to this, the Board avers that Romanoski did not testify at the hearing and the joint stipulation of facts does not contain a stipulation of non-receipt of her termination notice.

Upon review of the initial decision, the Commissioner agrees with the ALJ's findings and conclusions of law denying the award of thirty days' pay to the petitioners. It must be emphasized, however, that the court case which is controlling in this matter was not cited; namely, New Jersey Education Association v. Essex County Educational Services Commission v. Board of Trustees, Teachers' Pension and Annuity Fund, 1984 S.L.D. 420, aff'd State Board 1985 S.L.D. 1976, aff'd New Jersey Superior Court Appellate Division April 30, 1986. That case ruled that so long as notice of nonrenewal is provided by July 1 for contracts containing sixty days' notice, there is no entitlement to sixty days' pay. See also Nancy Nutt v. Newfield Township, letter decision of August 4, 1989, aff'd State Board February 7, 1990. Thus, even granting arguendo that the notice was untimely in this matter, the relief sought by petitioners would be denied, particularly in view of the fact that a thirty-day termination clause is at issue.

Accordingly, the Petition of Appeal is hereby dismissed for the reasons set forth in the initial decision as modified above.

AUGUST 30, 1991

COMMISSIONER OF EDUCATION

DATE OF MAILING - AUGUST 30, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6575-88
AGENCY DKT. NO. 176-6/88

IN THE MATTER OF THE TENURE HEARING OF DENNIS COOKE, SCHOOL DISTRICT OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY

Peter F. Bariso Jr., Esq., for the East Rutherford Board of Education, petitioner

Sheldon Pincus, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: June 25, 1991 Decided: July 1, 1991

BEFORE ELINOR R. REINER, ALJ:

PROCEDURAL HISTORY

On or about June 14, 1988, petitioner, the Board of Education of the School District of the Borough of East Rutherford, certified the charge of conduct unbecoming a teacher against respondent, Dennis Cooke. Respondent filed an answer on August 31, 1988, denying the charge and contending that it should be dismissed. The matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law (OAL) on September 7, 1988, for hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

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A prehearing conference was scheduled for October 6, 1988, and was adjourned at the request of counsel for petitioner. It was rescheduled to October 18, 1988, and was adjourned at counsel for respondent's request, pending a motion to place the matter on the inactive list. By motion dated November 7, 1988, counsel for respondent requested that the matter be placed on the inactive list pending disposition of the criminal charges against respondent. By letter dated November 22, 1988, counsel for petitioner indicated that he did not oppose respondent's application.

On December 23, 1988, the undersigned judge ordered the matter placed on the inactive list for a period of six months. On June 22, 1989, the undersigned was advised by the Clerk of the OAL that the six-month period had run and to determine the status of the case. A prehearing conference was scheduled for October 2, 1989, and was adjourned at the request of counsel for respondent. Conferences were held regarding the status of the criminal action and possible settlement of this matter. By letter dated June 29, 1990, counsel for petitioner advised the undersigned judge that respondent's criminal proceedings had been concluded on June 26, 1990, when he was accepted into the Pretrial Intervention Program supervised by Bergen County. A prehearing conference was held on August 6, 1990, during which the issues were isolated, and a hearing was scheduled and thereafter held on January 28, 29, 30, and February 4 and 6, 1991, at the OAL. Witnesses who testified and exhibits marked into evidence at the time of the hearing are listed in the appendix attached hereto. The record closed on June 25, 1991, after the last submission of documents from counsel.

ISSUE

At issue in the instant case is whether the charges as certified to the Commissioner constitute conduct unbecoming a teacher pursuant to *N.J.S.A.* 18A:6-10. Further, if the charges are sustained, at issue is whether the conduct warrants dismissal, reduction in salary, or other action.

Specifically, the charges allege that Cooke committed conduct unbecoming a staff member by engaging in improper sexual contact with 12 students in the East Rutherford School District. In the answer filed with the Commissioner and at hearing, Cooke denied engaging in improper sexual contact with any of the

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students. At hearing, the Board dismissed the charges pertaining to six of the 12 students. It proceeded with proofs only respecting students M.M., D.S., A.G., M.E., T.V., and D.P.

FINDINGS OF FACT

It is clear that the Board bears the burden of proving that Cooke committed improper sexual contact by establishing the truth of the charges by a preponderance of the believable evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962). In support of the charges, the Board relied on the testimony of student witnesses M.M., D.S., A.G., and M.E. In addition, support for their testimony was established by Janice Cassella, home economics teacher, Leslie Charlesworth Jr., then director of student services for the District, D.S.'s father, and M.M.'s mother.

In opposition to the charges, respondent relied essentially on character witnesses (Janice Cassella, Leslie Charlesworth Jr., Carl Castlegrant, John Franken, Annette Bortone, and Karen Gregoric). In addition, he denied the allegations of improper sexual contact in regard to the students, admitting only that there may have been physical contact within the course of functioning in shop class or activities class.

More specifically, and in order to present a true picture, he denied using the dust brush on students without permission; brushing across M.M.'s breast; touching M.M.'s buttocks; pulling out M.M.'s shirt; touching T.V.'s buttocks; making remarks regarding M.M.'s legs; reaching between M.M.'s legs and touching her vagina; touching T.V.; hitting M.M. in the buttocks with a stick; touching A.G.'s buttocks and seeking to touch her vagina; placing a stick between A.G.'s legs; touching M.E. with a hockey stick for purposes of sexual gratification; or placing his hand on D.P.'s buttocks or touching her buttocks with a ruler or placing the stick between her legs and running it up the inside of her thigh. He also denied that any of the students ever indicated that she felt uncomfortable with how he touched her or told him to "stop it."

Having reviewed the testimony and evidence in this matter, I make the following findings of fact:

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1. In April 1988, the seventh-grade enrichment class at Faust Intermediate School in East Rutherford, New Jersey, was shown a film entitled "DeGrassi Jr. High," a PBS production. The segment shown by Janice Cassella, a home economics teacher, to the class was entitled, "He's Back." The substance of the segment dealt with improper conduct by a substitute teacher towards a female student in a junior high school that initially went unreported by the students and then subsequently was reported by other students.

2. Following the film, Cassella held a general discussion with her class concerning the reporting of any improper touching. During this general discussion, three students requested to see Cassella after class and, with difficulty, indicated that "what happened in the show is happening to us." The students who discussed instances of improper touching by a teacher in their school were M.M., A.G., and N.O. (D.S., M.E., T.V., and D.P. were not in the class.) Although the students had difficulty in expressing themselves to Cassella, they were able to point out areas of their bodies where the improper touching occurred, which included under the armpits next to their breasts and their buttocks. While walking down the hall, they gave Cassella the name of the teacher involved -- Dennis Cooke. Cassella advised them to report it to the administration and she followed up with the administration to see whether the students had reported their allegations.

3. Cassella, employed by petitioner for 15 years, has known and had occasion to work with Cooke. She indicated that Cooke has had a good reputation for truthfulness and veracity, and she supplied a character letter to help him gain acceptance into the PTI program. She indicated that she had not learned anything specifically since the incident regarding his truth and veracity, but has heard comments that could effect her opinion. She is now skeptical and has no reason not to believe the students.

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4. Cassella opined, as a teacher of these students, that there was nothing about their behavior which would lead her to believe they would seek attention or fabricate their allegations.

5. M.M., A.G., and N.O., in accordance with Cassella's instructions, went directly to the administration to report their allegations. The students initially spoke to the principal, Edward Bednarz, who called Les Charlesworth, now Superintendent of Schools and at that time the director of student services for the District, responsible for curriculum and guidance of the school, to speak to the girls regarding some disturbing information given by them to him.

6. M.M. indicated that the touching occurred in the back and main rooms of the shop. A.G. was more vague but said that respondent touched her also. N.O. said that she saw the touching but that it did not happen to her.

7. During their discussions with Charlesworth, M.M. and A.G. identified the teacher who touched them wrongfully as Dennis Cooke. M.M. and A.G. then demonstrated the improper touching which was inflicted upon them by Cooke. The students demonstrated touching in the areas between their legs (inner thighs) and on their chests. M.M. said something about being touched in the center of her chest and pulled her blouse to demonstrate this. However, the students were very reluctant to pinpoint and touch the areas in front of Charlesworth.

8. Charlesworth was skeptical, and he requested the students write out their statements regarding their allegations against Cooke. Although N.O. did not set forth any allegations of improper touching, her statement reflects witnessing Cooke touching M.M. in an improper manner. M.M. wrote down as much as she could recall at the time in her statement.

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9. Charlesworth opined that it is typical of seventh- and eighth-grade students to seek attention (and knew this to be true of A.G.), and he stated that the students involved in the allegations against Cooke were typical seventh and eighth graders. However, Charlesworth opined, as a guidance counselor and teacher in the District for 23 years, that there was no basis upon which he could form an opinion that the allegations of these students were fabricated or less than credible.

10. Charlesworth and Bednarz reported the incident to the Superintendent and to the Division of Youth and Family Services (DYFS).

11. Later that same evening, M.M., A.G., D.S., and two other female students were returning home from a softball game with D.S.'s father. While passing the Faust School, the students noted a light on in the building and a statement was made regarding the "prostitute" in the classroom. Mr. S. immediately questioned the students regarding a "prostitute" in the school. The girls giggled and revealed that what the student really meant was "prosecutor." Mr. S. then asked why a prosecutor would be at the school and he was informed by the girls that there was a problem involving Cooke. Mr. S. dropped off the other students at their respective houses and returned home with his daughter.

12. Mr. S. was discussing the events involving Cooke with his daughter when they were interrupted by an investigator from DYFS and Investigator Barbado from the Bergen County Prosecutor's Office. Mr. S. discussed the events involving Cooke with his daughter, who indicated that Cooke had put a hockey stick between her legs and touched her buttocks with a ruler. She also indicated that Cooke had jokingly placed his hands in front of her breasts, gesturing with his hands, palms toward her.

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13. Mr. S. was concerned with these allegations and thereupon contacted M.M.'s mother. Mrs. M. was very disturbed with the allegations involving Cooke and informed Mr. S. that several students' names had been given to an investigator at Faust School. D.S.'s name was on the list.

14. Mr. S. knew that A.G., M.E., and M.M. were his daughter's classmates. His family did not socialize with any of the three families.

15. Mr. S. considered this matter to be "a big deal" and, after speaking to his daughter, concluded that she was telling the truth.

16. Mrs. M. first became aware that her daughter was touched by Cooke in October or November of 1987. M.M. related an initial incident to her mother which involved Cooke skimming her breasts with his hand. M.M. wanted to know if it was an accident or intentional. She also related a second incident in which Cooke touched her buttocks with his hand. M.M. also told her mother about an incident that occurred in the small outer room attached to the shop class. She told her mother that Cooke had come up behind her and placed his hand between her buttocks and through her legs. He then slid his hand forward and made contact with her vagina. Although Mrs. M. was extremely upset by this allegation, she did not report the incident because M.M cried, begged her not to, claimed she would be embarrassed, and threatened to run away from home if she did. When a teacher had been abusive to Mrs. M.'s older daughter, she contacted the administration. Since her older daughter had run away from home, her fear regarding M.M.'s threat if she reported Cooke was very real. Mrs. M. believed her daughter's allegations.

17. Mrs. M. was first informed by her daughter that she had reported Cooke to the administration the night she returned home after seeing the movie in Cassella's class. M.M. told her mother that she and two other girls from her class had come forward to speak to

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Cassella. Mrs. M. finally recalled that, later that evening, Mr. S. had called her and discussed an incident which occurred in his car as they passed Faust School that evening.

18. D.S. and M.M. are friendly but do not "hang out" together. D.S. and M.M. were best friends in seventh grade. D.S. and A.G. are not close friends. M.M. and A.G. are friends, but do not "hang out" together. A.G. was once at M.M.'s house. M.M. and N.O. are classroom acquaintances. M.E. and A.G. were not close friends. M.E. and D.S. are not good friends. A.G. was "pretty close" to D.S. in seventh grade. A.G. is not good friends with T.V.

19. M.M. is a ninth-grade student at Hackensack Christian School. She was a ninth-grade student the prior year at Becton Regional High School. She attended Faust School from the fifth to the eighth grades. She had Cooke as a teacher for fifth, sixth, and seventh grades.

20. The first incident concerning M M. was in November 1987, when she was in seventh grade. While M.M. was standing at the sink in the shop class, Cooke reached across the front of her chest to get a paper towel, skimming her breast with the back of his hand.

21. The second incident occurred approximately one week later, when M.M. was standing by the door in the shop class, at which time Cooke pulled the portion of her shirt in the middle of her chest out toward him.

22. During November 1987, on approximately four occasions, Cooke walked past M.M. and placed the palm of his hand on her buttocks. Specifically, he rubbed the palm of his hand on her buttocks, leaving his hand there for approximately two seconds. When M.M. looked at Cooke, he turned and looked at her with a blank, innocent stare.

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23. On the fourth occasion, in shop class, M.M. was questioning Cooke concerning the legs on her table (the table she was working on). Cooke looked up and down M.M.'s legs and stated, "They're fine."

24. On the fifth occasion, in November 1987, Cooke struck M.M. just below her buttocks with a brush while she was walking by him. It did not hurt her.

25. The sixth incident occurred in November 1987, when Cooke sent M.M. into the back room of the shop to obtain some wood for her project. M.M. bent over to pick up a piece of wood when Cooke appeared behind her and placed his hand between her buttocks, slid it forward, and made contact with her vagina. M.M. raised her hand to hit him and cursed at him. Cooke's response was, "I am sorry," and M.M. replied, "Yeah, right," to which Cooke replied, "Really."

26. The seventh occasion was during activities class, when Cooke touched M.M. on the buttocks with a plastic hockey stick.

27. During the same time frame, M.M. saw Cooke place the palm of his hand on T.V.'s buttocks during shop class. T.V. told M.M. that Cooke had touched her.

28. During an activities class in gym, while she was waiting, Cooke hit M.M. on the buttocks with the curved end of the hockey stick.

29. During another activities class, although unaware of the exact date, M.M. observed Cooke place a hockey stick between A.G.'s legs and lift it up. A.G. was not playing at the time. The stick did not touch her vagina because she jumped over it; it touched her inner thigh.

30. M.M. did not report any of these incidents to school officials until after seeing the movie in Cassella's class.

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31. M.M. was never disappointed with any grades she received from Cooke, nor did she ever have a problem with Cooke prior to these incidents.

32. M.M. was not sure of the order of the events regarding Cooke, the month in which she saw the movie, who sat next to her in the film, where she spoke to A.G., or if she spoke to the other girls regarding Cooke alone or separately.

33. M.E. is presently a sophomore at Becton Regional High School. She attended Faust School for grades five, seven, and eight and had Cooke as a teacher while in seventh grade. M.E. had Cooke as a teacher for shop in fifth grade and had no problem with him.

34. During activities class at Faust School in the winter or spring of 1988, while M.E. was waiting for a play, Cooke took a plastic hockey stick and ran the stick up the seam of her pants and into her buttocks. Melanie turned around instantly and stated loudly, "That was the most disgusting thing that anyone has ever done to me; never do it again." Cooke had no expression on his face and did not respond. M.E. walked off the gym floor and did her homework. M.E. did not report the incident to any administrators because she felt that she had handled it herself and it was over. M.E. emphasized that Cooke's actions were the most disgusting thing anyone had done to her in her life. M.E. was contacted by the principal's office and cooperated with the investigation against Cooke.

35. M.E. observed Cooke place his hockey stick between D.S.'s legs (the knees and upper-thigh area) during an activities class. D.S. immediately left the floor and sat next to M.E. on the bleachers after the incident occurred.

36. M.E. informed Robert D'Andrea, another teacher at Faust School and currently her basketball coach at Becton High School, that Cooke had placed a hockey stick between her legs and should not

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be a teacher. She told him it was no big deal because she had handled it herself. Mr. D'Andrea considers M.E. a "good kid," one of his better players and students, and believes M.E.'s accusations against Cooke despite the fact that he submitted a letter to the Pretrial Intervention Board on Cooke's behalf.

37. A.G. is a tenth-grade student at Becton Regional High School. She attended Faust School in grades five through eight. She had Cooke as a shop and activities teacher in sixth and seventh grades.

38. Prior to the two incidents, A.G. was not disciplined by Cooke, nor did she have any problems with him.

39. In November 1987, while a student at Faust School, A.G. was touched in an improper manner by Cooke. Cooke took a dust brush and went along A.G.'s buttocks from one side to the other with the brush. A.G. moved away and looked at Cooke. He had no expression on his face and said nothing.

40. During an activities class, while playing hockey, Cooke took a plastic hockey stick and placed it between A.G.'s legs, gradually lifting the stick up her inner thigh until A.G. jumped out of the way. A.G. observed that Cooke had no expression on his face.

41. A.G. spoke to D.S. and M.M. about the incidents prior to the film and they told her what had happened to them. D.S. mentioned being touched by a hockey stick.

42. A.G. did not report these incidents prior to the enrichment class with Cassella in April 1988 because she was scared.

43. A.G.'s statement is not entirely accurate as written. It is not specific and was written when she was afraid.

44. D.S. is currently the sophomore class president at Becton Regional High School and is a member of the student council. She plays on

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the softball team and is a cheerleader. She attended Faust School for fifth through eighth grades. Cooke was her shop teacher in grades five through seven. In seventh grade, he was her homeroom and activities teacher.

45. During the seventh grade at Faust, D.S. encountered several incidents of improper conduct with Cooke.

46. The first incident occurred in shop class when Cooke raised his hands, which were covered with glue, palms forward in a gesturing manner as if he were placing the palms of his hands on D.S.'s breasts. His hands were four inches from her chest. D.S. walked away afraid. There was no expression on Cooke's face.

47. During that same school year, Cooke slapped D.S. on her buttocks with a 12-inch wooden ruler. He walked away; there was no expression on his face.

48. During activities class, Cooke tapped D.S. on the buttocks with a plastic hockey stick. Cooke showed no emotion and said nothing.

49. During a subsequent activities class, while play was out-of-bounds, Cooke took a plastic hockey stick, came behind D.S., placed it between her legs, and, as it reached her upper thigh, she turned and said, "Stop it." Cooke walked away. D.S. then walked off the gym floor to the bleachers and sat next to M.E., who was seated in the bleachers. D.S. believed that M.E. had seen the event and M.E. confirmed to D.S. that she had, in fact, observed the event.

50. D.S. never told any adult about the incident until the day of the movie, when she learned that the others had told Cassella that they were touched improperly. She told her father after the softball game.

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51. Other than the incidents outlined by her, D.S. never had any problem with Cooke. She was not reprimanded or disciplined by him or upset with any grade he gave her.

52. D.S. did not tell any adults of the incidents earlier because she was 12 years old at the time and was afraid and embarrassed that these events had occurred. She told M.E. and M.M. because it was easier to talk to someone her own age, and she believed that they were also going through it. D.S. recalled that M.M. told her that Cooke had touched "all her private parts - her breasts, vagina, and buttocks." She believed that she was told this prior to the movie but was not sure when.

53. D.S. does not recall a conversation with M.E. about being touched by Cooke other than the conversation in the bleachers.

54. D.S. also observed Cooke hit D.P. on the buttocks with a hockey stick in activities class. She did not discuss this incident with D.P.

55. A clique among the students involved in the allegations against Cooke did not exist.

56. Cooke did not play hockey in activities class.

57. Charlesworth has known Cooke for approximately 20 years. Cooke was Charlesworth's best man when Charlesworth was married. Charlesworth wrote a letter of recommendation at Cooke's request so that he could enter a Pretrial Intervention Program. Charlesworth believed Cooke under oath. However, since the time that Charlesworth wrote the letter, he has become skeptical about Cooke's truth and veracity regarding these incidents. The incidents have brought forth certain doubts and he would be skeptical if respondent denied each and every charge.

58. Cooke admitted to Charlesworth that he failed the polygraph test administered by his expert, the former polygraphist for the New

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Jersey State Police, concerning the allegations presented by the students in this matter.

59. Sergeant Carl Castlegrant has known Cooke for 30 years and was a staunch supporter of Cooke's character, truth, and veracity. He would believe Cooke under oath.

60. John Franken, a police officer in Hackensack for 20 years, has been acquainted with respondent for 20 years. His wife, a former teacher, taught with Cooke. He met him at social functions and believed him to be forthright. He has a reputation for honesty and integrity. Franken would believe him under oath.

61. Annette Bortone has known Cooke for 30 years. They attended high school together. She is currently vice-president of the Lyndhurst Board of Education, and she indicated that Cooke has a very good reputation for honesty, integrity, veracity, and truthfulness. She has never heard negative remarks about him and would believe him under oath. Bortone was a member of the Lyndhurst Board of Education and voted to dismiss or suspend Cooke as the girls' softball coach after the incident giving rise to this tenure hearing.

62. The indictment in the Superior Court involved the allegation by M.M. regarding Cooke touching her in the back room of the shop. Cooke chose to enter the Pretrial Intervention Program rather than stand trial. He accepted PTI because there would be no trial, the charge would be dismissed, there would be no presumption of guilt, and he could apply for expungement of the charge. He completed six months' probation and the indictment was dismissed on January 2, 1991. The numerous letters submitted by Cooke's fellow teachers to the PTI Board at the request of the president of the East Rutherford Education Association, Paul Danielle, and Charlesworth were essentially submitted upon Cooke's request.

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63. Cooke admitted being in the back room with M.M. during the seventh-grade shop class on at least three or four occasions.

64. Cooke was the type of teacher to joke with his students during the course of the class and his students liked him. Cooke would let them listen to music in class and the students enjoyed him as a teacher.

65. Karen Mary Gregoric, a freshman at East Stroudsburg University, attended Lyndhurst High School and knew respondent. He was the softball coach for junior varsity while she was a freshman and sophomore at the high school. No student complained of improper touching by Cooke or "coming on" to team members in a sexual manner. There were no seventh graders on the team, and Cooke was not her coach after 1986.

66. Robert Michael D'Andrea, employed by the District for 20 years, is currently a seventh- and eighth-grade social studies teacher. He has served as a coach and is presently the girls' basketball coach. In the spring of 1988, he spoke to Mr. S. regarding Cooke. D'Andrea, questioned about Cooke, responded that he was a "regular guy" and that Mr. S. would like him. Mr. S. told D'Andrea that he was upset that he found out about the incident with Cooke when an investigator came to his house. Mr. S. indicated that he had asked his daughter why she had not told him and she said, "I didn't think it was much or I didn't think anything of it."

67. Cooke is a resident of Lyndhurst. He is 46 years old and has been married for 21 years. He has two children, ages 21 and 18, who attend college. He is a graduate of Montclair State College and received a B.A. in Industrial Arts in 1966. He is certified in Industrial Arts, grades K through 12. He has been employed for 17 years by petitioner. Prior to this, he taught at Kearny High School for one year, Lyndhurst High School for one year, and Paramus Catholic for three years.

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68. He coached for other school districts as a wrestling coach and was a junior varsity girls' softball coach for three years at Lyndhurst High School. Lyndhurst High School learned of the instant situation because he told them about it.

69. Cooke made physical contact with students when he demonstrated the use and operation of machines. He moved students to a proper position and guided their hands while working on a wood lathe. He sometimes brushed past or bumped into a student while circulating around the shop. He admitted that he occasionally made physical contact with a student with his hockey stick if he was going after a puck, incidental to the game itself. He admitted that if he refereed and students started "chitchatting" with their friends, he would walk over and give them a tap with the stick on the buttocks and say, "Get back in the game." He admitted touching M.E., D.S., and D.P. with a hockey stick in this fashion.

70. Referring to the incident with D.S., Cooke recalled showing her his hands full of glue with his palms outward, a few inches from her. She asked about her project and he kind of said, "Later, I got to go wash my hands."

DISCUSSION

There is no doubt that a determination in the instant matter must rest in the final analysis on a credibility determination as to whether the students who testified are to be believed or whether respondent's contention that he did not engage in improper sexual contact with any of the students is to be accepted.

Respondent would have this tribunal find that the testimony of the students cannot be accepted. Respondent points out that the testimony of minors must be examined with great care. Relying heavily on the fact that, prior to this case, he was an exemplary and highly regarded member of the East Rutherford teaching staff, respondent points out that in his service as a teacher and a coach, there was never a suggestion made that he had improperly touched any female student.

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Respondent asserts that it is significant that each of the four students who testified against him had previously had him as their teacher in grades five and six, yet none of them could suggest having had a single problem, let alone one of an alleged sexual advance, during that period of time. Respondent contends that not until M.M. began believing that things were happening to her and began influencing her close friends' perceptions that their opinions of Cooke changed. Respondent submits that the conclusion to be drawn from M.M.'s testimony is that she suffers from "innocent egocentrism."

Respondent alleges that the most damaging blow came from the fact that Mrs. M. took no action to report her daughter's allegations to the school administration, obviously for no other reason than the fact that she did not believe her daughter. As respondent alleges, perhaps her mother understood that her daughter was prone "to turn innocent facts into fantasy."

In a further effort to discredit M.M., respondent points to certain inconsistencies in the testimony. Similarly, respondent alleges that the allegations asserted by A.G., M.E., and D.S. are against the weight of the evidence. More particularly, respndent contends that when one considers the students' admissions, lack of recollections, inconsistent statements, and their friendships, coupled with Cooke's credibility, the charges should be dismissed. Respondent further alleges that the charges in regard to T.V. and D.P. should be dismissed inasmuch as neither testified at the hearing.

On the other hand, petitioner contends that respondent has failed to set forth any factual basis which supports his theory that the Board's witnesses completely fabricated their testimony. In fact, the only explanation tendered by respondent concerning the students' testimony is that the claims asserted by M.M. "are a product of fantasy and innocent egocentrism."

Moreover, petitioner asserts that when the testimony of the witnesses is examined, in light of the standard to be applied in considering the testimony of minors, it is undisputed that the series of incidents involving improper touching has been established by a fair preponderance of the evidence. In addition, in regard to Mrs. M.'s inaction, petitioner submits that her testimony substantiates her course of action following her discussions with M.M.

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Focusing on the inconsistencies between prior statements and the students' testimony, petitioner points out that the students' prior written statements were not taken under "controlled circumstances" and that minor inconsistencies regarding statements are not sufficient to discredit the students' entire testimony. In fact, petitioner alleges that certain statements which appeared in the written statements could have been testified to by the student witnesses if they were in fact trying to fabricate their testimony against Mr. Cooke.

Petitioner notes that inconsistencies in testimony are common to all people and especially so with the testimony of child witnesses. Moreover, petitioner asserts that Cooke has failed to supply one iota of evidence to attribute bias on behalf of any of the Board's witnesses. No basis was presented to conclude that the students had formed a clan or conspiracy to have Cooke removed as a teacher.

Moreover, petitioner points out that credibility is the central issue in this case and Cooke has failed miserably. He could not even pass a lie-detector test administered by his own expert. In fact, Cooke chose to enter a Pretrial Intervention Program rather than test his credibility against M.M. concerning a single incident of sexual assault which occurred in the back room of the shop class. Petitioner points out that respondent failed to call a single student and/or parent from his 17 years of teaching in the District on his behalf during the hearing.

Having considered the arguments of counsel, I must agree with the position espoused by petitioner. It is clear that "testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." *In re Perrone*, 5 *N.J.* 514, 522 (1950). It is to be noted that when determining the credibility of a pupil witness's testimony, the judge must balance the witness's believability against any possible biases which he or she holds.

In Palmer v. Bd. of Ed. of Audubon, 1939-56 *S.L.D.* 183, 188, the Commissioner of Education recognized that "the testimony of children . . . against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it." This was echoed in *In the Matter of the Tenure Hearing of Ronald E. Roemmelt*, OAL DKT.

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EDU 4722-86 (March 9, 1987) at 16, where the judge, citing *School District of Red Bank v. Williams,* 3 *N.J.A.R.* 237, 244 (1981) and cases cited therein, stated that the "testimony of child witnesses must be viewed with extreme caution, and . . . in some instances it may be dangerous to use such testimony against a teacher."

In *Roemmelt*, the witnesses were 11 and 12 years old and as such the judge "made a special effort to pay close attention to their credibility, taking into account their ages and whatever biases they might have in the matter." *Roemmelt* at 16. This is not to say that the pupils' testimony should be suspect, but merely to point out that it should be accepted with the knowledge that the pupil may possibly harbor some ill feelings toward the teacher which might result in biased testimony. *See also, In the Matter of the Tenure Hearing of Barry Deetz, School District of the Village of Ridgewood*, 1984 *S.L.D.* 1923, aff'd (N.J. App. Div., May 10, 1985, A-1264-84T5) (unreported), certif. den. 101 *N.J.* 321 (1985), wherein the Board, dealing with the testimony of teenaged students, said:

> Although we recognize that corroboration of student testimony is not required, it has long been established that student testimony must be examined with great caution. *See, e.g., In the Matter of the Tenure Hearing of Portia Williams,* decided by the Commissioner August 27, 1981, *aff'd* State Board March 24, 1982, *aff'd* Docket No. A-4036-81T3 (App. Div., Dec. 15, 1982). While this stricture generally has been applied where the students were under ten years old, *see, Portia Williams, supra,* at 8, the same caution has been used in evaluating the testimony of teenagers. *See, In the Matter of the Tenure Hearing of Nathan James Michaels,* decided by the Commissioner January 30, 1984, *aff'd* State Board September 5, 1984. [1984 *S.L.D.* at 1926.]

As is clear from the above, a pupil's testimony, although suspect, should not be dismissed unless there is good reason to believe that the testimony is biased.

In the instant matter, I have paid close attention to the students' credibility, taking into account their ages and whatever biases they may have in this matter. Having done so, I am compelled to agree with petitioner. The students were perfectly competent and particularly convincing in terms of credibility. To begin with, I note that the students here were not, as in *Roemmelt,* 11 or 12 years old but were approximately 14 or 15 years old. Thus, the potential swaying of such students seems less likely. They understood what they were saying and the ramifications

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thereof. There was nothing in the record to suggest that they could not distinguish right from wrong or, more to the point, the reality of the situation.

Against this backdrop, I have considered other factors which support the students' credibility. Essentially, I agree with petitioner's credibility arguments:

1. The students are not close friends. It is clear from their testimony that the students were classmates. Although some students were friends with some of the other students, not all of the students were friends. In fact, I cannot conclude that the students who testified constituted a clique or group of friends.

2. The students complained about similar problems with Cooke. A great deal of the testimony focused on the fact that Cooke had touched a student's buttocks with his hand in shop class and also used a hockey stick in order to go between a student's legs in a seeming effort to make contact with her vagina. There may be slight differences in the manner in which the students indicated what occurred but the basic thrust of the allegations remained consistent.

3. The testimony of the students was credible and worthy of belief. They testified from no other motivation other than the fact that they wanted to come here and testify to what they believed had occurred. Their testimony, quite simply, had the ring of truth. Enough of the contact was observed by other students as to lend credibility to the statements of those students who claimed they were touched.

4. No real reason exists not to believe the students. Although respondent contends that M.M. was suffering from "innocent egocentrism" and that the other students were compelled to follow M.M.'s lead, there is no evidence to suggest that M.M. was suffering from this. In fact, I heard no testimony to substantiate such a "disease." It is, in fact, the first time that I have ever heard it

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alleged that seventh graders are prone "to turn innocent facts into fantasy."

5. In addition, just because there were inconsistencies in the statements of the witnesses, particularly concerning the dates of the viewing of the film and the incidents and in regard to the fact that certain written statements did not set forth all of the allegations presented at the hearing, does not mean that the substance of the allegations has been fabricated. "There are personal differences in an ability to recall, length of time needed for recall, impressionability, imagination and ability to discriminate in processing and understanding auditory and visual observations." *See, In the Matter of the Tenure Hearing of Richard Wolf,* OAL DKT. EDU 6758-86 (May 15, 1987), rev'd on procedural grounds (N.J. App. Div., March 14, 1989, A-244-87) (unreported), at 5. Moreover, it must be observed that the written statements were not written under ideal or controlled conditions sufficient to ensure their reliability.

6. It is clear that Mrs. M. took no action to report her daughter's allegation to the school administration not because she did not believe her daughter but, rather, out of a concern that her daughter would be angered and embarrassed by her action.

7. I was not impressed by Cooke's testimony. While it is true that there had not been until this seventh grade an iota of concern raised that respondent had made any form of sexual advance towards a female student, I was not persuaded by Cooke's denial of the charges. He admitted touching students from time to time with a hockey stick or brushing up against them in shop class or touching students in order to help them with a project. It seems to this judge that even touching students with a hockey stick, under the circumstances as described by Mr. Cooke, would be inappropriate. Cooke's denial simply did not seem plausible or worthy of belief. Moreover, it strikes this judge that his "blank expression" just as easily can be construed to mean that he wished

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to take no responsibility for his actions and does not prove that he failed to take the action complained of by the students.

8. I am compelled at this juncture to address the question of the polygraph evidence. I have found as fact that Cooke told Charlesworth that he had failed the lie-detector test. Although this statement is admissible, I have given it no weight. The statement does nothing more than demonstrate that Cooke said he had failed the test. It does not serve to substantiate the reliability of the polygraph test administered to Cooke sufficient to prove that he, in fact, failed a valid polygraph test. That being so, I need not reach the question of admissibility of the results of the test in this case.

9. The testimony in regard to T.V. and D.P. is insufficient to prove sexual assault by a preponderance of the believable evidence. More particularly, in regard to T.V., M.M. testified that she observed Cooke place the palm of his hand on T.V.'s buttocks during shop class and that T.V. told her that Cooke had touched her. In regard to D.P., D.S. testified that she observed Cooke hit D.P. on the buttocks with a hockey stick in activities class. Cooke admitted touching D.P. with a hockey stick on the buttocks. The above statements were credible and worthy of belief. Accepted, they substantiate improper touching by Cooke and not that he touched the students in a sexual manner.

CONCLUSIONS OF LAW

Given the credibility determinations made here, I make the following conclusions of law:

1. Dennis Cooke's actions against M.M. constitute sexual contact and improper touching of a minor.

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2. Dennis Cooke's actions against M.E. constitute sexual contact and improper touching of a minor.

3. Dennis Cooke's actions against A.G. constitute sexual contact and improper touching of a minor.

4. Dennis Cooke's actions against D.S. constitute sexual contact and improper touching of a minor.

5. Dennis Cooke's actions against T.V. constitute improper touching of a minor.

6. Dennis Cooke's actions against D.P. constitute improper touching of a minor.

PENALTY

Next to be addressed is the appropriate penalty. Respondent asserts that the charges should be dismissed and that he should be reinstated to his tenured position. In support, respondent cites *In re Tenure Hearing of Ziobro*, 1983 *S.L.D.* 973 and *In re Tenure Hearing of McClelland*, 1983 *S.L.D.* 225. Respondent asserts that he did nothing lecherous, vicious, or cruel. Rather, he was a 17-year veteran staff member at the time these incidents arose. A review of his personnel file demonstrates that he was a highly regarded asset of the school system and one whose expertise and dedication should not be lightly discarded. He is a dedicated family man whose spouse has stuck by his side throughout these proceedings. According to respondent, he has forthrightly acknowledged an error in judgment about tapping students with a hockey stick in activities class.

Indeed, petitioner does not dispute that Cooke was a 17-year veteran staff member with an exemplary record at the time these incidents arose. However, according to petitioner, Cooke's record should be of no concern to the court due to the egregious, sickening, and criminal nature of the improper-touching incidents established by the Board through the student witnesses.

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I have considered the penalty to be imposed and must agree with the result sought by petitioner. In support, I note that the Commissioner of Education had the opportunity to consider in *In the Matter of the Tenure Hearing of Richard Wolf*, 1987 *S.L.D.* ___ (July 1, 1987), charges of unbecoming conduct against the respondent, a tenured elementary teacher, for alleged improper touching of female students, ridicule of students, and threats to students for reporting such alleged conduct. The Commissioner directed that the respondent be removed from his position as a tenured teaching staff member. In reaching his determination, the Commissioner held:

> The Commissioner, though, does question the ALJ's characterizing of respondent's touching of the girls as being "without prurient or lascivious intent" and instead characterizing the incidents as subjecting them "to embarrassment" and "hostility rather than fondness." (Initial Decision, at page 15.) The Commissioner finds it unnecessary, however, to determine whether respondent's motives were governed by one or the other or both. He relies instead upon his clear perception from the record before him that such actions did indeed occur and were entirely inappropriate. *See, In the Matter of the Tenure Hearing of George McClelland, supra,* citing *In the Matter of the Tenure Hearing of Frederick L. Ostergen, School District of Franklin Township,* 1966 *S.L.D.* 185 as follows:
>
> > It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty. *Wolf* at 38, citing *Ostergen* at 187.

The Commissioner, in response to the respondent's argument that *In the Matter of the Tenure Hearing of George McClelland, School District of Washington Township, Mercer County,* OAL DKT. EDU 5284-82 (February 10, 1983), reversed by the Commissioner (March 25, 1983), aff'd by the State Board of Education (July 6, 1983), aff'd (N.J. App. Div., July 20, 1984, A-152-83T2) (unreported), was distinguishable from the matter then before him (Wolf) because therein the respondent was dismissed for insubordination, not for improper touching, found such argument to be without merit. The Commissioner then warned:

> The Commissioner wishes there to be no doubt whatsoever that the *McClelland* case stands for the proposition as stated in many other similar cases, that improper touching of students will not be tolerated. (*Wolf* at 38-39.)

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The Commissioner recounted that McClelland was found to be guilty of conduct unbecoming a teaching staff member and of insubordination. The Commissioner stated in *McClelland*:

> Further, the Commissioner has difficulty with the concept of the "father figure" advanced under the present circumstances. Surely each child, boy or girl, should be treated with the warmth and friendliness to be exercised by any good teacher without engaging in questionable bodily contact. The Commissioner is fully cognizant that good teachers often use a quick hug or a pat on the head as a tactile reinforcement of a healthy relationship; always, however, in full cognizance of age, maturity and sex of the recipient. In the Commissioner's view, the exercise of judgment and restraint is an essential ingredient to successful teaching. Respondent's proclivities herein far exceed the bounds of good judgment and restraint. The Commissioner so holds.
>
> The Commissioner finds nothing in the record by way of explanation of respondent's philosophy to include the need for him to have his back scratched by female pupils. Respondent admitted that on frequent occasions he scratched pupils' backs and the pupils scratched his. The Commissioner finds this behavior of respondent, along with other questionable physical contact, to constitute unbecoming conduct. Such conduct, particularly in light of his having been advised and then ordered by his administrator to cease and desist, constitutes insubordination. *McClelland* at 245-6.

Thus, in *Wolf*, the Commissioner determined that:

> based not only upon the bra-snapping incidents alone, but also for the additional reasons set forth in the initial decision, the Commissioner finds and determines, in accord with *McClelland, supra; 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) (unfitness shown by a series of incidents); and *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967) (unfitness shown by a single incident) that respondent herein is guilty of conduct unbecoming a teaching staff member warranting his dismissal. [*Wolf* at 39.]

It is to be noted that *Wolf* was reversed and remanded by the Appellate Division. The Appellate Court reversed on procedural grounds. More particularly, exclusion of petitioner from the courtroom during student witnesses' testimony was held to bear a prejudicial effect on petitioner's procedural rights to confront witnesses and confer with counsel.

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I am compelled to point out, however, that the Appellate Division stated in a footnote that

> we have not commented directly on the legal theory under which petitioner was dismissed, *i.e.,* that the touching, even without licentious purpose, and the name calling, required dismissal, irrespective of the fact that petitioner had never been warned or counselled concerning this matter. We note, however, that both the ALJ and Commissioner based their decisions in part upon *In re Tenure Hearing of George McClelland,* 1983 *S.L.D.* 19, aff'd A-152-83T2 (App. Div. 1984) (unreported). Both the Commissioner and this court in *McClelland* stressed that the penalty for dismissal was appropriate on the grounds of insubordination, since the petitioner in *McClelland* had been once warned and later once again specifically directed concerning his practice of stroking and touching female students. We note that in the case before us, there were no warnings nor apparently even a consideration of a penalty less than dismissal after the first reporting of the incidents, whereas in *McClelland* dismissal was not considered appropriate until charges were brought after the third reporting of the incidents. [Wolf, App. Div. decision at 14-15.]

Although this footnote could arguably mitigate against removal here, such a result seems improper. The footnote was clearly *dicta* on the part of the court and is so stated by the court to be. Further, it is clear that in *Wolf,* a determination had been made that the touching was without licentious purposes. Such is not the case here.

Clearly, the allegations against respondent are sexual in nature and not simply inappropriate instances of touching. In *Wolf, supra,* the touching involved bra snapping. While such touching, as the Commissioner warned, is inappropriate, indefensible, and not to be tolerated, it is much less serious than the allegations herein which have been proven.

As is clear from the findings of fact, the instances of touching at issue here are of a very personal and disrespectful nature. To require that a teacher be warned about such conduct prior to removal is to suggest that a teacher must be told that such action is improper.

The penalty in *Wolf,* albeit overturned on procedural grounds, was dismissal. Nothing less is sufficient or warranted here. *See also, In the Matter of theTenure Hearing of Carl Gregg, School District of the City of Atlantic City,* OAL DKT. EDU

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5696-88, aff'd Commissioner of Education (June 2, 1989), wherein the ALJ, in finding that Gregg had sexually harassed T.R. and did have physical sexual contact with, and sexually harassed M.J. in the 1987-88 school year, stated that sexual contact by a teacher with a pupil is a violation of the teacher-pupil relationship and may have lifelong consequences.

The ALJ, in removing Gregg from his tenured position, stated that "the Commissioner has always held that teaching is a public trust, and its violation requires a heavy penalty." *Id.* at 7. See, *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302; and *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson*, 1974 *S.L.D.* 97. Indeed, a single incident of touching as proven herein should warrant dismissal. *See, In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967).

As was confirmed by the Commissioner in *Gregg*, at 16, the highest court in New Jersey ruled that unfitness to hold a position might be shown by one incident if sufficiently flagrant or by many incidents.

The gravity of any of the several incidents proven in the instant matter cannot be minimized. However, even if it is determined that one incident alone is not sufficiently flagrant to warrant dismissal, there exists ample authority to warrant the dismissal of Dennis Cooke if the series-of-incidents approach is followed.

Following the direction of *Redcay,* it must be concluded that even if one incident as alleged and proven herein is insufficient to warrant the dismissal of Dennis Cooke, the series of incidents alleged and proven here is sufficient to require his dismissal. ***See, In the Matter of the Tenure Hearing of Anthony Pasquale, Elizabeth School District, Union County***, OAL DKT. EDU 6879-83 (Nov. 22, 1983), aff'd by the Commissioner (Jan. 9, 1984), aff'd by the State Board of Education (Sept. 5, 1984), wherein respondent was dismissed for unbecoming conduct when it was established that his repeated touching of his male students' genitals was improper.

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In the instant case, I have considered the singularly egregious nature of each of the incidents testified to herein. Each incident is sexual in nature, involving the touching or purported touching of private parts by hand or instrument (hockey stick), showing harrassment and a disrespect to each of the students involved. I have further looked to the extraordinary number of such incidents, all of the same variety and all of extreme import. The result of Dennis Cooke's behavior -- an atmosphere of fear, uneasiness, and uncomfortableness -- cannot be tolerated. Dennis Cooke's lack of control, resulting in an unacceptable educational environment, warrants his dismissal.

CONCLUSION

I **CONCLUDE** that the Board's determination to dismiss respondent is affirmed, and it is hereby **ORDERED** that the charges against Dennis Cooke of unbecoming conduct are sustained. It is **ORDERED** that Dennis Cooke be removed from his position with the School District of the Borough of East Rutherford.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 1 '91
Date

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/3/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 08 1991
Date

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner:
Janet Zazulla
Janice Cassella
Leslie Charlesworth
Mr. S.
Mrs. M.
M.M.
M.E.
A.G.
D.S.

For Respondent:
Janice Cassella
Leslie Charlesworth Jr.
Carl Castlegrant
John Franken
Annette Bortone
Karen Gregorec
Robert D'Andrea
Dennis Cooke

LIST OF EXHIBITS IN EVIDENCE

P-1	Film, DeGrassi Jr. High, He's Back
P-2	Statement by M.M., dated 4/26/88
P-3	Statement by A.G., dated 4/26/88
P-4	Statement by N.O., dated 4/26/88
R-1	Identification
R-2	Letter to whom it may concern from Janet Zazulla, dated 3/17/89
R-3	Letter to whom it may concern from Leslie H. Charlesworth, dated 3/15/89
R-4	Letter to whom it may concern from Penny Charlesworth (two pages)

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R-5	Letter to whom it may concern from Carl Castlegrant, dated 3/15/89
R-6	Letter to whom it may concern from John Franken, Hackensack Police, dated 3/20/89
R-7	Letter to whom it may concern from Annette Bortone, dated 3/16/89
R-8	Dennis Cooke's personnel file (55 documents)
R-9	Letter dated 3/17/89 from Robert M. D'Andrea to whom it may concern
R-10	Letter dated 3/16/89 from Richard Vartan to whom it may concern
R-11	Letter dated 3/21/89 from Ruth M. Kearney to whom it may concern
R-12	Letter dated 3/17/89 from Ralph P. Kilore to whom it may concern
R-13	Letter (undated) from James A. Corino to whom it may concern
R-14	Letter from Paul J. Daniele to whom it may concern
R-15	Letter dated 3/16/89 from Patricia Kelly to whom it may concern
R-16	Letter dated 3/21/89 from Patricia A. Miano to whom it may concern
R-17	Letter dated 3/10/89 from Theresa Ridman to whom it may concern
R-18	Letter dated 3/20/89 from Kathleen C. Mastbeth to whom it may concern
R-19	Letter dated 3/20/89 from Barbara Paluzzi to whom it may concern
R-20	Letter (undated) from Diane M. Marshall to whom it may concern
R-21	Letter dated 3/20/89 from Mary Verga to whom it may concern
R-22	Letter (undated) from Gary A. Miano to whom it may concern
R-23	Letter dated 3/19/89 from Irene McCarthy to whom it may concern
R-24	Letter dated 3/17/89 from Joseph V. Rizzo to whom it may concern
R-25	Letter dated 3/17/89 from Senta V. Rizzo to whom it may concern
R-26	Letter dated 3/10/89 from Angela Giordano to whom it may concern
R-27	Letter dated 3/18/89 from Pauline Ingrassia to whom it may concern
R-28	Letter dated 3/18/89 from Frank Ingrassia to whom it may concern
R-29	Letter dated March 1989 from Paul Capozzi to whom it may concern
R-30	Letter (undated) from Christine L. Cooke to whom it may concern
R-31	Letter dated 3/20/89 from Kevin Cooke to whom it may concern
R-32	Letter dated 3/20/89 from Linda Cooke to whom it may concern
R-33	Letter (undated) from Daniel Petrowsky to whom it may concern
R-34	Letter dated 3/10/89 from Michael Cooke to whom it may concern
R-35	Letter (undated) from Margaret Maida to whom it may concern
R-36	Letter (undated) from Josephine Dempsey to whom it may concern
R-37	Letter (undated) from Diane Malinchak to whom it may concern
R-38	Letter dated 3/19/89 from Jeannine Cooke to whom it may concern
R-39	Letter dated 3/15/89 from Deborah A. DeAngelo to whom it may concern

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R-40 Letter dated 3/10/89 from Joseph J. Maida, Jr. to whom it may concern
R-41 Letter dated 3/17/89 from Joseph P. Cosma to whoever it may concern
R-42 Letter (undated from Danielle Zelinsky to whom it may concern
R-43 Letter (undated) from Jeff Somma to whom it may concern
R-44 Letter (undated) from Michelle Kozlowski to whom it may concern
R-45 Letter dated 3/21/89 from Thomas J. Gase to whom it may concern
R-46 Letter dated 3/14/89 from Jim E. Budo to whom it may concern
R-48 Letter dated 3/14/89 from Toni Reverendo to whom it may concern
R-49 Letter dated 3/10/89 from Sally Aiello to whom it may concern
R-50 Letter dated 3/20/89 from Joseph Colaneri to whom it may concern
R-51 Letter dated 3/18/89 from Pamela Franken to whom it may concern
P-52 Letter dated 3/16/89 from Barbara Bosch to whom it may concern
R-53 Letter dated 3/18/89 from Margaret Cooke to whom it may concern
R-54 Letter (undated) from Anna Leone to whom it may concern
R-55 Letter dated 3/17/89 from P. Condon to whom it may concern
R-56 Letter dated 3/19/89 from Pamela Costanza to whom it may concern
R-57 Letter dated 3/19/89 from Michael C. Costanza to whom it may concern
R-58 Letter dated 3/20/89 from Rose Cooke to whom it may concern
R-59 Letter dated 3/16/89 from June Kunz Palmieri to whom it may concern
R-60 Letter dated 3/16/89 from Rosemary Santorini to whom it may concern
R-61 Letter dated 3/17/89 from Philip Chesney to whom it may concern
R-62 Letter dated 3/17/89 from Karen A. Kaiser to whom it may concern
R-63 Letter dated 3/16/89 from Justine Romanelli to whom it may concern
R-64 Letter dated 3//15/89 from Marlene S. Coviello to whom it may concern
R-65 Letter dated 3/17/89 from Jane Ann Chesney to whom it may concern
R-66 Letter dated 3/10/89 from Patricia Bednarz
R-67 Letter dated 3/15/89 from Edward R. Bednarz to whom it may concern
R-68 Letter dated 3/17/89 from Evelyn Costanza to whom it may concern
R-69 Letter (undated) from Barbara Capozzi to whom it may concern
R-70 Letter dated 3/17/89 from Michael Bischak to whom it may concern
R-71 Letter dated 3/17/89 from Janet S. Bischak to whom it may concern
R-72 Letter dated 3/17/89 from Frank Peeters to whom it may concern
R-73 Letter dated 3/15/89 from Thomas P. Goffredo to whom it may concern
R-74 Letter dated 3/16/89 form Ronald A. Giordano to whom it may concern
R-75 Letter dated 3/16/89 from Arthur Santorini to whom it may concern

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R-76 Letter dated 3/17/89 from Barbara Jean Malaterra to whom it may concern
R-77 Letter dated 3/12/89 from Russell J. DeAngelo, III to whom it may concern
R-78 Letter dated 3/16/89 from Ronald M. Gregorec to whom it may concern
R-79 Letter dated 3/16/89 from Terrie Gregorec to whom it may concern
R-80 Letter dated 3/16/89 from Karen Gregorec to whom it may concern
R-81 Letter dated 3/12/89 from Anne DeAngelo to whom it may concern
R-82 Letter dated 3/12/89 from Russell J. DeAngelo to whom it may concern
R-83 Letter dated 4/16/89 from Vincent Maida to whom it may concern
R-84 Letter (undated) from Scott Rubinetti
R-85 Letter dated 3/16/89 from Mr. & Mrs. John Rubinetti to whom it may concern
R-86 Letter dated 3/17/89 from James M. Guida to whom it may concern
R-87 Letter dated 3/16/89 from Darius James Hughes to whom it may concern
R-88 Letter from Joseph Maida to whom it may concern
R-89 Letter dated 3/15/89 from Gail L. Kapp to whom it may concern
R-90 Letter from Joan Appello to whom it may concern
R-91 Letter dated 3/14/89 from Mrs. Joseph Perello to whom it may concern
R-92 Letter dated 3/14/89 from Joe Perello to whom it may concern
R-93 Letter dated 3/17/89 from Frank Rizzo to whom it may concern
R-94 Letter dated 3/15/89 from Carol A. Perello to whom it may concern
R-95 Letter dated 3/15/89 from Turh Weiss to whom it may concern
R-96 Letter dated 3/18/89 from Lillian Maida to whom it may concern
R-97 Letter from Dennis Cooke to whom it may concern
R-98 Letter dated 3/17/89 from Janice Zazula to whom it may concern
R-99 Letter dated 3/20/89 from John Franken to whom it may concern
R-100 Letter from Jennie Charlesworth to whom it may concern
R-101 Letter dated 3/15/89 from Carl Castlegrant to whom it may concern
R-102 Letter dated 3/16/89 from Annette Bortone to whom it may concern
R-103 Order of Dismissal, dated January 2, 1991
R-104 Copy of bill from Louis Jasmine regarding Dennis Cooke, dated March 6, 1989

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IN THE MATTER OF THE TENURE HEARING OF DENNIS COOKE, SCHOOL DISTRICT OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions submitted by the parties were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

The Board takes exception to the ALJ's findings regarding T.V. and D.P., urging that the touching of their buttocks by respondent are the same type of incidents which the court found to be sexual in nature with respect to the other students who testified. It contends that the same standard should be applied to T.V. and D.P. even though they did not testify at the proceedings.

Respondent's exceptions are a reiteration of the detailed arguments presented to the ALJ in his post-hearing brief and are incorporated herein by reference. In addition, he excepts to the ALJ's adopting almost verbatim the proposed findings of fact and conclusions of law submitted by the Board and avers that in the rush to issue the initial decision within five days of the close of the record the ALJ completely disregarded numerous inconsistent statements of the student witnesses, statements which he believes should have turned the credibility equation in his favor.

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Respondent urges reversal of the initial decision on the basis of the fact that the Board failed to meet its burden of proving that he engaged in improper sexual advances towards students. He argues, inter alia, that the ALJ only paid lip service to the well-established legal principles which must be used in weighing and crediting testimony of witnesses, particularly student witnesses. He reiterates that the claims asserted by M.M. are a product of fantasy and innocent egocentrism and that the claims asserted by M.M., M.E., D.S. and A.G. are against the weight of the evidence adduced at hearing.

Respondent also avers that there was no competent evidence to support the claim that he placed his hand on T.V.'s rear end while in shop class because the ALJ's conclusion relied upon the highly suspect testimony of M.M. and the Board failed to produce T.V. as a witness. In a similar vein, he urges that there was an absence of credible evidence that he initiated sexual advances towards D.P., given, inter alia, that (1) the Board failed to present her as a witness; (2) the only testimony regarding the charge was that of D.S. who testified she saw respondent tap D.P. with a hockey stick; and (3) while he denied ever placing his hands on D.P., he acknowledged that if she were chitchatting on the sidelines, he may have shooed her back in the game by tapping her with the hockey stick.

In addition to the above, respondent's exceptions reiterate that he should not suffer the penalty of dismissal, the reasons for which are summarized by the ALJ on page 23 of the initial decision.

Lastly, respondent argues that it was prejudicial error for the ALJ to refer to any polygraph examinations. With respect to

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this point, he avers that it was over his objection that Charlesworth was permitted to testify regarding a telephone conversation in which respondent was said to have stated that he failed a polygraph test. It is respondent's clear recollection that he only stated the results were inconclusive. Moreover, respondent argues that absent an appropriate stipulation, polygraph evidence is not admissible and that Charlesworth's statement relative to such evidence is not admissible either. Besides his emphatic denial of making such a statement, respondent maintains that Charlesworth's recollection was quite tenuous and that which was stated and understood were entirely two different things. (Respondent's Exceptions, at pp. 34-35)

* * * *

At the onset, the Commissioner wishes to emphasize that in reviewing this matter, he was critically aware of the principles of law with respect to making credible determinations, particularly as the decision in this case primarily depends upon the testimony of students and the decision will have a profound effect on respondent - his livelihood, his good name and reputation in the community and the teaching profession and his family. As such, the Commissioner conducted his own independent review of the record, including a thorough scrutiny of the transcripts in relation to the extensive arguments set forth in respondent's post-hearing brief and exceptions, particularly the alleged inconsistencies in the witnesses' testimony.

Upon such thorough review, the Commissioner adopts as his own the findings of fact set forth in the initial decision on pages 4-16 and the ALJ's conclusions of law set forth on pages 22

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and 23 except as modified herein in regard to T.V. Contrary to respondent's arguments otherwise, the Commissioner finds and determines that the ALJ did not merely pay lip service to the standards for assessing the credibility of witnesses and the care with which the testimony of students must be weighed when inconsistencies may exist.

While there is a noticeable consistency and even verbatim language between many of the proposed findings of fact submitted to the ALJ by petitioner and those set forth by the ALJ, this does not detract from the appropriateness of the determinations reached by the ALJ. Both the proposed findings of fact and those of the ALJ closely adhere to the testimony of the various witnesses. However, the ALJ's findings go well beyond those set forth by petitioner. More importantly, however, is the fact that the Commissioner, upon comprehensive review of the record, agrees with each of the findings set forth by the ALJ on pages 4-16 of the initial decision.

As to the exceptions set forth by respondent regarding M.M., the Commissioner strongly disagrees with respondent's allegation that the most damaging blow to her credibility came from her mother's own testimony. Review of Mrs. M.'s testimony reveals that she was very credible. The fact that another parent may have acted differently under the circumstances does not make Mrs. M.'s testimony lacking in credibility. Moreover, a review of the record does not support respondent's position that "[f]antasy and innocent egocentrism is indeed the conclusion to be drawn from M.M.'s testimony." (Respondent's Exceptions, at p. 6) Nor does a review of the record support that the claims asserted by M.M. are against the weight of the evidence. While there are certain inconsistencies

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that exist in terms of M.M.'s testimony, they do not in the Commissioner's judgment provide grounds for determining that her testimony as a whole is therefore incredible. She did inform her mother of, and testify quite credibly with regard to, three of the incidents, including the most egregious offense that occurred in the wood room at the back of the shop. These incidents alone would result in a determination of improper touching and sexual contact.

As to A.G., there is no disagreement that what she wrote in Exhibit P-3 on April 26, 1988 at the meeting with Charlesworth and what she testified to at the hearing are discrepant. P-3 reads in its entirety:

> When I was in the shop room Mr. [Cooke] would touch my rear and reached inside and in activity he would take the hockey stick and would put it between my legs or he would take the hockey stick and hit it against my rear.

At hearing A.G. testified that in the shop class respondent ran a dust brush along her butt on one occasion which was the only touching in that class which occurred (T3, pages 5-7, 21-26, 31) and that a second incident occurred in activities class where respondent ran a hockey stick up the inside of her leg to her upper thigh while she was standing in the wing awaiting the puck (T3, pages 9-12, 21, 35-39). She was quite clear in her testimony that these were the only two incidents that occurred (T3, pages 21, 45-46). A.G.'s testimony as to these two incidents was credible. Her explanation as to the discrepancy between the statement written in Charlesworth's presence (T3, pages 46-53) is in the Commissioner's judgment more than plausible given her age and the circumstances of the unforeseen events transpiring on April 26, 1988 which resulted from viewing the film (Exhibit P-1) shown in home economics class.

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As to D.S., the Commissioner rejects respondent's allegation that it would be unwise to credit her testimony because her father's testimony demonstrated he himself lied at hearing. Initially, it is emphasized that Mr. S. was an extremely credible witness. The alleged "lies" are to any reasonable person merely the difference in perception between that of an adult and children as to what constitutes "close" social relationships. More importantly, however, is the fact that D.S. was an exceptionally credible witness, entirely believable in terms of her claims against respondent and her explanation for not bringing the incidents to the attention of any adult prior to the involvement of DYFS and the office of the county prosecutor.

The same conclusion is reached by the Commissioner with respect to the testimony of M.E.

Now turning to the findings and conclusion reached by the ALJ with respect D.P., the Commissioner finds and determines that the ALJ did not err in reaching the conclusion that respondent improperly touched her. Although D.P. herself did not testify, D.S. testified quite credibly that she observed respondent hit D.P. with the hockey stick during activities class while awaiting the hockey play. (T3, page 71) The Commissioner disagrees that the touching was the same as that found to be sexual contact as opposed to improper touching. D.S. referred to D.P. being hit with the hockey stick, not that he ran the hockey stick up to her inner thigh such as occurred with M.M., D.S. and A.G. or the type of touching M.E. was subjected to, namely running the curved part of the hockey stick up the seam of the rear of her pants. Rather the type of touching observed by D.S. with respect to D.P. was descriptive of the type of

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contact with students' rear ends respondent admitted engaging in to get them back in the game, a type of touching which constitutes improper touching as opposed to sexual contact as found with the above-cited students.

As to the parties' exceptions regarding the ALJ's finding and conclusion with respect to T.V., M.M. testified that she observed respondent touching T.V. on the rear end with the palm of his hand (T2, pages 110-111, 124, 206-207). The Commissioner finds her testimony credible in this regard. Moreover, he agrees with the Board that the nature of the touching described is sufficient to sustain a conclusion of sexual contact. Thus, the ALJ's conclusion that such contact represented improper touching rather than sexual contact is modified.

In regard to the issue of polygraph testing, the Commissioner finds unpersuasive respondent's argument that the ALJ's reference to it was prejudicial. The ALJ is quite explicit on page 22 of the initial decision that she gave no weight to Charlesworth's testimony regarding it. As the trier of fact the ALJ chose to accept Charlesworth's testimony that the word "failed" was used as opposed to "inconclusive." The exceptions provide no basis upon which to reverse that credibility determination nor does a reading of the pertinent transcript passages. Moreover, the Commissioner agrees with the ALJ's ruling that Charlesworth's testimony regarding his conversation with respondent was admissible.

Accordingly, for the reasons stated in the initial decision, respondent is found to be guilty of conduct unbecoming a teacher due to the improper touching of, and sexual contact with, students as set forth on pages 22-23 of the initial decision, except

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as modified herein with respect to T.V. The Commissioner finds the ALJ's analysis of what penalty to be levied to be thorough and well-reasoned and her recommendation for dismissal appropriate. Consequently, respondent is of this date dismissed from his tenured position as a teacher in the East Rutherford School District. A copy of this decision shall be forwarded to the State Board of Examiners pursuant to the requirements of N.J.A.C. 6:11-3.6 for action it deems appropriate with respect to respondent's certification.

COMMISSIONER OF EDUCATION

AUGUST 30, 1991

DATE OF MAILING - AUGUST 30, 1991

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7539-90
AGENCY DKT. NO. 298-8/90

GUY CIARCIA,
Petitioner,
v.
TRENTON CITY BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent, (Sumners, Council and Inniss, attorneys)

Record Closed: June 1, 1991 Decided: July 15, 1991

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

Guy Ciarcia (petitioner), employed by the Trenton City Board of Education (Board) as a teacher of art, alleges that the Board violated his seniority rights when it reassigned him from its secondary schools to an elementary school or, as petitioner says, from the "secondary category" to the "elementary category" while retaining less senior teachers in the secondary category in which he now claims an enforceable seniority right. After the Commissioner transferred the matter September 19, 1990 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14-1 et seq., a hearing was scheduled to be conducted March 25, 1991. However, counsel to the parties agreed that the matter could be decided by way of motions for summary decision on a stipulation of fact and letter memoranda of the parties. The record closed on the cross-motions June 1, 1991, upon the filing of the Board's letter memorandum.

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Findings are reached in this initial decision that petitioner was not subject to a reduction in force. Consequently, the conclusion is reached that whatever seniority rights petitioner may have are not triggered by his reassignment as a teacher of art at the Board's secondary schools to a position as teacher of art in its elementary schools.

FACTS

The facts have of the matter have been stipulated by the parties. Those facts are as follows:

Petitioner is a teaching staff member who has been employed as a teacher by the Board since September 1, 1967. At all times relevant, petitioner has been in possession of an instructional certificate with an endorsement as a teacher of art. Prior to the 1988-89 year, petitioner was assigned as a teacher of art in one or more junior high schools in grades 7 and 8 which are departmentalized and, under current seniority regulations, are in the secondary category. For the 1988-89 school year, petitioner was on medical leave of absence which had been approved by the Board. Although the parties stipulate, at stipulation 7, that the Board assigned petitioner during the "1988-89" school year to teach at the Junior High School No. 2, grades 7 and 8, it appears that the parties intended to stipulate that that assignment occurred during the 1989-90 school year because of the earlier stipulation that he had been on a medical leave of absence for 1988-89. In any event, the difference is not crucial to the outcome of this case. But on the belief that he was assigned to teach art at the Junior High School No. 2 during 1989-90, the parties further stipulate that he was simultaneously directed by his school principal to teach art at an elementary school for a quarter of his time each day. The school principal, it is further stipulated, made this assignment without prior or subsequent Board approval in any sense. The rest of petitioner's employment time during 1989-90 as a teacher of art was, of course, spent at Junior High School No. 2 assigned grades 7 and 8.

During 1989-90, there were 12 art teacher positions at the secondary level of the Board's schools. The Board reorganized its schools prior to the 1990-91 school year which reorganization is still in effect. Now, four art teachers are at elementary schools which also contain 7th and 8th grade classes that are self-contained while there are nine positions of teachers of art at the secondary level. The Board, for

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1990-91, assigned petitioner to teach art at an elementary school which contains 7th and 8th grade classes. This assignment was made over petitioner's protest.

Finally, stipulations 14 and 15 are reproduced here in full:

> 14. There are teachers assigned as teachers of art solely in the secondary category, who have less seniority than petitioner in the secondary category and also in the positions which include both elementary and 7th and 8th grade self-contained classes. Petitioner contends that as a result of his greater seniority than those teachers in those categories, he was and is entitled to a position in one of the solely secondary category teacher of art positions for [the] 1990-91 school year, and thereafter.
>
> 15. Respondent [the Board], although conceding that there are teachers who are less senior in the secondary category as teachers of art than petitioner, contends that it had the legal right to assign petitioner to the elementary category, without regard to his seniority in the secondary category.

LEGAL ARGUMENTS

Petitioner argues four points which are categorized as follows:

1. When a reduction in force occurs in a category, and a teacher's position is abolished, that teacher cannot be involuntarily transferred out of that category if less senior teachers are retained therein.

2. Petitioner Ciarcia has consistently taught in the secondary category, and any brief service in the elementary school does not count toward elementary seniority because the respondent did not act in accordance with N.J.S.A. 18A:25-1 when transferring him.

3. Assuming arguendo that petitioner's teaching in the elementary school counts toward elementary seniority, petitioner was then in a district wide position, maintaining his seniority at the secondary level.

4. If petitioner's assignment at the elementary level is valid and counts for seniority in any category besides the secondary category, then petitioner held a district wide position during the 1989-90 school

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year. As such, when his position was abolished, petitioner was entitled to another district wide position and if no other district wide position existed, to revert back to his prior category--the secondary category.

While the Board concedes that petitioner's service at the elementary school level does not count towards any enforceable seniority claim he may have because that assignment was not approved by the Board, it does assert that its transfer of petitioner to the elementary school violated neither his tenure nor seniority rights. The Board points out that whatever seniority claim petitioner may have the claim has not been triggered by his reassignment and cites Howley v.Ewing Township Board of Ed., 1982 S.L.D. 1328, 1340, aff'd State Board, June 1, 1983. Because neither petitioner nor any other art teacher lost their employment as the result of its reorganization which resulted in the movement of 9th grade students from junior high school to the high school, its reorganization did not result in the abolishment of any teaching positions as authorized under N.J.S.A. 18A:29-9. Simply put, the Board says that it transferred petitioner from one assignment for which he is properly certificated to another assignment for which he is properly recertificated under the same instructional certificate, with the same endorsement, as a teacher of art.

DISCUSSION AND CONCLUSION

The facts in this case show that petitioner neither lost his employment with the Board as a teacher of art, nor has he suffered a salary reduction, nor was he transferred to a position for which he is not properly certificated, and the facts show that the Board properly transferred him pursuant to law. Petitioner's claim to an enforceable senior right in these circumstances to a position solely at the secondary level is wholly without merit and no one of the cases petitioner cites in his letter memorandum lends any support to his argument. Each of the cases cited by petitioner address a situation where the complaining party lost their employment or were reassigned from a full time to a part time position. Such is not the case here. Nothing at all happened to petitioner other than he was reassigned from the secondary level to the elementary level.

Petitioner's instructional certificate, with the endorsement as a teacher of art, is valid for teaching at all levels, kindergarten through 12. It is basic education law that seniority is a concept which applies to certain rights of tenured personnel and the concept only has meaning when a reduction in force is necessary in the judgment

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of the Board under its authority at N.J.S.A. 18A:28-9 and then when the Board takes action to reduce the number of teaching staff members employed in the district. The dismissals following the reduction must be made on the basis of seniority. The State Board of Education has consistently emphasized, reiterated, stated, and observed how well settled it is that seniority rights are inchoate until such time as dismissal or reduction actually occurs.

Petitioner's attempt to liken his situation regarding his transfer from the secondary to the elementary level, under the very same instructional certificate and under the very same endorsement by which he has been employed consistently throughout his career with the Board, to an enforceable seniority claim in these circumstances is rejected. It is acknowledged that a teacher with tenure may not be transferred from one category of employment which requires a specific endorsement on a particular certificate to another position, or category, which requires either a separate certificate and endorsement or a new endorsement on the same certificate, is improper without the teacher's consent. However, that is not the case here. Quite simply, petitioner was simply transferred by the Board from one assignment to another assignment but in the same position of teacher of art. His attempt to distinguish "categories" in these circumstances is misplaced for categories apply only in the context of seniority and whatever seniority claim he may have is not applicable here because his employment as a teacher has not been affected.

Consequently, I **CONCLUDE** that petitioner has no enforceable seniority claim in the circumstances presented herein. Therefore, the petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 15, 1991
Date

, ALJ

Receipt Acknowledged:

7/17/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1991
Date

OFFICE OF ADMINISTRATIVE LAW

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and replies by respondent were timely filed pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, petitioner argues that the ALJ erred factually and legally in concluding that a reduction in force (RIF) did not occur in this case. It is undisputed that, as a result of the district's reorganization of its schools, nine secondary art positions remained where previously there had been twelve; therefore, petitioner contends, notwithstanding that the total number of art teachers in the district did not change, there was unquestionably a RIF in the secondary category. Petitioner further takes issue with the ALJ's conclusion that seniority rights do not come into play herein because petitioner did not lose his employment. Relying on cases discussed in his brief before the ALJ and additionally citing Lewis and Barksdale v. Trenton Board of Education, Mercer County, Commissioner Decision of December 10,

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1990, petitioner construes N.J.A.C. 6:3-1.10(i) to require that any time a reduction occurs within a category, the least senior teachers must be transferred out of category before their more senior colleagues.

In reply, the Board of Education urges affirmance of the ALJ's decision as legally and factually correct and relies on its prior brief in support of this contention.

Upon careful review, with the exception of one comment as noted below, the Commissioner fully concurs with the ALJ's succinct and accurate discussion of the law and issues implicated herein. The language of N.J.S.A. 18A:28-9, from which the seniority rights conferred by N.J.S.A. 18A:28-11 explicitly flow, plainly speaks to "the number of teaching staff members employed in the district" and, thus, has no applicability to a situation where the total number of teachers was not reduced. As the ALJ properly notes, petitioner suffered no loss of employment, no reduction in salary or any other action that could be deemed to violate his tenure or seniority rights; he was merely transferred within the scope of his certificate as it is well established that boards of education have the prerogative to do. Greenway v. Board of Education of the City of Camden, 129 N.J.L. 46, 28 A.2d 99, affirmed 129 N.J.L. 461, 29 A.2d 890 (1943); Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978); Shirley Vanderhoff v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County, Commissioner Decision April 15, 1987, affirmed State Board June 1, 1988, affirmed N.J. Superior Court Appellate Division May 8, 1989. Thus viewing N.J.A.C. 6:3-1.10 in context, the language relied upon by petitioner ("Whenever any

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person's particular employment shall be abolished in a category***") is nothing more than a description of the impelling event that sets the "bumping" process in motion following a RIF, not an independently conferred entitlement relating to seniority category.

The Commissioner does, however, note that the ALJ's aside on the scope of a board's ability to transfer (Initial Decision, at page 5, "It is acknowledged ... without the teacher's consent" may give the impression that teachers may not be transferred to positions requiring endorsements other than the ones under which they have acquired tenure. The Commissioner herein must clarify that, while boards may not effect transfers for improper reasons or cause tenured employees to suffer reduction in salary or other loss of tenure rights through transfer, they may certainly transfer an employee to any position within the scope of his or her tenure for which the employee holds the necessary certificate and endorsement.

Accordingly, with the clarification noted above, the Commissioner affirms the decision of the Office of Administrative Law for the reasons well stated therein and hereby dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 3, 1991

DATE OF MAILING - SEPTEMBER 3, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 651-91
AGENCY DKT. NO. 8-1/91

SEMPRE CONSTRUCTION CO. INC., SODON'S ELECTRIC, INC.; COMFORT MECHANICAL CORP.; AND FRANK C. GIBSON, INC., NEW JERSEY CORPORATIONS,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,
Respondent.

Michael J. Herbert, Esq., for petitioners (Picco, Mack, Herbert, Kennedy, Jaffe & Yoskin, attorneys; James P. Manahan, Esq., on the Brief)

Madeline Brady Russell, Esq., for respondent (Levin, Shea, Pfeffer & McMahon, attorneys)

Record Closed: June 20, 1991 Decided: July 17, 1991

BEFORE LILLARD E. LAW, ALJ :

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STATEMENT OF THE CASE

Petitioners, all successful bidders, allege, among other things, that the Jackson Township Board of Education (Board) abused its discretion and was arbitrary, capricious and unreasonable when it rejected their respective low and responsible bids for construction to an addition to the Board's high school and failed to award them each contracts for the work. By way of relief, petitioner's seek, among other things, an order issued from the Commissioner of Education (Commissioner) to the Board ordering it to award them each the contracts bid upon.

The Board contends, among other things, that its rejection of petitioners' bids for its proposed high school addition was proper, under the circumstances, and within its statutory authority. In addition, the Board seeks to have petitioners matter dismissed because (1) the Commissioner lacks jurisdiction where the matter involves only questions of law which should be decided by the New Jersey Superior Court, Law Division; and/or, (2) petitioners fail to set forth a cause of action against the Board.

MOTIONS

The parties cross moved for summary decision pursuant to *N.J.A.C.* 1:1-12.5. Having carefully considered the entire record before me, I **FIND** there are no material facts in dispute. I **CONCLUDE**, therefore, that the instant matter meets the criteria for summary decision as set forth in *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67 (1954) and that the instant matter is ripe for summary decision. This matter is submitted on Briefs, Certification and Exhibits.

STATEMENT OF FACTS

The material facts are not in dispute. The following represents a summary of those facts which are set forth by the parties in their briefs and in support of their respective positions:

The parties to this case have stipulated that respondent Board will not take any action to advertise for bids for the high school addition project which is the subject of this contested case prior to June 3, 1991.

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The Jackson Township Board of Education publicly advertised for bids for the construction of an addition to the Jackson Township High School pursuant to *N.J.S.A.* 18A:18A-1, *et. seq.* entitled, "Public Schools Contract Law." The specifications for same were set forth in the bid documents issued by the Board and prepared by The Harsen & Johns Partnership, Architects. In both the Advertisement for Bids, and in the Instructions to Bidders, the Board reserved the right to reject all bids and to make such awards as may be in the best interest of the school district.

The public was invited to bid for the following six contracts:

a) General Construction;
b) Structural Steel and Miscellaneous Metal;
c) Plumbing
d) Heating, Ventilating and Air Conditioning;
e) Electrical
f) Overall Construction

Pursuant to the procedures set forth in *N.J.S.A.* 18A:18A-1 *et. seq.* and the bid documents, petitioners, as prime contractors, submitted bids in a timely fashion to the Board for consideration and award. Thereafter, all the bids submitted to the Board were received and unsealed by the Board on or about July 24, 1990. Each of the petitioners were the lowest responsible bidders for the contracts bid upon. On August 20, 1990, the Board's architects recommended each of the petitioners for the contracts bid upon. Each bid was also within budget.

On or about September 20, 1990, the Board notified the petitioner that it was seeking each petitioner's consent to extend the time for consideration of their submitted bids, as the Board was authorized to do by virtue of *N.J.S.A.* 18A:18A-36 and the bid documents. Each petitioner consented in writing to this extension of time request.

Regulatory permits (and consents) which necessitated the sixty day extension were not forthcoming within said extension period. On or about October 30, 1990, members of the Board met with the Board's architects, the Board's engineer, the Board's attorneys, to explore all lawful options available to the Board. After carefully analyzing each possible alternative, it was the determination of the Board that the most prudent course of action and the one best serving the publice interest,

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was to reject all bids and rebid the job when and if the Board was able to do so after its receipt of the necessary permits and consents.

At a regular meeting of the Board of Education held on November 20, 1990, the Board rejected all bids submitted for the construction of an auditorium addition to the Jackson Memorial High School. The affected bidders were advised of the reasons for the Board's action, by letter dated November 28, 1990, and informed that as soon as the problems were resolved the Board would rebid the project.

When the Board rejected the bids on November 20, 1990, the permits and/or consents still required were:

(1) The New Jersey Department of Environmental Protection Sewer Extension Permit; (2) Ocean County Planning Board approval; and (3) Compliance with the conditions set forth in the Pinelands Commission's findings of fact dated October 15, 1990. The Ocean County Planning Board granted conditional approval on January 2, 1991, and the New Jersey Department of Environmental Protection advised the Board on December 11, 1990, that a Sewer Extension Permit was approved on December 4, 1990.

JURISDICTION OF THE COMMISSIONER

The Board argues, among other things, that the instant matter is not an appropriate case to be decided by the Commissioner. Rather, in the "interest of justice" and the reasons underlying the exhaustion of administrative remedies doctrine under *R.* 4:69-5, should instead impel the Commissioner to defer to the Superior Court for decision on the purely legal issues involved herein. The Board cites, among other, the cases of *Wilbert v. DeCamp,* 72 *N.J.Super.,* 60 (App. Div. 1962) and *Silverman v. Board of Education of Twp. of Millburn,* 134 *N.J. Super.,* 253 (Law Div. 1975), aff'd 136 *N.J. Super. 435 (*App. Div. 1975), in support of the proposition that the exhaustion of administrative remedies is not necessary where the question is solely one of law. These two cases stood for the proposition that the Superior Court may exercise its jurisdiction in such matters.

There appears to be a difference of opinion expressed by our Appellate bench concerning this issue. In a *per curiam* opinion in the matter of *Fisher v. Board of Education of Union Twp. et. al.,* 99 *N.J.Super.* 18 (App. Div. 1968), in which Mr. Fisher appealed from a judgment for the Union Township Board of Education and

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which involved an interpretation of *N.J.S.A.* 18:11-10 (Now, *N.J.S.A.* 18A:18A-18) requiring separate bids and contracts for various types of work involved in the erection , construction, alteration or repair of public school buildings, the Appellate Court affirmed the trial court's decision and said, among other things, that:

> Neither in the trial court nor in this court have any of the parties questioned the propriety of plaintiff's resort to the courts without first exhausting the administrative remedies provided by the school law. *Cf. R. R.* 4:88-14; *Waldor v. Untermann,* 10 *N.J. Super.* 188, 190 (App. Div. 1950). Such failure is therefore not a bar to the affirmance of the judgment appealed from; the "exhaustion of remedies" rule is not jurisdictional. *Waldor, supra.* at *p.* 191.
>
> However, we are of the opinion that this case is one in which the administrative remedies - an appeal to the State Commissioner of Education (Commissioner), who is authorized to decide "all controversies and disputes arising under the school laws," *R. S.* 18:3-14, and an appeal from his decision to the State Board of Education. *N.J.S.A.* 18:3-15 - should first have been invoked. (*Id.* at 21.).

The Court continued to state that "[T]he Legislature has placed control of the construction of public schools under the combined authority of state and local boards of education..." (citation omitted). It then described the authority of the Commissioner with regard to the preparation and distribution of plans and specifications for the construction of public school buildings; that the plans and specifications, or any changes, must be submitted to and approved by the State Board,; that local boards are only permitted to accept and award bids to qualified persons approved by the State Board of Education. *Id.* at 21. The *Fisher* Court then concluded by stating that:

> Since the Commissioner and the State Board play so significant a role in relation to specifications and contracts for school construction, it is particularly appropriate that a controversy of the nature involved in this case be decided in the first instance by appeal to the Commissioner and the State Board under the school law. (99 *N.J. Super. at 22).*

Accordingly, I **CONCLUDE** that this matter, in the first instance, lies within the jurisdiction of the Commissioner and should proceed accordingly.

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It is therefore **ORDERED** that respondent Board's motion to transfer the instant matter to the New Jersey Superior Court, Law Division, be and is hereby **DENIED and DISMISSED** for the reasons set forth in *Fisher, supra.*

ARGUMENTS OF THE PARTIES

A summary of the parties arguments concerning this controversy are set forth below as follows:

Petitioners observes the statute upon which the Board relied when it rejected their bid documents. That statute, *N.J.S.A* 18A:18A-36 provides, in pertinent part, that:

> The board of education shall award the contract or reject all bids within such time as may be specified in the invitation to bid, but in no case more than 60 days, except that the bids of any bidders who consent thereto may, at the request of the board of education, be held for consideration for such longer period as may be agreed. ....

Petitioners contend that the Board did not have unfettered authority to reject their bids. Rather, a plain reading of the statute, *N.J.S.A.* 18A:18A-36, suggests that while in the normal course a board of education has 60 days to award a contract or reject all bids. The Board retains the discretion to hold the bids for consideration for such longer period as may be agreed to by the bidders. In this case, petitioners argue, the Board abused its discretion by not seeking further consents from the petitioners, beyond the original 60 day extension, rather that reject their bids. Petitioners objects to the Board's assertion as self serving that its rejection of petitioners' bids was in the best interest of the public. Petitioners' contend that it would be more in the public's interest to award the contracts to petitioners as the lowest responsible bidders, inasmuch as all of the bids were less than the amount budgeted for the work to be performed. Petitioners also contend the Board now must face the risk of increased costs for the additional construction by seeking new bids.

Petitioners cite, among other cases, the matter of *Scatuorchio v. Jersey City Incineration Authority,* 14 *N.J.* 72 (1953) at 91, where the Court held, among other

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things, that it is a subversion of the legislative intent to reject reasonable proposals in compliance with the specifications submitted by responsible bidders. Petitioners also rely upon the Appellate Division's opinion in *Cardell, Inc. v. Township of Woodbridge,* 115 *N.J.Super.* 442 (App. Div. 1971) where it quoted, with approval, from *Paterson Contracting Co. v. Hackensack,* 99 *N.J.L.* 260 (E.& A. 1923), which expressed the purpose of bidding statutes as follows:

> *** To encourage contracts to submit bids for public improvements should be the aim of every community. Numerous bidders create competition. Competition lowers the cost. If bids are rejected arbitrarily or capriciously, contractors will not take the time and expend the money necessary to submit proposals. They will infer favoritism. This will result in few bidders and higher bids. The statute providing for the award for a contract for a public improvement to the lowest responsible bidder was enacted for the protection of bidders. [at 264] (115 *N.J.Super.*, at 450.)

Petitioners argue that contrary to the Board's assertion, the public contracts laws are enacted not only for the benefit of the public entity, but also for the protection of the bidders. In support of its position, petitioners cite *Cardell* where 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." [citation omitted.]

The *Cardell* Court continued to say, at 450-451, that

> 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 municipal governing

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> body to abandon or substantially revise the project, then a total rejection of bids might well be required.

Petitioners observe that the Board herein did not reject their bids under the circumstances set forth in *Cardell supra*. Rather, the Board rejected petitioners' bids for the reason that all governmental agency approvals had not yet been obtained. Petitioners assert there was no reason why the Board could not seek further consents from each of the low bidders to extend the time within which to award the contracts or, instead, award the contracts to petitioners upon the condition that subsequent government approvals be obtained.

Petitioners also cites the case of *M.A. Stephenson Construction Co. v. Borough of Rumson*, 117, *N.J. Super. 431* (App. Div. 1971), where the issue of whether a public body that advertises for public work may reserve the right to reject any and all bids and when the exercise of that reserved right is valid and reasonable. Plaintiff's bid was the lowest of six submitted and was substantially lower than the cost estimates yet, the bid was rejected and rebidding was to take place. The Superior Court, Law Division, entered summary judgment for Rumson and dismissed Stephenson's complaint. On appeal before the Appellate Division, the Court applied the rationale of *Cardell* and held that (1) the mandate of the statute to award the contract to the lowest responsible bidder could not be evaded by arbitrary or unreasonable action on the part of Rumson; (2) it was legally proper for Rumson to reserve unto itself the right to reject all bids, and (3) in the exercise of that right Rumson could not act arbitrarily and was obliged to act in good faith and for sound public reasons. *Id.* at 438. The Appellate Court also held that a low bidder is entitled to be heard by the public authority before the bid is rejected. See *Trap Rock Industries, Inc. v. Kohl*, 59 *N.J.* 471 (1971).

With regard to the Board's denial of petitioner's request for a hearing, they cite the holding in the matter of *Casey Auto Parts v. City of Camden*, 218 *N.J. Super.* 255 (Law Div. 1987), where the Court determined, among other things, that if a public body rejects bids in a timely fashion, it is subject to having such conduct examined in a public forum for the benefit of the public good, consistent with the holding in *Trap Rock, supra*.

Petitioners admit that *Casey* was governed by *N.J.S.A.* 40A:11-24, the Local Public Contracts Law and not the Public School Contractor Law, *N.J.S.A.* 18A:18A-1 *et. seq.* They contend, moreover, that the latter is clearly the offspring of the former, which imposes bidding requirements for goods and services sought by public

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entities. The Legislative goal in public contracts is to establish competition and to "guard against favoritism, improvidence, extravagance and corruption ..." *Terminal Construction Corp. v. Atlantic City Sewerage Authority,* 67 *N.J.* 403, 410 (1975).

Petitioners observe that the Public School Contracts Law was enacted to impose requirements on the purchasing procedures utilized by local boards of education similar to those required by the Local Public Contracts Law. *F.S.D. Industries, Inc. v. Board of Education of Paterson,* 166 *N.J. Super.* 330, 334, (App. Div. 1979). Therefore, petitioners argue, much of the interpretation of the Public School Contracts Law necessarily rests upon judicial interpretations of the elder statute.

Petitioners argue, among other things, that if the Board had conducted a *Casey* hearing, the arbitrariness of the Board's decision would have come to light much sooner and remedial action could have been taken. Petitioners request this administrative tribunal review all the evidence and determine that they are entitled to an award of the respective contracts bid upon and determine that the rejection of their bids was improper. They contend that a remand to the Board for a *Casey* type hearing would now be a waste of time and, therefore, is not now necessary.

The Board responds to petitioners allegation and asserts it had the statutory authority to reject all bids. It observes the law governing the instant matter as *N.J.S.A.* 18A:18A-1 *et. seq.* , entitled "Public School Contracts Law." Under sections 22 and 36 of the Law, local boards of education are granted the right to reject all bids. Pursuant to *N.J.S.A.* 18A:18A-36, the Board is required to award a contract to the successful bidder or reject all bids within the time frame established in the Board's invitation to bid. However, such award or rejection may not take place more than 60 days from the date of the opening of the bids unless the Board requested the consent of the bidders for a longer period for consideration. When called upon to support a board's statutory right to reject all bids, the courts have done so. See *Somers Construction v. Board of Education,* 198 *F. Supp.* 732 (1961).

The Board contends that petitioners were not entitled to a hearing with respect to its decision to reject all bids. It asserts that the holding in *Casey, supra* is distinguished from the instant matter inasmuch as *Casey* dealt with the failure of a municipality to act under the Local Public Contracts Law, *N.J.S.A.* 40A:11-1 *et. seq.*, rather than the herein controlling statutes under the Public Schools Contract Law. *N.J.S.A* 18A:18A-1, *et. seq.* In *F.S.D. Industries, Inc., supra.*, the Appellate Court said:

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> ... The Public School Contracts Law was enacted to impose similar requirements on the purchasing procedures utilized by local boards of education to those required by the Local Public Contracts Law. Accordingly, there is an entirely separate statutory framework in which school boards must operate, thus rendering *N.J.S.A.* 40A:11-1 *et. seq.* entirely inapplicable (166 *N.J. Super. at 334).*

Petitioners agree that the amendatory legislation to the Local Public Contracts Law which excluded school districts from the definition of "contracting units," demonstrates that the Legislature intended to exclude local boards of education from the requirements of Title 40A. Not only is the applicable law different between the instant matter and that of *Casey,* but so are the facts presented. In *Casey,* the petitioner sought a hearing, as provided by *N.J.S.A.* 40A:11-24, to ascertain whether it was the lowest responsible bidder. Here, that issue is not in dispute; the Board recognized that all the petitioners were the lowest responsible bidders. Consequently, the holding in *Casey* is inapplicable to the instant matter and petitioners are not entitled to a hearing predicated on this issue.

The Board observes that petitioners further contend they are entitled to a hearing to determine whether the Board acted in a manner contrary to law. However, *N.J.S.A.* 18A:18A-1 *et. seq.,* does not support petitioners' contention. Under *N.J.S.A.* 18A:18A-30, entitled "Appeal from determination as to classification hearing," the statute provides for a hearing for a person dissatisfied with the classification given to that person by the Department of Education (Department). Neither the statute nor case law provides a bidder under the Public Schools Contracts Law with the right to a hearing when a board of education rejects all bids. The Board contends that petitioners demand for a hearing is without statutory justification.

The Board asserts that since it had the statutory authority and duty to reject all bids, its conduct did not constitute arbitrary, capricious or unreasonable behavior. It observes that the purpose of the Public Schools Contract Law is "...to benefit the public entity by securing to them prudent expenditure of taxpayers funds." *Somers, supra.* at 736. Further, "There is a public policy involved in a statute requiring a contract for public work ... that each bid, actual or possible, shall be put upon the same footing. *Case v. Trenton,* 47 *Vroom* 696." *Kay v. Board of Education,* 83 *N.J.L.* 551, 537 (1912). The statute, therefore, seeks to protect the public above all while setting the ground rules for fair competitive bidding to avoid fraud and favoritism.

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The Board submits that its conduct in rejection all bids, as sanctioned by statute, was necessitated by a change in existing conditions and, consequently, in furtherance of the public interest. As set forth herein before, the Board had requested one time extension from petitioners, which was granted. The Board, thereupon, consulted with its architects, engineers and attorneys, and it was determined that the most prudent course of action to take was to reject all bids and readvertise; in view of the changed circumstances.

The Board contends that it did not request a second extension of time from petitioners and was not required to do so. It argues that it cannot be seriously advanced that the process permitting extensions, at the Board's request, was structured to the benefit of bidders. It is the public interest which is paramount, not the private, economic self-interest of private contractors. The Board, therefore, believed the prudent course of action, and the one best to protect the public interest, was to reject all bids.

Finally, the Board argues that petitioners have failed to set forth a cause of action against the Board, therefore, summary decision should be granted in its favor.

DISCUSSION AND CONCLUSIONS

The dispositive question in this controversy is whether the Board's determination to reject all construction bids, as a consequence of the lack of all necessary government permits and approvals, was arbitrary, capricious and/or unreasonable. The secondary issue for determination is whether petitioners were entitled to a hearing before the Board as a consequence of its determination to reject all bids.

With regard to the first issue, the Commissioner and our courts have enunciated the philosophy and purposes of the statutes concerning public bidding that contracts are to be awarded upon competitive bidding solicited through public advertisement. *Hillside Township v. Sternin,* 25 *N.J.* 317, 322 (1957). The purpose is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. "Statute directed toward those ends are for the benefit of the taxpayers and not the bidders; they [the statutes] should be construed with sole reference to the public good, and they should be rigidly adhered to ..." *Id.* at 322. See also, *Weinceht v. Board of Chosen Freeholders of County of Bergen,* 3 *N.J.* 330,

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333 (1949); *Tice v. Long Branch*, 98 *N.J.L.* 214 (E & A 1922); *Case Box Lunch, Inc. v. Board of Education of City of Trenton*, 1972 *S.L.D.* 479

With regard to status and rights of a low bidder, the Commissioner in *Case* said:

> It is settled in this State that, in the absence of a question as to the responsibility of a bidder, the low bidder is entitled to an award of the contract as a matter of right. *Sellitto v. Cedar Grove Township*, 133 *N.J.L.* 41, 42 (*Sup. Ct.* 1945); *Frank P. Farrell, Inc. v. Board of Education of Newark*, 137 *N.J.L.* 408, 409 (*Sup. Ct.* 1948). The status of the lowest bidder on a public contract is not one of grace, but one of right, and may not be lightly disturbed for it is based upon competition, a State policy. *Sellitto v. Cedar Grove Township, supra.* 1972 *S.L.D.* at 483.

In the instant matter, there is no question regarding petitioners' responsibility. Nor is there doubt that they each submitted the lowest responsible bid. The facts further demonstrate that the Board was unable to secure the various governmental permits and approvals during and subsequent to the statutory bidding time constraints.

The controlling statute with regard to the Board awarding of contracts or rejecting all bids is found, in pertinent part, at *N.J.S.A.* 18A:18A-36 as follows:

> The board of education shall award the contract or reject all bids within such time as may be specified in the invitation to bid, but in no case more than 60 days, except that the bids of any bidders who consent thereto may, at the request of the board of education, be held for consideration for such longer period as may be agreed ....

The herein record shows that the Board opened the bids for the construction to an addition on its high school on July 31, 1990. Twenty days later, on August 20, 1990, the Board's architect recommended the Board accept the bids submitted by petitioners. On September 20, 1990, 51 days subsequent to the bid opening, the Board requested the consent of petitioners to extend the time by 60 days for consideration of their bids, pursuant to *N.J.S.A.* 18A:18A-36. This request for the 60 day extension was by way of a resolution adopted by the Board on September 18, 1990, and occasioned by delays in obtaining environmental permits

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required by New Jersey State agencies. Petitioners consented to the extension which ran until November 19, 1990. The period from opening the bids until the expiration of the 60 day extension consumed a total of 92 days.

Petitioners contend that because the Board did not request an extension beyond the 60 days consented to by them, the Board, therefore, was arbitrary, capricious and unreasonable in rejecting their bids and not awarding them each a contract to perform the work. I can not agree. The facts clearly demonstrate that the Board requested an extension of 60 days to consider petitioners' bids and in anticipation of approval of the necessary environmental permits required by the State of New Jersey. The permit approvals were not forthcoming within the 60 day extended period. Nor was the Board advised as to the when, if at all, such permits would be sanctioned in order for the contracts to be awarded and work on the construction to commence. In order for the Board to be in compliance with *N.J.S.A.* 18A:18A-36, it was left with no other choice than to reject petitioners bids.

I **CONCLUDE,** therefore, the petitioners herein have failed to demonstrate that the Board's action to reject their respective bids was arbitrary, capricious and/or unreasonable.

I **FIND and CONCLUDE** that petitioners presented no evidence that the Board rejected their respective bids for economic reasons; *i.e.*, it would be less expensive on rebid to pay for the work to be preformed.

I **CONCLUDE** , rather, that the Board's action to reject petitioners' bids, given the circumstances in this matter, was in accordance with its obligation and responsibility under *N.J.S.A.* 18A:18A-36, and due to the lack of required environmental permits.

With regard to petitioners claim that the Board was compelled to grant them a hearing prior to rejecting their respective bids, I **FIND and CONCLUDE** that no statutory requirement exists under Title 18A, Education Law. The only statutory provisions for a hearing under the Public School Contracts Law is found at *N.J.S.A.* 18A:18A-30, *"Appeal from determination as to classification."* Here, where the Department of Education has given an individual a classification rating with which the individual is dissatisfied, that individual may request a hearing before the Department. Subsequent to a hearing, the Department may then modify or affirm the classification. *N.J.S.A.* 18A:18A-30. There is no provision for a local board of

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education to provide or conduct a hearing prior to its adoption or rejection of a bid from a qualified bidder under *N.J.S.A.* 18A:18A-1 *et. seq.*

Having carefully considered the undisputed facts, together with the arguments of the parties, I **FIND and CONCLUDE** that petitioners have failed to demonstrate that the Board's action to reject their respective bids and award them each contracts was in any fashion contrary to law.

ORDER

Accordingly, it is **ORDERED** that **SUMMARY DECISION** be and is hereby **ENTERED** on behalf of the **BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON** and that Petitioners' Motion for Summary Decision be and is hereby **DENIED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

17 July 1991
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

22 July 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 1991
Date

OFFICE OF ADMINISTRATIVE LAW

lmh

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SEMPRE CONSTRUCTION COMPANY, INC., SODON'S ELECTRIC, INC., COMFORT MECHANICAL CORP. AND FRANK C. GIBSON, INC., NEW JERSEY CORPORATIONS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4 and are summarized below.

Petitioners aver that the ALJ failed to fully consider the general position that a public body, when considering bids, is obligated to act in good faith and for sound public reasons and that it does not have unfettered authority to unconditionally reject all bids. They further contend that the ALJ erred in deciding local school boards have unilateral power to reject all bids without justification because such rejection must be shown to be in furtherance of the public interest and exercised in good faith.

Petitioners also aver that the Public Schools Contracts Law does not mandate that a board either award or reject all bids after a single 60-day extension as conveyed on page 13 of the initial

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decision. As to this, they contend that the legislative history of N.J.S.A. 18A:18A-36 shows that the Legislature considered and rejected language in that statute which would have limited the time within which a board would have been required to award or reject all bids. Instead, the Legislature adopted statutory language that provided that bids could be held for such time as might be agreed to.

Moreover, petitioners aver that it was in the public interest to either award the contracts to them, conditioned upon receipt of the necessary agency approvals, or agree to hold their bids as long as they consented. It is their position that the test of whether a board is acting within the boundaries of law is whether the rejection of a bid is within the public interest. More specifically, petitioners allege that respondent presented no substantive evidence that rejection of their bids was in the public interest.

Petitioners also take exception to the ALJ's determination on page 13 of the initial decision that no evidence was presented that the rejection of their bids was based on economic circumstances. It is their contention that they presented uncontroverted evidence to this effect when submitting a transcript of the hearing before respondent on November 9, 1990; namely, Exhibit G and petitioners' brief at page 5, which demonstrates that respondent, through its attorney, recommended the bid rejection on the belief that future bids would probably be even lower, a belief which petitioners contend was without any credible evidence.

Lastly, petitioners reiterate their arguments that they were entitled to a hearing before respondent rejected their bids,

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averring, inter alia, that the ALJ failed to interpret the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., in pari materia with the Public Schools Contracts Law. As to this, they urge that legislation which relates to the same subject matter should be construed together when helpful in resolving doubts or uncertainties and ascertaining legislative intent. State v. Green, 62 N.J. 555 (1973) Further, petitioners maintain that the ALJ erred in not applying the principles of Trap Rock, supra, and Casey Auto Parts, supra, averring that contrary to his analysis, the holding in the latter matter is not limited to cases brought under the Local Public Contracts Law.

Upon review of the record in this matter, the Commissioner agrees with and adopts the recommended decision of the ALJ dismissing the Petition of Appeal. Initially, the Commissioner agrees with the ALJ that the dispositive issue in this matter is whether or not respondent's action to reject petitioners' bids, as a consequence of the lack of necessary governmental permits and approvals, was arbitrary, capricious and/or unreasonable. (Initial Decision, at p. 11) He also agrees with the ALJ that in the face of respondent's failure to secure the necessary governmental permits and approvals, respondent did not act in an arbitrary, capricious or unreasonable manner or contrary to law when rejecting petitioners' bids. A review of Exhibit G cited above by petitioners does not in any way alter this determination. Exhibit G amply supports that the rejection of the bids was a result of the failure to secure necessary permits and approvals, not economic advantage.

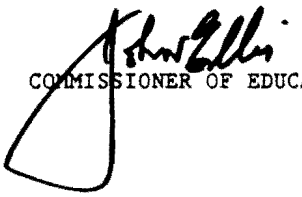
The Commissioner does not, however, agree with the ALJ that respondent had no other choice but to reject the bids in order to

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be in compliance with N.J.S.A. 18A:18A-36. A reading of that statute in the Commissioner's judgment comports with petitioners' position that respondent was not precluded from seeking a further extension from them under the provisions of that statute when the 60-day extension expired. Importantly, however, there is nothing in that statute which compels a board to seek any further extension.

As to the issue of petitioners' entitlement to a hearing before respondent, the Commissioner agrees with and adopts as his own the ALJ's finding and conclusion that no entitlement for such a hearing exists under the Public Schools Contracts Law, N.J.S.A. 18A:18A-1 et seq.

Accordingly, the Petition of Appeal is hereby dismissed.



COMMISSIONER OF EDUCATION

SEPTEMBER 5, 1991

DATE OF MAILING - SEPTEMBER 6, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 1633-91 & 4693-91
AGENCY DKT. NOS. 19-1/91 & 92-4/91

CONSOLIDATED

MONTVILLE BOARD OF EDUCATION,

Petitioner,

v.

GIOVANNI PINTO,

Respondent.

Robert M. Tosti, Esq., for petitioner (Rand, Algeier, Tosti & Woodruff, attorneys)
Sanford R. Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: June 26, 1991 Decided: July 11, 1991

BEFORE **STEVEN L. LEFELT**, ALJ:

This matter involves first, an action transferred to the Department of Education by the Superior Court, Morris County, Chancery Division, in which the Montville Board of Education (BOE) seeks to enforce a settlement allegedly entered into between Mr. Pinto, a tenured teacher, and the BOE sometime between October and December 1990. In the second action, Mr. Pinto seeks reinstatement as a teacher and back pay from December 1, 1990. Finally, in the third action the BOE seeks to

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remove Mr. Pinto for unprofessional and discriminatory remarks he allegedly made to pupils in the Lazar Middle School on or about September 27, 1990.

At a prehearing conference on May 20, 1991, these three actions were consolidated. It was agreed that the settlement enforcement matter should be heard first since if there has been a settlement, no further evidentiary proceedings would be necessary. Accordingly, a hearing on whether to enforce the alleged settlement was conducted on June 20, 1991. Upon submission of written final arguments and briefs on June 26, 1991, the record was closed on this issue.

THE TESTIMONY AND FINDINGS

Except for the critical question of whether the parties intended to reach a binding oral agreement sometime between October and December 1990, much of the evidence is undisputed. Accordingly, after considering all of the evidence presented in this matter, I make the following findings based on credible evidence to which there was neither conflicting evidence presented nor cross-examination that affected its credibility.

Mr. Pinto had previously been charged by the Montville Board of Education with unbecoming conduct for making unprofessional and discriminatory remarks. Extensive hearings were conducted on these charges. Montville and Mr. Pinto received much publicity and media coverage. To paraphrase one of the witnesses, a circus-like atmosphere prevailed during this difficult period. These prior charges against Mr. Pinto resulted in an October 4, 1989, State Board decision affirming the Commissioner's decision that Mr. Pinto was guilty of unbecoming conduct. While the administrative decision reinstated Mr. Pinto, the BOE transferred him from the high school to the Lazar Middle School.

Accordingly, because of this prior history, when allegations were made on October 16, 1990, that Mr. Pinto again made insensitive remarks and engaged in unbecoming conduct, there was interest in a settlement, if possible, before the BOE certified the new charges to the Commissioner of Education.

Settlement discussions began in late October and continued into the middle of November between Ms. Oxfeld, attorney for Mr. Pinto, and Mr. Rand, the BOE attorney. The attorneys had been considering the possibility of a resignation by Mr. Pinto to take effect in the future in conjunction with a paid leave.

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On November 16, 1990, Mr. Pinto had a lengthy telephone conversation with his attorney, Ms. Oxfeld, concerning a possible settlement. During this conversation, Ms. Oxfeld, based upon the prior contacts she had had with the BOE attorney, discussed with Mr. Pinto the concept of his resigning prior to June 30, 1992, in return for paid leave and benefits through June 1992. She also discussed with Mr. Pinto the possibility of his receiving a tuition credit for some courses he had taken and for which reimbursement had been previously rejected by the BOE. She further discussed with Mr. Pinto what would happen if Mr. Pinto obtained another job while he was on paid leave. Finally, she discussed with Mr. Pinto that if he resigned, he would be relinquishing his tenure and seniority rights. Ms. Oxfeld believed that after this long discussion, Mr. Pinto was willing to settle his case based on these terms, provided the terms were reduced to a written document. Ms. Oxfeld's notes confirm her testimony by providing that "if all details are written down clearly ..have to go along.. would be end" (J-15).

Mr. Pinto did not testify at the June 20, 1991, hearing and consequently what he heard and said to Ms. Oxfeld at this November 16, 1990, conversation was not provided to the undersigned. However, Ms. Oxfeld testified that Mr. Pinto subsequently informed her that she must have been mistaken about her authority since he never gave her any authority to settle this case.

On November 19, 1990, according to Mr. Rand, the BOE attorney, Ms. Oxfeld informed him that Mr. Pinto had agreed to resign effective June 30, 1992, provided he received the paid leave and tuition reimbursement. They discussed Mr. Pinto's pay during his leave and what would occur should Mr. Pinto obtain another job. They also discussed that if employment status inquiries were made, the BOE would provide the facts and be neither positive nor negative. Mr. Rand agreed to these terms. Ms. Oxfeld and Mr. Rand also agreed that these terms were to be reduced to writing.

Ms. Oxfeld does not deny stating to Mr. Rand that the matter was settled, however, she testified that she believed that until the written agreement was signed by all parties, the agreement would not be final.

On November 19, 1990, according to Superintendent Bozza, Mr. Rand informed him that an agreement had been reached in the Pinto matter and asked the superintendent to place the settlement on the BOE's November 20, 1990, agenda.

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At Mr. Rand's request, Ms. Bass, an attorney in Mr. Rand's law firm, drafted a Separation of Employment agreement that she and Mr. Rand believed reflected the understanding that had been reached. This agreement is contained at R-1. The credit which Mr. Pinto wanted for the $600 in tuition he had paid was set at $438.75 since according to Ms. Bass, Board policy is to reimburse 2/3 of paid tuition. There was no negotiation and this amount was entered into the contract, which was sent to Ms. Oxfeld as J-2. According to Ms. Bass, Ms. Oxfeld told her that J-2 covered the agreement as she understood it. Ms. Bass asked for Mr. Pinto's letter of resignation together with the signed agreement for presentation to the BOE on November 20, 1990 (J-1).

According to Ms. Bass, after Ms. Oxfeld expressed logistical concerns about the short time frame, Ms. Oxfeld and Ms. Bass signed an agreement on behalf of their clients to extend until December 30, 1990, the period for the BOE to reach its determination under *N.J.S.A.* 18A:6-11 on whether to certify unbecoming conduct charges. This agreement also provided that Mr. Pinto would remain "on a paid suspension from his duties of employment with the Board" pending the Board's determination (J-3). Ms. Oxfeld claims that she advised Ms. Bass during this conversation that she could not imagine Mr. Pinto signing the settlement agreement immediately and that if he was going to sign, it would only be after he had sufficient time to review the agreement.

On November 20, 1990, the Montville BOE approved the settlement as recorded in J-2, with one change requiring Mr. Pinto to provide the Board with five days notice if he obtains another job during his paid leave. The BOE authorized the Board president to execute the agreement and any other documents necessary to formalize the terms of the separation of employment.

Both Mr. Rand and Ms. Oxfeld agree that the Board change to J-2 was "minor." Since the paid leave under the original agreement would be reduced by any differential if Mr. Pinto obtained new employment, obviously some notice by Mr. Pinto to the BOE was required. The agreement was retyped with this change and forwarded by Ms. Bass on November 21, 1990, to Ms. Oxfeld (*See*, J-6).

On November 21, 1990, Ms. Oxfeld wrote to Mr. Pinto enclosing a "proposed settlement from the Board of Education." She stated that she had reviewed it and the terms appeared acceptable. This agreement is reflected in J-2, which did not include the five-day notice provision. Ms. Oxfeld also told Mr. Pinto that "I have agreed with them to extend the deadline to give you more time to

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consider the settlement" (J-5). She urged quick resolution, "despite having gained the extra time" (J-11).

It was not until November 29, 1990, that Ms. Oxfeld forwarded J-6, the agreement approved by the BOE, to Mr. Pinto. In this communication, she advised Mr. Pinto to review the agreement "and if acceptable, sign the original and three copies in the place indicated." She further advised Mr. Pinto that "I am in the process of preparing a proposed letter of resignation and will send it on to you shortly." J-8.

The written agreement that Mr. Pinto was reviewing sometime after November 29, 1990, required that Mr. Pinto submit an "irrevocable letter of resignation" effective June 30, 1992. The BOE was obligated to accept this resignation at a public meeting. Also, Mr. Pinto was to request a leave of absence from all school duties to commence November 21, 1990, and terminate June 30, 1992. The leave was to be requested for personal reasons "and shall be granted by the Board with pay and full insurance and health benefits." The Board "shall approve" the request at the same public meeting at which it accepts Mr. Pinto's resignation. The agreement also provided that Mr. Pinto was to be paid $40,400 as leave with this amount to be increased one step on September 1, 1991, to whatever the negotiated teacher pay rate may be at that date. Mr. Pinto was also to receive $438.75 for the tuition credit reimbursement. The agreement did not preclude further teaching in another district, but obligated the Board to cooperate with Mr. Pinto should he seek retirement. Mr. Pinto was not required to seek further work, but if he obtained work during his leave, he had to notify the BOE within five days and the BOE would be responsible only for any differential between the leave amount and Mr. Pinto's new salary. Mr. Pinto was to release the BOE from any and all claims, including tenure and seniority claims to any BOE position. J-6.

Furthermore, this written agreement was supplemented by letter to reflect an understanding also agreed to by Ms. Oxfeld and Mr. Rand on November 19, 1990, that the Board would neutrally answer any inquiries seeking references for Mr. Pinto. They would provide only the facts and not be positive or negative. *See*, J-9, dated November 29, 1990, and J-10, dated December 5, 1990.

It is important to note that R-1, the first written agreement that contained neither the specific tuition credit nor the five-day notice provision, and J-2, that contained the credit but did not contain the five-day notice provision, were identical in all other regards to J-6, the agreement that was approved by the BOE.

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The Board contends that the terms contained in J-6 together with the Board's obligation to answer neutrally any employment inquiries accurately memorialize the oral agreement that was entered into by Ms. Oxfeld and Mr. Rand on November 19, 1990.

Through late November and into early December, no executed documents were received by the Board attorneys. Ms. Bass began calling Ms. Oxfeld regularly to determine what happened to the documents. Ms. Bass never got a clear response. Both Mr. Rand and Ms. Bass testified that they were unable to get any firm information from Ms. Oxfeld as to why they were not receiving the signed paperwork.

On December 5, 1990, Ms. Oxfeld had a telephone discussion with Mr. Pinto and it becomes clear from her notes that some problems had developed. Ms. Oxfeld's notes indicate that during this conversation, Mr. Pinto contended that the Board was getting away with murder, that he wanted to be paid for sick days and that he wanted to pursue charges before PERC (J-15).

On December 5, 1990, in a telephone conversation, Ms. Oxfeld told Mr. Rand that Mr. Pinto was "thinking about" signing the documents. Mr. Rand became concerned and threatened certification on December 18, 1990, unless he received the documents before that date. R-2c and J-14.

Thereafter, Ms. Oxfeld wrote to Mr. Pinto on December 6, 1990, telling him that if Mr. Rand "does not have the signed agreement in his possession by Wednesday, December 12, 1990, the Board will certify the tenure charges on Tuesday, December 18, 1990. The Board is not willing to negotiate further. Should you decide to accept the settlement, I enclose herewith also a letter of resignation for you to sign, date and return to me in the enclosed envelope." J-12.

On December 10, 1990, Ms. Oxfeld's notes concerning telephone conversations with Mr. Pinto reflect that Mr. Pinto wanted better references from the Board. He wanted the Board to state he is "well-versed in subject matter - not just dates of employment." He also wanted $100 per day for 100 sick days.

Sometime after December 5, 1990, Mr. Rand took action to stop Mr. Pinto's salary beginning on December 1, 1990, because he felt that Mr. Pinto was abusing the district. The BOE was totally frustrated. Mr. Rand was never told there was no settlement and had never been told of any problem until the various lawsuits were brought. It was not until the BOE brought its Superior Court enforcement

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action that Mr. Rand was informed that Mr. Pinto was taking the position that there was no settlement. Mr. Rand hoped that by stopping Mr. Pinto's salary, he would "get his attention."

Thereafter, the parties began the various actions which comprise this lawsuit.

Mr. Pinto received no salary from December 1, 1990, until April 23, 1991, when the tenure charges were filed.

Findings on Authority and Intent

There are two critical, disputed factual issues that must be resolved. The first is whether Ms. Oxfeld had authority to settle this lawsuit on November 19, 1990 when she had her discussion with Mr. Rand. The second is whether the parties intended to be bound by the oral understanding of November 19, 1990. Mr. Pinto contends that there was no authorization to settle this lawsuit and that even if there were authorization, the settlement was subject to his final decision whether to sign the written agreement.

For the reasons which follow I **FIND** that Ms. Oxfeld had authority to settle this lawsuit and that the parties intended to be bound by an oral understanding that was entered into on November 19, 1990, by Ms. Oxfeld for Mr. Pinto and by Mr. Rand for the BOE.

I believe that Ms. Oxfeld did not make a mistake or misunderstand Mr. Pinto after their November 16, 1990, lengthy telephone discussion. She testified that she believed Mr. Pinto had agreed to settle this case on November 16, 1990. After the written agreements had been forwarded to Mr. Pinto, Ms. Oxfeld never called Mr. Rand to indicate that there was a problem, but kept attempting in writing and by telephone to get Mr. Pinto to execute the written agreement.

In his deposition, Mr. Pinto claimed that his lawyer misunderstood his position on this whole thing (p. 42, lines 5 - 7). Yet on November 26, 1990, after Mr. Pinto had had his discussion with Ms. Oxfeld and after he had probably received at least one of the written draft agreements, Mr. Pinto wrote to the president of Montville UNICO, which is an Italian-American service organization. He stated "I am pleased to inform you that, having settled my personal matters, I am reassuming my duties and responsibilities as Recording Secretary, effective immediately." J-13.

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It took from page 8 to page 30 in Mr. Pinto's deposition for him to explain that he was forced to take a leave from UNICO because of the president's concern about his relationship with the Montville BOE. During this interrogation, Mr. Pinto avoided answering even simple questions and attempted to mitigate the import of this letter by explaining that he had other personal situations at home and with the community to which he was referring. The details of these other personal problems were never explained. He further indicated that he was "negotiating with my lawyer for a settlement" at the time this letter was written. *See, e.g.*, p. 27, lines 11 - 14.

After reading Mr. Pinto's responses to the questions asked from page 8 to page 30 concerning this letter, I am convinced that Mr. Pinto was talking about the very settlement that is the subject of this case in his UNICO letter and that he believed on November 26, 1990, that the matter was settled. To be settled, he would have had to have authorized his attorney to take the action she took on November 19, 1990, when she conveyed the terms to Mr. Rand.

Mr. Pinto admitted at p. 31 of his deposition, lines 23 - 25, that he had told his lawyer "to get the best possible deal." I believe that Ms. Oxfeld's lengthy discussion with Mr. Pinto on November 16, 1990, was undertaken by Ms. Oxfeld so she could convey to Mr. Pinto what she believed was the best possible deal Mr. Pinto could get from the BOE. It was this conversation which convinced him to settle. Also, there is evidence in the record about pressure being applied by Mrs. Pinto, who did not want to undergo a second tenure proceeding.

I reject Mr. Pinto's statement in his deposition where he claims "There was no agreement, there is no agreement, there will be no agreement" (p. 33, lines 22 -23). Mr. Pinto claimed that he knew all along, from the beginning, that there would be no settlement (p. 34, lines 4 - 5). I find this statement to be incredible. Not only does it conflict with the UNICO letter, but it also conflicts with Ms. Oxfeld's understanding after her November 16, 1990, discussion with Mr. Pinto.

Ms. Oxfeld's notes indicate that sometime around December 5, 1990 things began to unravel. Since Mr. Pinto did not testify before me, it is difficult to discern what happened. However, Mr. Pinto indicated in his deposition that he made an appointment with the pension people to see exactly where he stood with his pension plan "somewhere in December" (p. 32, line 21, to p. 33, line 8 - Mr. Pinto believed this meeting to have occurred in the second week in December). Was Mr. Pinto informed about some unanticipated difficulties or did some other difficulties

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surface? We do not know. However, it was only after December 5, 1990, that the record reflects Mr. Pinto again pressing his lawyer with additional demands, including compensation for his unused sick days.

I therefore **FIND** that Ms. Oxfeld was authorized by Mr. Pinto on November 16, 1990, to settle this lawsuit.

The question remains whether the parties intended on November 19, 1990, not to be bound until a written agreement was signed by Mr. Pinto. Thus, the factual question presented is whether the parties intended that the written contract merely memorialize a previous oral agreement or whether the oral agreement required that the contract had to be written and signed before the agreement could be final.

Ms. Oxfeld testified that she believed that she was obligated to review the written document and that if she approved it, she would forward it to Mr. Pinto, who could decide whether or not to sign. However, she did not indicate to Mr. Rand that this settlement was contingent upon Mr. Pinto signing a written document. She stated the matter was settled.

I find it difficult to believe that if Ms. Oxfeld intended to make the agreement contingent on the written document, that she would not have clearly stated this to Mr. Rand. Based on what Ms. Oxfeld told Mr. Rand, he not only had a written document prepared, but he had this document approved by the BOE. It is highly unusual to have a BOE approve a possible settlement and, indeed, Mr Rand indicated that his practice is to ask BOEs to approve settlements, not expectations or possibilities.

The manner in which the parties handled the one change to the written document, the addition by the BOE of the five-day notice provision, indicates that only changes that sharpened or clarified terms would be permissible. Ms. Bass testified that when she submitted the contract to the BOE for its approval and the Board member raised the notice issue, she considered this to be a minor change that was within the scope of the agreement and, therefore, informed the Board that she believed that such a change could be accomplished. Similarly, had Mr. Pinto indicated that he preferred a ten-day notice provision or that notice be by telephone or some other such change, this may have been possible.

Furthermore, Ms. Oxfeld sent an inquiry to Ms. Bass regarding whether, pursuant to that oral understanding, the Board would agree to provide neutral

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letters of recommendation on behalf of Mr. Pinto (J-9). This letter was sent by Ms. Oxfeld because the written agreement drafted by Ms. Bass did not reflect this understanding. I believe that Ms. Oxfeld's conduct, in this instance, confirms her understanding that the written document was intended to memorialize the previous oral agreement she had made with Mr. Rand on November 19, 1990.

Based on the manner in which the lawyers acted, I do not believe that it was contemplated after November 19, 1990, that new terms or new deals could be made. Ms. Oxfeld must have known that Mr. Pinto's December demands for sick-day pay, etc., were not within the agreement, which is why they were not communicated to the Board lawyer. She must have known that negotiations were over.

I interpret Ms. Oxfeld's use of the term "proposed settlement" when forwarding this document to Mr. Pinto to be acknowledging the possibility that some changes could be made in the writing, but not that the entire agreement could be rewritten or rejected by Mr. Pinto. When Ms. Oxfeld was forwarding these drafts to Mr. Pinto she still believed that he had agreed to these terms and that she had actual authority to enter into this settlement. It was not until early December that Ms. Oxfeld was informed that Mr. Pinto claimed that he was unwilling to settle and that she was mistaken as to her authority.

All of the actions by the BOE and its lawyers are consistent with an understanding that they were bound by the oral agreement made by Mr. Rand on November 19, 1990.

The best indicator of Mr. Pinto's intent is his own conduct. When he wrote his UNICO letter on November 26, 1990, he either had already received the draft written agreements R-1 or J-2, which were mailed to him on November 21, 1990, or he had not received any of the written agreements. Yet, Mr. Pinto's letter indicated that he had "settled." His letter did not state that he was contemplating, considering, thinking about or pondering settling. It was not until the BOE moved by order to show cause in the Superior Court that Mr. Pinto formally contended that no settlement existed.

I believe Mr. Pinto's protestations in his deposition on this point to be quite unconvincing. For example, Mr. Pinto said that if all the details of the settlement were written down he would "go along" (p. 34, lines 16 - 19). Thereafter, he states "They were never written down the way I wanted. I never accepted them. I never wanted them. I don't want them and it's as simple as that. I never signed any

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contract and I will never sign anything that's it, simple"(p. 34, lines 19 - 23). Mr. Pinto apparently was hoping for a "real substantial settlement" which he explained would be comprised of "One hundred thousand dollars down, my pension paid up until 65 until I could retire, my sick accumulated sick days paid for at a decent amount [sic]" (p. 35, lines 6 - 11). These thoughts, in my opinion, sound like Mr. Pinto was simply hoping for a better deal than he had authorized his counsel to accept on November 16, 1990.

Consequently, when Mr. Pinto failed to sign the agreement, I agree with Mr. Rand that the BOE had two options. The BOE could proceed with the tenure charges and simply forget the settlement, or attempt to enforce the oral agreement of November 19, 1990, made between Mr. Rand on behalf of the BOE and Ms. Oxfeld for Mr. Pinto. The fact that in most cases with problems like this, boards elect to proceed with the tenure charges and forego enforcement, does not invalidate the enforcement option.

I also do not believe that the provisions of the draft agreement conflict with my belief that the written document was intended merely to memorialize the previous oral agreement.

The contract states that "This Agreement and the actions required hereby shall not be binding upon the parties" until the Montville Township Education Association provides its written approval (J-6). Both Ms. Oxfeld and Mr. Rand indicated that this approval was a formality and that provided Mr. Pinto agreed with the settlement, there would be no problem obtaining the Association's written approval. Both Ms. Oxfeld and Mr. Rand had the assurances of Mr. Fox, the New Jersey Education Association's representative on this point.

The contract further states that "This Agreement and the actions required hereby shall not be binding upon the parties until Mr. Pinto has delivered the letter of resignation and request for leave as required by this Agreement to Board Counsel to be held in escrow pending action by the Board as specified herein" (J-6). I believe this clause indicates how the basic agreement would be implemented and explains when the Board would be obligated to begin paying Mr. Pinto for his leave.

I **FIND** that the evidence establishes that Mr. Rand and Ms. Oxfeld orally agreed to the following terms on November 19, 1990:

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1. Mr. Pinto will waive his tenure and seniority rights and resign on June 30, 1992.

2. Mr. Pinto will receive a paid leave until June 30, 1992.

3. Mr. Pinto will have his tuition reimbursement claim paid by the BOE.

4. Mr. Pinto will be paid his current salary during his leave and will receive an increment whenever the salary scale for the 1991-92 school year is established.

5. Mr. Pinto will retain all medical and other teacher benefits during his paid leave.

6. If Mr. Pinto obtains new employment, he must advise the BOE and the Board will pay Mr. Pinto the difference between his new salary and the paid leave amount.

7. Any inquiries made of the district concerning Mr. Pinto will be answered neither negatively nor positively.

I believe that these terms are specific enough to enforce and I **FIND** that Mr. Pinto intended to be bound by these terms from November 16, 1990, until, on or about December 5, 1990. I further **FIND** that the parties' attempts to reduce these terms to writing were for purposes of memorializing this previous oral agreement.

Legal Analysis and Conclusions

The Montville BOE argues that I must apply court principles to determine whether this agreement is to be enforced. As I indicated at the hearing orally, I disagree. This is not a conflict of law situation since the courts are not a foreign jurisdiction. This matter was transferred to the Department of Education and I will apply the statutes, rules and cases that control education matters in an administrative proceeding.

However, I do not believe that there is a difference between the courts and the Commissioner on the principles to be applied to resolve the basic question of whether a settlement exists.

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A settlement agreement between parties to a lawsuit is a contract which, like all contracts, may be freely entered into. *Pascarella v. Bruck*, 190 *N.J.Super.* 118 (App. Div. 1983), certif. den., 94 *N.J.* 600 (1983). Basic contract law controls, whether the Commissioner or a court is reviewing this question.

The Index to New Jersey School Law Decisions reveals some 21 or more cases in which the Commissioner scrutinized the terms of a settlement agreement and, frequently, rejected them and set aside the settlement. In almost all of these cases, the Commissioner's rejection was caused by some policy problems with the settlement terms. However, the Commissioner will enforce valid settlements that are consistent with education policy. *Eg., R.F. on behalf of M.F.*, OAL Dkt. No. EDU 645 -84 (Nov. 30, 1984), adopted,Comm'r of Ed. (Jan. 17, 1985), aff'd, St. Bd. (June 7, 1985). *See also, In re Cardonic*, OAL Dkt. Nos. EDU 7093-81 & 7094 -81 (Feb. 17, 1982), adopted in part, Comm'r of Ed. (April 7, 1982), aff'd, St. Bd. (April 6, 1983).

When a lawyer has authority from a client, the lawyer may bind that client to a settlement. *New Jersey Highway Authority v. Renner*, 32 *N.J.Super.* 197 (App. Div. 1954). I have already found that Ms. Oxfeld had authority from Mr. Pinto to settle this case on November 19, 1990. There is no dispute over Mr. Rand's settlement authority especially since the entire Board ratified his actions on November 20, 1990.

Ms. Oxfeld on November 19, 1990, stated that Mr. Pinto would resign in return for paid leave and other benefits. When Mr. Rand accepted on behalf of the BOE, a binding contract occurred. *Eg., First Presbyterian Church, Newark, v. Howard Co. - Jewelers*, 12 *N.J.* 410, 413-414 (1953). An agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of a court and even in the absence of a writing. *Accord, Good v. Pennsylvania R.R.*, 384 *F.*2d 989, 999 (3rd Cir. 1967).

This case is not like *Orfanides v. Bayonne* (N.J. App. Div., March 26, 1986, A-5798-84T1) (unreported), which was submitted by Mr. Pinto. In *Orfanides*, the facts indicated pressure by a lawyer to obtain settlement authority followed almost immediately by a client rejection. The Appellate Division remanded the matter to the trial judge to make findings as to whether the lawyer had authority to settle. I have found that Ms. Oxfeld had authority to settle this matter. Furthermore, the record does not support even an allegation of undue pressure by Ms. Oxfeld: In addition, several days passed without any rejection or attempts at modification by

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Mr. Pinto. No dissatisfaction was communicated to the BOE or its attorneys during this period.

If the parties intended to be bound by an oral agreement, a written memorialization of the contract is not necessary for enforcement purposes. *Bistricer v. Bistricer*, 231 *N.J.Super.* 143 (Ch. Div. 1987). *See also, Comerata v. Chaumont, Inc.*, 52 *N.J.Super.* 299 (App. Div. 1958). The fact that parties "who are in agreement upon all necessary terms may contemplate that a formal agreement yet to be prepared will contain such additional terms as are later agreed upon will not affect the subsistence of the contract as to those terms already unqualifiedly agreed to and intended to be binding." 52 *N.J.Super.* at 305.

A settlement, however, cannot be enforced "where...the stipulated agreement is incomplete in some of its material and essential terms." *Kupper v. Barger*, 33 *N.J.Super.* 491, 494 (App. Div. 1955). But it is not necessary for an agreement to cover every contingency before it can be enforced. *Berg Agency v. Sleepworld - Willingboro, Inc.*, 136 *N.J.Super.* 369 (App. Div. 1975). I have already indicated that I believe the oral agreement to be sufficiently detailed to be enforced. It is expected that gaps in any oral agreement will be implemented in a fair and reasonable manner consistent with the entire agreement. *See, Bistricer, supra.*

Is there any education policy that would be impaired by enforcing this settlement? It is important to note that this settlement was negotiated before certification of charges to the Commissioner. Had the settlement not deteriorated, neither the Commissioner nor the OAL would have acquired jurisdiction. It is well established that school law "vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." *Kenny v. Board of Education of Montclair*, 1938 *S.L.D.* 647 (1935), aff'd St. Bd., 1938 *S.L.D.* 649, 653. Boards of Education are responsible to their constituents for the wisdom of their actions. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, aff'd, St. Bd., 1939 -49 *S.L.D.* 15, aff'd, 135 *N.J.L.* 329 (Sup. Ct. 1947), 136 *N.J.L.* 521 (E. & A. 1948).

In this case, a statute expressly grants to boards of education the power to pay salary during a leave of absence not constituting sick leave. *N.J.S.A.* 18A:30-7. Given the history of this case and considering the parties' interests, it cannot be said that approving this leave of absence would be an abuse of discretion and unmerited.

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Finally, the Office of Administrative Law in this matter has a policy interest which is distinct from the transmitting agency. The OAL believes in encouraging fair settlements that are consistent with the applicable law in order to divert unnecessary litigation from its dockets. *See, E.g., N.J.A.C.* 1:1-4.2, 1:1-8.1, 1:1-10.1(a), 1:1-19.1 and 1:1-20.1. This OAL policy is akin to the courts "strong public policy in this state in favor of settlements." *Department of Public Advocate v. N.J. Board of Public Utilities*, 206 *N.J. Super.* 523, 528 (App. Div. 1985).

ORDER

I therefore **ORDER** the parties to implement the November 19, 1990, oral agreement detailed above in the seven numbered findings.

I further **DIRECT** that this settlement shall be implemented as if it were to begin on December 30, 1990, since I believe the parties' agreement extending the time for the BOE to consider tenure charges also extended Mr. Pinto's time to consider the written memorialization of the settlement.

Accordingly, Mr. Pinto is awarded back pay from December 1, 1990, until December 30, 1990, with interest. I believe that pre-judgement interest should be awarded because the BOE's action suspending Mr. Pinto's pay conflicted with its J-3 agreement that Mr. Pinto would remain on paid suspension until December 30, 1990.

I finally also **DISMISS** both of the remaining actions (EDU 1633-91 and EDU 4693-91) as moot, given this resolution which completely disposes of the dispute between these parties.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.* 52:148-10.

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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/11/91
Date

STEVEN L. LEFELT, ALJ

Receipt Acknowledged:

7/16/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1991
Date

OFFICE OF ADMINISTRATIVE LAW

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WITNESSES

FOR THE PETITIONER:

David Rand, Esq.
Ellen S. Bass, Esq.
Richard Bozza

FOR THE RESPONDENT:

Nancy I. Oxfeld, Esq.

EXHIBITS

FOR THE PETITIONER:

None.

FOR THE RESPONDENT:

R-1	Separation of Employment Agreement
R-2a	Record of telephone transmissions 12/5/90 from David Rand to Nancy Oxfeld, 1430 hrs.
R-2b	12/5/90 Rand to Oxfeld letter 1431 (short letter)
R-2c	12/5/90 Rand to Oxfeld letter 1431 (longer letter) later in day

JOINT EXHIBITS:

J-1	11/19/90 letter from Bass to Oxfeld
J-2	First draft Separation of Employment Agreement
J-3	11/19/90 Facsimile transmission slip from Ellen Bass to Nancy Oxfeld with attached signed Stipulation
J-4	Package of documents relating to the Regular Meeting of the Montville Township Board of Education on 11/20/90
J-5	11/21/90 letter from Oxfeld to Pinto
J-6	Second draft Separation of Employment Agreement
J-7	11/21/90 letter from Bass to Oxfeld
J-8	11/29/90 letter from Oxfeld to Pinto

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J-9	11/29/90 letter from Oxfeld to Bass
J-10	12/5/90 letter from Rand to Oxfeld
J-11	11/21/90 letter from Oxfeld to Pinto
J-12	12/6/90 letter from Oxfeld to Pinto
J-13	11/26/90 letter from Pinto to Joseph Natoli, President, Montville Unico
J-14	12/5/90 letter from Rand to Oxfeld
J-15	Notes of 12/5/90, 11/16/90, 11/9/90, 11/21/90 and 12/10/90
J-16a	12/20/90 Certification of Ellen S. Bass, Civil Action, Morris County Chancery Division, Dkt. No. MRS-C-4-91
J-16b	2/1/91 Supplementary Certification of Ellen S. Bass, Civil Action, Morris County Chancery Division, Dkt. No. MRS-C-4-91
J-16c	2/1/91 Certification of David B. Rand, Civil Action, Morris County Chancery Division, Dkt. No. MRS-C-4-91
J-17a	1/28/91 Certification of Nancy I. Oxfeld, Civil Action, Morris County Chancery Division, Dkt. No. MRS-C-4-91
J-17b	1/27/91 Certification of Giovanni Pinto, Civil Action, Morris County Chancery Division, Dkt. No. MRS-C-4-91
J-18	Transcript of Deposition of Giovanni Pinto and Janet A. Pinto taken 3/15/91

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BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GIOVANNI PINTO, RESPONDENT.	:	DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by respondent (hereinafter "Pinto") and replies by the Board were timely filed pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, Pinto essentially argues that the purported agreement herein arose from the filing of tenure charges, and that it should therefore have been judged by the standards governing settlement of tenure charges as set forth in In re Cardonick, supra. Had the ALJ properly applied these standards, Pinto contends, he would have been compelled to find that Pinto did not agree to any settlement, let alone to one indicating his understanding and consent that the charges against him would be referred to the State Board of Examiners as required by In the Matter of the Tenure Hearing of Robert B. Olek, School District of the City of Garfield, Bergen County, Commissioner's decision of September 5, 1990. Moreover, the ALJ failed to address other Cardonick issues as well, such as supporting documentation of the

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charges, circumstances justifying settlement and consideration of the public interest. Finally, attempts to characterize a written settlement document as mere "implementation" of an actual agreement with its own independent existence, such as the ALJ has made herein, have already been discounted by the Commissioner in Leon Wilburn v. Board of Education of the Township of Teaneck, Bergen County, decision of May 21, 1990. From this, Pinto also claims that, since there was neither a settlement nor a resignation on his part, the Board had no authority to withhold his salary until such time as it actually certified tenure charges to the Commissioner, so that he is entitled to back pay with interest from December 1, 1990 through April 23, 1991.

In reply, the Board urges acceptance of the ALJ's analysis and notes that, contrary to Pinto's claims, Cardonick standards are inapposite where tenure charges have not yet been certified to the Commissioner, which in this case they indisputedly had not been at the time of settlement. Further, the Board urges that the ALJ's credibility determinations on the question of the parties' intentions regarding settlement were based on his firsthand observation and examination of witnesses and should not be disturbed. Finally, the Board argues that the ALJ's assessment of Pinto's salary entitlement was correct, in that it provided pay with interest for the period during which Pinto's salary was withheld by the Board without lawful basis, but found that Pinto's entitlement for the period thereafter was governed by the terms of the settlement that would have taken effect on December 31, 1990 but for the within controversy. The ALJ further correctly found that Pinto was entitled to no interest on payments to have been made under that

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settlement because it failed to become operative solely through Pinto's own conduct.

Upon careful consideration of this matter, the Commissioner fully concurs with the analysis and conclusions of the ALJ in his detailed and well-reasoned initial decision.

As noted by the Board, Pinto's arguments and the legal precedents cited in support of them all pertain to settlement of tenure charges after their certification to the Commissioner, whereas the facts in this matter show that while charges were certainly filed with the Board prior to settlement attempts, they were indisputedly not certified to the Commissioner until April 1991. Therefore, Pinto's attempts to equate the responsibilities of the Board and the Commissioner herein with cases where charges have already risen to the Commissioner's level are wholly misplaced. This being so, the ALJ was entirely correct in applying the standard of review that he did, concluding that the agreement between Pinto and the Board was both valid and consistent with sound educational policy and must therefore be enforced.

In judging Pinto's intentions with respect to settlement, the Commissioner has carefully examined Pinto's deposition and finds no basis therein or elsewhere to question any credibility determination made by the ALJ, to whom the Commissioner must defer as the trier of fact, particularly in the absence of transcripts of the testimony of witnesses. Indeed, the Commissioner fully concurs with the ALJ's assessment of Pinto's deposition, and his assessments of other witnesses appear entirely consonant with the record before the Commissioner.

Finally, the Commissioner finds that the ALJ correctly determined Pinto's back pay entitlement, restoring with interest the

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salary improperly withheld from Pinto during the period before tenure charges were certified and before the payment terms of the settlement would have taken effect but for Pinto's refusal to accept them. Thus, the ALJ correctly concluded that, after December 30, 1990, the terms of the settlement would apply as stated with no entitlement to interest.

Accordingly, for the reasons set forth in the initial decision, the Commissioner adopts as his own the directive of the ALJ that the within settlement be enforced and that back pay be awarded with interest for the period of December 1, 1990 through December 30, 1990. He further adopts the ALJ's directive dismissing the parties' remaining reinstatement and tenure actions as moot in view of his findings with respect to settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 9, 1991

DATE OF MAILING - SEPTEMBER 10, 1991

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4954-91
AGENCY DKT. NO. 126-5/91

IN THE MATTER OF THE
ANNUAL SCHOOL ELECTION
OF THE SCHOOL DISTRICT OF
LACEY TOWNSHIP, OCEAN COUNTY,

James LeTellier, petitioner, *pro se*

Arthur Stein, Esq., for respondent, Lacey Township Board of Education

Record Closed: June 21, 1991 Decided: July 24, 1991

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

James LeTellier, an unsuccessful candidate for a seat on the Board of Education of Lacey Township (Board), submitted a written request to the Commissioner of Education (Commissioner) dated May 4, 1991, requesting an inquiry into alleged violations of the annual school election held on April 30, 1991, pursuant to *N.J.S.A.* 18A:14-63.12. On May 24, 1991, petitioner LeTellier sought to amend his original request alleging improprieties with regard to votes cast for the Board's 1991-92 school budget. The Board opposes petitioner's application to amend his request alleging, among other things, that LeTellier failed to conform to the

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statutory prescription for an inquiry into the Board's annual school budget question, as found in *N.J.S.A.* 18A:14-63.12.

The matter was transmitted to the Office of Administrative Law (OAL) on May 24, 1991, 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.* The hearing was held on June 21, 1991, at the Lacey Township Municipal Court. Immediately prior to opening the hearing record, a prehearing conference was held. The hearing record closed as of June 21, 1991.

In his initial sworn request, petitioner LeTellier alleged the following:

1. On numerous occasions, challengers for my opponents interfered with voters entering the voting booths by stopping them and requesting their names, addresses and other information from these individuals.

2. There was an insufficient number of workers to handle the [registration] books, leaving many of the books unattended, several untended books were gone through by challengers of my opponents.

3. Judges left [voting] machines unattended and spoke with challengers and voters at the same time.

4. At 9:00 p.m., upon the closing of the polling place, the general public was allowed to remain in attendance, doors [to the polling place] were left wide open and unsecured.

5. The back of the voting machines were open, unsecured and left unattended while approximately 50 to 60 people were in the room.

6. During the tallying of ballots cast, numerous unauthorized personnel gathered in back of several machines at the far end of the room. I feel that the total number of ballots cast for candidates was inconsistent with those cast for budget.

7. During peak voting rush hour, while acting as challenger on my own behalf, according to rules and regulations for elections, I was harassed by uniformed police officers, and was ordered to leave the building or be arrested.

8. Uniformed police officers told voters coming to vote that I was being removed from the polling place because I was threatening and harassing voters.

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In his unsworn request to amend, petitioner alleged he had evidence that a person not entitled to vote in the annual school election did, in fact, vote illegally; that the vote cast was in favor of the Board's 1991-92 school budget which passed by one vote; and, that the individual who voted illegally was intimidated by a Lacey Township police officer who advised the individual not to vote for candidate LeTellier.

MOTION

By way of motion and brief, the Board objects to petitioner's application to amend his initial request for an inquiry based upon the following:

1. As it relates to a question placed before the voters, Mr. LeTellier has no standing to raise the issue pursuant to *N.J.S.A.* 18A:14-63.12.

2. In addition, Mr. LeTellier's letter of May 24, 1991, is beyond the time limit established by statute.

The Board observes that *N.J.S.A.* 18A:14-1 *et. seq.* consists of the statutes which embody the legislative intent to insure free school elections and provides for severe penalties, including fines and/or incarceration for violations. Chapter 14 of Title 18A provides for the manner in which school elections shall be conducted. Petitioner has alleged violations of the statutorily prescribed procedures with regard to the Board's 1991 school budget. The Board observes that the controlling statute concerned with an inquiry into alleged violations of the annual school budget is found at *N.J.S.A.* 18A:14-63.12 and provides as follows:

> Upon written request within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of a question, proposition or referendum, upon petition of 10 qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.

The Board observes that in the case of the question of the budget, the statute clearly requires the Commissioner to inquire into violations . . . . "upon petition of 10 qualified voters at any school election." The Board observes that there has never been a petition of 10 qualified voters requesting an inquiry of its 1991-92 budget.

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Therefore, the Board argues, petitioner has no standing to bring before this court allegations of irregularities regarding the 1991-92 school budget.

The rules regarding the amendment of pleadings before the OAL are found at *N.J.A.C.* 1:1-6.2, and provide as follows:

> (a) Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, an amendment would be in the interest of efficiency, expediency and the avoidance of over technical pleading requirements and would not create undue prejudice.
>
> (b) A judge in granting pleading amendments may permit a brief continuance to allow an opposing party additional preparation time.

Petitioner has applied to amend his initial inquiry request pursuant to the regulation. The Board objects to petitioner's application to amend grounded upon it assertion that the amendment is "....precluded by law...." *N.J.A.C.* 1:1-6.2 (a).

Having carefully considered the record with regard to this issue, I agree with the Board arguments and conclusions. I **FIND and CONCLUDE** that petitioner's application to amend his initial request for an inquiry into alleged election irregularities to include an inquiry into the Board's budget is defective. While the rules to provide for the amendments of initial pleadings are to be liberally construed, resort to such amendments may not be used to circumvent the law. In the instant matter, petitioner alone petitioned the Commissioner, rather than the statutorily required 10 qualified voters of the school district. Petitioner alone, has no standing under the law to request an inquiry into the Board's budget.

Accordingly, I **FIND and CONCLUDE** that petitioner LeTellier lacks standing, pursuant to *N.J.S.A.* 18A:14-63.12 to request an inquiry into the results of the annual school election held on April 30, 1991, concerning the Board's 1991-92 school budget.

Accordingly, petitioner's request to amend his initial request to inquire into the Board's 1991-92 school budget is hereby **DENIED.**

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STIPULATED FACTS

On April 30, 1991, Lacey Township School Board conducted their annual school election. Candidates for School Board membership and the issue of the budget was presented to the voters. Michael Timochko with 1,150 votes and Thomas Loranger with 1,147 votes were the successful candidates. The defeated candidates were James LeTellier with 962 votes and James Zartler with 765 votes. There were two votes each cast for two write-in candidates. The budget was passed by one vote with 946 votes in favor of the budget and 945 votes cast against the budget. (J-1)

FINDINGS OF FACT

Based upon the evidence adduced at the hearing, including the testimony and documents proffered; and having given fair weight thereto, I **FIND** the following **FACTS** in this matter:

Testimony regarding the alleged irregularities was elicited from the Board Secretary - Business Administrator, Assistant Board Secretary, an unsuccessful candidate for a seat on the Board, the municipal chairperson of the Republican organization, a challenger for the unsuccessful candidate, a voter, an election worker and a Lacey Township employee who voted illegally. None of the testimony was refuted, although differences of opinion were expressed by the witnesses.

The annual school election held on April 30, 1991, took place at the Lacey Township High School gymnasium between the hours of 3:00 p.m. and 9:00 p.m. Therein were voting machines, tables and chairs for the judges of the election and election workers. There were four different designated voting districts, one through four, assigned different locations in the gymnasium with two voting machines assigned to each voting district. There was a main entrance to the polling place which was from the corridor of the main entrance to the school building. However, due to the heat and the lack of air conditioning in the gymnasium, other doors to the polling place were opened to provide air circulation.

The herein record reveals that not one of the witnesses witnessed or observed any voter being prevented from casting their vote. Nor did any witness observe any one in violation of any of the election laws. Nor was there any evidence of interference with the election workers or judges in the performance of their duties.

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With regard to paragraphs 1 through 3 of petitioner's complaint, there was no evidence produced in support of these allegations. One witness, Joseph Zartler, a defeated candidate for a seat on the Board opined there were many irregularities which occurred at the election held on April 30,1991; *i.e.*, the election workers did not shout the names of the voters for the challengers to hear, Zartler was able to leaf through the voter registration book to locate his own name and there were people at the closing of the polls who were not supposed to be there. He admitted, on the record, that he did not observe any voter being prevented from voting nor did any voter express to him that he or she was not permitted to vote.

With regard to paragraphs 4 through 6 of petitioner's complaint, there was testimony that subsequent to the closing of the polls at 9:00 p.m. on April 30, 1991, the doors of the polling place remained open. There was no testimony, however, that any member of the public was permitted to vote after the closing of the polls. The evidence also reveals that members of the public, other than the election workers, candidate and judges, remained in the polling places after the close of the polls. There was testimony of some confusion with regard to calling out the election results and that unauthorized individuals were behind the voting machines when the machines were opened. There was no interference with the election workers or judges in counting the votes for each candidate or the votes for and against the school budget. There was no testimony that the voting machines were unattended and/or unsecured after they were opened for the count. There was absolutely no testimony with regard to the total number of ballots cast for Board candidates as being inconsistent with the ballots cast for the school budget.

With regard to paragraphs 7 and 8 of the petitioner's complaint, there was extensive testimony that petitioner was subject to harassment by uniform police officers at the polls on April 30, 1991. Petitioner, a candidate for a seat on the Board, acted as his own challenger at the polls on election day. Petitioner did not, however, advise the Board Secretary prior to election day he would serve as his own challenger. Nor did petitioner wear any mark of identification which identified and set him apart as a challenger on election day. Petitioner did not position himself at any one polling districts in the gymnasium. Rather, petitioner positioned himself between the main entrance to the gymnasium and the voter information table which was located in the gymnasium approximately one-third of the distance from the entrance.

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Board Secretary Savage testified that at approximately 3:30 p.m., he was approached by an election worker, identified on the record as Mrs. Grant, who expressed her concern that petitioner could be electioneering. Savage responded to Mrs. Grant that it was his opinion that petitioner was not electioneering. Savage proffered that Mrs. Grant was an experienced election worker who had served as a worker and judge for a number of years.

At approximately 4:30 p.m., two uniformed Lacey Township police officers entered the polling place and approached petitioner LeTellier. The Board Secretary, who believed the two police officers were present to vote, engaged them in conversation. One officer, identified as Sergeant Nally, asked Board Secretary James Savage why was petitioner in the polling place; whereupon Savage advised Sergeant Nally that it was legal and proper for petitioner to be there. It is noted here that petitioner LeTellier is a police officer with the Lacey Township Police Department and is known to the police officers who were present. In any event, Board Secretary Savage left the gymnasium to telephone the Ocean County Board of Elections to determine whether petitioner's presence at the polling place was, in fact, proper. Savage discussed the problem with Joan E. Kaplan, Executive Supervisor of the Ocean County Board of Elections, who advised the Board Secretary that it was proper for petitioner to be present in the polling place, however, petitioner was not to be located in the main thoroughfare nor was petitioner to engage in conversation with voters entering or leaving the polling place.

Board Secretary Savage conveyed this instruction to Sergeant Nally. Sergeant Nally advised Savage that election workers had advised that petitioner was electioneering at the polling place.

Savage testified on cross-examination he observed an occasional voter approach petitioner and engage petitioner in conversation. On some occasions, the voter would shake petitioner's hand. Savage testified there were no other Board candidates in the polling place talking with voters and exchanging handshakes. There were other challengers present, all of whom wore identification indicating that they were challengers.

Sergeant Nally and the other officer identified as Officer Olbrys approached petitioner to advise petitioner they were present at the polling place on official business. Sergeant Nally advised petitioner that the police had received complaints that petitioner was electioneering. Petitioner opined to Sergeant Nally that the

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local police did not have jurisdiction but, rather, jurisdiction did lie with the New Jersey State Police. Sergeant Nally ordered petitioner removed from the polling place.

Board Secretary Savage stated he did not want to have a confrontation at this time or place. Savage initiated a telephone call between Sergeant Nally and Joan Kaplan. Ms. Kaplan advised Sergeant Nally that it was proper for petitioner to be present at the polling place. Ms. Kaplan further told Sergeant Nally that petitioner should not stand in the doorway entrance to the polling place nor should petitioner talk with voters. Petitioner was instructed to move from the entrance of the gymnasium and that he was not to talk with voters. Petitioner complied with the instructions. Board Secretary Savage testified there were no threats, no intimidation and no harassment by the police officers toward petitioner.

DISCUSSION AND CONCLUSIONS

Having found that no evidence was produced at the inquiry to support petitioner's allegations as contained in his complaint in paragraphs 1 through 3, I **CONCLUDE**, therefore, that said complaints be and are hereby **DISMISSED.**

In consideration of petitioner's complaint with regard to paragraphs 4 through 6, the proofs demonstrate that individuals other than election workers were present subsequent to the closing of the polls at 9:00 p.m. on April 30, 1991. The proofs also show that the entrance and exit doors to the polling place remained open even though the polls were declared closed.

The statute, *N.J.S.A.* 18A:14-57, provides, in pertinent part, as follows:

> Immediately after the closing of the polls, the election officers shall proceed to count the votes for each candidate and the votes for and against the adoption of each proposal, resolution or question submitted to the voters at the election. ***The counting shall be open and public*** but the number of persons permitted to be present shall not be such as to hinder, delay or inconvenience the election officers in counting and ascertaining the result. . . . .(Emphasis supplied)

Petitioner complains, in paragraph 4 of his complaint that, "...upon the closing of the polling place, the general public was allowed to remain in attendance. ..." The statute clearly provides that subsequent to the close of the polls, "the counting shall be open and public." The statute continues with the caveat that "...the number of

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persons permitted to be present shall not be such as to hinder, delay or inconvenience the election officers in counting and ascertaining the result." The proofs proffered at the hearing demonstrate that the general public was present after the polls closed and witnessed the election workers ascertaining the election results. The evidence also demonstrates that those present neither hindered, delayed nor inconvenienced the election workers with their assigned duties.

The evidence is clear that "...the total number of ballots cast for candidates was inconsistent with those cast for the budget,"as alleged by petitioner in paragraph 6 of his compliant. (J-1) The record shows that candidate Michael J. Timochko received a total of 1,150 votes while the Board's annual school budget received a total of 945 ballots cast, including absentee ballots. This differential in votes cast does not rise to an election irregularity but, rather, merely demonstrates that more voters cast their ballots for candidate Timochko than voted for or against the annual school budget.

I **CONCLUDE** that there are insufficient proofs to sustain petitioner's allegations of election irregularities pursuant to his complaint in paragraphs 4 through 6.

Accordingly, paragraphs 4 through 6 of petitioner's complaint are without merit and are hereby **DISMISSED.**

Petitioner alleges, in paragraph 7 of his complaint, that he was harassed by uniformed police officers while petitioner acted as his own challenger at the polls on April 30, 1991. The evidence demonstrates that petitioner, a candidate for a seat on the Board, was present at polls and acting as his own challenger. Petitioner, however, had no identification markings to indicate that he was, in fact, acting as his own challenger. There is no question that under *N.J.S.A.* 18A:14-15, petitioner had the right to act as his own challenger. However, *N.J.S.A.* 18A:14-17, provides that:

> Each challenger ***shall wear a mark of identification*** as a challenger... (Emphasis supplied)

Petitioner wore no such identifying mark and, therefore, was suspect of electioneering at the polls as a candidate for the Board. As a consequence, someone, not identified on the record, alerted the Lacey Township Police of petitioner's suspected illegal electioneering. The police responded and, after the

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Board Secretary intervened with a telephone call to the Ocean County Board of Elections, petitioner was permitted to continue his activity of challenger.

Having considered all of the evidence with respect to this issue, I **CONCLUDE** that petitioner's failure to comport with *N.J.S.A.* 18A:14-17, to wear a mark of identification as a challenger, lead to a confrontation with the local police; who operated under the belief that petitioner was engaged in illegal electioneering. As the Commissioner said *In the Matter of the Annual School Election Held in the Township of Hamilton, Mercer County* 1977 *S.L.D.* 618, 220:

> Consideration should be given to having police officers at least visit polling places during the course of the election to render any assistance required by election board officers to uphold the election laws.

Thus, the police in the instant matter were affording assistance to uphold election laws which they mistakenly believed were being violated. The mistake, on the part of the police, however, can be attributed to petitioner's failure to identify himself as an election challenger rather than a candidate.

Under such circumstances, I **DO NOT FIND or CONCLUDE** that there was a violation of the School Election Law, *N.J.S.A.* 18A:14-1 *et. seq.*

Accordingly, petitioner's complaint with respect to paragraphs 7 and 8 are hereby **DISMISSED.**

I **FIND and CONCLUDE,** as did the Commissioner *In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County,* 1976 *S.L.D.* 585 at 589;

> The Commissioner concludes that, taken as a whole, the testimony falls far short of that needed to invalidate an election. It is well established that elections are to be given effect whenever possible and are not be set aside unless it can be shown that the will of the people was thwarted, was not properly expressed, or could not fully be determined.

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The testimony in the instant matter does, indeed, fall far short of that needed to sustain petitioner's allegations and invalidate this election. There is no evidence that the will of the people was thwarted by the outcome of the election.

ORDER

Accordingly, petitioner has failed to demonstrate that the will of the people was thwarted, or was not properly expressed or could not fully be determined. Therefore, it is **ORDERED** that petitioner's complaint be and is hereby **DISMISSED**.

It is **FURTHER ORDERED** that the will of the electorate must be given effect.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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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Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 July 1991
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

29 July 1991
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 2 - 1991
Date

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

lmh

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DOCUMENTS IN EVIDENCE

JOINT EXHIBITS

J-1 A33 Regular/Combined Statement of Result of School Election
J-2 Diagram of Gymnasium

BOARD EXHIBITS

B-9 Ocean County Election Board

COMPLAINANT EXHIBITS

C-1 Letter, April 30, 1991 to James Savage from Marie S. Pellecchia, Township Clerk
C-2 To Whom It May Concern, May 31, 1991, signed Joan E. Kaplan
C-3 Election Workers - April 30, 1991
C-4 Lacey Township Board of Education, District 2
C-5 Change in Address, Duplicate Permanent Registration
C-6 Permanent Registration
C-7 Election Worker Information - Challenger Information Sheet
C-8 I.D. only
C-9 Note, May 20, 1991 to LeTellier from Ball

WITNESSES

FOR PETITIONER:

James Savage
Carol Schlossareck
Joseph Zartler
Kurt Booth
Simone Zartler
Edward W. Frydendahal, Jr.
Elizabeth Booth
Thomas Ball

FOR RESPONDENT:

None

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OAL DKT. NO. EDU 4954-91

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

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner's proofs fail to sustain his allegation that election irregularities in Lacey Township on April 30, 1991 require invalidation of said election. The Commissioner concurs with the ALJ below that there is no evidence that the will of the people was thwarted by the outcome of the election. In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County, 1976 S.L.D. 585

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

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1991
DATE OF MAILING-SEPTEMBER 13, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4444-90
AGENCY DKT. NO. 114-5/90

MARY WINDHAM,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF PISCATAWAY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Rubin, Malgren & Kuhn, attorneys)

Record Closed: June 11, 1991 Decided: July 26, 1991

BEFORE BRUCE R. CAMPBELL, ALJ:

Mary Windham, petitioner, is employed as a custodian by the Piscataway Township Board of Education. She alleges and the Board denies that she was improperly reduced in work hours by administrative or supervisory action or both, and not pursuant to N.J.S.A. 18A:11-1 (General Mandatory Powers and Duties of Boards of Education) or 18A:16-1 (Officers and Employees in General).

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The petitioner opened this matter before the Commissioner of Education who transmitted it 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. Following a prehearing conference, counsel were able to stipulate all operative facts. Each party moves for summary judgment.

THE PARTIES SUPPLIED THE FOLLOWING STIPULATION OF FACTS:

1. The Board of Education of the Township of Piscataway ["Board"] is charged with operation of the Piscataway Township Public School District ["District"] and its constituent schools.

2. The Board is party to a contract with the Servicemaster Company ["Servicemaster"] relating to maintenance of school facilities in the District. [See Agreement dated July 1, 1987, annexed as Exhibit A.]

3. On or about June 10, 1988, Petitioner Mary Windham [hereinafter designated "Windham"] commenced employment with the Board as an hourly maintenance worker. The position of maintenance is considered a custodial position as the term custodian is set forth herein, for purposes of the Servicemaster contract which is attached as Exhibit A. At no time has she been a member of any collective negotiations unit, nor were the terms and conditions of her employment governed by any written contract.

4. The only official action taken by affirmative vote of the Respondent Board was the appointment of Windham to fixed annual terms of employment on an hourly basis, at a stipulated hourly rate.

5. The Respondent Board never took affirmative action to establish a maximum or minimum hours to be worked by Windham. In practice, Windham's hours were set in the first instance by Servicemaster, subject to general guidelines given Servicemaster orally by the "Central Administration" of the District.

6. The above guidelines were established by the Central Administration, and have not been subject to formal Board policy. Since before Windham commenced employment, the guideline/practice has been that hourly custodians (and Windham is a custodian for purposes of this stipulation) were not to work more than nineteen hours (19) per week.

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7. At some point in 1990, the "Central Administration" of the District learned that a new supervisor employed by Servicemaster had assigned Windham to work more than ninetteen (19) hours per week at various times.

8. Annexed as Exhibit B is a schedule of the hours worked by Windham, on a week per week basis, during her employment with the District.

9. Annexed as Exhibit C are copies of Windham's W-2 forms reflecting her compensation for the years she has worked.

10. In or about March 1990, a union representative inquired on Windham's behalf to the "Central Administration" as to her eligibility for paid coverage under the State Health Benefits Plan, which the District has participated in at all times relevant. At that time, Central Administration reviewed Windham's work records, and determined that she has been assigned at times to work more than nineteen hours (19) per week.

11. At that point, "Central Administration" advised the Servicemaster Supervisor of the guideline referred to in paragraph 6 herein, and from that point forward, Windham's hours were reduced as reflected in Exhibit B.

12. No formal action was taken by affirmative vote of the Board of Eduation to establish, increase, or decrease Windham's hours.

13. The District employed the following procedure to pay Windham's wages. The "Central Administration" prepared a series of financial reports for review and approval by the Board at periodic Board meetings. The financial reports include aggregate disbursements for different categories of payroll, including custodians, but do not contain a breakdown of the wages paid each individual employee during the relevant pay period. That individualized information is set forth in a computer-generated payroll register for each period, containing a breakdown of all monies paid each employee by name, with appropriate payroll deductions, which is signed by the Board President. A representative sample of Board minutes showing the format of the motion submitted to the Board for approval is attached as Exhibit D.

14. Annexed as Exhibit E is a copy of the certification form attached to the periodic payroll registers.

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ARGUMENTS

The petitioner suggests that N.J.S.A. 18A:11-1(c) and N.J.S.A. 18A:16-1 not only authorize boards of education to make such personnel policies and rules, within law, as they see fit, but these statutes command boards of education to determine and adopt such rules. In the petitioner's view, the Board failed to perform an affirmative duty when it did not establish minimum or maximum hours for the petitioner's job title. The agreement between the Board and Servicemaster recognizes this (Exhibit A). Thus, any assertion that Servicemaster could set the petitioner's hours of employment must be rejected.

The Board cannot delegate the authority to set custodians' and maintenance persons' hours.

The petitioner is entitled to restoration of 20 hours per week employment and, thus, enrollment in the State Health Benefits Program. New Jersey Administrative Code provides that, for State Health Benefits Plan purposes, full-time employment means an average of 20 hours per week. It is therefore critical to determine how the petitioner's hours should be computed. The parties agree that the petitioner worked relatively few hours when she was first employed. As time went by, her hours increased to well over 20 per week. She was entitled to health benefits, on the basis of hours per week worked, from October 19, 1990. Since that time she has worked an average of 20 hours per week or more. She believes that the reduction of her employment was effected to circumvent her entitlement to health benefits.

Here, the Board did act. Besides paying the respondent for the hours she worked each week, the Board approved an aggregate disbursement for employees in her category each week. Although not listing her by name, her salary was included in the disbursement and approved by formal Board motion. Thereafter, a computer payroll record was generated including her salary. This was signed by the Board president. It appears that the Board followed the requirements of N.J.S.A. 18A:19-1 et seq. in paying the petitioner's salary. That being so, the Board's actions established the petitioner's formal hours and were binding on the Board.

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Because the Board paid the petitioner for her actual hours of work through formal action, only the Board and not the central administration could act to reduce her hours. In other words, the Board's action constituted ratification of the petitioner's hours. Those hours could be reduced only by formal action. The petitioner is and was entitled to employment on a 20-hour per week basis, enrollment in the State Health Benefits Program and all benefits and emoluments as if employed on that basis.

The Board maintains the issue in the case is whether the central administration of a school district can control the number of hours worked by a nontenured, nonunion maintenance worker appointed on an annual basis at a stipulated hourly rate. The petitioner was employed by the Board as a maintenance worker on an hourly basis for consecutive, fixed terms. She is not a member of any collective bargaining unit, has no written contract and has not acquired tenure under N.J.S.A. 18A:17-3.

The Board has subcontracted the management of custodial services to an independent contractor [Servicemaster]. The contract with Servicemaster provides that Servicemaster is responsible for "training, scheduling and supervising" custodial employees. The Board "retains ultimate control for their hiring, disciplining and termination . . . ." Exhibit A. Since inception of the arrangement, the Board's central administration has relied on Servicemaster's discretion to schedule hourly maintenance workers on an as-needed basis, subject to the limitation that they not work more than 19 hours per week.

In or about March 1990, central administration learned that Servicemaster had, from time to time, scheduled the petitioner to work more than 19 hours in a single week. Servicemaster was reminded of the 19-hour guideline and saw to it thereafter that the petitioner's hours did not exceed 19 per week. The petitioner's weekly workload fluctuated above and below 19 hours throughout her several years of service in the district. When the Board learned the petitioner had been exceeding 19 hours, her workload had been approximately 25 hours for several weeks (Exhibit B).

The petitioner alleges that central administration's decision to reduce her workload from 25 hours to 19 hours per week was ultra vires because the Board

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took no formal action. The only legal authority cited in the petition is the two statutes cited above that invest all boards with the authority to make, amend and repeal rules, within lawful boundaries, governing work and compensation of board employees.

The only involvement of the Board in this matter was the appointment of the petitioner for consecutive fixed terms at a stipulated hourly rate (Exhibit C). One of the purposes of employing hourly maintenance workers is to preserve the flexibility to deploy the work force on an as-needed basis. The Board employed the petitioner, fixed her compensation and determined the length of her term of employment. Nothing in statute requires the Board to determine, week-by-week, the workload and schedule of an hourly employee. School districts routinely appoint substitute teachers at a stipulated daily rate for a particular school year while leaving to the central administration the discretion to use these individuals as and when needed. The petitioner's position in this case is no different from that of a substitute teacher who complains that she was assigned less teaching days one week than the week before. Because there is no contractual minimal workload, no membership in a collective bargaining unit and no statutory tenure in this matter, the petitioner cannot prevail on this type of claim. The petition is without merit and should be dismissed.

DETERMINATION AND CONCLUSION

A presumption of validity attaches to board actions taken within legislatively delegated authority and those actions will not be overturned unless arbitrary, capricious or unreasonable. Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd o.b. 46 N.J. 581 (1966); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). Boards need not always expressly formulate a statement of reasons for their actions, but when challenged in litigation, they must come forward with appropriate evidence that they acted with reason and not in an arbitrary, capricious, unreasonable or discriminatory manner. Mears v. Boonton Town Bd. of Ed., 1968 S.L.D. 108, 111. And it is long established that board actions must be consistent with statutes. Trenton Bd. of Ed. v. State Bd. of Ed., 125 N.J.L. 611 (Sup. Ct. 1941).

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Some delegations of authority by boards of education to individuals or to other groups have been held improper. Witchel v. Cannici, 1966 S.L.D. 159 (board cannot confer upon superintendent a power imposed by statute on board); Hibbler v. Dover Tp. Bd. of Ed., 1939-49 S.L.D. 1 (1940) (contract made by board agent without proper authorization not binding on board); Gersie v. Clifton Bd. of Ed., 1972 S.L.D. 462 (superintendent's letter to teaching staff member announcing increment withholding insufficient, board action required).

Once policy is determined by the whole board, however, it is properly delegated to an agent of the board. Tenure of Onorevole, OAL DKT. EDU 5576-85 (Oct. 31, 1986), aff'd Comm'r of Ed. (Jan. 22, 1987), remanded St. Bd. of Ed. (Aug. 5, 1987), Comm'r decision on remand (Aug. 31, 1987), St. Bd. decision (Feb. 5, 1988).

A board of education does not run the public schools of a district. It sees to it that the schools are run. This responsibility is discharged principally through policy making. It is the board's employees who implement the policy. Generally, policy, if not reduced to writing, as a matter of good management practice should be. Boards and their agents always are on surer ground when working under a clear policy even in an area in which boards enjoy wide discretion.

In the present matter, the Board was pursuing a legitimate economic concern. The regulation governing the State Health Benefits Plan enrollment, N.J.A.C. 17:9-4.6 provides:

> (a) For purposes of local coverage "full-time" shall mean:
>
> 1. Employment of any eligible employees who appear on a regular payroll and who receive a salary or wages for an average of 20 hours per week;
>
> 2. Sabbaticals where the compensation paid is 50 per cent or more of the salary granted just prior to the leave and the period of eligibility terminates with the end of the fiscal year.

The Board prudently intended that maintenance workers in the petitioner's category work 19 hours per week or less. In or about March 1990, district administrators learned that Servicemaster had scheduled the petitioner for more than 19 hours of work per week on several occasions. They reminded

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Servicemaster of the 19-hour guideline. Thereafter, the petitioner's workload did not exceed the 19-hour guideline.

The mere fact that the Board followed N.J.S.A. 18A:19-1 et seq. concerning expenditures of funds cannot be taken to mean that it established the petitioner's "formal hours and [they] were binding on the Board." I am shown no authority for the proposition that hourly workers are somehow entitled in every pay period to the greatest number of hours worked in any pay period.

In consideration of all the circumstances, I **CONCLUDE** that the petitioner's workload was not reduced as that term is normally construed. The Board did, despite the petitioner's allegation otherwise, establish general policies regarding her hours of employment. The day-to-day implementation was left to an agent of the board. At this point, it is necessary to distinguish matters such as Abramson v. Colts Neck Bd. of Ed., 1975 S.L.D. 418, aff'd St. Bd. of Ed., aff'd 1976 S.L.D. 1103 (N.J. App. Div.) (unreported) and Abrahamsen v. Middletown Tp. Bd. of Ed. (OAL DKT. EDU 9369-88) (Feb. 15, 1989), aff'd Comm'r of Ed. (May 1, 1989) in which claims that a board of education was bound by its agents' promises were denied. Those cases are clear, correct and inapposite. The present matter turns entirely on delegated authority, not unilateral action by a board agent or usurpation of board prerogative. Likewise, LaPolla v. Union Cty. Freeholder Bd., 71 N.J. Super. 264 (Law Div. 1961) deals with delegation of power to remove a secretary of public works. For the same reasons, this case is inapposite. Again, considering all the circumstances, I **CONCLUDE** that the delegation from the Board to an agent of monitoring maintenace persons' hours was not unlawful.

Under N.J.A.C. 17:9-4.6 above, the petitioner was eligible for the State Health Benefits Plan during several weeks of her employment. She has not, since March 1990, met that standard. It is not possible to award retroactive insurance benefits. It was clearly error that the petitioner did work 20 hours per week or more at certain times. The Board must be warned not to repeat this error. The mere fact of this error, however, is not sufficient basis for granting the petition.

In sum, I **CONCLUDE** the Board erred in allowing the petitioner to work 20 hours per week or more on several occasions, that the Board properly delegated monitoring of maintenance persons' hours to an agent and that notwithstanding the

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Board's error, there is insufficient basis upon which to grant the petitioner's prayers for relief.

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

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

26 JULY 1991
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

July 29, 1991
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 29 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

JOINT **EXHIBITS:**

A Agreement between Piscataway Township School District and Servicemaster Company

B Substitute custodians' work hours, April 1988 - March 1990

C W-2 Wage and Tax Statements for Mary E. Windham, 1988 and 1989

D Excerpt, Board Agenda, June 27, 1988

E Detail payroll register printout, sample of signature page, January 15, 1991

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MARY WINDHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Relying on her post-hearing brief and the joint stipulation of facts developed by the parties, petitioner claims the ALJ's initial decision must be rejected.

First, petitioner excepts to the ALJ's determination that the Board could subdelegate the responsibility of setting hours of employment to administrators or to a private entity. She avers the ALJ failed to give proper force and effect to the relevant statutes, and to the well-established case law that such authority cannot be subdelegated. Contrary to the ALJ's conclusions, petitioner finds La Polla v. Freeholders of Union Co., 71 N.J. Super. 264 (Law Div. 1961) and Mercer County #4, N.J. Civil Service Association v. Alloway, 94 N.J. Super. 119 (App. Div. 1972), aff'd 61 N.J. 516 (1972) controlling in this matter.

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Second, petitioner also excepts to the ALJ's conclusion that her hours had not been established through actual practice or by the time she actually worked. She submits the Board's payment to her made in accord with N.J.S.A. 18A:19-1 has such effect, and she cites Rivers v. Mercer Co. Area Vocational-Technical Schools, 1984 S.L.D. 102 in support of this proposition.

Third, petitioner claims there was no policy which established petitioner's hours. She believes that at most, the administration created an informal practice and, therefore, that the ALJ erred in suggesting that such policy existed.

Fourth, petitioner claims the ALJ recognized at page 8 of the initial decision that for a substantial period, she was entitled to State Health Benefits coverage, but that it is not possible to provide retroactive insurance benefits. Petitioner excepts to the latter conclusion, claiming the ALJ cited no authority for so finding. Petitioner claims the Board was bound for the weeks that she was so entitled, that is, when she worked more than 20 hours, to provide her with State Health Benefits coverage. Thus, petitioner contends the ALJ erred in stating that no remedy can be provided. She seeks a make whole remedy order that the Board pay her the premium amounts which would have been remitted to the State Health Benefits Commission or, alternatively, reimburse her for any insurance premiums she paid, as well as for any out-of-pocket medical expenses occasioned by respondent's failure to provide medical insurance for that period.

Last, petitioner submits that the reduction of her hours, and the failure to provide continued coverage in the State Health Benefits Plan was and is improper.

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Upon a careful and independent review of this matter, the Commissioner concurs with the findings and conclusions of the ALJ below, and adds the following by way of clarification.

Only a Board of Education can establish terms of employment. See N.J.S.A. 18A:16-1 which provides that "[e]ach board of education *** may employ *** such *** janitors *** as it shall determine, and fix and alter their compensation and the length of their terms of employment." See also Edward E. Baranoski v. Board of Education of the Borough of Woodcliff Lake, 1985 S.L.D. 1136, 1147. There is no challenge to the fact that the Board employed petitioner, fixed her compensation and the length of her term of employment. Moreover, there is no contest to the fact that only a board sets policy for its district and only the board can alter such policy.

The parties herein have stipulated that general guidelines given Servicemaster limited petitioner's custodial services to not more than 19 hours per week. The contract between Servicemaster and the Board specifically addresses such matter at paragraph 1b(1) wherein it is stated:

> SERVICEMASTER shall not be regarded as a party to any collective bargaining agreement or agreements which have heretofore or may hereafter be entered into by the FACILITY. SERVICEMASTER shall not participate in any decisions as to wages, hours or other working conditions for employees of the FACILITY. (Exhibit A, p. 2)

Thus, it is plain that the janitorial staff of the district remained at all times employees of the district and that their working hours were not governed by the Servicemaster. Further, the same contract states that Servicemaster is responsible to "train, manage and direct" (Id.) custodial employees, while the Board

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retains ultimate control for their hiring, disciplining and discharge. (Id.) Because it was known between Servicemaster and the Board that there was a guideline in place limiting the hours for such janitorial staff employees of the Board to fewer than 19 hours a week, it is plain that only the Board could act to affirmatively place petitioner in a category by herself as a janitorial employee working greater than 19 hours a week. No such formal Board action was taken in regard to Ms. Windham.

Because the Board did not act formally to alter the terms of petitioner's employment, it may not be seriously argued that central administration's decision to reduce her workload from 25 hours to 19 hours per week was ultra vires because the Board took no formal action. On the contrary, since the Board did not formally act to alter petitioner's hours to allow her to work more than 19 hours per week, her argument of entitlement to such extended employment hours fails.

In so finding, the Commissioner agrees with the ALJ that La Polla, supra, is inapposite to the instant matter. La Polla concerned removal of an employee under R.S. 40:21-4. Neither removal from service nor laws specifically related to governing bodies of a county or municipality have bearing on this matter. Indeed, it is not argued herein that only the Board has authority to hire and terminate services of its employees. Similarly, the Mercer County #4, supra, matter involved a narrowly focused review of Department of Civil Service functions under its rule-making authority. Such an administrative Agency's subdelegation powers are not at issue herein.

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The Commissioner concurs with the ALJ's observation that a board of education's function is to see to it that the schools are run. The Commissioner finds no breach of the Board's authority in its administrators having established guidelines for limiting janitorial work hours in that there was legitimate economic concern underlying the limitation of fewer than 19 hours per worker per week. Nothing in statute or regulation requires the Board itself to determine, week by week, the workload and schedule of an hourly employee. In so finding, the Commissioner observes the ALJ's admonition to the Board, however, that "[g]enerally, policy, if not reduced to writing, as a matter of good management practice should be. Boards and their agents always are on surer ground when working under a clear policy even in an area in which boards enjoy wide discretion." (Initial Decision, at p. 7)

Accordingly, the Commissioner adopts that finding of the Office of Administrative Law that petitioner's workload was not reduced in any manner prohibited by law. Absent Board action to formally alter petitioner's employment status, no ratification by the Board of petitioner's having worked increased hours may be found. In so concluding, the Commissioner dismisses petitioner's contention that the Board president's having signed a payroll register represents Board approval of petitioner's increased work hours. Case law has established clearly that an individual board member's unilateral action does not represent a determination by the board. See, Baranoski, supra, at 1140 citing Nicholas Campanile v. Bd. of Ed. of the Twp. of Middletown, decided March 24, 1982 and Cheryl Dorrington v. North Bergen Bd. of Ed., decided by the

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Commissioner March 24, 1982 among other cases for the proposition that "***no agent of the Board can legally bind the Board."

To the extent that the ALJ concluded that the Board erred in allowing petitioner to work more than 20 hours per week, the initial decision is modified to find that only by Servicemaster's oversight was petitioner scheduled for hours exceeding those guidelines set by the administration limiting her employment to fewer than 19 hours a week. While regrettable, the Commissioner finds no obligation arising therefrom that would entitle petitioner to health benefits. The Commissioner concurs with that conclusion of the ALJ stating that while such an error occurred, "[t]he mere fact of this error, however, is not sufficient basis for granting the petition." (Initial Decision, at p. 8)

Accordingly, for the reasons expressed in the initial decision as modified and clarified herein, the instant Petition of Appeal is dismissed, with prejudice.



ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1991

DATE OF MAILING - SEPTEMBER 13, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3310-89
AGENCY DKT. NO. 56-4/87

THEODORE R. MURNICK,
Petitioner,
v.
ASBURY PARK BOARD OF EDUCATION, W. FRANK JOHNSON & THE BUREAU OF FACILITY PLANNING SERVICES,
Respondents.

Gita R. Rothschild, Esq. and **Gary T. Hall,** Esq., for petitioner (McCarter & English, attorneys)

Howard M. Newman, Esq., for respondent, Asbury Park Board (Kalac, Newman, Lavender & Campbell, P.C., attorneys)

Donald Parisi, Deputy Attorney General, for respondents, W. Frank Johnson and the Bureau of Facility Planning Services (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: April 29, 1991 Decided: July 12, 1991

BEFORE **DAVID J. MONYEK, ALJ:**

STATEMENT OF THE CASE

Petitioner, Theodore R. Murnick, challenges the Bureau of Facility Planning Services' approval of the Bond Street site for an elementary school in Asbury Park. He alleges that both substantive and procedural errors were made by the Bureau and concomitantly claims that the Bond Street site is neither approvable nor appropriate for a 700 pupil elementary school.

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PROCEDURAL HISTORY

The State Department of Education, Bureau of Facility Planning Services (Bureau), by letter dated October 2, 1985, (Exhibit P-33), approved the site acquisition and schematic plan submitted by the Asbury Park Board of Education (Board) which proposed the use of the property of Mr. Murnick and others (known as the Bond Street site) as a site for construction of a new elementary school. On October 8, 1985, however, a referendum to approve acquisition of the site and construction of the proposed school was defeated. The Board submitted the question to the voters again and on October 7, 1986, the school referendum passed.

On November 13, 1986, Mr. Murnick requested that the Bureau hold an informal hearing regarding its approval of the Bond Street site. The informal hearing conducted by W. Frank Johnson, Manager of the Bureau, on December 15, 1986 resulted in a decision rejecting Murnick's objections to approval of the site. On April 1, 1987, Mr. Murnick filed a petition with the Commissioner of Education contesting the Bureau's actions and decision. The petition was transmitted to the Office of Administrative Law as a contested case on May 11, 1987. A prehearing conference was held July 2, 1987 and a hearing was scheduled for August 27, 28, and 31, 1987. Meanwhile, on April 22, 1987, the Board filed a complaint in the Superior Court seeking to condemn the property. Mr. Murnick contested the condemnation and on July 6, 1987, the court rejected Murnick's objections to the condemnation on its merits. Mr. Murnick appealed this decision.

The Board of Education then moved for summary judgment and/or dismissal of the administrative proceeding based upon the decision in the condemnation case, and the Bureau joined in the motion. The administrative hearing scheduled to begin August 27, 1987 was adjourned pending decision on the motion. On September 23, 1987, an initial decision granted summary judgment in favor of the Board and dismissed the matter, *Murnick v. Asbury Park Board of Education*, OAL DKT. EDU 3015-87 (Sept. 23, 1987). The Commissioner of Education affirmed on October 26, 1987. Mr. Murnick filed his appeal with the State Board of Education on November 25, 1987.

During this same period of time, Mr. Murnick filed an action in the Appellate Division appealing the Law Division's decision to permit the Board to proceed with the condemnation. In the interest of expediency, the decision of the Commissioner

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affirming the summary judgment in favor of the Board was consolidated in the Appellate Division with the condemnation appeal, notwithstanding that the State Board had not yet rendered its decision. On April 12, 1988, the Appellate Division ruled that the condemnation case and school site challenge should be treated separately and accordingly, affirmed the dismissal of the condemnation matter, but remanded the site approval issue to the Office of Administrative Law. *Asbury Park Bd. of Educ. v. Murnick*, 224 *N.J. Super.*, 504, 513 (App. Div. 1988). The State Board of Education, acknowledging the Appellate Division's remand, deferred further action on the appeal pending before it.

Following the resumption of the OAL proceedings and more complete discovery, Mr. Murnick moved for summary decision. The motion was granted on March 16, 1989, *Murnick v. Asbury Park Board of Education*, OAL DKT. EDU 3120-88 (March 16, 1989). The Commissioner rejected the initial decision on May 1, 1989, ruling that controverted factual issues existed and a plenary hearing was ordered. The matter was remanded to the OAL. On interlocutory appeal, the State Board affirmed the Commissioner's remand decision.

Judge McKeown, who originally heard the matter and rendered the summary decision, recused himself and the matter was reassigned to Richard Murphy, ALJ, who conducted a pretrial conference on August 10, 1989. The matter was reassigned and the hearing conducted by the undersigned on the following dates: May 25, 30, 31, June 4, 5, 6, 27, July 31, August 1, 2, 3, September 6, 7, October 9, 10, 11, 12, 15, 17, 1990, and January 10, 1991. In addition to the hearing dates, at the request of the parties the site and environs were viewed with representatives of the parties on October 19,1990. By motion made and granted, all parties were given the opportunity to submit memoranda in support of their respective positions. All availed themselves of the opportunity. The record in this matter closed April 29, 1991 following the receipt of the reply briefs. An extension of the 45 days to render the initial decision was requested and approved due to the administrative law judge's illness which required an extended absence from the office.

FACTUAL DISCUSSION

In 1985 the Asbury Park Board of Education decided to construct two new elementary schools, one on the east side of the city and one on the west side, to replace the insufficient and substandard facilities then in existence. The City of

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Asbury Park is geographically divided into two almost equal parts, an east and west side. These two sections are divided by Main Street (New Jersey State Highway #71) and the Jersey Shore Commuter Railroad running parallel to its immediate west. The Board retained the architectural firm of Harsen & Johns to assist in selecting a site for a new elementary school on the east side.

The Board chose a site on the east side that was in part the site of its previously owned and operated Bond Street School. This school had been constructed prior to the turn of the century and used through the mid 1970s, when it was closed for reasons of safety. In 1980 the Board sold the school property to Mr. Murnick for approximately $31,000. The present Bond Street site includes the original school property together with the remainder of the entire city block, aggregating an area of approximately 1.84 acres (Exhibits P-93, P-96, P-98). The property is located in a multi-family residential zone where schools are a permitted use and is adjacent to commercially zoned property. Two sites were considered in 1985 for the east side in addition to Bond Street, property located on Grand Avenue and the Salvation Army premises. Both of these sites were subsequently abandoned by the Board for multiple reasons, among which were higher acquisition costs and relocation inconveniences and costs. The Bond Street site was most desirable because of its location and since it required a minimum of condemnation and relocation costs.

In July 1985, the Board sought approval from the State Department of Education, Bureau of Facility Planning Services (Bureau), for both the east and west side school sites. The plans called for a school on the east side with a maximum enrollment of approximately 700 students in grades pre-kindergarten through grade five and special education programs for pre-school handicapped, mentally retarded, perceptually impaired, emotionally disturbed, and neurologically impaired. Following the receipt of approval from the Bureau by letter dated October 2, 1985, the Board went to referendum with both sites in one public question. The referendum was defeated.

As a result of its substandard facilities, the Asbury Park school system was placed in Level III Monitoring by the State Department of Education on April 10, 1986. The Board contacted the Bureau for advice as to whether it was necessary to reapply and resubmit its educational program and drawings for consideration and approval. The Bureau advised that as long as there were no significant changes in

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the site or the plan submitted the previous year, new submissions did not have to be submitted for approval. The Board submitted the issue to the voters again. The referendum was approved on October 7, 1986.

PETITIONER'S ARGUMENTS

Mr. Murnick challenges the adequacy of the Bureau's review of the Board's request for site approval. He contends that the Bureau failed to comply with the regulations established by the State Board of Education when it approved a 1.84 acre site for a 700 student elementary school. Additionally, he claims that the approval decision was based on insufficient information and the misunderstanding of material facts. He argues that the Bureau was obligated to require the Board to resubmit its approval request in 1986 so that it could apply the regulations that had become effective October 21, 1985, subsequent to the initial approval.

TESTIMONY PRESENTED

Petitioner's testimonial case consisted of the presentation of two experts witnesses. Dr. Lewis C. Solmon, Dean of the Graduate School of Education at the University of California, Los Angeles, was offered as an expert on education generally, as well as on the economics of education in particular. He has written extensively on issues relating to the economics of education and oversees the operation of the laboratory school located on the UCLA campus. His work with the school includes involvement in discussions concerning the potential relocation of that school into an urban district and the assessment of the suitability of various sites.

Dr. Solmon expressed great concern about the limited space available for outdoor recreation on the Bond Street site. The literature that he cited included an article by Bergman and Uerling that recommended 250 square feet of outdoor recreation per pupil; the Bond Street site will provide 50 square feet per pupil. Bergman & Uerling, "A Functional Approach to Determining the Size of a School Site", 23 *Council of Educational Facilities Planners Journal* 4-6(1985) (Exhibit RB-1). He opined that the physical education program in Asbury Park, which for grades 1 through 5 does not involve any recess and is limited to two physical education classes per week, which he alleged is unusual and contrary to current educational theories. He further testified that the setback and buffer zones required by local and state

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codes are insufficient for this site, and the school site is not in the exact geographical central location for the pupil population. In summary, he testified that the site was inadequate under the 1985 guidelines and under the guidelines and regulations in effect in 1986.

Norman Day, a professional planner, presented testimony concerning the appropriateness of the school site from a planning perspective, as opposed to an educational perspective. While Mr. Day has never been retained specifically to assist in the siting of a new school, his planning activities sometimes involve the siting of schools. Mr. Day served as a consultant to the City of Asbury Park beginning in 1985 in connection with the development of a waterfront redevelopment plan. In addition, in December of 1985, he advised Superintendent Jannarone that in his opinion the Grand Avenue site was preferable to the Bond Street site for a school.

Mr. Day testified that the site was inadequate and unapprovable for several reasons. He cited the recommendation that schools be centrally located in terms of student population as one of the factors in his decision. Further, he believed that the surrounding and adjacent land uses would adversely impact upon the use of the site for a school. These surrounding uses include a five-story parking garage, a food distribution center, a fifteen-story residential structure (owned by Mr. Murnick), and single-family residences. He indicated that these uses raised related traffic safety concerns. As in Dr. Solmon's testimony, Mr. Day stated that the site provided inadequate playground space and insufficient setbacks and drop-off areas. He concluded that the site was not approvable under the 1985 guidelines or the 1986 regulations and guidelines.

In the course of the hearing, respondents presented both factual and expert testimony concerning the approval process utilized by the Bureau. Their witnesses included W. Frank Johnson, Director of the Bureau; Michael D. Macaluso, Educational Specialist II at the Bureau; R. Thomas Jannarone, the Superintendent of Schools in Asbury Park; Milton G. Hughes, Monmouth County Superintendent of Schools; Emery Malasits, an architect for the Board; Jeffrey A. Hunt, a real estate appraiser; James W. Higgins, a licensed professional planner; and Dr. John A. Falzetta, a professional school site planner.

The site approval application filed with the Bureau by the Asbury Park Board was reviewed by Dr. Macaluso, who in the course of his career with the Bureau had

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reviewed hundreds of these applications. At the hearing, he explained the approval process and the specific review he performed for the Asbury Park request. He testified that he was permitted to and did, in fact, use his discretion to approve the site although it was smaller than that set forth in the guidelines, because Asbury Park was an urban district to which the guide had no practical application. Further, he stated that the site acquisition approval and schematic plan approval were properly granted.

Dr. Johnson became involved in this application process after Dr. Macaluso issued his approval. His experience in educational facility planning at the Department of Education dates back to 1978. He is currently employed as director of educational planning with an architectural firm. In the course of his testimony, he indicated that he followed the usual and customary practice of the Bureau when he maintained the approval of the Bond Street site for eighteen months. Further, he testified that the site was approvable under the 1985 guidelines and under the 1986 regulations and guidelines.

The application of the requirements in the current regulations to the site was presented by Dr. John N. Falzetta, a retired professor of education from Glassboro State College and presently a school site planner for a number of urban communities. His detailed analysis of the criteria used to determine site suitability was most persuasive and impressive.

The expert witnesses presented by petitioner were articulate, credible, and highly qualified in their fields. Their backgrounds, experience, and areas of expertise, however, are not as germane, material, and pertinent to the issues presented in this matter as those of the witnesses presented by the respondents. Dr. Solmon is quite knowledgable about education, generally, and the economics of education; specifically, however, his expertise in determining suitable sites for schools is limited. The experience he has gained overseeing the laboratory school in no way compares with the expertise of respondents' witnesses who have reviewed hundreds of site approval applications and routinely, continuously, and habitually consider these matters. Mr. Day's expertise in the siting of schools is similarly limited. Neither witness possessed specific knowledge about the activities that would take place at the school or were familiar with Asbury Park's educational plan, which has been in place for many years and formed the basis for the design and siting of the proposed school. When they indicated that the site was too small, they were

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evaluating the site using their general theoretical knowledge, not the existing educational program in Asbury Park. Furthermore, both relied upon a review of recognized educational texts, which for them was their initial introduction to the matters stated therein, and both on cross-examination were shown to have misread or misinterpreted parts of the materials relied upon. This, too, compromised the weight and substance to be given to their testimony.

ISSUES

Pursuant to the Pre-Hearing Order of September 27, 1989, the following issues were listed for resolution:

1. Whether the Bond Street school property in Asbury Park is appropriate for a 700 pupil elementary school?
2. Whether the site was properly approved by the Bureau pursuant to the State Board regulation currently in effect prior to the Board's seeking of voter approval by referendum?

On the initial date of the plenary hearing, May 25, 1990, these were supplemented by the following issue:

3. Whether the Bond Street site was approvable in 1985 and 1986 based upon the then applicable regulations and the documents and information in the possession of the Bureau at that time?

BURDEN OF PROOF

Pursuant to the Prehearing Order, Petitioner has the burden of proof to demonstrate that the Bureau's approval was erroneous.

I.
WHETHER THE BOND STREET SITE WAS PROPERLY APPROVED BY THE BUREAU PURSUANT TO THE STATE BOARD REGULATION CURRENTLY IN EFFECT PRIOR TO THE BOARD'S SEEKING OF VOTER APPROVAL BY REFERENDUM?

Prior to July 1, 1984 school site acquisition approvals were governed by the rules contained in former *N.J.A.C.* 6:22-1.1 *et seq.*, which established standards for public school facility construction. Those provisions expired on July 1, 1984 pursuant to Executive Order 66 (1978). In addition, the Bureau published guidelines in a

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publication entitled , *School Sites: Selection, Development and Utilization* (1973). The State Board of Education proposed a new *N.J.A.C.* 6:22, 17 *N.J.R.* 650 (March 18, 1985) which was adopted with a few changes on September 4, 1985, 17 *N.J.R.* 2540. The effective date was October 21, 1985, after the approval for the Bond Street site had been obtained.

The regulations specified the information required by the Bureau in order for the school district to receive approval of the adequacy of the site, *N.J.A.C.* 6:22-1.2. The regulations also included a table of standards for the minimum acceptable school site sizes that recognized smaller minimum site sizes in municipalities with greater population densities, *N.J.A.C.* 6:22-1.2(b)(4). The prior guidelines were more general. The smallest minimum site sizes were allowed where population density exceeded 10,000 people per square mile, as in Asbury Park. According to the regulations,the minimum site size for a 700 pupil elementary school in Asbury Park would be 3.4 acres.

When the Board began the process of obtaining site approval in July 1985, the regulations had lapsed and only the guidelines were in effect and utilized. The guidelines recommended a seventeen acre site for a 700 student elementary school, but also provided ways that a smaller site would be appropriate in an area of high density. The Bureau reviewed the request for site approval utilizing the guidelines then available, and concluded that 1.84 acres was appropriate and adequate for a school site in Asbury Park, a densely populated, built-up urban area.

The process of obtaining site plan approval consists of several stages. Initially, a school district applies for site acquisition approval. The next level is schematic plan approval which includes a review of what the building is to look like and where it will be placed on the site. These approvals are necessary prior to presenting a referendum to the voters. A more specific approval process occurs in the subsequent phase where the architect designs specifics to the building and the Bureau reviews how the site is to be laid out and what the essential features of the site are. Final plan submission which includes the working drawings off which the construction is to be done and permits are obtained is the final level of approval. The issues in this matter concern only the first two levels of approval: site plan and schematic plan.

In July 1985, the Bureau received a letter from Harsen & Johns, architects for the Asbury Park School District, informing it that a submission was being made on

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behalf of the Asbury Park school district for site acquisition approval and schematic plan approval for two elementary schools (Exhibit P-7). The letter enclosed the project cost estimate (Exhibit P-8) and transmittal letters to the Monmouth County Superintendent of Schools (Exhibit P-10) and the Asbury Park Planning Board (Exhibit P-9) as required by the Bureau. The Bradley Street School has been constructed on the west side and opened in September 1989. It functions as an elementary school for approximately 400 students. The within matter is solely concerned with the east side school or Bond Street site.

On August 9, 1985 the Bureau received a copy of the educational program for the elementary schools from R. Thomas Jannarone, Jr., the Asbury Park Superintendent of Schools (Exhibits P-11 and P-12). By letter dated August 27, 1985 Harsen & Johns submitted revised floor plans and cost estimates (Exhibit P-14), as well as educational programs and the Office of Equal Educational Opportunity form (Exhibit P-15) that the Bureau required the local district to file in conjunction with any schematic plan approval request. By letters dated that same day, notice was forwarded to the County Superintendent of Schools (Exhibit P-16) and the Asbury Park Planning Board (Exhibit P-17) of the revised schematic plans. Dr. Macaluso of the Bureau, after reviewing the Asbury Park file determined that the required eight components of the submissions had in fact been made (Exhibit P-21) and sent a letter to Harsen & Johns on September 3, 1985 indicating that the Bureau would begin its review for educational adequacy (Exhibit P-22).

Subsequently, the file was supplemented with additional educational program information; a statement from the architectural firm indicating that in the opinion of the firm the sites chosen by the Board were appropriate (Exhibit P-25); a cover letter to the New Jersey Department of Environmental Protection putting that agency on notice of the application (Exhibit P-26); a letter from the County Superintendent indicating that the Board agreed to acquire the entire block of the Bond Street site (as opposed to just the prior school site) (Exhibit P-20); a letter from David Roberts, City Planner of Asbury Park (Exhibit P-19); a memo from the Office of Equal Educational Opportunity submitting its analysis and approval (Exhibit P-28); a site plan (Exhibit P-29); a first floor plan of the Bond Street school (Exhibit P-30); and a pupil distribution map (Exhibit P-18). The site plan satisfied the Bureau's requirements for site acquisition and the site plan and first floor plan were submitted to satisfy the Bureau's requirements for schematic plan approval. In addition, a representative of Harsen & Johns, Superintendent Jannarone, and

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County Superintendent Hughes attended a meeting in Dr. Macaluso's office on August 8, 1985 to discuss matters pertaining to the approval. Dr. Macaluso completed a Bureau checklist that indicated the proper documentation had been received for site acquisition approval (Exhibit P-31).

Dr. Macaluso reviewed the submitted plans to determine whether the building met the minimum size requirements of the State Board of Education; whether the spatial relationships among the various classrooms operated as a cohesive unit so that they functioned in a reasonable and efficient manner; and whether the functional capacity of the building met the Board's needs. The functional capacity of the Bond Street School was determined to be 711 students. The site plan indicated the size of the parcel to be acquired and what surrounded the parcel. It also showed the footprint of the building and the orientation of the building on the site. The schematic plan, which contains more specificity than the site plan, demonstrated how the architect intended to design the building so as to implement the educational program.

Based on his review of the submissions, Dr. Macaluso concluded that site acquisition approval and schematic plan approval should be granted. Although he was aware that the guidelines suggested a 17 acre site, he recognized that land was at a premium in Asbury Park. In light of this limitation, he exercised his discretion to approve a smaller site after noting that the school was to be three stories in order to allow more room for outdoor play areas.

Dr. Macaluso admitted that he misunderstood some of the information in the file and believed while he conducted his review that the Board already owned the old school property and was now going to acquire an additional 1.84 acres. Dr. Macaluso credibly testified that even if he had known the total area was 1.84 acres, he nevertheless would have approved the site. There was also some confusion as to whether the Asbury Park Planning Board had recommended the property as the best available site. Although the Bureau file contained a letter from David Roberts, the Asbury Park City Planner, he specifically indicated that he was not speaking for the Planning Board (Exhibit P-19). The record includes a resolution from the Planning Board dated February 9, 1987 that expresses its disapproval of utilizing the site for an elementary school (Exhibit P-60). I find that the Bureau was not required to receive a response from the Planning Board before it acted and that the resolution of February 9, 1987, seventeen months after the Planning Board received notice of

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the School Board's intention to use the site for a school, was manifestly untimely and consequently has no bearing on this issue.

Following the defeat of the first referendum and the Level III monitoring, the Board contacted the Bureau to determine whether it was necessary to reapply for approval before submitting the issue to the electorate again. Bureau custom and practice permitted an approval of an application to remain in effect for eighteen months so long as there were no major changes in the plan. This practice recognized the waste of energy, time, and expense that would result if resubmission of substantially the same documentation was necessary and created a limited vested right in favor of the applicant for a relatively short time period. The Board was permitted to go to referendum on the 1985 approval after submitting an updated cost estimate.

After the referendum was approved, Mr. Murnick requested an informal hearing before the Bureau to contest its approval of the site. The informal hearing was held December 15, 1986 at the Bureau's offices in Trenton. Those attending included Mr. Murnick, his counsel, counsel for the Asbury Park Board, and Dr. Johnson. After considering petitioner's objections to the approval of the site by the Bureau, Dr. Johnson issued his decision by letter dated January 14, 1985 affirming the approval of the site. Although he rendered a decision that reapproved the site, his file also contained a memo written three days after the hearing that indicated problems with the site and concluded that it should not have been approved. At hearing, Dr. Johnson testified that he wrote the memo to the file when he was angry, agitated, and under misconceptions of fact. Before the informal hearing, he had thought that the request was for a smaller school (350 students) and he wondered if alternate sites were available. When he was calmer and claimed to have been consequently more rational, he again reviewed the facts and determined that the site was properly approved and rendered his final decision indicating approval. The negative memo in the file in no way impairs the force and effect of his final decision. The memo, although reflective of an emotional reaction, was more than neutralized by the competent, credible subsequent testimony.

Murnick contends that the 1985 approval should not have been carried forward to 1986 because regulations became effective in the interim. He further contends that the Bureau should have required a new submission and applied the new regulations to the request.

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After carefully considering all of the evidence presented on this issue, I find that the Bureau acted appropriately when it followed its usual and customary practice of maintaining approvals for eighteen months. Dr. Johnson credibly testified that the Bureau practice of maintaining approvals for eighteen months remained the same whether an application for site approval was evaluated under the guidelines or the regulations. His testimony is further supported by the promulgation of N.J.A.C. 6:22-1.2(d) which codified this practice (currently N.J.A.C. 6:22-2.1(f)). As it turns out, Dr. Johnson indicated that he applied the regulations to the Bond Street site following the informal hearing. I have no need to consider that fact, however, to reach my conclusion which would remain the same whether or not the regulations had been applied to this site.

I conclude that the Bureau properly approved the site in 1985 and 1986. The Board prepared and submitted all of the necessary documentation for the Bureau's review. Although there were some misunderstandings of fact as the submission went through the review process, the candid hearing testimony of both Dr. Macaluso and Dr. Johnson credibly explained that the ultimate approvals would have resulted had the actual facts been then known by them and therefore, the misunderstandings were not sufficient to adversely affect the final approval.

II.
WHETHER THE BOND STREET SITE WAS APPROVABLE IN 1985 AND 1986 BASED UPON THE THEN APPLICABLE REGULATIONS AND DOCUMENTS AND INFORMATION IN THE POSSESSION OF THE BUREAU AT THE TIME?

As was stated above, petitioner's expert witnesses alleged that the site was inadequate due to its size which limited outdoor recreation space, lack of centrality to the student population, surrounding uses and related traffic concerns, and insufficient setbacks and drop-off areas. The findings and conclusions which follow have been reached after carefully reviewing and weighing all of the testimony and evidence in the record.

The decision as to whether the Bond Street site was approvable in 1985 and 1986 is determined by analyzing the guidelines and Bureau policies and procedures then in effect. *School Sites: Selection, Development and Utilization* (1973) provides recommendations for desirable site characteristics. Among the criteria considered are size, shape, topography, sub-surface conditions, and location. The publication

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further discusses economic considerations. There are no disputes in this matter as to the shape, topography, or subsurface conditions; thus, I find them to be adequate. Analysis will focus on the size and location of the Bond Street site.

The size of the site must be sufficient to provide space for the educational program utilized in the school district. Ideally, the guidelines suggest 17 acres, where applicable in a suburban or rural area, for a 700 student elementary school; however, there is a provision that offers suggestions for communities where land is at a premium. Several of the suggestions were incorporated in the Asbury Park plan. For example, a three-story building, staggering recreational periods (lunch times), and planning multi-use of the same area. The guidelines indicate that urban school districts can meet students' needs by utilizing "innovative and imaginative solutions," *Id.* at 7. The implication is that the size of the school site is not as important as whether the needs of the educational program can be met.

I find that the size of the playground areas is adequate for the activities that will take place on them and for the number of students who will participate. The Bergman and Uerling recommendation of 250 square feet per student is based on the number of students using the area at one time, not the total number of students in the school. Further, the size of this site did not determine the physical education program in the Asbury Park schools. The district's program which does not include a recess and places an emphasis on indoor activies, was developed in response to the need to improve the students' academic abilities. The physical education program had been in place for many years prior to the submissions herein. Whether the program is unusual or contrary to current educational theories as opined by Dr. Solmon, is not an issue before this tribunal.

Location includes consideration of accessibility, safety, and environment. Accessibility is judged by the centrality of the location and the presence of well maintained roads. The Bond Street site is located approximately five blocks from the center of the current student population. Further, the entire city is approximately 1.4 square miles and this school will only serve the east side of the city. Thus, the suggested limitation of thirty minutes travel time for elementary students included in the guidelines can easily be met, *Id.* at 12. It would be unreasonable to eliminate any site because it is not located in the precise center of the school community. There is no dispute as to the accessibility of the roads surrounding the site. In light of the small size of the area and the site's reasonable distance from the center of the

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school population, I find that the site is accessible to the student population who will attend the elementary school.

The surrounding uses of the site include commercial and residential zoning. Although there is a five-story parking garage in the area and some light industry, the traffic on the streets adjacent to the Bond Street site was not shown to be particularly heavy or unsafe. [Parenthetically, on the date of the site visit it was observed that vehicular traffic in the area was practically non-existent] The parking garage does not exit onto the adjacent school street. In addition, Emory Street is a one-way street which limits both the traffic and the safety hazards. There was also some testimony during the hearing about bars and a tatoo parlor in the area These businesses are not relevant to our review because they are either west of the school site and students from the east side traveling to school are unlikely to come in close proximity to them or their prime hours of operation are normally well after school is out for the day. I find that the surrounding uses are not an adverse health or safety component for an elementary school.

The petitioner also argues that the setbacks and drop off points are insufficient. Setbacks established by local zoning ordinances may be varied for educational buildings. Although everyone concerned with school properties would prefer that they be surrounded by spacious, lush lawns, that is not practical in many urban areas. The setback requirements are met on two sides of the building. In addition, the site has sufficient acreage to meet all of the setback requirements, but it makes more sense to waive the requirements in order to provide larger play areas.

The drop off points are not a major problem at this early stage of the planning process. The main entrance, for example, would accommodate a large bus if the students were going on a field trip. It's well removed from the traffic flow of Monroe Avenue. There was some concern expressed at the hearing about the safety of the indentation alongside of Emory Street that will be used as a drop off point for the students in the handicapped program. If this is still a concern when the Board enters the preliminary phase of the review process there are adjustments that can be made. Thus, I find that the setbacks and drop off points are adequate.

Having applied the guidelines to the information available to the Bureau concerning this site, I conclude that the site was approvable in 1985 under the guidelines then in existence.

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Since I have found that the Bureau properly allowed the referendum in 1986 without requiring the Board to resubmit its site approval request, the regulations do not apply to this case at all. As was indicated above, however, Dr. Johnson applied the regulations to the site application when he reviewed the matter following the informal hearing. His review affirmed the approval of the school site request.

The thrust of Mr. Murnick's argument is that the site could not be approved pursuant to the 1986 regulations because the regulations require a 3.4 acre site size for a 700 student elementary school in a city the size of Asbury Park. He further states that the Bureau had no authority to vary the size requirement. The Bureau contends that it has always had the authority to vary site size as necessary and the new regulations did not inhibit that authority in any way. Dr. Johnson's testimony is further supported by the summary accompanying the proposed amendments to *N.J.A.C* 6:22-1.1 *et seq*. which stated: "The inclusion of *N.J.A.C.* 6:22-1.2 into the code clarifies long-standing variance practice wherein the Manager, Bureau of Facility Planning Services has approved variances to site sizes, given appropriate justification." 20 *N.J.R.* 3 (January 4, 1988).[Emphasis supplied]

It has long been held that "an agency's express authority is augmented by implied authority which may be reasonably necessary or appropriate to effectuate expressly delegated authority." *In re Solid Waste Util. Cust. Lists*, 106 *N.J.* 508, 516 (1987); *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 44, 562 (1978); *Lane v. Holderman*, 23 *N.J.*304, 315 (1957). Further, an administrative agency's construction of its regulatory authorities is accorded great weight. *In re Plainfield-Union Water Co.*, 57 *N.J. Super.* 158, 177 (App. Div. 1959). In the matter before me, the agency habitually and properly utilized its authority to vary site size to meet its objective of approving sites for schools for the children in New Jersey. The agency's review focused on whether the site provided sufficient space for the district's educational program.

I find that the Bureau acted within its authority when it varied the site size as necessary, and therefore, conclude that the Bond Street site was approvable in 1986.

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III.

WHETHER THE BOND STREET SCHOOL PROPERTY IN ASBURY PARK IS APPROPRIATE FOR A 700 PUPIL ELEMENTARY SCHOOL?

The Commissioner's remand ordered the administrative law judge to determine if the site is approvable under the current regulations. In so ordering, he applies the time-of-decision rule in order to expedite the resolution of this matter.

The current regulations, effective July 16, 1990, provide that the size is "directly related to the acreage required for the structures and activities to be situated thereon." *N.J.A.C.* 6:22-2.1(c). The specific site size requirements were eliminated in 1988, 20 *N.J.R.* 2057 (August 15, 1988). *N.J.A.C.* 6:22-1.2(d) states that the acreage must be sufficient to meet the eight site elements listed. Dr. Falzetta's testimony thoroughly and carefully elicited the application of the current regulations to the Bond Street site. The application of each element to the site follows:

1. There is enough acreage for placement of the building;
2. The site is already at its maximum capacity;
3. There are no other structures to be placed on this site;
4. The site has sufficient acreage for all-purpose play and recreation fields;
5. The site has sufficient acreage for walkways and roadways on which people and vehicles traverse the site;
6. The site has sufficient acreage for public and service access roads;
7. The site has sufficient acreage to provide 30 foot wide access around the building (two sides are city streets, one side is a large play area, and the last side has no obstructions to prevent access to the grounds); and,
8. The site has sufficient acreage to meet local setback requirements if they apply to a school, although as I expressed in another part of this decision, the requirements should be waived in order to provide larger play areas.

The uncontradicted, uncontroverted testimony of Dr. Falzetta, a most qualified, candid, and credible expert witness, unequivocally and categorically concluded that the Bond Street site meets the eight criteria listed in the regulations. I conclude, therefore, that the evidence ineluctably warrants the conclusion that the Bond Street property is approvable and appropriate for a 700 pupil elementary school under the current regulations.

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The findings and conclusions made herein resulted from a careful review of all of the evidence, both testimonial and documentary, presented by the parties. Significant of that review was the weighing and evaluation of both the testimony and the qualifications of the expert witnesses, their respective backgrounds, education, training, experience, and professional propinquity to the issues of this case. Although both Dr. Solmon and Mr. Day were well qualified in their respective fields, their expertise was tangential, at best, to the issues herein. Neither of them had ever had any hands-on experience, education, or training involving the specific issues about which they were asked to render an opinion. Both candidly admitted that they became acquainted with the literature and texts involving the issues herein while preparing their testimony for this case.

On the other hand, respondent's experts, Dr. Macaluso, Dr. Johnson, and Dr. Falzetta, have spent their entire professional lives in the very field in which the issues to be considered were part and parcel. In short, respondents' expert testimony and opinions were analogous to the radii emanating from the center of the circle to its entire circumference rather than merely a line outside the circle which happened to touch only the circumference tangentially. Additionally, respondents' fact witnesses had spent most of their professional lives in the field of education and were extremely credible both by virtue of what they said and how they said it. In short, respondents' case was well corroborated and rang true.

In sum, respondents' case carried substantially greater weight, substance, and ultimate credibility with regard to the seminal issues to be determined.

CONCLUSION AND ORDER

Accordingly, I **FIND** and **CONCLUDE**:

1. The Bond Street school property in Asbury Park is approvable and appropriate for a 700 pupil elementary school.
2. The Bond Street school site was properly approved by the Bureau pursuant to the State Board's regulatory provisions then currently in effect prior to the Asbury Park Board's seeking voter approval by referendum.
3. The Bond Street site was appropriate and approvable in 1985 and 1986 upon the then applicable regulations and the documents and information in the possession of the Bureau at that time.

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It is therefore **ORDERED** that petitioner's appeal be and is hereby **DISMISSED**; it is further **ORDERED** that the approvals heretofore granted by the Bureau to the Asbury Park Board be and are hereby **DECLARED** to be valid, subsisting, and in good standing.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/12/91
Date

DAVID J. MONYEK, ALJ

Receipt Acknowledged:

7/16/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 22 1991
Date

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

P-1 Bureau publication: "School Sites: Selection, Development and Utilization" (1973).

P-2 Prior Regulations (adopted 1979; expired 1984).

P-3 Proposed Regulations (March 18, 1985).

P-4 Board of Education, minutes of special meeting (June 24, 1985).

P-5 Board of Education, minutes of special meeting (July 9, 1985).

P-6 Board of Education, minutes of closed executive session (July 9, 1985).

P-7 Letter, dated July 23, 1985, from M. Wagner, Architect, to M. Macaluso, Bureau of Facility Planning.

P-8 Project cost estimate for proposed Bond Street, dated July 26, 1985 (enc. to P-7).

P-9 Letter, dated July 23, 1985, from M. Wagner, Architect, to Asbury Park Planning Board (enc. to P-7).

P-10 Letter, dated July 23, 1985, from M. Wagner, Architect, to M. Hughes, Monmouth County Superintendent of Schools (enc. to P-7).

P-11 Letter, dated July 29, 1985, from R.T. Jannarone to F. Johnson, Bureau of Facility Planning.

P-12 Asbury Park Board of Education - Educational Program for Proposed Bond Street School (enc. to P-11).

P-13 Letter, dated August 1, 1985, from M. Hughes, County Superintendent, to M. Macaluso, Bureau.

P-14 Letter, dated August 27, 1985, from M. Wagner to M. Macaluso, Bureau.

P-15 OEEO FORM (undated) (enc. to P-14).

P-16 Letter, dated August 27, 1985, from M. Wagner, Architect, to M. Hughes.

P-17 Letter, dated August 27, 1985, from M. Wagner to D. Roberts, Asbury Park Planning Board.

P-18 Letter, dated August 29, 1985, from R.T. Jannarone to M. Macaluso, with attached pupil distribution map.

P-19 Letter, dated August 30, 1985, from D. Roberts, Asbury Park City Planner, to M. Macaluso, Bureau.

P-20 Letter, dated August 30, 1985, from M. Hughes, County Superintendent, to M. Macaluso, Bureau.

P-21 Schematic plan submission review sheet, dated September 2, 1985, for proposed Bond Street School.

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P-22 Schematic plan acknowledgement letter, September 3, 1985, from M. Macaluso to Harsen and Johns Partnership, Architects.

P-23 Letter, dated September 5, 1985, from R.T. Jannarone, Superintendent to M. Macaluso, Bureau.

P-24 Letter, dated September 25, 1985, from M. Wagner to M. Macaluso, forwarding 10 listed items.

P-25 Letter, dated September 25, 1985, from G. Johns, AIA, to M. Macaluso regarding proposed school sites (enc. to P-24).

P-26 Letter, dated September 25, 1985 from M. Wagner to L. Cattaneo, NJDEP (enc. to P-24).

P-27 Memorandum dated September 30, 1985 from B. Anderson, OEEO, to M. Macaluso, Bureau.

P-28 OEEO review form dated September 30, 1985.

P-29 Site plan of existing Block 125, East School (Bond Street School) (1985).

P-30 Site plan and 1st floor plans, Asbury Park East School (Bond Street), last revised September 23, 1985 (2 sheets).

P-31 School site approval file form for Bond Street site (undated).

P-32 Schematic plan approval letter dated October 1, 1985 from M. Macaluso to Harsen and Johns.

P-33 Site acquisition approval letter, dated October 2, 1985 from M. Macaluso to R.T. Jannarone.

P-34 Adopted regulations (October 21, 1985).

P-35 Board of Education minutes of Buildings and Grounds Committee meeting of October 22, 1985.

P-36 Memorandum from R.T. Jannarone to Board of Education (November 6, 1985).

P-37 Memorandum from R.T. Jannarone to Buildings and Grounds Committee (November 25, 1985).

P-38 Report to Buildings and Grounds Committee by R.T. Jannarone (December 4, 1985.

P-39 Proposed regulations (March 17, 1986).

P-40 Unlabeled and undated committee report by D. Chianese and W.F. Johnson regarding Asbury Park school facilities [early in 1986 according to Johnson deposition testimony]

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P-41 Level III Report and cover letter from M Hughes to R.T Jannarone dated April 10, 1986. [Note that pages 17-30 correspond to P-40].

P-42 Letter dated July 9, 1986 from M. Wagner to M. Macaluso, Bureau

P-43 Project cost estimate for proposed Bond Street School (June 20, 1986) (enc. to P-42).

P-44 Adopted regulations (July 21, 1986).

P-45 Bureau publication: "School Sites: Selection, Development and Utilization" (revised 1986).

P-46 Affidavit re results of school referendum on October 7, 1986.

P-47 Letter dated November 13, 1986 from McCarter & English to F. Johnson, requesting informal hearing.

P-48 Letter dated December 2, 1986 from F. Johnson, Bureau, to McCarter & English scheduling informal hearing.

P-49 Letter dated December 3, 1986 from R.T. Jannarone to Commissioner of Education, S. Cooperman.

P-50 Letter dated December 4, 1986 from Harsen and Johns to M. Macaluso, Bureau, filing preliminary plans and other materials.

P-51 Preliminary plans for Bond Street, dated November 24, 1986 and last revised December 16, 1986 (6 sheets).

P-52 F. Johnson, Bureau, draft memo, with cover sheet, dated December 19 [1986].

P-53 F. Johnson, Bureau, deliberation memo dated December 18, 1986. (Final version of P-52).

P-54 Letter dated January 2, 1987 from Commissioner Cooperman to R T Jannarone.

P-55 Letter dated January 6, 1987 from McCarter & English to F. Johnson, Bureau.

P-56 Draft letter initially dated January 6, 198[7] from F. Johnson to McCarter & English (draft of P-58).

P-57 Letter dated January 13, 1987 from McCarter & English to F. Johnson, Bureau.

P-58 Letter dated January 14, 198[7], from F. Johnson, Bureau, to McCarter & English, presenting decision on informal hearing.

P-59 Letter dated January 20, 1987 from McCarter & English to F. Johnson, Bureau.

P-60 Resolution adopted February 9, 1987 by Asbury Park Planning Board.

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P-61 Letter dated February 18, 1987 from McCarter & English to F. Johnson, Bureau.

P-62 Supplemental Johnson decision letter dated February 18, 1987

P-63 Identification only.

P-64 Identification only.

P-65 Identification only.

P-66 Identification only.

P-67 Identification only.

P-68 Identification only.

P-69 Proposed regulations (January 4, 1988.

P-70 Adopted regulations (April 4, 1988).

P-71 Proposed regulations (May 16, 1988).

P-72 Adopted regulations (August 15, 1988).

P-73 Current regulations, N.J.A.C. 6:22-1.1 to 1.8.

P-74 Letter dated August 24, 1989 to Tom Jannarone, Superintendent, from John N. Falzetta, President, Falzetta Associates.

P-75 Site plan for proposed Bond Street School, dated October 1, 1989.

P-76 Letter dated October 5, 1989 to John Falzetta Associates from R. Thomas Jannarone, Superintendent.

P-77 Identification only.

P-78 Identification only.

P-79 Identification only.

P-80 Letter dated August 7, 1987 to Dr. Michael Macaluso from Evelyn M. Vatasin, Board Secretary, East Rutherford.

P-81 Letter dated September 2, 1987 to Mrs. Evelyn Vatasin, Board Secretary, East Rutherford, from W. Frank Johnson, Bureau.

P-82 Letter dated January 27, 1988 to Mrs. Harriet Wagner, Board Secretary, East Rutherford, from W. Frank Johnson, Bureau.

P-83 Letter dated June 26, 1986 to Dr. Frank Johnson from Gustav H. Ruh, Superintendent, Atlantic County.

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P-84 Letter dated July 7, 1986 to Dr. Jack Eisenstein, Superintendent, Atlantic City, from Michael Macaluso.

P-85 Letter dated July 28, 1986 to Dr. Frank Johnson from Martin F. Blumberg, Architect, Atlantic City.

P-86 Letter dated September 12, 1986 to Martin F. Blumberg, Architect, Atlantic City, from W. Frank Johnson (with attachment).

P-87 Letter dated January 7, 1987 to Martin Blumberg, Architect, Atlantic City, from W. Frank Johnson.

P-88 Letter dated November 10, 1986 to Michael Macaluso from Anthony Scardaville, Superintendent, Irvington.

P-89 Letter dated December 5, 1986 to Anthony Scardaville, Superintendent, Irvington, from Michael Macaluso.

P-90 Letter dated December 9, 1986 to Frank Johnson from Anthony Scardaville, Superintendent, Irvington.

P-91 Curriculum Vitae - Norman Day.

P-92 Asbury Park Waterfront Redevelopment Plan - Adopted: 7 November 1984; Amended: 7 January 1987.

P-93 Street map of Asbury Park indicating renewal area, rehabilitation area, and major thoroughfares dated March 6, 1990.

P-94 Asbury Park Board of Education, minutes of special meeting (December 5, 1985).

P-95 Asbury Park School Site Analysis - March 6, 1990; Revised May 18, 1990.

P-96 Street map of Asbury Park indicating resident pupil distribution dated May 18, 1990.

P-97 Lewis C. Solmon Resume dated April, 1990.

P-98 Street map of east side Asbury Park indicating lots and blocks immediately surrounding Bond Street site and land uses entitled "Asbury Park Site Analysis" and dated March 6, 1990.

P-99 Identification only.

P-100 Identification only.

P-101 Educational Specifications dated 1973 - Revised 1986.

P-102 Identification only.

P-103 Identification only.

P-104 Identification only.

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P-105 Educational Specifications 1973.

P"a" Transcript - Depositions under Oral Examination of W. Frank Johnson and Michael Macaluso.

RA-1 Identification only.

RA-2 Identification only.

RA-3 Handwritten notes calculating the area of the proposed playgrounds.

RAP-4 Memorandum from David Egbert, Secretary, to President and Members of the Board of Education, re: minutes of Buildings and Grounds Committee Meeting, dated December 12, 1985.

RAP-5 Letter from David Egbert, Secretary to Milton G. Hughes, dated July 8, 1986.

RAP-6 Letter from David Egbert, Secretary to Walter J. McCarroll, Asst. Commissioner, dated July 22, 1986.

RAP-7 Educational Program for Bond Street School, revised December 4, 1986.

RAP-8 Plans for Bond Street School, prepared by The Harsen and Johns Partnership, dated January 3, 1987.

RAP-9 Preliminary Plan Approval letter from Michael Macaluso, Bureau, to The Harsen & Johns Partnership, dated January 20, 1987.

RAP-10 Schematic drawings (20 pages) with four (4) page memorandum attached, dated August 15, 1988, prepared by The Harsen and Johns Partnership.

RAP-11 September 29, 1989 Enrollment documents consisting of eleven (11) pages.

RAP-12 School Facilities Master Plan, Five-Year Long-Range Facility Plan, dated July 1, 1985.

RAP-13 Minutes of the Regular Meeting of the Asbury Park Bd. of Ed. (August 22, 1985).

RAP-14 Letter of R. Thomas Jannarone to OEEO, dated August 27, 1985.

RAP-15 Street map and seven photographs indicating Bond Street site and environs.

RAP-16 Identification only.

RB-1 Bergman & Uerling, "A Functional Approach To Determining The Size Of A School Site," 23 *CEFP Journal* 4-6 (1985).

RB-2 Identification only.

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WITNESSES

On behalf of petitioner:

Norman Day
Dr. Lewis C. Solmon

On behalf of respondent, Asbury Park Board of Education:

James William Higgins
Jeffrey A. Hunt
R. Thomas Jannarone
Emery Malasits

On behalf of respondent, Bureau of Facility Planning Services:

Dr. John N. Falzetta
Milton G. Hughes
Dr. W. Frank Johnson
Dr. Michael D. Macaluso

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OAL DKT. NO. EDU 3310-89
(EDU 3120-88 AND EDU 3015-87 ON REMAND)

THEODORE R. MURNICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, W. FRANK JOHNSON AND THE BUREAU OF FACILITY PLANNING SERVICES,	:	DECISION ON REMAND
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board and the State filed timely reply exceptions.

I. Exceptions to Findings of Fact

Petitioner's exceptions first object to the ALJ's findings of fact. Because the Board's reply to these exceptions regarding the findings of fact correspond to each exception, they are summarized immediately below each summarized exception.

> 1. The statement of procedural history (p. 2, para. 2) should be clarified to state that the decision which resulted from the informal hearing was set forth in letters issued by W. Frank Johnson, dated January 14, 1987 and February 18, 1987 (Exhibits P-58 and 62). Petitioner submits that these decision letters should be specifically identified for the sake of clarity and completeness. (Exceptions, at p.2)
>
> Board's reply:
>
> 1. The request that the letter opinions of Dr. Frank Johnson dated January 14, 1987 and February 18, 1987 be specifically identified in

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the Statement of Procedural History is not objectionable. Yet this adds nothing of substance to the Findings of Fact.

(Board's Reply, at p. 1)

2. ~~The~~ findings with respect to selection of the Bond Street site by the Board of Education in 1985 are inaccurate and incomplete. The last two sentences on the first full paragraph on page 4 should be deleted and in their place should be substituted findings that:

> George Johns of Harsen and Johns preferred the Grant Avenue site over all other sites because it was aesthetically more pleasing, and Superintendent Jannarone favored the Grant Avenue site because he thought the location was better. In addition, Superintendent Jannarone solicited the views of Norman Day, a planning consultant to the City of Asbury Park, who advised from a planning perspective that he preferred the Grant Avenue site to the Bond Street site. The Board of Education nevertheless selected the Bond Street site because it was viewed as the least expensive site and the site involving a minimum of condemnation and relocation expenses. (8/1/90T, 37:1 to 41:18; 5/30/90T, 125:10 to 133:8).
>
> (Exceptions, at pp. 2-3)

Board's reply:

2. The allegation that the findings with respect to the selection of the Bond Street site are inaccurate and incomplete is a distortion. Incomplete perhaps -- but Findings of Fact are intended to be the "essential findings of fact" and not a replication of the record. The findings in that regard are not inaccurate. The Administrative Law Judge found:

> "Two sites were considered in 1985 for the east side in addition to Bond Street, property located on Grand Avenue and the Salvation Army premises. Both of these were subsequently abandoned by the Board for multiple reasons, among which were higher acquisition costs and relocation inconveniences and costs. The Bond Street site was most desirable because

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> of its location and since it required a minimum of condemnation and relocation costs." (Initial Decision, at p. 4)

The Board querries in this regard whether it is significant or essential to this case whether the architect may have believed one site to have been more pleasing aesthetically or that the City of Asbury Park's planning consultant believed a site other than Bond Street was preferable "from a planning perspective." (Board's Reply Quoting Exceptions, at p. 2)

> 3. The discussion of the information in the possession of the Bureau during the 1985 approval process (p. 10) ignores the significant fact that David Roberts, City Planner for Asbury Park, alerted the Bureau to specific problems with the Bond Street site. Additional findings with respect to this should be added as follows:
>
> > The letter submitted by Mr. Roberts (Exhibit P-19) pointed out that the Board "made a policy decision to choose sites that would involve a minimum of condemnation and acquisition," and advised that there were problems with the Bond Street site including: site size of 2 to 3 acres was less than minimum appropriate elementary school site size of 7 to 8 acres; neither proposed school site was located within northeast quadrant which had become a year-round neighborhood and lacks an elementary school; site is immediately adjacent to downtown shopping district; site lacks close neighborhood association desirable for an elementary school. (Exceptions, at p. 3)
>
> Board's reply:
>
> 3. The request that the findings include a paraphrasing of the City Planner's letter setting forth his views on where elementary schools should be located and on what size lots is not justified, in that it would add nothing of factual significance.
>
> The Administrative Law Judge deals with the factual issue of site location and site size in the context of information obtained from the respondents' school planning experts who

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> testified on these issues. Those findings are significant. It should also be noted that the City Planner specifically admitted that "he was not speaking for the Planning Board" when he wrote his letter.
> (Board's Reply at p. 2 citing Initial Decision at p. 11)

> 4. The Initial Decision seriously understates the severity of the mistakes Dr. Macaluso made during the 1985 review process and also does not indicate the cursory nature of the review conducted by Dr. Macaluso. (Exceptions, at p. 3)

Petitioner cites excerpts from the transcript for his argument that Dr. Macaluso did not visit the Bond Street site before granting the approval. Petitioner claims said excerpts are contrary to his testimony which petitioner cites as stating that the Bond Street site was in a residential area based on a vacation Dr. Macaluso took there. Petitioner further charges that Dr. Macaluso assumed without any data, that the Bond Street site was centrally located so that students would not have to travel inordinate distances to school. Petitioner further claims that Dr. Macaluso relied on a map of the district showing the location of other schools to decide for himself that most of the prospective students were living in proximity to the school and would only have to contend with crossing one major street.

Further, petitioner cites the transcript for the statement that after the referendum was defeated in 1985 Dr. Macaluso had no further involvement with the Bond Street site until August, 1988, which was well after Dr. Johnson's decision in early 1987 to affirm the prior approval decision. Finally, petitioner claims that while he acknowledged that the guidelines emphasized the importance of outdoor play areas, Dr. Macaluso considered but did not apply the Guidelines dealing with adequate space, citing the transcript for this contention. Petitioner claims Dr. Macaluso's information

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concerning the physical education program for the proposed school was limited to the educational specifications, which only indicated inclusion of a multipurpose room and, thus, did not provide any relevant information with respect to the need for outdoor recreation space.

The Board's reply:

> 4. The request to supplement the factual record because of the "severity of the mistakes" made by Dr. Macaluso during his review process in 1985 has a particularly hollow ring, especially when considered in the context of the allegation that Dr. Macaluso "did not apply the guidelines" in performing his review. The Administrative Law Judge aptly noted that Dr. Macaluso in the course of his career at the State Department of Education had reviewed hundreds of similar applications, and inasmuch as Asbury Park was an urban district "the guide had no practical application." The Administrative Law Judge found that:
>
> > "Macaluso credibly testified that even if he had known the total area was 1.84 acres, he nevertheless would have approved the site." (Initial Decision at p. 7)
>
> Why? -- Because "although he was aware that the guidelines suggested a 17 acre site, he recognized that land was at a premium in Asbury Park. In light of this limitation, he exercised his discretion to approve a smaller site after noting that the school was to be three stores in order to allow room for outdoor play areas." (Initial Decision at p. 11)
>
> The foregoing is the essence and significance of Dr. Macaluso's testimony and not the minutiae with which petitioner proposes the record be supplemented. (Board's Reply, at pp. 2-3)

Petitioner claims that the finding in the initial decision that Dr. Johnson's testimony was credible is contrary to and unsupported by the record, in that Dr. Johnson's testimony was rife with internal inconsistencies and was contrary to testimony by Dr. Macaluso. More specifically, petitioner submits:

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Dr. Macaluso testified that he consulted with Dr. Johnson, his superior, only rarely prior to approving school site acquisition applications, and he did not consult with Dr. Johnson prior to approving the Bond Street site. (5/31/90T, 180:17 to 24; 182:4 to 22; 8/3/90T, 34:10 to 24) In contrast, Dr. Johnson testified that the Bond Street site acquisition application was one of the rare cases where Dr. Macaluso felt a need to discuss the situation with Dr. Johnson and they accordingly discussed it and then agreed that it should be approved. (5/25/90T, 153:22 to 158:12)

Dr. Johnson also testified in direct contradiction to Dr. Macaluso's testimony that Dr. Macaluso came to him in late September of 1985 to express concern that all documentation required for approval had not been received by the Bureau. (9/6/90T, 13:12 to 15:21) Dr. Johnson further testified that he happened to be passing by a room where Dr. Macaluso was meeting with the Board's architect and was informally called in to take a look at the proposed building plans, and he did so very informally for about one or two minutes. (9/6/90T, 15:22 to 16:8; 21:4 to 6)

Dr. Johnson's testimony concerning which regulations or guidelines he applied when purportedly viewing the school plans in 1985 was also contradictory. He initially testified that he applied the adopted but not yet effective regulations in 1985 (5/31/90T, 112:20 to 113:4) and that he guessed that he considered granting a site size variance. (5/31/90T, 133:6 to 8) Dr. Johnson later testified that he applied the Guidelines during his brief review of the school plans in 1985. (9/6/90T, 18:10 to 15)

(Board's Reply, at pp.5-6)

The Board replies:

5. The Administrative Law Judge found that the testimony of Dr. Frank Johnson was credible. The minor inconsistencies in Dr. Johnson's testimony are of no moment.

What petitioner contends is factual "contrast" between the testimony of Drs. Macaluso and Johnson, in reality is consistency, to wit: Macaluso testified that he consulted with Dr. Johnson "only rarely." Dr. Johnson confirmed that the Bond Street site acquisition application was "one of the rare cases where Dr. Macaluso felt the need to discuss the situation with Dr. Johnson." Where is the "contrast" in the testimony?

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> Petitioner makes much of Dr. Johnson's testimony concerning which regulations or guidelines he applied when reviewing the school plan for the Bond Street site. Which regulations applied did not take on monumental proportions as the Administrative Law Judge noted:
>
> > "I have no need to consider that fact, however to reach my conclusion which would remain the same whether or not the regulations had been applied to this site." (Initial Decision, at p. 13)
>
> What the petitioner actually seeks here is a determination that the finding of Dr. Frank Johnson's testimony as credible now be reversed. This, of course, is unwarranted. Our Courts have held that in non-jury cases, the scope of appellate review is limited. In order for the Commissioner to comply with what the petitioner seeks in this Exception he would have to conclude that the Administrative Law Judge's finding "is not supported by adequate, substantial and credible evidence in the record." (See Liqui-box v. Estate of Elkman, 238 N.J. Super. 588 at 596 (1990).) There is more than adequate, substantial and credible evidence in the record to support the Administrative Law Judge's finding on credibility. (Board's Reply, at p. 4)

Petitioner's sixth exception on the findings of fact objects to the ALJ's acceptance of Dr. Johnson's memo, Exhibit P-53. He submits the findings should reject Dr. Johnson's explanation concerning said memo as follows:

> Although Dr. Johnson testified that the "deliberation memo" was prepared in an emotional state of anger, the record shows that he took the time to proofread it and have his secretary retype it the next day. (See Exhibits P-52 and 53; 5/31/90T, 174:21 to 175:22; 9/6/90T, 142:16 to 143:23) Dr. Johnson testified that based upon further investigation he concluded that he had been in error and that the site was in fact approvable, but in connection with that alleged investigation he did not even discuss the prior approval decision for the Bond Street site with Dr.Macaluso, the individual who had prime responsibility for the 1985 approval decision. (5/31/90T, 213:14 to 214:23; 9/6/90T, 140:19 to 23) Furthermore, although Dr. Johnson testified that he went to Asbury Park on January 9, 1987 to inspect possible alternate sites in connection

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> with his investigation, he had already prepared an initial draft letter on January 6, 1987 which affirmed the prior approval of the Bond Street site. (See Exhibit P-56) (emphasis in text) (Exceptions, at pp. 6-7)

The Board responds:

> 6. This Exception is another attack on the credibility of Dr. Frank Johnson. It fails for the same reasons expressed above.
>
> (Board's Reply, at p. 4)

Petitioner's sixth exception to the ALJ's findings of fact rigorously objects to the findings with respect to the testimony presented by Norman Day. Petitioner claims that Mr. Day was thoroughly familiar with the record of the case at hand, that he was qualified to serve as an expert in this matter by virtue of his thorough review of the student population based on data provided by the Board. Petitioner further argues that Mr. Day evaluated the proposed Bond Street site in light of surrounding and adjacent land use, contending that because there is a five story parking lot, a food distribution center, some retail and commercial uses, as well as single and multi-family residential structures, the site is inappropriate for a school due to related traffic safety concerns and undersirable surrounding uses.

Further, petitioner argues that Mr. Day provided expert testimony concerning the small site size and resulting inability to provide sufficient acreage for certain site elements as set forth in the current regulations, and inadequate playground and recreation space. Also, petitioner seeks a finding based on Mr. Day's testimony that the small site size precludes compliance with the local building setback requirement of 30 feet as well as a safe student drop-off area. Petitioner also seeks a finding of fact to comport with Mr. Day's testimony that the provision for landscaping

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and screening was inadequate and that the plan includes an overlap between the fire lanes and portions of the recreation area which would restrict the ability to install fixed play equipment.

Further, petitioner contends Mr. Day evaluated the proposed Bond Street site with reference to the regulations and guidelines in effect in October 1986. Petitioner seeks a finding that comports with Mr. Day's opinion that, based upon those regulations and guidelines, the 1.84 acre proposed Bond Street site was inappropriate and inadequate for a 700 pupil elementary school and that it was not an approvable site. Petitioner adds that Mr. Day also testified that in regard to traffic patterns, centrality of student population and other locational considerations, his analysis and conclusions concerning current approvability would be the same under the 1985 Guidelines and the 1986 Regulations.

Finally, petitioner seeks a finding based upon Mr. Day's opinion as a planner that in light of the information contained in the plans and other documents in the possession of the Bureau at that time, it would not be possible to evaluate the Bond Street site based upon the regulations and guidelines in effect in 1985 and 1986. In regard to this, petitioner avers that the material reviewed was devoid of any reference to a request for a variance or any evaluation by the county superintendent with reference to the guidelines in the "School Sites" publication. (Exceptions, at p. 13)

To these exceptions, the Board replies:

> 7. The petitioner contends that the Initial Decision contains inadequate and incomplete findings with respect to the testimony presented by the City Planner, Norman Day. The petitioner requests that the findings be supplemented with six pages of references to the testimony of Mr. Day. It is contended that "Mr. Day became

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> thoroughly familiar with the records of proceedings involving the Board and the Bureau with respect to the Bond Street site." Even if the foregoing, self-serving declaration is acknowledged, it is insufficient to supersede the fact that the Administrative Law Judge specifically found with support in the record that Mr. Day's expertise "in the siting of schools is similarly limited." (Initial Decision at p. 7) Actually Mr. Day testified that he had never been employed by a Board of Education in the siting of a school. The Administrative Law Judge concluded "although both Dr. Solmon and r. Day were well-qualified in their respective fields, their expertise was tangential, at best, to the issues herein. Neither of them ever had any hands-on experience, education, or training involving specific issues about which they were asked to render an opinion." (Initial Decision at p. 18) This is not damning with faint praise. This is simply damning and it has sufficient support in the record. To add six pages to the Findings of Fact based on Mr. Day's testimony, as the petitioner requests, would be nothing more than prolixity without purpose.
>
> (Board's Reply, at pp. 4-5)

Petitioner's eighth exception to the ALJ's findings of fact avers that the initial decision contains an inadequate and incomplete statement of the testimony provided by Dr. Lewis Solmon. Again, petitioner suggests the findings of fact should be altered to reflect his version of Dr. Solmon's testimony as follows:

Dr. Solmon's expert testimony was based upon his background and experience generally in the field of education, the result of his literature search and analysis on the specific subject of school sites, discussions with others and review of the relevant documents in this case and the specific guidelines and regulations applicable to school site selection. Petitioner emphasizes that Dr. Solmon's testimony stressed the importance of outdoor recreation and recess at the UCLA laboratory school with which Dr. Solmon is involved. Petitioner suggests that Dr. Solmon's testimony stated that the

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recreation program in Asbury Park, which for grades 1-5 does not involve any recess and is limited to two physical education classes per week is unusual in his experience and contrary to the educational theories he discussed.

Petitioner seeks a finding of fact to comport with Dr. Solmon's purported testimony that the current regulations require sufficient acreage for the building to be setback and for buffer zones as required by local and state codes. He also seeks a finding consistent with Dr. Solmon's purported testimony that it is important to have a school environment that minimizes disruption from noise and visual distractions, protects children from pollutants such as auto emissions and provides a pleasant environment.

It was Dr. Solmon's opinion, petitioner adds, and the record should find that the Bond Street site is not adequate, based upon a variety of factors, including size, location, configuration and overreliance on cost. It was Dr. Solmon's further testimony that the site is inadequate under the 1985 Guidelines and also under the Guidelines and Regulations in effect in 1986.

To these proposed findings of fact, the Board replies:

> 8. The eighth Exception of the petitioner mirrors that of the seventh Exception. Here petitioner would supplement the Findings of Fact with four additional pages of the testimony of Dr. Solmon. As noted above in reply No. 7, Dr. Solmon's expertise never rose any higher than those of Mr. Day's. (Board's Reply, at p. 5)

Petitioner's ninth exception to the findings of fact also concerns the expert testimony of Mr. Day and Dr. Solmon contending the ALJ erred in concluding that both men "on cross-examination" were shown to have misread or misinterpreted parts of the materials

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relied upon. (Exceptions at p. 17 quoting Initial Decision, at p. 8) Petitioner submits that absent specific supporting findings with respect to the alleged instances of misreading or misinterpretation by petitioner's witnesses, this finding should be stricken.

To this exception, the Board replies that the ALJ's finding in this regard is supported by the record. It claims:

> Actually, Dr. Solmon had proposed a thesis with regard to playground space. The thesis he advanced was predicated on certain literature dealing with the subject in issue. The opinion he advanced was that playground space of 250 square feet should be provided for each enrolled student. Mr. Day, who also offered opinions on this issue, piggy-backed his opinion on the one advanced by Dr. Solmon. During the cross questioning of Dr. Solmon, it became unequivocally clear that the material upon which he relied for his 250 square foot conclusion contained a very pertinent caveat, to wit: schools with large enrollments should plan their playground space based not on total enrollments, but rather on the number of students that would utilize the playground at a given time. Dr. Solmon overlooked that caveat in reaching his conclusion. (See RB-1 in evidence, "A Functional Approach to Determining the Size of a School Site" Dean F. Bergman and Donald F. Uerling, 4 CEFP Journal, January-February, 1985, and Transcript 8-2-90, Page 84, Lines 2 to 9, and Page 85, Lines 3 to 8; and Transcript 6-27-90, Page 66, Lines 17-23, and Page 67, Lines 4 to 6, and Page 67, Lines 13 to 18 and Page 68, Lines 2-24) (Board's Reply, at p. 6)

At exception 10 to the findings of fact, petitioner objects to the ALJ's conclusion that the expertise of petitioner's experts was "tangential, at best, to the issues." (Exceptions, at p. 17, quoting the Initial Decision, at p. 18) He claims that "[a]lthough Mr. Day had never been specifically retained by a school district to assist in the siting of a new school, his planning activities involve the siting of schools many times." (Exceptions, at

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pp. 17-18) Similarly, petitioner also objects to the ALJ's characterization of Dr. Solmon's expertise. "As in the case of Mr. Day, there was no reason to in effect overrule the prior rulings permitting testimony by Dr. Solmon by according so little weight to that testimony." (Exceptions, at pp. 18-19) Petitioner seeks the following finding:

> Petitioner's expert witnesses, Norman Day and Dr. Lewis Solmon, were well qualified to testify on the issues in this case and their persuasive testimony is entitled to substantial weight. (Id.)

To exception 10, the Board replies:

> Petitioner apparently wishes the Commissioner and the Administrative Law Judge to overlook Mr. Day's acknowledgement that a specialty of Educational Facility Planning exists and that he does not consider himself to be an expert in such area (Transcript 6-27-90, Page 34, Lines 12-16) and that he has no prior familiarity with the site approval processes of the Bureau (Transcript 6-27-90, Page 72, Lines 11 to 12) and further, that he was not aware of the various stages of the approval process relating to school districts and the Bureau (Transcript 6-27-90, Page 83, Lines 10-14). In fact, it was Mr. Day who recommended that the site for the east side elementary school should, in fact, be on the west side of Asbury Park, necessitating kindergarten through fifth grade students to cross Main Street, Memorial Drive and North Jersey Coast Railroad tracks to attend elementary school. (Transcript 6-27-90, Page 111, Lines 11 to 17)
>
> Mr. Day's testimony in this regard should not be surprising inasmuch as he acknowledged that he had never been retained by a school district to assist in the siting of a new school. In view of the foregoing, it might be argued that the finding by the Administrative Law Judge that the testimony of Dr. Solmon and Mr. Day was merely "compromised" (Initial Decision at p. 8), is the quintessence of graciousness. There is sufficient (sic) in the record to disregard their testimony in toto. (Board's Reply, at pp. 7-8)

The eleventh and last of petitioner's exceptions to the factual findings concerns Dr. Falzetta, respondent's expert on

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educational facility planning. It is petitioner's position that "***Dr. Falzetta presented only the most conclusory testimony on the pertinent issues, without adequate explanation or analysis." (Exceptions, at p. 19)

More specifically, petitioner notes that while Dr. Falzetta has been in the teaching profession for a number of years, he has not authored any publications. Petitioner challenges his preparation for his testimony, stating that on cross-examination Dr. Falzetta acknowledged that he had given contrary testimony at his deposition when he stated he had not reviewed the Bureau file or seen any site plan other than the 1989 plan.

Petitioner avers Dr. Falzetta's cross-examination testimony was inconsistent with his testimony on direct regarding play and recreation fields, play equipment and that he was not provided with certain layouts for play equipment, thus, rendering his testimony less reliable. Petitioner claims Dr. Falzetta expressed no opinion as to whether the outdoor recreation areas would be adequate in size to accommodate larger groups of children as might be on the site if recess periods were provided. Petitioner challenges Dr. Falzetta's testimony concerning drop-off lanes, fire lanes and setback requirements, as well as buffer zones as required by state and local code. Petitioner finds Dr. Falzetta's conclusions about setbacks "***entirely in the abstract and did not include any discussion of the setbacks for the Bond Street site as shown on the current plan*** nor did it include any statement of opinion by Dr. Falzetta as to the adequacy of the proposed setbacks." (Exceptions, at p. 22)

The Board replies:

> A thorough analysis of this expert's testimony is set forth at pp. 26-46 of the post hearing brief filed by the Attorney General's office. To

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repeat same herein would be impractical. The Commissioner's attention is specifically directed to the aforesaid references.

It should be emphasized that the Court accepted Dr. Falzetta as an expert on Educational Facility Planning (Transcript 10-11-90, Page 42, Lines 4 to 6 and Page 46, Lines 16-17). No other witness was so qualified. It is obvious that the Court viewed Dr. Falzetta as a most persuasive witness. Credibility is for the initial fact finder. The Administrative Law Judge concludes this expert to be "a most qualified, candid and credible expert witness." (Initial Decision at p. 17) It is the Court's conclusion as to credibility to which petitioner takes issue. Dr. Falzetta's conclusions are well supported in the record. (Board's Reply, at p. 8)

II. Exceptions to Conclusions of Law

Petitioner's exceptions also disagree with all three principal conclusions of law as set forth in the initial decision, and submits that the Commissioner should reach different conclusions of laws more specifically set forth below.

Petitioner first claims the Bond Street site was not properly approved in either 1985 or 1986. Contrary to the ALJ's conclusion, petitioner reiterates his contention that the Bureau's action can be assessed only by reference to the regulations which took effect on October 21, 1985. Petitioner claims that the fact that these regulations did not take effect until shortly after the Bureau's initial site approval decision of October 2, 1985 did not exempt the Bond Street site from these regulations after the first referendum failed. Petitioner argues anew that after the original referendum was defeated and the new regulations took effect, there was no justification for giving any effect to the prior approval inasmuch as it had not been considered or issued in compliance with the regulations.

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In so claiming, petitioner rejects the ALJ's conclusion that Bureau practice allowed approvals to remain in effect absent major changes to the plans. Conceding that such a practice may be appropriate as a general matter, petitioner contends there is no rational basis for applying it to the unique circumstances of this case, where there was a significant change in the regulations shortly after the 1985 approval and referendum defeat. Petitioner summarizes this argument by stating that "***any concern about needless duplication of effort was more than outweighted by the overriding necessity for the Bureau to ensure compliance with the public policy embodied in the new regulations." (Exceptions, at p. 24)

Thereafter, petitioner's exceptions raise again the argument that the Bureau's approval in 1985 was not granted properly. Petitioner encapsules his contentions in this regard by stating that the principal conclusions to be drawn from the facts as he sees them relative to the 1985 approval are that said approval

> ***1) was based upon meager information; 2) involved no meaningful evaluation of the site; 3) involved several significant mistakes by Macaluso as to material facts; 4) approved a site which on its face fell far short of the about-to-become-effective minimum site size standard, absent any express authority to grant a variance or any evidence that the grant of the variance was consciously considered; and 5) approved a site which was inappropriate according to the Bureau's own standards. (Id., at p. 25)

Petitioner relies upon those findings of fact which it suggests in earlier exceptions in support of these proposed conclusions, stressing the alleged factual discrepancies between the testimony of Dr. Johnson and Dr. Macaluso and relying in particular on Dr. Johnson's memo, dated December 21, 1985. Petitioner contends

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the language of Dr. Johnson's letter is dispositive of his contention that the 1985 approval was invalid.

Petitioner goes on to state that the record also establishes that the approval decision on October 2, 1985 was not consistent with the new site approval regulations which had already been adopted by the State Board and took effect several weeks later. Petitioner contends that the Bureau of Facility Planning and its manager were

> ***vested with responsibility for enforcing these regulations and ensuring that proposed school site acquisitions were not approved unless the State Board's site suitability standards were satisfied. The record of this case established that the precise opposite occurred: the regulations were ignored and the proposed site was never conscientiously evaluated. Accordingly, there is no basis upon which the Bond Street site could be found to have been properly approved. (Exceptions, at pp. 30-31)

The Board's reply to petitioner's first exception to the conclusion of law avers:

> ***As the record and the Administrative Law Judge's decision reveals, at the time the Bond Street School site was initially approved by the Bureau (October 2, 1985) there were no regulations in effect. (Initial Decision at p. 8) Further, petitioner demands that the "approvability must be construed narrowly" and although site acquisition approval and schematic plan approval may as a general matter be carried forward, "there is no rational basis for applying it to the unique circumstances of this case."
>
> Notwithstanding petitioner's protestation to the contrary, there are no unique circumstances in the approval process through October 2, 1985 and as the Administrative Law Judge concludes, the regulations now codify that the approval process continues for an 18-month period. (See N.J.A.C. 6:22-2.1(f), formerly N.J.A.C. 6:22-1.2(d).) The balance of petitioner's initial Exception to the Conclusions of Law of the Administrative Law Judge rehashes the alleged factual discrepancies between the testimony of Dr. Johnson and Dr. Macaluso, and the deliberation memo written

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> by Dr. Johnson. The record and the findings of the Administrative Law Judge amply support that this memo was "more than neutralized by the competent, credible, subsequent testimony" given by Dr. Johnson at trial. (Initial Decision at p. ~~12~~)
>
> The court specifically found that the Board "prepared and submitted all of the necessary documentation for the Bureau's review," and that although there was some misunderstanding of facts the "candid hearing testimony of both Dr. Macaluso and Dr. Johnson credibly explained that the ultimate approval would have resulted had the actual facts been then known by them and, therefore, the misunderstandings were not sufficient to adversely affect the final approval." (Initial Decision at p. 13) The respondent, Asbury Park Board of Education, should not have its properly approved school site rejected because of a memo written by Dr. Johnson when he was "angry, agitated and under misconceptions of fact." (Initial Decision at p. 12) (emphasis in text)
>
> (Board's Reply, at pp. 9-10)

At Exception II to the Conclusions of law, petitioner avers the Bond Street site was not approvable in 1985 and 1986. Petitioner suggests that the prehearing order was supplemented to add the issue of "whether the Bond Street site was approvable in 1985 and 1986 based upon the then applicable regulations and the documents and information in the possession of the Bureau at the time." (Exceptions, at p. 31 quoting transcript 5/25/90, 126:1 to 9). Petitioner Murnick avers that this issue was added so that respondents could argue that even if the Bond Street site had not been properly approved by the Bureau in 1985 and 1986, it was in fact approvable at that time and, therefore, any procedural flaws constituted harmless error.

Petitioner refines his contention by stating that the flaws in the prior approval proceedings were so substantial that they

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could not be cured or "retroactively validated," (Exceptions at p. 32) even if the Bond Street site had been approvable in 1985 and 1986. He argues against retroactive validation, citing among other cases, Durgin v. Brown, 37 N.J. 189, 198-199 (1962). Petitioner cites this case for the proposition "one can conceive of supervening events which so nullify the premise upon which the vote was had, that discretion remains in the Board to seek relief from the mandate in the public interest." (Exceptions, at p. 33, quoting Durgin at 198-199) Under such analysis, petitioner submits that the mandate of the voters should be given no further effect because it is apparent that the referendum was based upon a material mistake of fact and law as to the approval and approvability of the Bond Street site.

Further, petitioner suggests in exceptions that the Bond Street site cannot be found to have been approvable in 1985 and 1986 based upon the documents and information in the Bureau's possession at the time. The ALJ's contrary conclusion, petitioner avows, is based largely upon consideration of information not in the possession of the Bureau in 1985 or 1986. Thus, Mr. Murnick contends, the ALJ's analysis directly contravenes the expressly stated scope of this issue. Petitioner reiterates his version of the testimony, including citations from the transcript, which leads him to conclude that neither Dr. Macaluso nor Dr. Johnson visited the site before the 1986 approval, and they did not possess or request the various types of additional information suggested by Dr. Falzetta. To bolster his contention, petitioner adds the argument that the site was only 1.8 acres in size while the regulations required a minimum site size of 3.4 acres, or 17 acres

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under the prior guidelines. Therefore, petitioner summarizes, the site was not approvable on its face, since the regulations did not contain any express variance authority applicable to the school site criteria.

Further, petitioner argues that the Bureau's action could not be retroactively validated by the 1988 change in the regulations. Even if the Bureau possessed implied authority to approve an undersized site, there was no factual basis upon which to grant such a variance, particularly such a substantial variance, petitioner posits.

By way of summary to its second exception to the conclusions of law, petitioner states:

> In summary, the information in the possession of the Bureau at that time revealed that at a minimum the Bond Street site had the following problems: (1) the site was only 1.8 acres versus a minimum requirement of 3.4 acres (only sightly more than 50% of the standard); (2) the site was not centrally located with respect to student residency on the east side; and (3) the site was immediately adjacent to the downtown shopping district, rather than being within a residential neighborhood. In addition, the information with respect to the site itself as shown on the plans (Exhibits P-29 and 30) was so incomplete as to preclude intelligent evaluation of how the site would function. Based on this information, it is impossible to conclude the Bond Street site was approvable at that time. (Exceptions, at p. 37)

In reply to petitioner's second exception to the ALJ's conclusions of law, the Board states:

> II. In Exception No. II, petitioner relies in substantial part on the case of Durgin v. Brown, 37 N.J. 189 (1962). Such reliance is misplaced. This decision and its progeny cannot be read for the proposition advanced by the petitioner. Durgin, supra, deals with a factual scenario where a change in circumstance dealing with the actual need for a new school now vitiates that need. Here the record is absolutely devoid of any evidence that an east side elementary school

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> is unnecessary. In fact, to the contrary, the testimony of Superintendent Jannarone and the County Superintendent, Milton Hughes detailed the emergent need for such a school. In fact, the County Superintendent's testimony was such as to describe the facilities then occupied by the elementary students of Asbury Park as "totally inadequate, unattractive, degrading in some cases, dehumanizing and in some cases...unhealthy conditions." (Transcript 9-7-90, Page 52, Lines 20 to 22) In fact, the testimony also reveals that because of the delay in constructing an east side elementary school the County Superintendent has been required to grant temporary approval for continued use of the existing, ancient Bradley Street School, a substandard facility, slated to be razed when the new Bradley School was completed in September, 1989. There are no changed circumstances warranting the application of the principles in Durgin, supra. The elementary school needed in 1985 for the east side children of Asbury Park is equally as important today as it was then.
>
> (Board's Reply, at pp. 10-11)

Petitioner's third exception to the initial decision's conclusion of law suggests that the Bond Street site is not currently approvable. In this regard, petitioner first takes exception to the ALJ's allocation of the burden of proof on this issue, citing the Commissioner's remand of this matter which, he avers, directed that the hearing include whether the Bond Street site is currently approvable. Petitioner claims the Commissioner rejected the request of the Board and Bureau that the issue of current approvability be addressed initially in remand proceedings before the Bureau. Thus, petitioner contends, the ALJ conducted a de novo determination of what he avers is a review of what is, in effect, a new application under the current regulations without the approval or disapproval of the Bureau. It is petitioner's position, therefore, that the Board should have been required to bear the burden of proving current approvability, just as it would have had to do if an application had been submitted to the Bureau under

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current regulations. Petitioner further avers that this burden was not met, and that the Bond Street site is not currently approvable.

Petitioner cites the current regulations, N.J.A.C. 6:22-1.2 et seq. and N.J.A.C. 18A:18A-16, in support of his claim of unapprovability of the site. He suggests, inter alia, that while Planning Board recommendations are not binding on the Bureau and the Board cannot compel the Planning Board to issue recommendation, the law mandates that such recommendations be requested, and that if they are provided, they must be considered. Petitioner contends the plans have been changed considerably since 1985 and given the substantial lapse of time, the applicable law has changed. He thus claims one cannot assume there have not been changes in relevant planning facts and concerns in Asbury Park. Petitioner argues that these conditions represent a fatal defect which precludes a finding that the site is currently approvable.

Petitioner harkens back to his recommended findings of fact submitted as Exceptions for further demonstration of why the site is not currently approvable. Once again, petitioner relies on the expert testimony of Mr. Day and Dr. Solmon in support of his position on nonapprovability of the site currently. He avers again that Dr. Falzetta's testimony was not sufficient to overcome the persuasive testimony of Mr. Day and Dr. Solmon.

Finally, petitioner avers the Bond Street site is deficient on its face under N.J.A.C. 6:22-1.2(c)(1)(viii), which he claims requires adequate land for building setbacks per local code. He reiterates his argument that said regulation expressly authorizes variances from the requirements of section 1.2 and are to be approved only if "the spirit and intent of the standards are

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observed and the need for the variances is satisfactorily documented." (Exceptions, at p. 44, quoting section 1.7(b)) Petitioner claims this regulatory language clearly placed the burden on the Board to demonstrate entitlement to a variance, and further claims these requirements cannot be found to have been met on the present record.

In summary, it is petitioner's position that the Bond Street site cannot be found to be currently approvable based upon the record. He claims the Board's presentation was fatally defective and the evidence and expert testimony compels the conclusion that the applicable requirements and standards are not satisfied for this site. He therefore seeks a determination that rejects the initial decision findings and conclusions and asks that the Commissioner enter a decision consistent with the foregoing proposed findings and conclusion.

To the final exceptions of law, the Board replies:

> III. Petitioner's attack on the legal conclusions of the Administrative Law Judge set forth under III, reiterates his dissatisfaction with the factual conclusions of Judge Monyek. Again, he resurrects the testimony of his two witnesses, Mr. Day and Dr. Solmon concluding that such testimony is "persuasive" and challenges the testimony of the experts produced by the respondents. Obviously, this case is fact sensitive and the trier of fact must, therefore, conclude which facts are more significant and which testimony is more credible. As the Administrative Law Judge sets forth succinctly, "In short, respondents' case was well corroborated and rang true." (Initial Decision at p. 18)
>
> He found that the witnesses of the respondents were extremely credible and had spent the majority of their professional lives in the field of education. Petitioner is unable to counter such a conclusion, especially on the shoulders of the testimony of Mr. Day and Dr. Solmon.

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> The balance of the legal arguments to be made in this case have been set forth in the post hearing brief and the reply brief filed on behalf of the Board of Education, copies of which are enclosed and incorporate herein by reference in the interests of brevity and in the interests of time constraints established by the Administrative Code. (Board's Reply, at pp. 11-12)

The Board seeks affirmance of the initial decision.

The State's reply exceptions submit its Proposed Findings of Fact and Conclusions of Law and Reply Brief submitted to the Office of Administrative Law by Respondents Bureau of Facility Planning Services and W. Frank Johnson as its response to the exceptions submitted by petitioner. Said respondents add the following:

> ***This matter involved very specific facts and in large part turned upon the credibility, as well as the expertise, of the various witnesses. ALJ Monyek had the opportunity to hear the testimony of these witnesses. He also visited the site in question. His evaluation of the testimony and the conclusions he drew are entitled to substantial weight since he had the benefit of observing the witnesses first-hand. Brundage v. The New Jersey Zinc Co., 48 N.J. 450, 478 (1967). (State's Reply, at p. 1)

The State respondents seek affirmance of the initial decision.

Upon his careful and independent review of the record of this matter, the Commissioner adopts the initial decision for the reasons expressed by the ALJ. In so deciding the matter, some further discussion of the voluminous exceptions is warranted.

First, the Commissioner rejects petitioner's claim that the Board should bear the burden of persuasion relative to current approvability. No such burden was ever visited upon the Bureau by the Commissioner in his directive on remand. By law and regulation, the Bureau is empowered to approve plans and specifications for

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public school sites in New Jersey. See N.J.S.A. 18A:18A-16, and N.J.A.C. 6:22-1.1 et seq. Notwithstanding the fact that the Appellate Court determined that the Commissioner shall consider "***whether a 1.8 acre parcel of land known as the Bond Street School property *** in Asbury Park is an appropriate site for a 700 pupil elementary school and whether it was properly approved by the Department of Education, Bureau of Facility Planning Services***" (Commissioner's Decision on Remand dated May 1, 1989, quoting Initial Decision dated March 16, 1989, at pp. 1-2), Mr. Murnick, as petitioner in this matter, challenges the Bureau of Facility Planning approvals dating back to 1985. Inextricably linked to said challenges is, in the court's reasoning, the question of current approvability of said site. Because the seminal question under review in these proceedings concerns the approval that was given by the Bureau under the procedures in place on October 2, 1985 and again, under new regulations in 1986 it is sophistical, in the Commissioner's judgment, to attempt to shift the burden for approval to the Bureau when discussing current regulations and site approval. Such argument is dismissed, therefore, as being without merit. The Commissioner thus adopts as his own the ALJ's determination as embodied in his initial decision dated July 12, 1991 that petitioner bears the burden of proof to demonstrate that the Bureau's approvals were erroneous. (Initial Decision, at p. 8) Moreover, upon consideration of the court's remand, the Commissioner agrees with those three -- not two -- issues set forth in the Pre-Hearing Order of September 27, 1989 as appropriate for review in this matter.

In considering the exceptions posed by petitioner, the Commissioner will consider such arguments by following the scheme

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established in the initial decision. First, to be considered then, is whether the Bond Street site was properly approved by the Bureau pursuant to those guidelines in effect prior to the Board's seeking voter approval by referendum in 1985. In so doing, the Commissioner adopts as his own the recitation as set forth by the ALJ at page 8 through the last full paragraph of page 9 as the state of the law pertaining to site acquisition approval at the time the challenged site approval was sought in July 1985. He particularly notes that at such time, there was no requirement that the site be visited. The Commissioner finds that site visitation was properly not made a requirement in site review in that such requirement would impose an unreasonable burden on the Bureau in its duty to grant or deny such approvals, which according to its former director, Dr. Johnson, number in the hundreds.

Careful review of the exhibits indicates that Dr. Macaluso prepared a sheet indicating that the required eight components of the submissions necessary for a "complete schematic plan submission" had been received. (See Exhibits P-7, P-8, P-10, P-9, P-11, P-12, P-14, P-15 and P-21.) Exhibit P-31 indicates that Dr. Macaluso completed a Bureau checklist indicating that proper documentation had been received for site acquisition approval also. The record thus supports that such documentation as was then required by the Bureau was before Dr. Macaluso at the time he concluded the site acquisition approval and schematic plan approval should be granted. The Commissioner notes that on P-31 the site size is indicated as being 1.8365 acres. He also notes from TR 8/3/90 p. 24 that Dr. Macaluso understood the capacity for the Bond Street school was to be 711 students. Said testimony cites P-31 in support of this

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testimony. With these observations, the Commissioner adopts the ALJ's recitation of fact as found on pages 10, 11 and 12 of the initial decision on remand wherein he finds that the Bureau acted appropriately when it approved the 1985 site acquisition and schematic plan for the Bond Street site based on the presence of necessary documentation. See also, P-1 in evidence.

In so concluding, the Commissioner specifically notes with approval that finding of the ALJ pertaining to the lack of import attached to Dr. Johnson's memo dated December 18, 1986 (P-52, P-53), three days after the informal hearing challenging the 1985 approval. Dr. Johnson's later approval of the site, dated January 14, 1985, renders the memorandum a nullity. The Commissioner finds the testimony of Dr. Johnson in this regard, that is, that he was agitated at the time he drafted such document, but later, when calmer, reviewed the facts and determined that the site was properly approved, entirely plausible and credible. The Commissioner thus concludes, as did the ALJ, that the negative memo "***in no way impairs the force and effect of [Dr. Johnson's] final decision. The memo, although reflective of an emotional reaction, was more than neutralized by the competent, credible subsequent testimony." (Initial Decision, at p. 12) See TR 5/3190, p. 176, wherein Dr. Johnson replied in answer to the question "This deliberation memo was not a draft or the basis of your letter, your decision letter then?" Answer: "***No." (See also P-58.)

Moreover, the Commissioner's review of the record comports with the ALJ's that the Bureau acted appropriately when it followed its past practice of extending its 1985 approval for eighteen months, in the absence of changes in the scope of the building plans

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for the reasons expressed in the initial decision. The promulgation of N.J.A.C. 6:22-1.2(d) codified said practice, which at the time of the 1986 approval was not in regulation. Said procedure is now embodied at N.J.A.C. 6:22-2.1(f). The Commissioner finds, contrary to petitioner's position, that there were no extraordinary or unique circumstances in the approval process either at the time of the original site approval in this case, followed by the initial defeat of the referendum in 1985 or after October 21, 1985, when the new regulations took effect and the reapproval was thereafter granted. On the contrary, the 1988 regulations codified the past practice of the Bureau to extend such a site approval for eighteen months, thus defeating petitioner's claim that the revised regulations required a de novo review of the 1985 site approval. Moreover, Dr. Johnson's testimony establishes that because there were no changes in the scope of the building (see P-58, P-62) in the specifications submitted for consideration for approval of the Bond Street School in 1986, a full resubmission in 1986 was unnecessary because the site was approvable under the regulations in place during the summer of 1986, based upon the language in the guidelines' chapter on "Where Land is at a Premium." (See TR 9/6/90 at p. 35. See also, P-58, P-62.) The Commissioner finds such testimony and the practice behind it eminently reasonable and practical and, thus, the Bureau's action in approving the 1986 plan was proper. He thus dismisses petitioner's arguments regarding the 1986 approval as being without merit.

In so finding, the Commissioner rejects petitioner's argument that the absence of formal variance in any way compromised or negated the validity of the Bureau's approval. As noted by

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Dr. Johnson in P-58, under the regulations in place in 1985, the Director's approval incorporated any necessary variances. P-62 clarifies the position the Bureau assumed under the 1986 regulations in regard to variances.

> Since the October, 1985 adoption by the State Board of Education of the current code (N.J.A.C. 6:22), formal written requests for variances are submitted to the Manager, Bureau of Facility Planning. As I have indicated, visits have been made to the site with local school officials and the County Superintendent of Schools whereupon the approval of the 2+ site was given. The files will not show, therefore, a written request for a variance. Instead, on-site planning and review was done with district staff. (P-62, at p. 1)

It bears emphasizing that by law, the Bureau provides the sole means for acquiring site approval, based upon the regulations established by the State Board. N.J.S.A. 18A:18A-16 The Bureau's approval itself thus constitutes a variance where any such approval requires the Bureau's deviation from the regulations, in that said Bureau is the sole source for acquiring approval to modify or to construct school facilities. Petitioner's argument that Dr. Macaluso did not grant a variance in 1985 because he purportedly was unaware of, and did not apply, the 3.4 acre minimum site size requirement of the pending regulations is another attempt to circumvent the bona fide approval process in place in 1985 and again in 1986. The discussion earlier in this decision makes plain that Dr. Macaluso granted the approval of the Bond Street site knowing that the site size was not in accord with either the not-yet-effective regulations nor the guidelines that were effective. The record demonstrates that Dr. Macaluso was also fully aware that the student capacity intended for the three-story structure was 711 students and that the additional stories would accommodate the district's educational program. (See P-30. See also, Initial

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Decision, at pp. 7 and 11.) The record supports the fact that Dr. Macaluso was also aware of the educational specifications as embodied in Exhibit P-12, which petitioner admits. (See Exceptions, at p. 4.) Said document notes the need for specific playground areas. Based on all such considerations, Dr. Macaluso's extensive experience in the field of school siting permitted him to conclude that approval was appropriate, notwithstanding the 1.8 acre site. Such approval, in the Commissioner's judgment, constituted a variance. Dr. Johnson concurred. (See, P-58, P-62, TR 9/6/90, p. 28, 35.) It was Dr. Johnson's testimony that the site could deliver the educational program sought and that there was nothing detrimental about the site. (Id., at pp. 34-35) By such approval by the Bureau of Facility Planning a variance was granted in accord with the guidelines in effect at the time, which condition carried forward to the 1986 reapproval. The Commissioner so finds, rejecting the Petitioner's argument that "a conscious decision to grant a variance was never made." (Exceptions, at p. 27)

Petitioner's "retroactive validation" argument likewise fails because the 1985 and 1986 approvals were both valid. Petitioner argues that

> [r]etroactive validation would be contrary to public educational policy, since it would give further life to a referendum which was presented to the voters based upon the premise that the Bond Street site had been evaluated by the Bureau and found to be an appropriate school site."
> (Exceptions, at p. 33)

The Commissioner herein has concluded that the site was properly approved and was an approvable site at the time of both referenda. Thus, petitioner's position that the referendum was based on a factually and legally erroneous premise is without merit. Because

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no "supervening events which so nullify the premise upon which the vote was had ***" (Durgin v. Brown, supra, at 198) have occurred in the instant matter, it may not be seriously argued that "discretion remains in the Board to seek relief from the mandate in the public interest." (Id.) Consequently, the Commissioner dismisses petitioner's retroactive validation argument as being without merit.

In concurring with the ALJ's finding of fact the Commissioner adopts as his own the findings and conclusions concerning the credibility of the witnesses in this matter. It is well established "that the standard of judicial review of factual determination made by an administrative agency is rather narrow, i.e., whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. (citation omitted)" (emphasis in original) Parker v. Dornbierer, 140 N.J. Super. 188 (App. Div. 1976) See also, Brundage, supra. The Commissioner's independent review of the record comports wholly with that of the ALJ that the State's witnesses' testimony and their level of expertise in school facilities siting and planning "rang true." (Initial Decision, at p. 18) The Commissioner concurs that although petitioner's expert witnesses, Dr. Solmon and Mr. Day, are experts in their respective fields, they lacked specific qualifications in comparison to the State's witnesses regarding the real issues of this case. Dr. Solmon, an economist (TR 6/4/90, at p. 5, 10) acknowledged that he had no education experience in siting a school in New Jersey. See TR 6/4/90 at pp. 20-21.

Similarly, Mr. Day, while highly qualified as a professional planner, has had no experience in siting a school

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building. See TR 6/6/90, pp. 5-6. Neither has he ever been employed by a school district or developed experience in the design of a school or its play areas. (TR 6/6/90, at p. 7) On the other hand, the experience and educational training of Drs. Macaluso and Johnson, as well as that of the State's expert witness, Dr. Falzetta, in the areas of school siting and facilities planning are, as counsel for the Bureau notes, "vast." A careful review of the exceptions and the transcript citations proffered by petitioner does not convince the Commissioner that the ALJ's assessment of the expertise and credibility conclusions derived therefrom were amiss. Accordingly, for the reasons expressed in the initial decision, the Commissioner adopts the findings of fact and conclusions of law of the ALJ derived from the expert testimony adduced in the proceedings herein. He concurs in particular with the conclusion that respondents' case was well corroborated and that it carried substantially greater weight, substance, and ultimate credibility with regard to the seminal issues to be determined.

In so concluding, the Commissioner observes that the myraid arguments raised by petitioner herein seek to substitute his own judgment and that of his experts for those of the Bureau whose ultimate responsibility it is to make the kinds of judgments which are the subject of this controversy. This is a matter that has dragged on for six years while the students of Asbury Park, in the meanwhile, are required to attend school in inadequate facilities. The Commissioner believes that the time has come to put an end to the endless bickering that has ensued between the parties of this matter and to get on with what needs to be done to provide the thorough and efficient education to which Asbury Park pupils are

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entitled. The Commissioner is in accord with the reasoning as stated in the Board's reply brief dated April 26, 1991 at p. 16:

> The Board has a specific mission that it must accomplish. It must provide a thorough and efficient system of free public education to the elementary school students in Asbury Park. The Board has selected the Bond Street site as a site for an east side elementary school. The site isn't perfect, but it is adequate and it is approvable and, significantly, it has the imprimatur of the voters of Asbury Park, something no other east side site has. The school has been delayed long enough. The Court should approve its construction.

As to whether the Bond Street School property in Asbury Park is appropriate for a 700 pupil elementary school under current regulations effective July 16, 1990 the Commissioner similarly adopts the findings and conclusions of the ALJ below for the reasons expressed in the initial decision. The eight criteria in the regulations have been met. See initial decision at pp. 17-18 wherein the ALJ states:

1. There is enough acreage for placement of the building;

2. The site is already at it maximum capacity;

3. There are no other structures to be placed on this site;

4. The site has sufficient acreage for all-purpose play and recreation fields;

5. The site has sufficient acreage for walkways and roadways on which people and vehicles traverse the site.

6. The site has sufficient acreage for public and service access roads;

7. The site has sufficient acreage to provide 30 foot wide access around the building (two sides are city streets, one site is a large play area, and the last side has no obstructions to prevent access to the grounds); and,

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3. The site has sufficient acreage to meet local setback requirements if they apply to a school, although as I expressed in another part of this decision, the requirements should be waived in order to provide larger play areas.

Accordingly for the reasons expressed by the ALJ below and also in the reply exceptions filed by the Board, and the finding of fact advanced by the State, as augmented herein, the Commissioner adopts the initial decision, in toto, finding petitioner has failed to meet his burden in this case. More specifically, the Commissioner adopts those conclusions found on pages 15 and 19 of the initial decision stating:

1. The Bond Street school property in Asbury Park is approvable and appropriate for a 700 pupil elementary school.

2. The Bond Street school site was properly approved by the Bureau pursuant to the State Board's regulatory provisions then currently in effect prior to the Asbury Park Board's seeking voter approval by referendum.

3. The Bond Street site was appropriate and approvable in 1985 and 1986 upon the then applicable regulations and the documents and information in the possession of the Bureau at that time.

The Commissioner thus directs that the instant Petition of Appeal be dismissed and that the construction of the Bond Street School commence forthwith.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1991

DATE OF MAILING - SEPTEMBER 16, 1991

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1334-90

AGENCY DKT. NO. 376-12|89

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1033 ON BEHALF OF KAREN NORTON, BARBARA WOOLSTON, MARYELLEN SCHOEN & JOHN DOE & MARY DOE, THE LAST TWO NAMES BEING FICTITIOUS BUT REPRESENTING SUCH NURSES WHO MAY BE EFFECTED NOW OR IN THE FUTURE BY RESPONDENTS ACTION,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, MARIE H. KATZENBACH SCHOOL FOR THE DEAF,

Respondents.

David Sherman, Esq., for petitioners

Melvin E. Mounts, Deputy Attorney General, for respondent (Robert J. Del Tufo, attorney General of New Jersey, attorney)

Record Closed: July 1, 1991 Decided: July 30, 1991

BEFORE **DANIEL B. McKEOWN**, ALJ:

The Communications Workers of America, Local 1033 (petitioners), on behalf of Karen Norton, Barbara Woolston, Maryellen Schoen and other similary situated registered nurses employed by the Marie H. Katzenbach School for the Deaf (Katzenbach) allege that Katzenbach authorities arbitrarily changed the named nurses' schedules as the result of a misunderstanding of their, the nurses, professional qualifications to administer

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medication to pupils. After the matter was transferred February 21, 1990 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 May 2, 1991 at the Office of Administrative Law, Mercerville. Thereafter, counsel to the parties filed letter memorandum in support of their respective positions and the record closed July 1, 1991 upon the receipt of a reply letter from Katzenbach.

Findings are reached in this initial decision that no one of the named petitioners, Karen Norton, Barbara Woolston, or Maryellen Schoen, are school nurses with an appropriate certificate issued by the New Jersey State Board of Examiners. The conclusion is reached that pursuant to a rule announced by the Commissioner of Education in a prior administrative decision and as affirmed by the State Board of Education and by the Appellate Division, individuals employed by Katzenbach who are not certificated school nurses may not administer medication to school pupils.

FACTS

The facts are not in dispute between the parties and they are as follows. Each named petitioner is presently employed at the Katzenbach School health center. Each named petitioner is a registered nurse; no one of the named petitioners possesses a certificate as a school nurse. N.J.A.C. 6:11-11.7. During November 1988 the superintendent of Katzenbach, Richard Bozza, directed an assistant, Ronald Goodwin who holds the position of director of support services, to review the laws surrounding the administration of medication to students because of his, Bozza's, concern that the then existing policy of having teachers administer medication to students on school trips might not be appropriate. Following his review, Goodwin, relying upon an earlier decision of the Commissioner of Education and as affirmed by the State Board of Education and by the Appellate Division in Bernards Township Education Association v. Board of Education of Bernards, 1981 S.L.D. 1070, 1443, and 1502, recommended that Katzenbach provide that only the certified school nurse in its employ, who is not a party to this action, be authorized to administer medication during school hours. When that recommendation was adopted, the three named petitioners and the certified school nurse were so advised.

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A new policy was implemented during January 1989 and resulted in no one of the three named petitioning registered nurses being assigned the assertedly "more desirable" shift during the regular school day in order to avoid registered nurses who are not certificated as school nurses administer medication to pupils who may be in need. .

ARGUMENTS

Petitioners, while acknowledging the policy change was made upon the strength of the Bernards Township Education Association ruling, argues in the first instance that Katzenbach is a unique school which significantly differs from other public schools operated by boards of education which results in the Bernards Township rule not being applicable. Furthermore, petitioner says that the Bernards Township case differs factually from this case in that the Bernards Township board was impermissibly having medical assistants, not otherwise licensed as a nurse in any manner, administer medication to pupils. Here, petitioners point out that they are registered nurses authorized to administer medication.

Petitioners claim that there is no basis for requiring registered nurses, licensed by the State, to be certified as school nurses in order to administer medication during school hours. Petitioners point out that under existing Education Law, neither a registered nurse nor a certified school nurse need be present in school at all hours of the day and that a local board has the discretion to require other school employees to substitute for a nurse in the nurse's absence. Furthermore, petitioners point out that each school need not have a registered or certified school nurse because all the law requires is that each school district have one certified school nurse.

Even if Katzenbach may be considered a public school similar to all other public schools, petitioner seem to argue that registered nurses under State Board of Nursing authority and legislative authorization at N.J.S.A. 45:11-23, et seq., may be allowed to administer medication in place of the certificated school nurse to school pupils in a manner similar to the Commissioner allowing clerical aides to perform basic first aid in Wyckoff Education Association v. Wyckoff Board of Education, 1981 S.L.D. 1128. In short, petitioner's contend that the Bernards Township rule is not relevant in this case because registered nurses at Katzenbach administer quality health care and, as the

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Commissioner allowed in Wyckoff, the duty assigned registered nurses of ministering medication to pupils is not the kind of substantive obligations which may be expected to be performed only by certificated nurses.

Consequently, petitioners seek relief in the form of an order directing Katzenbach authorities to allow registered nurses to administer medication to pupils.

Katzenbach argues that it is like any other public school for purposes of this case and that the only difference between it and other public schools are that its students are deaf and there is a residential component not found in other public schools. Nevertheless, Katzenbach points out that it is funded with public money and that it provides its pupils with the constitutional mandate of a thorough and efficient program of education as is required in all other public schools. Katzenbach points to several school law decisions including Rooney, et al. v. Upper Saddle River Board of Ed., 1981 S.L.D. 25 (1981) and Scrupski v. Warren Township Board of Ed., 1977 S.L.D. 1047 for the proposition that registered nurses are not certificated school nurses and a registered nurse may not be assigned responsibilities more properly reserved for the certificated school nurse. In this regard, Katzenbach contends that both administrative decisions in Wyckoff and Bernards Township, Supra, establish the principle that a registered nurse may not dispense medication to school pupils during the school day; medication must be dispensed by the certificated school nurse. Katzenbach says petitioners have presented no reason why the Bernards Township rule should be relaxed in this case.

ANALYSIS

While it is clear that in most other contexts, registered nurses may administer medication to young persons who otherwise are of school age, the Commissioner of Education has supervisory authority over all public schools. N.J.S.A. 18A:4-23. The Commissioner of Education has authority to hear and determine controversies and disputes arising under school law. N.J.S.A. 18A:6-9. Rulings which follow administrative determinations on such controversies and disputes and made applicable to all public schools are consistent with the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., particularly where no challenge has been filed to rule-making by adjudication.

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The existence of Katzenbach is authorized by law at N.J.S.A. 18A:61-1. N.J.S.A. 18A:61-2 specifically places Katzenbach under the supervision of the Commissioner of Education who is authorized to "make rules for the government and management of the school and the admission of pupils thereto * * *." While parents of children who are enrolled at the Katzenbach may be required to pay either the whole or a portion of the pupils care and maintenance while at Katzenbach, State funds support the school with respect to the educational program. Consequently, Katzenbach is for purposes of this case a school under the direct supervision of the Commissioner of Education and, as such, rules and regulations promulgated either by adjudication or by a more formal rule making process apply to Katzenbach in the same manner as such rules apply to all other public school district in the State.

That being so, the Bernards Township rule applies to Katzenbach. That is, only certificated school nurses are authorized to dispense medication to pupils during the school day. Anyone, including registered nurses, who is not certificated as a school nurse is not authorized to administer medication to pupils during the regular school day. The underlying purpose behind such a rule is to insure the administration of medication to school pupils by an individual who is licensed as a registered nurse by the State Board of Nursing and who has also obtained formal training in child growth and development, principals of education, and psychology of the exceptional child to name but a few requirements for certification. The Commissioner of Education has determined that it is appropriate in a school setting in which he has supervisory authority to require the administration of medication to be performed only by a person who has formal training in education in order to insure that all professional activities in a school setting are performed by those who are authorized by the State Board of Examiners to perform such activities. That goal is reasonable and the certification of school nurses as teachers is a reasonable means in order to achieve that goal.

Consequently, I **CONCLUDE** that Katzenbach is for purposes of this proceeding a school under the supervision of the Commissioner of Education and State Board of Education and, as such, it is obligated to comply with administrative rules and regulations promulgated by adjudication as are all other school districts in this State. I **FURTHER CONCLUDE** that Katzenbach is obligated to comply with the Bernards Township rule as announced by the Commissioner until and if such time the Commissioner amends that rule or the rule is set aside by a court of competent jurisdiction. Finally, I

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CONCLUDE that petitioners have presented no basis upon which to grant the relief requested. Therefore, the petition of appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 30, 1991
DATE

DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

AUG 1, 1991
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 6 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

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COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1033, ON BEHALF OF KAREN NORTON, BARBARA WOOLSTON, MARYELLEN SCHOEN ET AL.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, MARIE H. KATZENBACH SCHOOL FOR THE DEAF,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have timely exceptions filed by petitioner pursuant to N.J.A.C. 1:1-18.4. These exceptions present arguments made before the ALJ in petitioner's post-hearing brief, as summarized in the initial decision at pages 3-4, and need not be reiterated herein.

Upon careful consideration, the Commissioner affirms the decision of the ALJ for the reasons stated by him. While the fact pattern in Bernards Township, supra, may not be directly analogous to the situation in this matter, as argued by petitioner, it is clear from that decision and its progeny (including Wykoff, supra, and Rooney, supra) as well as from controlling statute and regulation as cited at length in those cases, that nursing services in the school setting are to be performed solely by nurses

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certificated for this purpose by the State Board of Examiners. As noted by the ALJ, the present situation presents no exception to that rule, nor has any cause been demonstrated that would warrant its relaxation as urged by petitioner.

Accordingly, for the reasons stated therein, the initial decision dismissing the instant Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1991

DATE OF MAILING SEPTEMBER 16, 1991

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4955-91
AGENCY DKT. NO. 116-5/91

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF WANAQUE, PASSAIC COUNTY.

Carole Pizzani, pro se

Mark J. Blunda, Esq., for respondent
(Sill Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Record Closed: June 17, 1991 Decided: August 1, 1991

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By petition filed pursuant to N.J.S.A. 18A:14-63.12, petitioners, ten qualified voters at the annual school election held on April 30, 1991, requested that the Commissioner of Education inquire into alleged violations of statutorily prescribed procedures for school elections to determine if such violations occurred and if they affected the outcome of the election. The petition was filed on May 6, 1991, and the matter was transmitted to the Office of Administrative Law, (OAL) on May 14, 1991, for hearing 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.

Since the Commissioner recommended that this matter be scheduled as soon as possible, the matter was scheduled for hearing on June 5, 1991. However, because of the unexpected illness suffered by Board attorney Frank D'Ambra, Esq., the hearing was adjourned and rescheduled to June 17, 1991, on which date a hearing was held and

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concluded and the record was closed.

FACTUAL DISCUSSION

The essential facts in this matter are not disputed. Accordingly, the facts set forth herein are determined to be Findings of Fact.

Carole Pizzani, the only one of the ten petitioners who was able to attend the hearing, testified that she is a registered voter and that she resides in the Borough of Wanaque. She indicated that on April 30, 1991, she intended to vote in the annual school election and arrived at the Haskell School, which is one of the two polling sites used for this election, at approximately 2:05 or 2:10 p.m. She indicated that there was a long line of individuals waiting to vote and that there was a shortage of election workers to process the voters. She indicated that there was only one person checking the names of the individuals. In many cases, the voters did not know which district they lived in and it was necessary for the voter and the worker to determine the proper district by checking the voter's street address. Once the district of each voter was determined, the election worker checking names was then obligated to locate the proper book containing the voter's name. It was then necessary for the individual voter to go to another election worker in order to sign in. Finally, there was a third worker who would take the slip allowing entry into the voting machine.

Ms. Pizzani also testified that she had been told that there was a delay in the opening of the polls because the books had been sent to the wrong place. Ms. Pizzani testified that the purpose of the vote was to elect a new board and to vote on the school budget. She opined that the school budget involved a substantial tax increase and that it was important to give voters the opportunity to vote. She further opined that the long lines may have been the reason why many registered voters chose not to vote at the election. However, she was personally aware of only two individuals who advised her that they did not vote because of the long lines. It was noted at the hearing that this testimony could not be considered anything more than hearsay because these individuals were not present to testify as to the specific reasons for their failure to vote.

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On cross-examination, Ms. Pizzani testified that she voted at the Haskell School and that she had not previouslv voted in any school election.

At the close of Ms. Pizzani's testimony, counsel for the Board of Education made a motion to dismiss on the basis that the petitioner's testimony failed to disclose any violation of the election laws. The motion to dismiss was denied after providing to petitioner all favorable inferences, considering that there was a delay in the opening of the polls and a possible understaffing of the polling places as well as the fact that under the statute, this proceeding is an inquiry into alleged irregularities.

Dr. Warren Ceurvels, Board Secretary to the Board of Education of the Borough of Wanaque and Business Administrator of the Borough of Wanaque School District, testified on behalf of respondent. He indicated that as secretary to the Board of Education, he is responsible for the conduct of school elections and is responsible for all facets of the elections. He indicated that election workers are appointed by the Board of Education and that he oversees the inservice training of the workers. All election workers who worked at the annual election were certified by the county superintendent as having been duly and properly trained.

Dr. Ceurvels also testified that he is responsible for poll openings and closings and for the tally and announcing of election results. Dr. Ceurvels indicated that over the past three years the school election voter turnout has consisted of approximately 500 to 600 voters and that as in past elections, two polling sites are used. For each of these sites, the Board of Educaion has retained the services of five election workers and one substitute worker. At the annual election in this case, five workers were employed at each site.

Dr. Ceurvels testified as to the fact that there was a delay in opening the polls at the Wanaque site, which had been scheduled to open at 2:00 p.m. The opening was delayed until 2:07 p.m. because the county election board had provided to school officials sealed envelopes containing the wrong keys. This was discovered a short time before the opening of the polls when the envelopes containing the keys were opened and it was discovered

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that the keys had been switched. Dr. Ceurvels testified that he had a custodian bring the proper keys from Wanaque to Haskell and vice versa and that as a result, the Wanaque poll opening was delayed for approximately seven minutes. He also testified that the signature register books were in the wrong locations but that this had been remedied prior to the opening of the polls.

Dr. Ceurvels testified that he was at the Wanaque site from 1:45 p.m. to 3:30 p.m. overseeing its use as a polling site. He indicated that he saw no one leave because of the seven-minute delay in opening the polls and he further testified that no one was refused the right to vote. He conceded that the lines were long and that this was the result of several factors. One factor was the higher than expected voter turnout. Another factor was the fact that only one copy of a signature register book was available at each site and that this caused a bottleneck in processing voters. He indicated that in the future, the Board would consider providing an additional signature register book and the possible addition of a second voting machine at each site.

Dr. Ceurvels testified that the judges employed by the school district did not report any irregularities on election day. He identified the Regular/Combined Statement of Result of School Election signed by him on April 30, 1991, which gives the election results (Exhibit R-1). He testified that the margin of victory for the school budget was 76 votes. He indicated that of the 4000 registered voters in the Borough of Wanaque, there is usually a seven percent turnout for the school election. However, at this election there was approximately a 25 percent turnout.

Dr. Ceurvels' secretary, Peggy Craig, also testified on behalf of respondent. She has been employed in this position for approximately seven years. She testified that the only other annual school election in which there was a large turnout occurred in 1985 or 1986, when there was a referendum for substantial expenditures in the school budget including roof replacement and other substantial capital projects. On that occasion, approximately 800 voters turned out for the annual school election. However, she testified that the normal turnout is between 500 and 600 voters.

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Ms. Craig testified that she was present at the Haskell School polling site and that she arrived there at 1:40 p.m. and left at aporoximately 2:30 p.m. When it was learned that the keys to the voting machines were incorrect, arrangements were made to switch the keys and she testified without contradiction that the Haskell polling site opened at 2:00 p.m. She later returned to vote at the Haskell site at 4:05 p.m. or 4:07 p.m. and she indicated that while the lines were long, no one was denied the right to vote.

LEGAL DISCUSSION AND ANALYSIS

The procedures for holding school elections are prescribed in N.J.S.A. 18A:14 et seq. and N.J.S.A. Title 19. Many of the procedures are considered "directory" and not "mandatory." In re Wene, 26 N.J. Super. 363, 376 (Law Div. 1953); In the Matter of the Annual School Election Held in School District No. 1, Camden County, 1987 S.L.D. 150 (June 6, 1987). The distinction between directory and mandatory procedures is not itself codified in the statutes, but instead is a product of the courts. Beaudoin v. Belmar Tavern Owners Association, 216 N.J. Super. 177, 187-188 (App. Div. 1987). Procedures which are mandatory are construed more narrowly than those which are merely directory. However, even the violation of mandatory procedures by election officials does not automatically void an election. A claimant must still show that the irregularity casts the results of the election in doubt. Sharrock v. Keansburg, 15 N.J. Super. 11, 19-20 (App. Div. 1951).

"Directory" procedures are meant to guide the school boards and election officials in conducting elections. Failure to comply with directory procedures will not result in overturning election results. Beaudoin, supra. The general rule concerning these requirements is that elections "should be upheld even when there are gross irregularities." The Commissioner and the courts require some element of fraud or illegality before voiding the results of an election. In the Matter of the Annual School Election Held in the Matawan-Aberdeen Regional School District, Monmouth County, 1987 S.L.D. 254 October 20, 1987. Elections must be reviewed in such a fashion so as not to frustrate the will of the voters, and the electorate should not be disenfranchised based upon technical irregularities which have not been shown to alter the ultimate result. In re 1984 Maple Shade General Election, 203 N.J. Super. 563, 589-590 (Law Div. 1984).

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Since no fraud has been alleged in this matter, and the presumption is one of good faith on behalf of those running the election, In the Matter of the Annual School Election Held in the Parsippany-Troy School District, Morris County, 1975 S.L.D. 203 April 4, 1975), the central issue is whether the technical irregularities alleged by petitioners were of a directory or mandatory nature. In making this distinction, courts examine a number of factors, such as the nature of the irregularity, its materiality, the significance of its influence to the outcome, the legislative intent, and whether the irregularity caused the will of the people to be thwarted. Sharrock, supra, at 17; Beaudoin, supra, at 188.

Petitioners in the instant case presented testimony that several technical irregularities occurred during the election as follows: (1) there was a seven-minute delay in the opening of the polls at one voting site; (2) the polls were understaffed; and (3) long lines at the polls caused a wait of up to 45 minutes to vote. Both the Commissioner and the courts refuse to void election results absent circumstances which make the election procedures "egregious"; even "gross irregularities when not amounting to fraud do not vitiate an election." Mundy v. Board of Education of the Borough of Metuchen, 1938 Edition of School Law decisions at 194, cited in Matter of Annual School Election Held in the Township of Pittsgrove, Salem County, 1976 S.L.D. 585 (June 10, 1976), at 589.

N.J.S.A. 18:14-45, which prescribes the procedures for opening and closing of polls, merely states that:

> The polls shall be and remain open between the hours of five and nine P.M. and during any additional time which the Board may designate between the hours of seven A.M. and nine P.M. . . .

In the present case, all polls were open and functioning between the mandatory hours of 5:00 p.m. and 9:00 p.m. There is no statutory requirement that the polls open at 2:00 p.m. Consequently, I **FIND** that there has been no violation of mandatory election procedures.

Cases decided by the Commissioner of Education have clearly demonstrated a tolerance for late starts in an election. See, Magura v. Smith, 131 N.J. Super. 395 (Law

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Div. 1974), holding that the fact that a poll was inoperative for the first two and one-half hours in the morning was an insufficient basis to void an election.

In In the Matter of the Annual School Election Held in the School District of the City of Camden, Camden County, 1974 S.L.D. 618, 623 (June 12, 1974), polls were declared open at 2:00 p.m. but did not become operable until 3:15 p.m. because the voting machine was not functioning properly. Despite the inability of the electorate to utilize this polling place for three and one-quarter hours, the Commissioner refused to void the election for this and a host of other reasons. Id. at 624. In upholding the election, the Commissioner noted several important factors applicable to the present case. First, the defect in the voting machines was caused "accidently" when members of the election board attempted to open the machine. Second, there was no evidence of intentional wrongdoing or conspiracy. Third, there was no way of determining what number of votes would have been cast for which candidates had the machine not malfunctioned and, thus, petitioners could not meet their burden of proof in showing that the will of the people had been thwarted.

The same factors are present in the instant case. Petitioners do not allege any intentional wrongdoing and the tardiness was accidental. In addition, it is impossible to determine "what numbers of votes would have been cast for which candidates" had the polls been open for those additional seven minutes. In sum, because the Commissioner in City of Camden found that the inoperation of the single machine coupled with other serious violations of N.J.S.A. 18A et seq. did not provide sufficient irregularities to void an election, it would be unreasonable for an election to be voided where the time lapse was only seven minutes and other violations alleged are not as serious. Consequently, petitioners' challenge to the election because of the delay in opening one polling site must be rejected.

Petitioners also maintain that the polls were understaffed. N.J.S.A. 18A:14-6 vests in the board of education the power to appoint clerks as it deems necessary. However, this requirement has been held to be a directory requirement, the noncompliance with which will not result in voiding an election. City of Camden, supra. In addition, the

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testimony in this case established that the polls were staffed by the same number of personnel as in prior years. However, the 1991 election generated more than 1,000 voters rather than the 500-600 as in past years.

School elections may not be set aside in the absence of conclusive proof that irregularities constituted so major a factor as to nullify the expression of the voters. In re Wene, supra., at 393; Sharrock v. Keansburg, supra, at 19-20. Elections are to be given effect whenever possible, and irregularities and deviations from election laws by election officials provide insufficient grounds for voiding an election if the will of the people has been fairly exposed and determined and has not been thwarted. In re Livingston, 83 N.J. Super. 98, 107 (App. Div. 1964).

Petitioners have the burden of establishing that the will of the people has been suppressed. Mere speculation that improved conditions would have afforded a different result is not enough. Matawan-Aberdeen Regional School District, supra. The real intent of the voter must be established, and such expression of intent must be read in light of the surrounding circumstances proven by reliable evidence. In re Fifteen Registered Voters, Cty. of Sussex, 129 N.J. Super 296, 300-301 (App. Div. 1974). Petitioners must show this by a preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982).

The substance of what must be proved and the corresponding burden of proof varies depending on whether it is alleged that the election was marred by "malconduct", whether election results were disturbed by the presence of illegal votes, or whether the election was disturbed when the legal votes were rejected at the polls. N.J.S.A. 19:29-1. Although this standard is a result of court decisions interpreting N.J.S.A. 19:29-1a and e, it applies to school elections. See, In the Matter of the Election Inquiry in the School District of the Borough of Fair Lawn, Bergen County, 1977 S.L.D. 1156 (October 27, 1977); In the Matter of Mallon, 232 N.J. Super. 249 (App. Div. 1989).

In cases such as the present one, where the alleged thwarting of the will of the people was caused by rejecting legal votes which could have been cast but were not because procedures for voting were discouraging, there must be "conclusive proof that the

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irregularities constituted so major a factor as to nullify the expression of the voters." Parsippany-Troy Hills School District, supra; see also In re Wene, supra; Sharrock v. Keansburg, supra.

While challenges for "malconduct" in violation of N.J.S.A. 19:29-1a must show evidence sufficient to challenge the result, proponents challenging elections under N.J.S.A. 19:29-1e must show evidence sufficient to change the results. Magura v. Smith, supra, at 401. It is not necessary to show how the rejected voters would have voted; it must merely be shown that the number of votes rejected was sufficient to have altered the outcome. See, Application of Murphy, 101 N.J. Super. 163 (App. Div. 1968), certif. den., 52 N.J. 172 (1968); In re Application of Abbott Low Moffat, 142 N.J. Super. 217 (App. Div. 1976).

However, voters discouraged by long lines are not rejected under N.J.S.A. 19:29-1e. "A voter who fails to vote because instant access to a polling booth is not provided cannot claim 'rejection' under the election contest statute." Maple Shade, supra, at 590. The term "rejection" for the purposes of the election statutes has been defined "to include any situation in which qualified voters are denied access to the polls, including a denial because of shutdown of a voting machine." Magura v. Smith, supra, at 399. The Appellate Division has clearly stated that where "a voter must wait in line to vote" and "gives up his suffrage right because of impatience or inconvenience," such circumstances "could not serve as a ground for setting aside an election on the basis that a legal vote was rejected." In re Petition of Hartnett, 163 N.J. Super. 257, 268-69 (App. Div. 1978). Such a vote is not considered "rejected" but rather the result of the voter's "voluntary decision." Id. at 269. Thus, petitioners cannot rely on the delay to contest the election. In additon, since such an irregularity is considered only directory in nature, this allegation of the petitioners is effectively defeated.

Since no fraud is alleged in this case, the election cannot be contested under N.J.S.A. 19:29-1a.

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FINDINGS AND CONCLUSIONS

Based upon the foregoing legal discussion and analysis, I make the following findings and make the following conclusions in connection with this matter:

1. There has been no violation of any mandatory election procedure caused by the seven-minute delay in the opening of one polling place.

2. The understaffing of the two polling, places which was inadvertent because it was based on the estimates of voter turnout in previous years, does not amount to a violation of the election laws.

3. Any voters who may have been discouraged by long lines caused by the inadvertent understaffing of polling places are not "rejected" voters and the election may not be set aside on this basis.

4. There is no basis in fact or in law for a challenge to the election in this matter and, accordingly, it is appropriate for the petition to be dismissed.

DECISION AND ORDER

Based upon the foregoing, it is **ORDERED** that petitioners' request for an inquiry in this matter be and is hereby **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 1, 1991
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

8/2/91
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
AUG 6 1991
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

dgi/e

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APPENDIX

LIST OF WITNESSES

For petitioners:

Carol Pizzani

For respondent:

Warren Ceurvels
Peggy Craig

LIST OF EXHIBITS

R-1 Combined statement of result of school election, dated April 30, 1991

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF WANAQUE, PASSAIC COUNTY.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ for the reasons stated by him that the undisputed facts of this matter demonstrate neither violation of election law nor thwarting of the will of the voters, so that there is no basis on which the election could properly be set aside.

Accordingly, the initial decision of the ALJ recommending that the within petition for inquiry be dismissed is hereby adopted as the final decision in this matter.

IT IS SO ORDERED.

Leo Klagholz

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1991

DATE OF MAILING - SEPTEMBER 16, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6156-90
AGENCY DKT. NO. 209-6/90

VIRGINIA GITTELMAN,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner (Lake & Schwartz, attorneys)

Frank N. D'Ambra, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: May 22, 1991 Decided: July 18, 1991

BEFORE JEFF S. MASIN, ALAJ:

Virginia Gittelman, now principal of Nottingham High School in Hamilton Township, Mercer County, and formerly the Director of Elementary Education for the District, appeals to the Commissioner of Education from the action of the respondent Board of Education which reassigned her from the position of Director to the High School principalship. The reassignment purportedly occurred as the result of a reduction in force necessitated by budgetary concerns. Dr. Gittelman disputes that the RIF was necessary and, in addition, argues that even if it was, she was improperly reassigned when in fact she should have been maintained in the position of Director of Elementary Education, a position which continues to exist in the school district. She asserts that as a result of an improper interpretation of tenure and seniority rights the Board reassigned her rather than another one of the directors.

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Following transmittal of the contested case to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted before Hon. Jeff S. Masin, ALAJ, on November 16, 1990. A prehearing order was issued on December 3, 1990. Hearings were held before Judge Masin on February 28 and March 1, 1991. Thereafter, the parties submitted briefs and closing arguments and in addition the petitioner submitted a motion to reopen and supplement the record with additional pieces of evidence. That motion will be resolved in the course of this initial decision. The last reply briefs were received on May 22, 1991 and the record closed on that date. As a result of other commitments, the Administrative Law Judge requested an extension for the filing of the initial decision which was granted by the Director of the Office of Administrative Law and the Commissioner of Education.

ISSUES

The prehearing order established the central issue in the case as whether the evidence established that the petitioner was entitled to an order placing her in any or all of the positions which she sought in her Petition of Appeal and, in addition, whether she was entitled to any back pay or other relief. In more detail, Dr. Gittelman asserts that she had accrued tenure and seniority as an assistant superintendent and more specifically as an assistant superintendent for elementary education, that she had tenure and seniority rights to the position of Director of Student Services and Programs and/or the Director of Elementary Education, that her transfer to the high school principalship violated her tenure and seniority rights and that the reduction of her salary from that of the level of a director to that of the level of a high school principal constituted a violation of tenure and seniority rights and that the action of the Board of Education in removing her from the position of Director of Elementary Education was arbitrary, capricious and unreasonable.

EVIDENCE

There are essentially two phases or portions of the evidence in this case. One revolves around Dr. Gittelman's allegations that the determination of the Board of Education to remove her from the position of Director of Elementary Education arose from political considerations and personal retribution directed at her, largely from one of the elementary school principals, a Mr. Russ Wilbert, who, it is asserted, is a major

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political force in the community who has control of the majority of the Board of Education and who has been out to get Dr. Gittelman and other senior officials of the District because of their alleged roles in an investigation of Wilbert and the bus company which he owns with his wife, which holds a contract for transportation services in the District.

The second aspect of the evidence generally revolves around questions of the appropriateness of certain seniority and tenure determinations made by the Board which resulted in the assessment that Dr. Gittelman was the least senior director among the four directors employed by the District and that therefore she was the director who was "bumped" out when the determination was made to eliminate the position of Director of Curriculum aand Instruction as part of a reduction in force. In addition, as part of her attack upon the consequences of the RIF, Dr. Gittelman alleges that the Board did not act in good faith with respect to the RIF in that it took actions subsequent to the elimination of the director's position and the concomitant reassignment of her to the principal's position, actions which have caused financial consequences which appear to run contrary to the alleged necessity of saving money which was the purported reason for the elimination of the director's position.

Initially, a discussion of the evidence will center upon Dr. Gittelman's position and the tenure and seniority issues involved.[1] As noted, at the time that the Board instituted the reduction in force, Dr. Gittelman held the position of Director of Elementary Education. The Board also maintained positions of Director of Secondary Education, Director of Curriculum and Instruction, and Director of Student Services and Programs. Dr. Gittelman had served in the position of Director of Elementary Education since July 1, 1981, with the exception of a period from December 1983 to April 1984, when she served as an Acting Assistant Superintendent for Instructional Services. Charles McCall had served in the capacity of Director of Secondary Education since July 1, 1979, and had never served in any other director position. Fred Young served as Director of Curriculum and Instruction since July 1, 1976, and had never served as a director in any other such position. Michael Luciano, the Director of Student Services and Programs, was appointed to that position approximately November 1988, and was not tenured in any position in the District.

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[1] A Stipulation of Facts is in evidence as J-1.

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According to documentary evidence, the Board submitted an application for approval of unrecognized titles to the County Superintendent of School, Barbara Anderson, in 1989 in accordance with N.J.A.C. 6:11-3.6. County Superintendent Anderson responded by a letter of April 23, 1989, approving the unrecognized titles. Her letter, R-4, authorizes continuation of the position titles of Director of Personnel, Director of Curriculum and Instruction, Director of Elementary Education, Director of Secondary Education and Director of Student Services and Programs. The authorizing endorsement for each of the positions of Directors of Personnel, Curriculum and Instruction, Elementary Education and Secondary Education is "Principal" and the legal title is also "Principal". The Director of Student Services and Programs is authorized as an endorsement for "Principal/Director of Student Personnel Services" with a legal title of "Principal/Director of Student Personnel Services."

As noted, following the reduction in force, Dr. Gittelman was transferred to a high school principalship. The Board abolished the position of Director of Curriculum and Instruction, which had been held by Fred Young, and placed Mr. Young in the position of Director of Elementary Education, which had been held by Dr. Gittelman. The Board argues that its determination to make these personnel moves was necessitated by economic realities and that the ultimate determination of which of the directors would be transferred was the result of a simple application of tenure and seniority rights. According to its view, the letter from Dr. Anderson, which established that the Director of Student Programs and Services position was to be treated differently with respect to legal titles and which required that the person holding the Director's position should hold endorsements both as a principal and as a director of student personnel services, demanded that that directorship be treated separately from the general category of other unrecognized Director titles in the District. As a result of this, Dr. Gittelman held no seniority for any of the available directorship positions because she did not hold the necessary endorsements for the Director of Student Programs and Services position and she was least senior among Mr. Young, Mr. McCall and herself.

Dr. Gittelman's first witness was John J. Conte, a former member of the Board of Education from April 1987 through April 1990. According to Conte, Russ Wilbert, principal of an elementary school in the District, was his campaign manager, as well as campaign manager for Pat Migliaccio and Charlie Stanley, and had also been campaign manager for four others who were elected to the Board, three in 1988 and one in 1990. Mr. Wilbert served as a principal under the supervision of Dr. Gittelman, who was the Director of Elementary Education.

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Conte related that at the time that Wilbert served as his campaign manager, he made comments concerning the inept and corrupt persons at the top of the District hierarchy. Specifically, Conte listed Al DeMartin, then the Superintendent of Schools, Charles McCall, Business Administrator Lou Triverio, Dr. Gittelman, Robert Callahan and Joe Novembre, who was in the personnel department. Sometime in 1989-90, a general discussion ensued among Board members as to whether a reorganization of the Department's administrative staff should be undertaken. As a result, a study was commissioned with the Fleischer Management Associates, Inc., which rendered a report in March 1990, P-1. That report recommended that there be more administrators appointed in the District. Since this idea was apparently not compatible with what the Board had been looking for, the idea for the reorganization was dropped. One of the recommendations in the report was that two of the directors be elevated to assistant superintendent level.

Conte recalled that at the time that he was on the Board, Mr. Callahan was serving as superintendent of schools and that Callahan never recommended the elimination of the position of any of the directors nor did he recommend the reorganization of the administrative staff.

Conte related that the C & R Bus Company, which is owned by Mr. & Mrs. Russell Wilbert, has had a bus contract for the Board of Education up to and including April 1990. During an investigation of the company conducted by the Mercer County Prosecutor's Office, several administrators and other employees of the Board were subpoenaed to appear at the grand jury, including Dr. Gittelman, Mr. Callahan, and former Board attorney Graziano. Graziano had instructed Board members not to discuss the investigation with anyone and the witness was unaware of any conversations with Board members which took place. Graziano was "let go" by the Board on April 30, 1990. Conte and Wilbert had a falling out about six months after his election. Conte was defeated in April of 1990, at which time the budget was also voted down by the voters. Conte was not involved in the discussions concerning the reductions which took place following the rejection of the budget.

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The witness advised that Mr. Callahan was "definitely against" the reduction of curriculum assistants from twelve to ten-month status several months prior to the budget defeat, a change which had been discussed for about three years. There had also been discussions about reductions in the number of vice principals and several of these positions were eliminated. Conte believes these reductions occurred prior to the election.

The witness acknowledged that on occasion Mr. Wilbert would tell him how he should vote, although he "usually didn't follow" this advice and "never voted the way Wilbert wanted if it was against his beliefs."

According to the witness, Wilbert had expressed his desire to eliminate certain people from the District. They "have been eliminated" in one way or another.

The witness was asked about the circumstances under which Russ Wilbert and C & R received bus contracts and indicated that these were awarded on the basis of sealed bids. He had faith in the Board and administration's actions in connection with the sealed bid process.

On redirect examination the witness noted that it was common practice for Board members to make recommendations concerning personnel actions. Frequently actions were taken over the objections of the Superintendent.

Robert L. Callahan, former Superintendent of Schools in the Hamilton District for two years beginning December 30, 1988, testified that he is no longer employed by the Board. He was first acting superintendent for Mr. DeMartin. Prior to serving as superintendent, Callahan was the Assistant Superintendent for Curriculum and Instruction for eight years. There was also an Assistant Superintendent for Business Services.

According to the witness, there was a discussion by the Board of Education concerning the reorganization of the administration as a result of budgetary constraints which led the Board to suggest the reduction of vice principals in the high school. A study was conducted, limited to the central office and high school, but later expanded to the middle school. The final report, the Fleischer report, was produced in March of 1990. This suggested that the Director of Curriculum and Instruction be upgraded to an Assistant Superintendency and that the Directors of Elementary and Secondary Education report to the Director. The report did not recommend the elimination of any positions.

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Mr. Callahan had opposed the idea of the study in the first place. Board members had recommended it over his objections, a commonplace occurrence in the District. Following issuance of the report, the Board voted to shelve it.

The witness believes that in February and March 1990 the Board was faced with a shortfall in funding of over $4,000,000, resulting from a loss of state funding. As a result, the Board held meetings and a Board member requested a list of possible reductions in staff. Callahan produced the list, which called for across-the-board reduction, including a reduction of curriculum personnel from twelve to ten and one-half months, and the elimination of the assistant to the superintendent. Callahan supported the elimination of a personnel specialist. The recommendations also included the reduction of the Director of Personnel to the title of Personnel Administrator, however, Callahan did not recommend the reduction of any line directors.

Following production of this list, Board members requested more information concerning the possibility of the elimination of the position of Director of Elementary Education, as well as Assistant to the Superintendent. Board member Stanley received the information from Callahan, but did not bring the matter up with the Board prior to Callahan's departure. He went out on sick leave during the month of May 1991 when the Board voted to abolish a director's position following the defeat of the budget on the first Tuesday in April.

The memorandum produced by Callahan concerning possible staff reductions did not discuss seniority issues. When Callahan was asked for information about the possibility of the elimination of the Director of Elementary Education, he gave Board member Stanley information which he believed convinced him that there would be too much of a void created if the position was eliminated.

Mr. Callahan related that the Wilberts had had control of the Board of Education for at least six to eight years. Investigations concerning the relationship of C & R and the Board have popped up for twenty plus years. According to Callahan, Board members have been pressured at times in connection with appointments. In fact, there was pressure exerted not to appoint him to the Superintendents position, although he was eventually appointed by a nine to nothing vote after a "rather uncomfortable session." The witness was told that Wilbert had pressured against his appointment. In Callahan's view the "sticky part" in Hamilton has always been the hiring aspect. At the time that

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Mr. Callahan became superintendent, the two assistant superintendents had left the District. There was a great deal of pressure concerning the possible appointment of Mr. Wilbert in the Board Secretary position, which also is an assistant superintendent slot. There were two different rounds of interviews for the assistant superintendent position and it was clear to Mr. Callahan that he would not be able to get Dr. Gittelman for this post. Eventually, Mr. Palughi was hired, although he was not supported by Mr. Wilbert and did not come from within the District.

At sometime in the past Dr. Gittelman had made some charges concerning the way in which boundaries for elementary school attendance were drawn. According to Callahan, this alienated certain Board members and at the time that the interviews were taking place for the assistant superintendent's position, Callahan was told by Board member Stanley that he would never get Gittelman as his assistant superintendent for curriculum instruction. Mr. Stanley was not a member of the Board at the time that the director's position was eliminated.

Charles R. McCall, Director of Secondary Education for twelve years with the Board, testified that he was aware of the reorganization taking place during 1990 and was advised by Director DeFeo, the then Acting Superintendent, that his position was in jeopardy of being abolished. Shortly thereafter, he was told by DeFeo that he was not going to be the eliminated individual. This all resulted from an initial statement to him that he probably had the least seniority among the directors, but a few days later he was told that he did not have the lowest seniority and was told "I guess they may be more interested in Gittelman than you." All of this occurred within three days, or a week at most. Mr. McCall has been a director for a longer period of time than Dr. Gittelman. He served as a vice principal and principal in the District, becoming a principal in 1978.

Mrs. Judith E. Enderlien Costanzo, an employee of the Board of Education serving as Transportation Supervisor for the past five years, testified that she deals with C & R as a result of her position. She was aware of the investigation which took place and testified before the grand jury. She was not aware of whether Mr. Wilbert was aware of her having testified. C & R still has a contract with the Board. Whenever there was a disagreement with the bus company, she would be responsible for being in touch with the company and letting them know what the problem was and trying to straighten it out. At

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present, Ms. Enderlien-Costanzo reports to Mr. Palughi. Sometime during the summer of 1990, Sal Chianese, a Board member, after seeing her in the office told her "Oh, you still have a job, we'll have to see about that next year."

Dr. Virginia Dickson Gittelman testified on her own behalf. She is presently principal of Nottingham High School, serving in that capacity since July 1, 1990. She became Director of Elementary Education for the District in 1981. A job description for that position was entered in evidence as Exhibit A.

In her position as Director of Elementary Education, Dr. Gittelman supervised Russ Wilbert and was responsible for evaluating him. On occasion, she wrote a less than satisfactory performance evaluation for Wilbert.

In April and May 1988, she spoke with Wilbert concerning a few incidents but nothing was written concerning these. However, she was advised by Mrs. Costanzo that Wilbert was apparently letting children out of school early in order to allow the C & R bus to make a double run. As a result of this information, both Costanzo and Gittelman positioned themselves so that they could see what happened prior to the 3:30 dismissal time at Wilbert's school. They saw students leave early, about 3:22 or 3:23, and board a C & R bus and then saw the bus return and make a second run at the proper time of 3:30.

As a result of this information and her own inspection, Gittelman went to Superintendent Callahan, who spoke with Board Attorney Graziano about the problem. Graziano advised C & R to stop the practice. The next day, Gittelman advised Wilbert that he was under investigation concerning these activities and he said that he had done it for years for "safety purposes" and that the clocks were wrong. He had never discussed the practice with anybody, either Costanzo, Gittelman, or the police and he had never told anyone about the allegedly inaccurate clocks.

Subsequent to these events, Dr. Gittelman was contacted by the prosecutor's office and was asked several questions. In November she was asked to sign a written statement. Subsequent thereto, the reorganization study was called for "out of the clear blue." She does not recall whether she ever told Wilbert that she had given the written statement, but he was aware that she was cooperating with the prosecutor's office.

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Because she was concerned about possible retaliation by Wilbert, she contacted the prosecutor's investigator to advise him of her concerns. See, Letter of November 16, 1989, P-2.

Dr. Gittelman referred to a luncheon that she attended where Wilbert sat next to her and announced "loudly" that he was going to get all four individuals involved in the investigation, Graziano, Callahan, Gittelman and Costanzo. After this occurred and as a result of a complaint about these comments, Dr. Gittelman was contacted by an assistant prosecutor, who told her that he was going to call Wilbert's attorney and tell him to have Wilbert knock off the threats and intimidation.

According to the witness, her recollection was that Mr. Riccigliano proposed the administrative reorganization. To her knowledge, Wilbert was "instrumental" in Riccigliano's election. She was never advised that her job might be affected by the reorganization. However, when she went to Texas for a conference she received a call from the Superintendent, who told her that he needed written arguments as to why her position should be preserved as opposed to that of the Director of Secondary Education, and she had to prepare the document immediately and send it to the Superintendent.

Prior to April 30, 1990, Gittelman was never advised that she might lose her position. However, on May 8, 1990 she wrote a letter, P-4, to the State Department of Education Compliance Unit advising that she felt that her job was in jeopardy. She saw the "handwriting on the wall" as a result of the defeat of the budget and her belief that the Board was "honing in on the directors".

At some point Dr. Gittelman was told by Mr. McCall and Dr. Young that McCall would be RIFed. When the three directors went down to speak to Dr. DeFeo and ask for support in respect to any RIF, the response which he made was to get up and point to Gittelman and say "It's you, you know it's you, you're not naive . . ". On May 30, 1990, the position of Director of Curriculum and Instruction was abolished, which job was held by Dr. Young. Gittelman was RIFed and reassigned to the Nottingham High School as principal. The position of Director of Elementary Education continued to exist. This action followed notice which she received of the possibility of action against her on May 24. She addressed the Board on both the 24th and the 30th concerning the possibility of action against the directorships. However, she was on vacation and did not get notice of the meeting of May 29.

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Dr. DeFeo asked the Board if it could delay her transfer to the high school until September because she was involving in working on a desegregation order and monitoring which was to occur in October. However, she assumed her position with Nottingham High School on July 1. Her salary of almost $92,000, which had been paid to her in the Director's position, was continued for six months until December 1990 as per the notice requirements of her contract. After that her salary went down to about $84,000, which was the principal's salary level. She was advised that the reason for her reassignment was economic. She was never shown a seniority list and does not believe that there was one in existence in the District in June of 1990.

The witness became aware through newspaper articles that subsequent to this "economic" reorganization, that the Board voted to increase the salary of two assistant superintendents by about $15,000 each. The Board also created the position of Program Supervisor, a post which called for the holder thereof to perform some of the duties which she had previously engaged in. In addition, a stipend was voted for ten and one-half month employees. A principal was appointed to the Sayre School, which already had a principal, and one of those individuals was made a consultant, resulting in the Board paying two principal salaries for the same school. Finally, the Board granted Mr. Callahan the right to remain out of work for the rest of the time prior to his scheduled retirement in December 1990 without taking a sick leave so that he could be compensated for sick time. All of these actions seemed to Gittelman to be in conflict with the Board's alleged financial difficulties which had caused it to eliminate a director's position, resulting in her reassignment.

On cross-examination the witness acknowledged that when she wrote Dr. DeFeo and asked why she was the director who had been reassigned to a principal's position that she was told in response that this was due to her having the least seniority among the directors. The letter indicated that seniority was being based upon years of service as a director.

Gittelman believes that the stipends paid to curriculum assistants resulted from negotiations over the reduction of these individuals from twelve to ten and one-half month employees. She acknowledged that these individuals play a role in the preparation for District monitoring which occurred in 1991.

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The witness acknowledged that if the directors positions were considered to be one category with a legal endorsement for principal, then she was junior in seniority. However, if her service as a principal was used as part of the basis for determining seniority among the three directors, then she was senior because she had longer service as a principal.

The witness further acknowledged that she was never told by any member of the School Board that Mr. Wilbert wanted her out of her directorship. However, one of the newly-elected Board members approached her at a public meeting and advised her that the Board was going to "root out the bad apples involved in the ludicrous investigation of Mr. Wilbert. She was given a copy of a speech in which this statement was made, and copies were also provided to Graziano.

In summary, Dr. Gittelman asserted her belief that at the time the Board members were considering the possibility of the elimination of a directors position, they knew that she would be the individual who would be subject to a RFI. She also believes that DeFeo was aware of the investigation and aware of the fact that she was on Wilbert's hit list.

Patrick F. Migliaccio, a member of the Board of Education for four years and vice president and president in the 1989-90 term, testified that he had felt that the budget was too high and said so publicly. When it was defeated in April, the Board met with the Mayor and Council, but he did not appear at that meeting because, since he felt the budget was too high, he thought it would be an injustice to the Board for him to appear at the meeting at which possible cuts would be discussed. The Board met and spoke about the possibility of eliminating a directorship, which he felt could be done. As a result he supported the suggestion. The elimination of a directorship would be done solely in response to the need to reduce the budget and no names were discussed as to who might be affected by the reduction. According to the witness, he did not know who it would be, but for some reason he thought that it would not be Dr. Gittelman.

The witness acknowledged that when he first ran for election in 1987 and then again in 1990, that Mr. Wilbert was not on his campaign staff and that he does not know whether Wilbert supported him publicly or paid for any of his campaign expenses. Wilbert never told him how to vote and never spoke to him about Gittelman's employment.

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Migliaccio denied that his vote to eliminate a directors position was an attempt to oust Dr. Gittelman. The witness was aware of the grand jury investigation and testified before the grand jury.

On cross-examination the witness denied ever telling the superintendent on a personal basis where cuts should be made in the budget. The Board went through the budget, item by item. He agreed with some of the superintendent's recommendations. He argued that there were too many directors, but he never said which one should be cut. He felt that the District could get along with two directors, but he never made a recommendation as to which director should be eliminated by either position or name. He believes that Acting Superintendent Dr. DeFeo recommended the elimination of the Assistant Director for Curriculum.

The witness was queried concerning a "meeting" involving three Board members, he, Stanley and Viscigliano, with Russ Wilbert at the Golden Dawn Restaurant. This allegedly occurred following a Board meeting. When Wilbert sat down and started talking, Migliaccio advised that he did not want to talk about "this now" and got up and left.

According to the witness, when the Board advised Dr. DeFeo that it wanted to eliminate a directorship, he came up with a recommendation as to which one should be eliminated and said that the elimination of the Director of Curriculum would have the least impact on the children. However, DeFeo argued against the cutting of any of the directorships on "educational grounds." He was overruled because the Board felt that the budget was too high and there were too many administrators in the system and there was a need to reduce costs. The elimination of the director's position saved 80 to 90 thousand dollars. The Board was interested in both immediate and future savings.

The witness acknowledged that there were two principals assigned to one school who received full salaries because of contractual obligations. He also acknowledged that the Board did vote $15,000 apiece in increases to assistant superintendents in June 1990, although he did not support this. He recalled that a new position of Program Supervisor was created and that Carol Chiacchio was placed in this position. This job "more or less filled in gaps." The witness was uncertain as to whether this employee performed much of the work of the former Director of Elementary Education.

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The budget reduction by the Council amounted to $3,000,000 from that which had been established by the Board. Approximately $250,000 of this was restored by the Commissioner of Education. The 1990-91 budget was higher than the 1989-90 budget. Even with the elimination of 4.5 million dollars, as recommended by Callahan, his proposed budget was higher than the 1989-90 budget and even higher than that which existed after the Council cut the budget.

Salvatore James Chianese, a member of the Board for eleven months beginning in April 1990, testified that he did not support the budget and that he felt that there were too many vice principals in the high school. He felt that the school could get along with two vice principals as opposed to four. This was the only area that he was able to pick out right away that could be reduced in order to lower the budget. There was discussion about the possibility of consolidating or eliminating administrative staff. Chianese attended the budget meetings with the Municipal Council, but only as an "observer." He does not recall whether the Council raised the issue of the four directorships. When the cuts came back from the Council, the Board discussed where it could cut its budget with the least educational impact and the issue of the directors was placed on the table. Chianese could not recall who first did this. Dr. DeFeo did not support the idea of cutting directorships and gave reasons for his position. Chianese voted to cut one directorship. He could not recall who that director would be and no names were mentioned during the discussions. After stating this, the witness acknowledged that any one of the directors could have been the possible victim of a cut. There was some discussion concerning seniority lists.

The witness denied that Mr. Wilbert was on him campaign staff and stated that he did not know whether Wilbert had contributed to his election campaign. No one advises him how to vote and he never had a conversation with Wilbert on how to cast his ballot with the Board. When he announced for election, Wilbert called him and told him to pull out, suggesting that he wouldn't get 500 votes.

In the early fall of 1990 discussions took place concerning the search for a new superintendent. Dr. Gittelman's name came up in an executive session and he felt that she deserved the opportunity to vie for the position. He made a motion to this effect and Mr. Migliaccio seconded it.

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The witness acknowledged that he knew Ms. Costanzo quite well and they had been neighbors at one time. Her father was a "very good friend of his." They had worked together and attended family functions. He denied any recollection of a conversation regarding her employment status and denied that he ever would have made a statement to her in line with the testimony which she gave concerning his purported comment that something would have to be done about her continued employment with the Board.

On cross-examination the witness denied ever being in the Golden Dawn Restaurant with Wilbert, although he may have said hello to him there and he also acknowledged that he and other Board members on occasion had been together at Fred and Pete's Restraurant. However, there is no discussion of Board business at these get-togethers.

Chianese further discussed his feelings with respect to the directorships stating that he felt that there was a duplication of services in these positions. When he was elected he found out the importance of the positions of Director of Elementary and Director of Secondary Education and therefore when Dr. DeFeo said that if one of the directorships should be eliminated it should be that of the Curriculum Director, he agreed with this. After voting, he found out about the contractual agreements which would delay some of the tax impact from the reductions and reorganization. However, savings would occur down the road.

The witness never saw a seniority list and never had one. He did not know which of the Directors was least senior and does not recall ever being shown a list by Dr. DeFeo which told him who would be the "victim."

Chianese voted against the establishment of the program supervisor position, but after the Board voted in favor of the creation of the spot he voted "yes" with respect to the person who was appointed. His vote against the position was based upon his belief that the position was not needed.

Dr. William E. DeFeo, Acting Superintendent for the District since the end of April 1991 and before that Assistant Superintendent for Instructional Services, testified that as Assistant Superintendent he was the immediate supervisor of the Directors. When he was asked for information concerning the possibility of elimination of a Director's position, he prepared a "non-recommended" list, which was a working document which

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dealt with some of the suggestions by the Board regarding reorganizations and elimination of positions. Some of these were very impractical. He could not recall whether he included the Director and Vice Principal's position on this list.

The witness participated in the discussions regarding the budget cuts. He prepared answers in response to questions raised by the town Council and passed on to him by the municipal clerk. He is not sure whether he shared these answers verbally with the Board or not. DeFeo represented the Board at the meetings with the Council, although some members of the Board were present.

Item number 35 of the discussions dealt with director's positions. He believes that the issue of the elimination of a director's position was "in the arena" before the Council during its meeting with the Board.

Upon receipt of a copy of the Council's resolution reducing the budget, DeFeo reviewed the document in order to determine possible ways of meeting the cuts which had been made. Discussions ensued concerning the elimination of a director's position. DeFeo argued in support of keeping all the positions, but the Board voted to eliminate one. He was then requested to provide information about which position should be eliminated and, after review, he suggested that the Director of Curriculum be cut because it was better to keep the Directors of Elementary and Secondary Education who had more direct contact with the schools. Once the decision was made to eliminate the Director of Curriculum, DeFeo contacted the law firm which represented the Board to determine who was the appropriate person to be RIFed. He was first advised that Mr. McCall was the appropriate one, but was then told by the attorneys that they had reviewed "something" and as a result it was Dr. Gittelman who was to be eliminated. Three Vice Principals were also eliminated and the twelve-month Curriculum Assistants were reduced to ten and a quarter months. The Director of Personnel's position was reduced to Personnel Administrator prior to the budget defeat.

According to the witness, he was present at the Board discussions concerning the possible reductions and he was asked for his professional opinion, which was that all directors should remain. The only reasons for the reduction which were discussed were economic ones.

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Dr. DeFeo explained that one of the reductions which occurred was the elimination of the assistant to the superintendent's position. The holder of that job, Mr. Keller, was entitled to a principal's position based on his seniority. The principal of Sayre School was going to retire and it was felt appropriate to place Keller in this position and have him work with this principal for a few months. Keller was not actually serving as the principal, but he was paid as a principal because he was entitled to this based on seniority and tenure.

According to Dr. DeFeo, his original comment advising Mr. McCall that he was the individual who would be eliminated, was made in order to avoid embarrassment for McCall. This advice was based upon information received from Mr. D'Ambra, special labor counsel for the Board, who had advised that Mr. McCall was the individual who would be subject to the RIF. However, he was later advised by D'Ambra that Gittelman was the individual who had to go and he had the same type of conversation with her. Her elimination was based upon having the least seniority as a director. At the time that the discussions were taking place with the Board about the elimination of the director's position, he did not know who would be the individual who would be RIFed. No Board member ever stated that Gittelman "had to go" and he never heard Russ Wilbert make such a statement. Many Board employees, including teachers, had testified before the grand jury.

On cross-examination DeFeo asserted that he believes that he recommended that the Board keep Gittelman on in her position as director until September, due to the upcoming monitoring and the desegregation program. However, apparently the Board must have overruled this recommendation. He can recall no "significant vehemence" on the part of the Board as to her reassignment.

In summary, the witness noted that although he opposed the elimination of any director's position he felt that he had no choice but to recommend the elimination of one such position in view of the Board's conclusion that such elimination was appropriate. There were continual discussions concerning the director's role and the need for all of the directorships but there was no specific focus on the position of Director of Elementary Education either at the Municipal Council or at the Board.

Dr. DeFeo has no tenure at this time. He is serving in the last year of his contract but has just been given a three-year contract. Mr. Palughi and Mr. Luciano have

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also received such contracts, although they are presently not tenured. Both Palughi and Luciano received $15,000 increases. These resulted from the fact that these employees have stayed on the old salary guide when other employees have moved to a new salary guide as of July 1, 1989. Palughi had begun work in July of 1989. The salary increase began effective July 1, 1990.

On rebuttal, Dr. Gittelman testified that she actually testified before the grand jury in June of 1990 which was subsequent to the RIF. However, she had been originally scheduled to testify in April.

DISCUSSION

As noted, Dr. Gittelman's dispute with the actions of the Board arises both from her conviction that the Board's decision to eliminate a directorship was motivated by "political" considerations sparked by Russell Wilbert and aimed at eliminating her from the administration and by her alternative contention that, even absent improper motivations for the Board decision, the implementation of the reduction in force was mishandled so that she, with tenure and seniority rights which should have protected her, was nevertheless improperly subjected to a demotion. In connection with the first aspect of her claims, Gittelman asserts that the purported economic reasons for the RIF simply are not supportable in light of actions taken by the Board which, in her view, cost it substantial funds and which bespeak a lack of the economic crisis which the Board asserts necessitated the RIF.

"Political" Motivation

During this hearing the petitioner has presented evidence which suggests that her involvement in the investigation of charges of improper conduct by Wilbert's C & R Bus Company caused Wilbert to use his supposed influence with Board members to eliminate her from her administrative position. In addition, there have been suggestions that other administrative authorities within the District who were in one way or another involved in the investigation and/or testified before the grand jury have also been "eliminated" from positions of authority and/or threatened concerning their jobs by Wilbert or his political puppets.

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A careful consideration of the type and quality of the testimony presented concerning these charges fails to discover a sufficient level of support for Gittelman's suspicions so as to lead to a supportable conclusion that her transfer resulted from political maneuvering and illicit influence on Russell Wilbert's part. There is no question but that there are individuals within the District who have political ties to Wilbert and from the testimony it appears that he does play a role in the political process within the District and has attempted to assert his influence on Board members, perhaps with some success. In addition, it is clear from the testimony of several Board members and the Superintendents that the Board does not always accept the recommendations of its Superintendent concerning personnel matters. However, if one seeks to find a preponderance of credible evidence to establish that this Board of Education was politically maneuvered into a position of eliminating a directorship for the express purpose of "getting" Dr. Gittelman, the evidence simply will not support such a conclusion. The testimony of several Board members, which I found to be generally credible, indicated that they were never approached by Mr. Wilbert concerning either the elimination of directorships and/or Dr. Gittelman. While Wilbert may well have desired Gittelman's removal, there is simply an insufficient basis of competent and significant evidence from which to draw the conclusion that this reduction in force was a sham to get Gettelman. Even if an analysis of the economic results of the reduction, with consideration for some of the financial obligations and expenditures upon which Dr. Gittelman has based her attack on the reduction, were to demonstrate that the Board's financial maneuverings reduced the economic impact of the RIF, nevertheless, I still see no reasonable basis for the conclusion that all of this activity was a cover for the realization of a vendetta by Wilbert against Gittelman. While there is no doubt that were some in the community, and perhaps some on the Board, who felt that the C & R investigation was uncalled for or unwelcome, there is still no strong evidence to support a finding that this dislike for the investigation led to a "plot" to oust Gittelman or other administrators. Although there may be some bad blood between various parties and factions involved in the District, the petitioner's attempt to portray this reduction in force as it affected her as the creation of Russell Wilbert has failed. This is not to suggest that Dr. Gittelman may not have some real and perhaps even legitimate concerns about whether there are those in the District who dislike her and would wish her some professional ill, but in an administrative proceeding findings and conclusions must be based upon something more substantial than possibly accurate feelings, innuendoes and assumptions. The petitioner has simply failed to prove that the reduction in force was politically motivated.

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Tenure and Seniority Rights

Given the above, the remaining issues to be dealt with concern the propriety of the determination that Dr. Gittelman was to be the "victim" of the elimination of a directorship.

N.J.A.C. 6:3-1.10 provides standards for determining seniority. The regulation establishes categories of employment which are deemed as recognized titles. Boards of education are required by N.J.A.C. 6:11-3.3 to assign position titles to teaching staff members. According to 6:11-3.3(b)

> "If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education 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 or 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 title shall be continued for the next school year. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis."

The title of "Director" is not a recognized title within a district board of education under N.J.A.C. 6:3-1.10(l). Thus, in accordance with the requirement for approval on a yearly basis for unrecognized titles under N.J.A.C. 6:11-3.3(b) County Superintendent Anderson approved the use of the titles and established requirements for certification. For each of the unrecognized Directorships, except that of Director of Student Services and Programs, Anderson listed the "legal title" and the "authorizing endorsement" as "principal." The letter specifically notes

> "Further, you are advised that while you may continue to use the unrecognized titles, the persons employed will accrue seniority upon the attainment of tenure under the respective legal titles listed below."

A review of the structure of N.J.A.C. 6:3-1.10, the regulation which deals with the standards for determining seniority, shows that subsection (l), which contains the list of specific categories, lists a total of twenty-one entries, beginning with Superintendent

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of Schools and moving on through various other titles. The listings for "Principal" are six in number; High School Principal, Adult High School Principal, Alternative School Principal, Vocational School Principal, Junior High School Principal and Elementary Principal. Assistant, or vice principals, are also listed in the same fashion, broken down by the particular nature of the school in which they are working. Supervisors are listed as a category, but the listing notes that "each approved supervisory title shall be a separate category. District boards of education shall adopt job descriptions for each supervisory position which set forth the qualifications and specific endorsements required for such position." The interesting feature of this list of categories for seniority purposes is that it does not lump together either the principalships or, in view of the note, the supervisors. Therefore, the seniority category for a principal is determined not by general service as a principal, but instead by the service within specific categories. N.J.A.C. 6:3-1.10(i) provides

> "Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligibility list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her."

Thus, it is clear that the scheme provides for seniority within categories. Since each type of principal is set forth as a separate category, then the seniority status of a high school principal is first determinable in connection with employment in that category, not in a more generalized super-category of principal. Similarly, with respect to supervisors, each approved supervisory title constitutes a separate category and once again seniority status is to be determined within each supervisory category and only where insufficient seniority for employment in the same category exists does the employee revert to a previous employment category. By analogy, it would appear that for director positions, as for principalships and supervisorships, each specific type of directorship should serve as a separate category for seniority purposes. If there is something sufficiently distinctive about service as a high school principal, as opposed to an elementary school principal, as opposed to a vocational school principal, etc. so that the regulations provide for the accural of seniority in each separate category of principalship, it would appear just as logical to assume that there is a similar separation of concerns, interests, focus,

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concentration, etc. between such positions as the Director of Elementary Education and the Director of Secondary Education, at a minimum, so as to strongly suggest that these positions be treated as separate categories. Although the Directorships are admittedly unrecognized titles, nevertheless, there is no question but that the individuals holding these positions function within the school district in specific roles, performing specific duties geared toward the particular level of education that they are involved with. If those high school principals who serve under and report to the Director of Secondary Education accrue seniority as high school principals rather than simply as principals, and if those elementary school principals who served under Dr. Gittelman's supervision accured their seniority in the limited category of elementary school principal, as opposed to a large category of principal, then there seems no reason why Dr. Gittelman should not similarly have accured her seniority within her realm of focus and the other Directors should not have accrued their seniority in their own realms. Although it is possible that there may be some explanation for a distinction between the method of accrual of seniority of principals and supervisors within narrower categories then the super-category of principal and/or supervisor, there is nothing in this record to support such different treatment for directors.

On the basis of the above, I **FIND** that Dr. Gittelman's seniority rights should properly have been determined within the category of Director of Elementary Education, a position in which she concededly was senior to the other Directors, who had not previously held that position. While there may be no question of her junior status as opposed to the other Directors in a super-category of Director, the Board's reliance upon that procedure for determining the seniority rights of its directors is in apparent opposition to the form and intent of the seniority categorizations as set forth in N.J.A.C. 6:3-1.10. Although the problem in determining this question is exacerbated by the failure of the regulations to recognize the legitimacy of directorships, as opposed to having them approved on a yearly basis under the category of unrecognized titles, nevertheless, the spirit of the seniority regulations would appear to dictate separate treatment for the Director categories. If this is inappropriate, there is nothing in the record of this case which would demonstrate such inappropriateness.

For the reasons expressed, I **CONCLUDE** that Dr. Gittelman, as the senior director with respect to the category of Director of Elementary Education, was entitled to retain that position, since the position was not abolished. In view of this ruling, her other claims regarding mistaken applications of seniority and tenure rights need not be

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determined. Therefore, the Board of Education must undertake a review of the seniority rights of other directors and determine which of them must suffer the consequences of the reduction in directorships which resulted from the RIF.

It is hereby **ORDERED** that Dr. Gittelman be reinstated as Director of Elementary Education and that she be made whole for any lost wages and benefits to which she would have been entitled had she not been improperly demoted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

JEFF S. MASIN, ALAJ

Receipt Acknowledged:

July 22 1991
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 25 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

On behalf of petitioner:

P-1 OPERATIONAL ANALYSIS OF ADMINISTRATIVE STAFFING WITH IMPLICATIONS FOR NUMERICAL ADEQUACY, HAMILTON TOWNSHIP SCHOOL DISTRICT, MERCER COUNTY, NEW JERSEY, SUBMITTED BY: FLEISHER MANAGEMENT ASSOCIATES, INC., MARCH 1990

P-2 Letter of November 16, 1989 from Virginia Gittelman, Ed.D., Director of Elementary Education, to Mr. R. Holliday

P-3 Memo of April 9, 1990 from Dr. V. Gittelman to Mr. R. Callahan

P-4 Letter of May 8, 1990 from Virginia Gittelman, Ed.D. to Mr. Richard Kaplan, Department of Education, Office of Compliance

P-5 Letter of May 30, 1991 from Virginia Gittelman, Ed.D. to Dr. William DeFeo, Acting Superintendent

P-6 Job Specifications for Director of Student Services and Programs

P-7 Withdrawn

P-8 Withdrawn

On behalf of respondent:

R-1 Letter of June 5, 1990 from William E. DeFeo, Ed.D., Acting Superintendent to Dr. Virginia Gittelman

R-2 Memorandum of May 2, 1990 from Christina N. Wylder, Municipal Clerk to Dr. William DeFeo, Acting Superintendent, Instructional Services

R-3 Resolution Number 90-248 of the Hamilton Township Municipal Council, dated May 15, 1990

R-4 Memorandum of August 23, 1989 from Barbara Anderson, County Superintendent of Schools, to Mr. Robert Callahan, Chief School Administrator

R-5 Permanent Record of Certificated Personnel for Virginia J. Gittelman

R-6 Permanent Record of Certificated Personnel for Michael V. Luciano

R-7 Permanent Record of Certificated Personnel for Charles R. McCall

R-8 Permanent Record of Certificated Personnel for Frederick Young

R-9 Minutes of Special Public Session of May 29, 1990

J-2 Copy of Page 2 of Unidentified Document Containing LIST B - NON-REAPPOINTMENT OF TENURED DIRECTOR AND REASSIGNMENT

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VIRGINIA GITTELMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner were timely filed. Exceptions by respondent, however, were received one day late pursuant to N.J.A.C. 1:1-18.4 and are not considered herein. Reply exceptions were timely filed by both parties.

In her exceptions, petitioner raises four issues: First, she avers, the Board's action in abolishing a directorship was ultra vires in that it was a personnel action taken without recommendation of the superintendent as required by the Commissioner in Brescia v. Board of Education of the Township of Pemberton, Burlington County, decided April 1, 1991. Second and third, she reiterates her arguments that the Board's actions were arbitrary, capricious and tainted by political motivation, alleging that the ALJ's own recitation of testimony supports her view of events. Fourth, petitioner alleges that, although the ALJ correctly determined her seniority status, he erred in failing to reach to her tenure status

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as well; here petitioner renews her argument that her tenure lies in an assistant superintendency, since she is properly certificated for the position and served in it on an acting basis for five months, and since as Director she had districtwide responsibilities, supervised principals and was precluded from belonging to the principal's bargaining unit because of her duties.

In reply, the Board argues that its actions were fully proper in that it eliminated an administrative title, but did not terminate, transfer or take other discretionary action with regard to individual personnel such that the superintendent's recommendation would have been necessary; that its actions, for the reasons given by the ALJ, were neither arbitrary and capricious nor politically tainted; and that petitioner's legal title was clearly designated by the county superintendent as "principal" and neither the Director's duties nor its role in district organization rises to the level of assistant superintendent.

Upon careful consideration, the Commissioner determines to affirm the ALJ for the reasons well stated in the initial decision.

On the question of improper motive, as the ALJ notes, feelings, innuendos and assumptions, even if accurate, do not suffice to prove political motivation in the context of an administrative proceeding, and the evidence presented by petitioner herein simply does not rise to the level necessary to enable her to prevail on this point. Neither is there indication that the Board's action was arbitrary or capricious, as the reduction at issue fairly appears to have been part of a larger attempt to streamline administration, notwithstanding that dollar savings may have subsequently been offset by other actions. On the question of

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acting without the recommendation of the superintendent, the Commissioner finds inapposite petitioner's reliance on Brescia, supra, as the matter herein was an elimination of position, not a personnel action, and petitioner's assignment to a principalship was not a discretionary transfer on the part of the Board but, rather, an automatic application of what the Board believed to be controlling seniority regulations emanating from its reduction in force.

With respect to petitioner's employment rights, the Commissioner likewise concurs with the ALJ's reasoning. There being no separate seniority category for "director" in N.J.A.C. 6:3-1.10 and the legal title of the directorship having been determined by the County Superintendent to be "principal," the ALJ's application of the grade-level distinctions of the principal category to the directorship position is fully appropriate. Moreover, his further application of the subject area distinctions of supervisor positions, which are in many aspects analogous to directorships, is fully consistent with the spirit and intent of the seniority regulations as a whole. Indeed, the Commissioner would encourage the State Board of Education to consider adopting as a rule that each directorship, like each supervisory position, be a separate seniority category.

Finally, on the question of petitioner's tenure, the ALJ did not find it necessary to address specific claims in view of his finding on seniority. It seems clear, however, that notwithstanding petitioner's arguments to the contrary, her tenure lies in the position of principal, this being both the designated legal title of the Director position for tenure purposes and the certificate

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required to hold it pursuant to N.J.A.C. 6:11-3.3(b). Both parties now concede that shortly before the close of the record in the initial decision, the position of Director of Elementary Education, to which petitioner would have been entitled under the ALJ's decision, was eliminated. Petitioner must therefore now be assigned to either a principalship within her entitlement or the appropriate preferred eligibility list.

Accordingly, with the modification due to current circumstances noted above, the initial decision of the Office of Administrative Law is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1991

DATE OF MAILING - SEPTEMBER 16, 1991

Pending State Board

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
OAL DKT. NO. EDU 6972-91
AGENCY DKT. NO. 264-7/91

ANTHONY MONGIARDO,
Petitioner,
v.
ELLEN GAMBATESE, ET AL,
AND THE BOARD OF EDUCATION
OF WEST PATERSON, PASSAIC
COUNTY,
Respondent.

Rudolph A. Filko, Esq., for petitioner, (Mizzone and Filko, attorneys)

Robert G. Rosenberg, Esq., for respondent

Record Closed on Motion: August 1, 1991 Decided: August 7, 1991

BEFORE WALTER F. SULLIVAN, ALJ:

This matter was transmitted to the Office of Administrative Law by the Department of Education, which characterized it as a case demanding emergent relief.

Petitioner Mongiardo had been elected President of the West Paterson Board of Education at its reorganization meeting of May 14, 1991. He achieved the position upon a 5-4 majority and one of the votes cast in his favor was that of Linda Coller, who had been seemingly elected to the Board a month earlier. The election results were certified by the Department of Education on May 31, 1991.

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Subsequently, on June 11, 1991, the Hon. Nicholas G. Mandak, J.S.C., declared that the Board which was seated and acted on May 14, 1991, was improperly constituted due to a miscount of votes. A copy of Judge Mandak's judgment is attached to this decision as Appendix A. Ms. Coller was ruled not to be a member of the Board.

Following the judgment, a number of members of the Board acted on July 2, 1991, to replace Mongiardo as president and to rescind various contracts entered into by the Board on May 14, 1991.

This matter is brought by Mr. Mongiardo and seeks to establish that the purported reorganization meeting of July 2, 1991, was illegal and that he continues to hold office as Board president. In addition, petitioner seeks to have the purported rescision of the Board's contracts for professional services be declared invalid.

The matter was argued on August 1, 1991, and the record closed on that date as to the presidency. I note that a number of subsidiary items remain having to do with claims of the May 14, 1991 majority respecting improprieties under the Open Public Meetings Act and claims of improprieties by the July 2, 1991 majority which might or might not rise to an estoppel. Nevertheless, should the Commissioner rule that the July 2, 1991 meeting undertook to act in ways forbidden by statute then these issues need not be pursued.

Petitioner argues from Edwards v. Mayor and Council v. Moonachie, 3 N.J. 17 (1949) that Boards of Education have only those powers granted to them by the Legislature. No party disputes this but, in my view, such an assertion begs the question of whether or not the May 1991 majority ever held proper office and whether or not the actions of Ms. Coller were ultra vires at all times. Petitioner correctly points out that the election recount was certified by the Commissioner of Education on May 31, 1991, but subsequent developments reflected in Judge Mandak's Order indicate that the Commissioner was in error. Thus, while I will treat the question of the capacity of de facto officers to bind future de jure officers below, any argument that the Board was properly constituted on May 14, 1991, is based on its own boot straps.

The more cogent citation is that of Claire M. Eagan, et al v. Joseph G. Brady, et al, 1970 S.L.D. 153. In that case, an erroneous vote count was discovered on a

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recount but, before certification by the Commissioner of Education The Commissioner ruled that notwithstanding the erroneous count, the de facto members of the Board not only had the capacity to act, but also the capacity to bind the subsequent de jure Board

The respondents stress the factual distinction that the order here was based on the casting of invalid ballots and represents a judgment of the Superior Court. These are factually correct observations, but do not distinguish the matter from Eagan. Had the Superior Court found a taint of fraud, it could have easily enough reflected the same in the judgment. The Appendix speaks for itself. Furthermore, I take official notice that there are many ways in which a ballot may be invalidated, some innocent and some not innocent. Since there was no finding of a taint or bad faith in Ms. Coller's seeming accession to the Board, there is no basis for either myself or the Commissioner to find one based on claims and speculations. Therefore, I find that the logic of Eagan pertains here

This does not make Eagan dispositive To begin with, while I accept the cogency of a published record of agency practice, the situations in Eagan and here occurred 20 years apart and should the Commissioner choose to overlook the logic of Eagan, I know of no bar to his doing so. Clearly, administrative considerations would advance finality and repose with respect to public transactions and, as the petitioner rightly points out, there is nothing in the statutes that contemplates a second reorganization

On the other hand, the entire logic of an elected Board of Education is to support a school system which, within law, reflects the will of the electorate. If that will were thwarted by a misperception that Ms. Coller belonged on the Board when in fact she did not, I am at a loss to understand what values are enhanced by allowing a judicially determined error control the future activities of the West Paterson Board of Education.

Because of the diligence of public officials in counting votes, this situation occurs but rarely. Nevertheless, the paramount values of having the Board selected by an accurate count, in my view, far outweigh the stability which is found in Eagan. Furthermore, Eagan relied on a secondary treatise as to the rights of de facto officers and such treatises, upon even modest research, reveal conflicting views. See Black's Law Dictionary as to de facto officers (5th Edition, at p. 375).

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The question of the powers of de facto officers and, more importantly, the survival of their actions upon a challenge by de jure authorities is treated quite differently in the annotation at 7 ALR2d 1407 which, in turn, is premised upon its discussion of Bowman v. Moorehead _____ Minn. _____, 36 NW2d 7 (1949).

The annotation states as its central premise, quoting American Juris prudence, that "the existence of de facto municipal corporations is generally recognized in the United States, but that in the absence of the law authorizing the creation of a municipality de jure, there can be none de facto." 7 ALR2d at 1407.

While the cases discussed in the treatment of Bowman pertain to municipalities, an analysis of these cases does not suggest a difference between them and cases upon the survivable de facto powers of school boards. Some of the grounds under which de facto municipal powers were held were the absence of fraud, a potentially open question in this matter (Taylor v. Cole, 201 327, 257 P 40 (1927)). Furthermore, in Clapp v. Otoe County, 104 F 473 (8th Cir. 1900), the Circuit Court analogized a kind of latification by the citizenry after the acts of the quasi-municipality and its quasi-officers had gone unchallenged for a lengthy period of time. Here, in contrast, the minority faction of the May 14, 1991 then took prompt and vigorous action to assert their position.

Lastly, although the annotation does not so note, the majority of the cases deal with the validity of bonds issued by the de facto or quasi-municipality. Without stretching the concept of official notice beyond its proper bounds, it would appear likely that bonds are issued for the construction of capital projects (see Tulare Irrig. Dist. v. Shepard, 185 US 1 (1902) and St. Paul Gaslight Co. v. Sandstone; 73 Minn. 225, 75 NW 1050 (1898). Thus, an invalidation of quasi-municipal activity would run the risks of making it more difficult for municipalities of all sorts to raise debt capital, result in a chaotic condition with respect to the enforceability of bond covenants and, lastly, interrupt public works with the potential for increase in cost or, possibly, abandonment.

As of noted, none of these conditions exist with respect to a board of education. On the other hand, since the general law seems well fixed as to the conditions under which a de facto body may be upheld, I **ORDER** approval of the action of the Board with respect to the election of Ellen Gambatese as its president.

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This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N J A C 1 1-14 10 or at the end of the contested case, pursuant to N J A C 1:1-18 6

3/12/91
DATE

WALTER F. SULLIVAN, ALJ

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ANTHONY MONGIARDO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ELLEN GAMBATESE ET AL. AND THE BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and Decision on Motion rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4. Respondent Gambatese's exceptions were untimely filed.

Before reviewing the exceptions, the Commissioner notes for the record that on page 4 of the initial decision Ellen Gambatese is incorrectly identified as the president of the West Paterson Board of Education. She is the vice-president. Further, for greater clarity in understanding the facts of this matter, it is noted that Anthony Mongiardo was elected president and Raymond Frey was elected vice-president of the West Paterson Board of Education at the Board's reorganization meeting on May 14, 1991. At the July 2, 1991 meeting of the Board Dennis Wyka was elected as president and Gambatese as vice-president.

Petitioner excepts to the ALJ's statement on page 2 of the initial decision that Judge Mandak ruled on June 11, 1991 that the West Paterson Board on May 14, 1991 was "improperly constituted."

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He also takes exception to the ALJ's statement that Judge Mandak found a "miscount of votes." As to this latter point, petitioner avers that Judge Mandak simply invalidated 17 absentee ballots and recalculated the new total of votes with the 17 ballots excluded.

Petitioner further objects to the ALJ's statement on that same page which says that the record closed on August 1, 1991 as to the presidency. With respect to this, petitioner avers that at the hearing he argued for all the relief requested in his petition; i.e., a ruling that the entire reorganization of July 2, 1991 was illegal including the recision of the contracts for Board attorney, labor negotiating attorney and the auditing firm, not just the president issue.

Petitioner also avers that the ALJ is incorrect when he states that the Commissioner's May 31, 1991 certification of election results was in error. It is petitioner's position that the certified results were modified by court intervention.

In addition to the above, petitioner seeks reversal of the recommended decision, arguing, inter alia, that Eagan, supra, is controlling in the instant matter. He further contends that the ALJ failed to address those statutes which are applicable to the matter, namely N.J.S.A. 18A:10-3 which specifically provides for only one reorganization of a board of education, N.J.S.A. 18A:15-1 which requires that the president and vice-president of a board shall be elected at the first regular meeting after the annual election and N.J.S.A. 18A:15-2 which dictates that those officers may only be removed if they refuse to perform a duty imposed upon them by law.

Upon review of the record, the Commissioner agrees with petitioner's exception that Judge Mandak did not rule that the Board as of May 14, 1991 was "improperly constituted." A review of Judge

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Mandak's judgment contains no such finding or conclusion Petitioner is also correct in arguing that the May 31, 1991 certification of election results by the Commissioner was not in error. By law the Commissioner of Education has no jurisdiction whatsoever over contested absentee ballots, N.J.S.A. 19:57-24. Thus, the election results of May 31, 1991 were accurate at the time. It was only upon a challenge to the absentee ballots in New Jersey Superior Court before Judge Mandak that the results of the election were modified based upon his finding that various absentee ballots were invalid.

Further, the Commissioner finds and determines that the action of the West Paterson Board of Education to conduct a second reorganization meeting on July 2, 1991 was invalid. By law, a board of education must reorganize at its first regular meeting after the annual school election. N.J.S.A. 18A:10-3 That meeting must be conducted no later than the last day of the second week following the election. N.J.S.A. 18A:10-3(b)

Moreover, N.J.S.A. 18A:15-1 requires that the president and vice-president of a board shall be elected at the first regular meeting after the annual school election and shall serve for a term of one year. Those officers may only be removed if they refuse to perform their duties as set forth in N.J.S.A. 18A:15-2. Therefore, the Board's action to conduct a "second" reorganization meeting on July 2, 1991 was ultra vires. So too was its action to remove petitioner from his duly elected position as Board president through the election of a new president. Eagan, supra See also Schill et al. v. Board of Education of the Borough of Elmwood Park, Bergen County, decided June 25, 1990 which is a more recent decision than Eagan and entirely consistent with it in terms of the determination

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that there is only one time by law that a board may reorganize and elect a president and vice-president. The fact that Judge Mandak's order subsequently altered the composition of the Board in no way alters this determination. At the time petitioner was elected to be the president of the West Paterson Board, the Board was duly constituted in accordance with the election results that were in effect at that time. A change in the results of that election does not nullify the legality of the Board actions taken prior to Judge Mandak's order with respect to the membership of the West Paterson Board. Eagan, supra

Accordingly, the ALJ's recommended decision is reversed. This determination does not extend, however, to the other positions set forth in the Petition of Appeal. There is no statute or regulation which controls the termination of attorneys for a board of education or auditing firm. Nor is there a legal requirement that such personnel be appointed at a board's reorganization meeting.

Consequently, it is ordered that Dennis Wyka and Ellen Gambatese be removed from the president and vice-president positions of the West Paterson Board of Education and those board members duly elected to said offices on May 14, 1991 be immediately reinstated.

It is further determined that the decision herein fully disposes of the issues set forth in the Petition of Appeal. Therefore, there is no need for a plenary hearing on the merits of the petition to be conducted.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 17, 1991

DATE OF MAILING SEPTEMBER 17, 1991 - 9 -

Pending State Board

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ANTHONY MONGIARDO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ELLEN GAMBATESE, DENNIS WYKA, ANN MARIE T. KAHWATY, MARY ZAZALLA, FRED DE NUDE AND BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

Rudolph A. Filko, Esq., for Petitioner, (Mizzone, Filko and Mizzone)

Robert G. Rosenberg, Esq., for Respondent Gambatese

This matter was opened before the Commissioner by Respondent Ellen Gambatese through the filing of a Notice of Motion for a Stay of the Acting Commissioner's decision rendered on September 17, 1991 which is currently pending on appeal before the State Board of Education.

Respondent filed an Affidavit in support of her motion pursuant to the provisions of N.J.A.C. 6:2-1.11. She avers that a stay should be granted based on the reasons set forth below:

> I, Ellen Gambatese, of full age, being duly sworn according to law upon my oath depose and say:
>
> 1. I am Vice President of the West Paterson Board of Education and was elected in a previous election.
>
> 2. I am part of a group of five board members who are philosophically aligned.

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3. The Honorable Walter F. Sullivan, A.L.J. rendered a decision on August 7, 1991 [with] which I am in agreement. Acting Commissioner of Education, Leo Klagholz, has mistakenly ordered reinstatement of Anthony Mongiardo as Board President and Raymond Frey [as] Board Vice President.

4. There have been three meetings of the Board since Judge Sullivan's ruling. All standing committees have been established and regular meetings progressing. These all obviously must change to the harm and detriment of the children.

5. The policies and procedures implemented as [a] result of the new administration would immediately cease.

[6.] The expense involved is prohibitive in changing all of the various documentation forms, checks and other official paperwork which has now been conformed to Dennis Wyka, Board President, and Ellen Gambatese, Board Vice President.

[7.] There would be clearly a log jam between Mr. Mongiardo and the five philosophically aligned board members as to cause the Board not to function in a normal and correct fashion given the opposite educational view points.

[8.] It is clear that the Commissioner saw fit to rule in our favor with regard to the various professional appointments. A stay is requested in order that the State Board can review this matter in its entirety. A stay at this time would ensure continuity and continued orderly running the Board of Education without interruption.

[9.] Should the Board overturn the Commissioner and the Commissioner not grant this Stay, the effect would cause extreme confusion, disenchantment and hardship to both board members and more importantly the children. There would be no irreparable harm done to Mr. Mongiardo if a stay is granted and the status quo maintained until the appeal process has taken its due course. In order to avoid confusion, mistrust and otherwise uncertainty a stay would be required to maintain the status quo.

(Respondent's Affidavit)

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In his opposition to the request for a stay, Petitioner Mongiardo argues, inter alia, that:

> 8. MRS. GAMBATESE seems to indicate in her Affidavit that illegal officers have relied upon the recommendation of Walter F. Sullivan, A.L.J., and because of same reliance, the Commissioner's decision must be stayed. MRS. GAMBATESE fails to point out that the illegal actions of the "philosophically aligned five" took place at the July 2, 1991 meeting. The illegal officers took their seats on same date. The A.L.J. recommendation was not made until August 7, 1991. There was no reliance upon same recommendation. The Commissioner ruled that the A.L.J.'s recommendation was erroneous and contrary to New Jersey law.
>
> 9. As a result of the Commissioner's decision, a special meeting of the Board was scheduled for September 25, 1991. The purpose of same meeting, among other things, was to re-establish the Board committees which were illegally changed by the respondents. The "philosophically aligned five" failed to show up for same meeting thereby preventing a quorum.
>
> 10. On October 1, 1991, a regular Board meeting was held. I sat as President for same meeting. RAYMOND FREY sat as Vice-President. I re-established the Board committees which I had previously appointed. There were no objections from any Board members and the meeting ran smoothly. There was no "log jam" as feared by MRS. GAMBATESE.
>
> 11. Thus, the illegal officers have been removed and the Board has returned to original and proper form. Any claims by MRS. GAMBATESE concerning harm or detriment to the Borough children are without merit. On the contrary, I submit that if the illegal officers were entitled to return to their posts, the children would suffer. The business of the Board would again be frustrated by having two presidents and two vice-presidents. This is particularly true where the Commissioner of Education has rendered a final decision which finds that the actions of the respondents were illegal.

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12. MRS. GAMBATESE, in paragraph 5 of her Affidavit argues that if the Commissioner's decision is not stayed, "the policies and procedures implemented by the new administration would cease". This statement is erroneous. I know of no "policies or procedures" which have been implemented subsequent to the illegal actions of the respondents. The "new administration" spoke of by MRS. GAMBATESE consists of two members of a nine member board. I do not see how two members alone can implement policies or procedures for the Board.

13. In paragraph 7 of her Affidavit, MRS. GAMBATESE erroneously states that there would be a prohibitive expense in changing forms, checks, and "other official paperwork". This statement is ridiculous. There are no forms or official paperwork which have to be changed, with the exception of the bank account signature card which has already been changed and filed allowing me to once again sign the checks.

14. In paragraph 8 of her Affidavit, MRS. GAMBATESE again makes a statement with which I take exception. She implies that as President, I would somehow help cause the Board to not function properly because of "opposite educational viewpoints". I would hope that MRS. GAMBATESE's educational viewpoint is identical to mine, that being to do what is best for the children of West Paterson.

15. The Board has followed the Commissioner's decision and is presently operating in accord with same decision. There is presently no "confusion, disenchantment or hardship" nor should there be any of same in the future.

16. If I again am denied my rightful office as President I will surely suffer irreparable harm. I would be denied the right to service in the capacity for which I was lawfully elected.

17. MRS. GAMBATESE asks the Commissioner to maintain the status quo pending an appeal. Since the Board has already reverted back to its original form and I have regained my seat as President, the status quo would be maintained by denying MRS. GAMBATESE's request for a stay of the Commissioner's Order. What MRS. GAMBATESE is

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really asking for is another re-organization to once again disrupt the Board.
(Petitioner's Affidavit, at pp. 2-5)

Whereas, the Commissioner has reviewed the positions of the parties and finds no basis for granting a stay because respondent has not met the standards for granting injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982) since she has failed to demonstrate that:

1. She or the West Paterson School District would suffer irreparable harm if the stay were denied;

2. She has a likelihood of prevailing on the merits of her appeal to the State Board;

3. Greater harm would inure to her than petitioner if the stay were denied; and

4. The public interest compels the grant of a stay; now therefore

IT IS SO ORDERED this 28th day of October 1991 that the Motion for Stay is DENIED.

COMMISSIONER OF EDUCATION

OCTOBER 28, 1991

DATE OF MAILING - OCTOBER 29, 1991

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 696-91
AGENCY DKT. NO. 396-12/90

VINCENT J. CAPRARO, VINCENT N. D'ONOFRIO, AND JOSEPH J. KARABIN,
Petitioners
v.
WOODBRIDGE TOWNSHIP BOARD OF EDUCATION,
Respondent.

Petitioners, Capraro, D'Onofrio & Karabin, pro se
Carl J. Palmisano, Esq., for respondent (Palmisano & Goodman, attorneys)

Record Closed: July 3, 1991 Decided: August 8, 1991

BEFORE **DANIEL B. McKEOWN**, ALJ:

Each named petitioner is a sitting member of the Woodbridge Township Board of Education (Board). Each petitioner, individually and collectively, allege that the Board improperly and contrary to regulation appointed an out-of-district certified teacher as its head baseball coach and rejected a qualified in-district certified teacher. Petitioners seek a declaration that the Board not only acted contrary to the regulation, N.J.A.C. 6:29-6.3, but also to a prior ruling of the Commissioner regarding that regulation in Chambers v. Neptune Township Board of Education, 1985 S.L.D. - (Sept. 5, 1985). The Board claims the fact pattern in Chambers is entirely different than the facts in this case and that, if granted the opportunity at a plenary hearing, it would establish that its choice of the out-of-district head baseball coach over the in-district applicant was based upon facts sufficient for the Commissioner to modify his earlier holding in Chambers.

Warren R. Larsen, an originally named petitioner, has since withdrawn his name as a petitioning party.

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Petitioners moved for summary decision as a matter of law which is opposed by the Board. A stipulation of fact has been submitted signed by the parties, together with letter memorandum in support of their respective positions on the motion.

The conclusion is reached in this initial decision that the matter is ripe for summary decision because the material facts, as stipulated, are not in dispute and that as a matter of law the Board's action appointing an out-of-district applicant to be its head baseball coach is contrary to the referenced regulation as interpreted by the Commissioner in Chambers.

STIPULATION OF FACT

The facts stipulated in writing by the parties are as follows:

1. Petitioners Capraro, D'Onofrio and Karabin are duly elected members of the Board of Education of the Township of Woodbridge. Petitioner Larsen, at the time of the appointment in question, was a duly elected member of the Board of Education of the Township of Woodbridge.

2. On August 28, 1990, the Board Attorney, Carl J. Palmisano, responded to an inquiry of Superintendent of Schools, Dr. Fredric Buonocore, regarding the appointment of a Head Baseball Coach.

3. The Board Attorney advised that "if a person meets the requirements set forth in the advertisement for the position, then the district is bound to hire that individual who is a certified staff member employed by the district, rather than a certified individual employed outside the district."

4. On October 18, 1990, the Board of Education, acting on the recommendation of Superintendent of Schools Dr. Fredric

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Buonocore and Director of Personnel Services, Dr. Bernard Novick, appointed Jeremiah Smith as Head Baseball Coach of John F. Kennedy High School for the 1990-91 baseball season, at a salary of $3,300.00.

5. The position of Head Baseball Coach was advertised on May 18, 1990 within the District, and on May 27, 1990 in the Star Ledger.

6. In addition to the successful applicant, Jeremiah Smith, applicants for the position included Ronald Hoyda.

7. Jeremiah Smith is an elementary school teacher in Hoboken.

8. Ronald Hoyda is a high school teacher in the Woodbridge Township School District at Colonia High School.

9. Both candidates were fully certified as teachers.

10. Only Ronald Hoyda was a certified teacher in the local Woodbridge Township School District.

11. Jeremiah Smith had prior experience as Head Baseball Coach in the Woodbridge Township School District at John F. Kennedy High School. Ronald Hoyda had prior experience as Assistant Baseball Coach in the Woodbridge Township School District at Colonia High School.

12. During prior appointments of Head Baseball Coach, no other qualified in-district applicants sought the position.

13. Superintendent of Schools Fredric Buonocore contends he may recommend out-of-district candidates over qualified in-

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district applicants "if there are substantial reasons for such a selection."

14. Jeremiah Smith has operated the baseball program in the prior appointments and has achieved public support for his work from students and parents.

15. Ronald Osborne, Supervisor of Athletics for the District, John Hoagland, Principal of John F. Kennedy High School and Dr. Bernard Novick, Director of Personnel Services, believe Jeremiah Smith is more qualified than Ronald Hoyda because of his prior experience as Head Baseball Coach and his demonstrated ability to lead a program.

16. Ronald Osborne, John Hoagland and Bernard Novick recommended to Superintendent of Schools Buonocore that Jeremiah Smith be hired over Ronald Hoyda for the benefit of the program.

17. Superintendent of Schools Buonocore accepted the recommendation of Ronald Osborne, John Hoagland and Bernard Novick because he beleived Jeremiah Smith was a better qualified candidate for the program and that the regulations allowed such an appointment.

18. The Superintendent of Schools relies on language of N.J.A.C. 6:29-3.3 which states:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.

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The Superintendent of Schools contends "not in the employ of a district Board of Education" should be interpreted to mean "any" school district in the State of New Jersey.

19. The Superintendent of Schools contends the Board Attorney incorrectly interpreted the regulations where he states the candidates must be in the employ of the Woodbridge School District.

20. The Superintendent of Schools accepted the recommendation of his staff and therefore supported the action of the Board on October 18, 1990.

ARGUMENTS OF THE PARTIES

ARGUMENTS OF PETITIONER

Petitioners argue that the facts in this case parallel the facts in Chambers which, in turn, requires the rejection of the Board's apparent position that it selected the out-of-district applicant for appointment because he was "more qualified" than the in-district applicant because of his prior experience as head baseball coach and his demonstrated ability to lead a program. Petitioners note that a similar defense was used by the Neptune Board of Education in which it argue that Chambers, the in-district candidate, lacked the technical skills necessary to be appointed the controverted assistant varsity football coach. Petitioners maintain that so long as an in-district applicant who is employed as a teacher by the district board and who is properly certificated and applies for a coaching position, and in the absence of some disqualifying factor, that person must be selected by the Board over an out-of-district applicant regardless of the latter's asserted superior coaching ability or leadership style.

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THE BOARD

While the Board recognizes in its filed letter memorandum the continuing vitality of the Chambers case, it asserts that this case may be factually distinguished if summary decision is denied petitioners here and it, the Board, is granted the opportunity of establishing the superior qualifications of the out-of-district applicant. For that essential reason, the Board requests that summary decision as a matter of law be denied and that the matter proceed to a full plenary hearing in order for the record to be developed.

ANALYSIS

The State Board rule, N.J.A.C. 6:29-3.3, recodified from N.J.A.C. 6:29-6.3 with a modification from superintendent of schools to chief school administrator and not otherwise relevant here, provides in full as follows:

> (a) Any person not certified as a teacher and not in the employ of a district board of education shall not be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction, or coaching or for conducting games, events or contests in physical education or athletics.
> (b) School districts shall be permitted to employ any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised.
> (c) In the event there is no qualified and certified applicant, the holder of a county substitute certificate is authorized to serve as an athletic coach in the district in which he or she is employed for a designated sports season, provided that:
>
> 1. The district chief school administrator demonstrates to the county superintendent that:
>
> i. The vacant coaching position had been advertised; and

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ii. There was no qualified applicant based on the written standards of the district board of education;

2. The district chief school administrator will provide a letter to the county superintendent attesting to the prospective employee's knowledge and experience in the sport in which he or she will coach; and

3. Approval of the county superintendent shall be obtained prior to such employment by the district board of education. The 20-day limitation noted in N.J.A.C. 6:11-4.4(i) shall not apply to such coaching situations.

In the Chambers v. Neptune case, Chambers was a physical education teacher employed by the Neptune board who also had experience as assistant track and field coach. He applied for the vacancy as assistant varsity football coach and he was the only in-district applicant. However, the Neptune board appointed a recent college graduate who did not have prior teaching experience but who had been recently hired by it as a permanent substitute teacher. The board argued that the recent college graduate was better qualified than petitioner. After the Commissioner determined that Chambers was qualified under the administrative rule then found at N.J.A.C. 6:29-6.3 by virtue of his certification as a teacher and employment by the Neptune Board, the Commissioner held as follows:

> The primary concern in hiring coaches * * * is that '* * * all persons who serve as coaches of interscholastic athletics in public schools in this State are first and foremost teaching staff members * * *'.
>
> This concern is expressed in N.J.A.C. 6:29-6.3(a) [now N.J.A.C. 6:29-3.3(a)], which was not altered by the 1983 amendments. Since there was an in-district teacher who duly applied for the coaching spot, no other out-of-district candidates should have been considered except pursuant to written specifically setting forth qualifications as set out in N.J.A.C. 6:29-6.3 [that is, certification and employment as a teacher by the board where the coaching vacancy exists].

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The Commissioner found that the Neptune Board acted in violation of the administrative rule by employing an out-of-district applicant to be assistant varsity football coach when Chambers, then a physical education teacher in its employ who was properly certified, had also applied for the very same position.

In this case, the stipulated facts are not very much different from those in Chambers. The in-district applicant is employed by the Board as a teacher, is properly certificated, and applied for the position of head baseball coach for 1990-91. There is no suggestion in the joint stipulation of fact that the in-district applicant was otherwise disqualified from being named head baseball coach by the Board for 1990-91. Therefore, the in-district applicant under N.J.A.C. 6:29-3.3, as interpreted by the Commissioner in Chambers, had an enforceable claim to that vacancy as opposed to the out-of-district applicant who had no enforceable claim to the vacancy regardless of asserted superior qualifications, in light of a qualified in-district applicant.

Summary decision is appropriate where there is no genuine dispute regarding a material fact. Rankin v. Sowinski, 119 N.J. Supra. 393, 399-400 (App. Div. 1972); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). In this case, the material facts are not in dispute. Under the administrative regulation as interpreted by the Commissioner it is irrelevant that the out-of-district applicant is in the Board's view "more qualified" than the in-district applicant because of the former's prior experience as head baseball coach or his demonstrated ability to lead a program. The qualifications for athletic personnel are clearly stated in N.J.A.C. 6:29-3.3 and, absent a Board policy such as here, so long as an in-district applicant is a teacher in the employ of the Board and is properly certificated for that teaching position he is then qualified for appointment to the coaching vacancy over an out-of-district applicant. That the superintendent may view the regulation to be more broad in its application to employmnet as a teacher by 'a district board of education' than the Commissioner does not vitiate what the Commissioner has stated in Chambers. The Commissioner's view of the regulation is binding until and if his interpretation is overruled.

Consequently, and under the standards articulated for summary decision, summary decision is appropriate in this case. The Woodbridge Township Board of Education had an in-district applicant for the position of head baseball coach and the applicant was otherwise qualified under N.J.A.C. 6:29-3.3. The Board elected, despite legal advice to the contrary, to appoint an out-of-district applicant to that vacancy. Such election and such conduct by the Board is in violation of N.J.A.C. 6:29-3.3. Therefore,

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the Woodbridge Township Board of Education is hereby **ORDERED** to fully and faithfully comply with N.J.A.C. 6:29-3.3 in all respects as that regulation has been interpreted by the Commissioner of Education.

It is so **ORDERED.** The in-district applicant who was improperly denied the position of head baseball coach is not entitled to relief in this case for he is not a named petitioner. All further proceedings scheduled for this case are cancelled.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 12, 1991
DATE

DANIEL B. McKEOWN, ALJ

Receipt Acknowledged:

8/9/91
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 14 1991
DATE

OFFICE OF ADMINISTRATIVE LAW

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VINCENT J. CAPRARO ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner adopts the conclusion of the Office of Administrative Law that in the absence of evidence that the in-district applicant seeking a coaching position was disqualified for reasons unrelated to the fact that he was certificated as a teacher employed by the Board, summary judgment in petitioners' favor is appropriate. In so deciding, the Commissioner must emphasize that a properly certified in-district candidate could, conceivably, be passed over in favor of an out-of-district candidate, who was likewise properly certified, if the in-district candidate did not meet previously established written qualifications for the coaching position pursuant to N.J.A.C. 6:29-3.3.

In a recent case entitled Skip Norcross v. Board of Education of the North Hunterdon Regional High School District,

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Hunterdon County, decided by the Commissioner on August 8, 1991, the issue of written qualifications for the position of coach was discussed in detail. In that matter, which relied on John H. Chambers v. Board of Education of the Township of Neptune, 1985 S.L.D. 1379, the Commissioner determined that the in-district petitioning coach met the two threshold criteria for coaching in his district, that is, he was a certified teacher and was employed by the Board as a teacher. The Commissioner then stated that "[o]nly after it is determined that the hiring priorities established in N.J.A.C. 6:29-6.3(a) [now N.J.A.C. 6:29-3.3] cannot be met does the priority shift to selecting a candidate 'employed' not as a teacher, but as a coach (Chambers, at 1382)." (Norcross Slip Opinion, at pp. 20-21) He then stated that having determined that the individual teacher applicant meets the two threshold criteria, the Board is left with one other inquiry, that is, "***whether the Board had written policy regarding qualifications for the position." (Id.)

In both Norcross and the instant matter, the record is devoid of evidence of written standards of performance and other qualifications to be applied to candidates for the holder of coaching positions. Without such preexisting standards for candidates, the Board is without reasonable criteria upon which to eliminate any certified, in-district candidate from competition for a coaching position in its district. See, N.J.A.C. 6:29-3.3.

Accordingly, for the reasons expressed in the initial decision as clarified herein, the Commissioner finds and determines that the Board's action in appointing an out-of-district applicant to a vacancy as a head baseball coach when it had an in-district qualified applicant was arbitrary and in violation of N.J.A.C.

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6:29-3.3. Accordingly, the Woodbridge Township Board of Education is hereby DIRECTED to fully comply with the dictates of said regulation as interpreted by the Commissioner. The Commissioner concurs that the in-district applicant who was improperly denied the position of head coach is not entitled to relief in that he was not named as a petitioner.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1991

DATE OF MAILING - SEPTEMBER 19, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER AND INITIAL DECISION
DENYING EMERGENT RELIEF
OAL DKT.NO. EDU 8017-91
AGENCY DKT. NO. 311-8/91

A. M. L., ON HER OWN
BEHALF AND ON BEHALF OF
HER MINOR SON, J. L.,
Petitioners,
v.
MOORESTOWN TOWNSHIP
BOARD OF EDUCATION;
MRS. HAYNES, A TEACHER
AT MOORESTOWN HIGH
SCHOOL; AND NEW JERSEY
ALL STATE CHORUS/NEW MUSIC
EDUCATORS ASSOCIATION,
Respondents.

BEFORE **STEVEN L. CARNES**, ALJ:

THIS MATTER having been filed with the Commissioner of Education by John T. Barbour, Esq. of Barbour & Costa, on behalf of Petitioner, and having been transmitted by the Commissioner of Education to the Office of Administrative Law for initial consideration, and having come before the Honorable Steven L. Carnes, ALJ for oral argument and a preliminary relief hearing as to why interim relief should not be granted, with the said John T. Barbour, Esq. appearing on behalf of Petitioner; Theodore Moss, Esq., of Moss, Powers & Kugler, appearing on behalf of Respondent Moorestown Board of Education; Steven Cohen, Esq., of Selikoff & Cohen, appearing on behalf of Respondent Jeanne Haynes; and Richard A. Friedman, Esq., of Zazzali, Zazzali, Fagella & Nowak, appearing on behalf of Respondent New Jersey All State Chorus/New Jersey Music Educators Association;

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and the Court having considered the pleadings and supporting documents filed herein, the live testimony, documents admitted into evidence, and the arguments and briefs submitted by counsel, the Office of Administrative Law hereby issues an initial decision and order that provides that the application for emergent relief be denied.

The basis for this initial decision and order is that under the standards set forth in Crowe v. DeGoia, 90 N J 126 (1982), there is no likelihood of success on the merits of the matter, because the Commissioner of Education does not have jurisdiction over this dispute. Under N.J.S.A. 18A:11-3, jurisdiction over this matter lies with the Superior Court of New Jersey rather than with the Commissioner of Education, because of the substantial involvement in this matter of the New Jersey All State Chorus/New Jersey Music Educators Association, which is neither a public school district, a student, a faculty member, an administrator, or a School Board, and whose activities involve more than just public school districts and students. Alternatively, to the extent that petitioners' assert the Commissioner has jurisdiction under N.J.S.A. 18A:6-9 and/or J.B.A. and A.M.A., Individually and as Guardians Ad Litem of A.H.A., vs. Board of Education of the Borough of Bernardsville, Somerset County, OAL Decision 1981 S.L.D. 321; C.D. 1981 334; St. Bd. 1981 S.L.D. 339, and 1983 S.L.D. 1573, if the New Jersey All State Chorus/New Jersey Music Educators Association does not fall under the scope of N.J.S.A. 18A:11-3, thus resulting in Superior Court jurisdiction, it is necessarily a private organization over which the Commissioner lacks jurisdiction, and this matter, since relating to it, is therefore subject to the jurisdiction of the Superior Court, not the Commissioner of Education. Further, the determination of jurisdiction in this matter is controlled by N.J.S.A. 18A:11-3, which statute is more specific and was adopted subsequent to N.J.S.A. 18A:6-9, and therefore governs this matter.

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This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

9 September 1991
Date

STEVEN L. CARNES, ALJ

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tp

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A.M.L., on her own behalf and on behalf of her minor son, J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY, MRS. HAYNES, A TEACHER AT MOORESTOWN HIGH SCHOOL AND NEW JERSEY ALL-STATE CHORUS/ NEW JERSEY MUSIC EDUCATORS ASSOCIATION,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record and initial decision denying emergent relief have been reviewed, as have the tapes of the hearing held on September 5, 1991. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board, Respondent Haynes and New Jersey Music Educators Association (hereinafter NJMEA)/New Jersey All-State Chorus all filed timely reply exceptions.

Petitioner first objects to the ALJ's having joined NJMEA/New Jersey All-State Chorus as a respondent in this matter. Petitioner asserts she had originally filed against the Board and Mrs. Haynes, a teacher in the Board's employ and, further, contends that the only relief sought and wrongs alleged were directed against the Board and/or Mrs. Haynes. At no point did petitioner seek any remedy or make any complaint against NJMEA/New Jersey All-State

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Chorus and, thus, she claims, it was error to require NJMEA/New Jersey All-State Chorus to be joined as a party to the matter.

Second, petitioner excepts to the ALJ's decision and order holding that N.J.S.A. 18A:11-3 controlled this dispute and that jurisdiction lay with the Superior Court rather than with the Commissioner of Education. She explains that the ALJ held that the New Jersey All-State Chorus was sponsored and created by the NJMEA which is a voluntary association created pursuant to N.J.S.A. 18A:11-3. She contends further that the ALJ held that membership in that voluntary association was not limited to public school districts, their boards, students, and faculty and, thus, that the Commissioner has no jurisdiction to decide a complaint against a voluntary association. Petitioner's pleadings did not allege any complaints against that voluntary association, she rebuts. Petitioner avers that N.J.S.A. 18A:11-3 by its terms restricts its application by the limitation that "[n]o such voluntary association shall be operative without approval of its charter, constitution, bylaws, and rules and regulations by the Commissioner of Education." (Exceptions, at p. 3 citing N.J.S.A. 18A:11-3) She further claims that there must be an actual resolution adopted by the local board of education to join such a voluntary association. In the instant matter, she claims, there was no evidence adduced upon which such a finding could be based, and that no such finding was made by the ALJ. Therefore, petitioner submits, basing the dismissal or denial upon N.J.S.A. 18A:11-3 was in error and must be reversed.

Third, petitioner objects to the finding that the NJMEA, the sponsor of New Jersey All-State Chorus, is a private

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organization, and that if N.J.S.A. 18A:11-3 does not apply, then the Commissioner of Education nonetheless lacks jurisdiction over such a private organization under N.J.S.A. 18A:6-9. Petitioner reiterates her position that she never brought the instant action against the NJMEA but, rather, only sought a remedy against the Board and Mrs. Haynes. Petitioner claims it was plain error to deny jurisdiction in the instant matter on the basis of this alternative argument set forth by the ALJ.

NJMEA filed timely reply exceptions. It first contends that the Commissioner should not consider petitioner's exceptions because she fails to include transcript citations as required in In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). It avers that in order for the Commissioner to review this matter, Morrison requires petitioner to cite and to supply those portions of the transcript upon which they rely in opposition to Judge Carnes' decision, and to also provide respondents with the opportunity to provide and cite those portions of the transcript which support Judge Carnes' decision. NJMEA submits that because petitioner failed to do so there is an insufficient basis upon which the Commissioner can review Judge Carnes' decision and, thus, that the Commissioner should decline to review this matter.

Further, NJMEA argues in the alternative that if the Commissioner does review the substance of the ALJ's decision, the testimony and documents establish that NJMEA/New Jersey All-State Chorus is an essential party to the matter, that Mrs. Haynes' activities were primarily related to her membership status in said association, that Moorestown Board of Education is neither a sponsor nor a participant in said organization or its activities, that the

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School Board neither establishes nor enforces the organization's rules, and that the OAL's or Commissioner's intervention in this matter would significantly impact upon the private affairs of the organization and upon Mrs. Haynes in her capacity as a member of the organization. Thus, NJMEA would have the Commissioner affirm the initial decision which held that the Commissioner and OAL lack jurisdiction in this matter.

To support these contentions, NJMEA first states that the ALJ properly exercised his discretion pursuant to N.J.A.C. 1:1-16.1 et seq. in including NJMEA/New Jersey All-State Chorus because it is a necessary party to this action. Said organization claims petitioner has cited no portion of the transcript or the record which suggests that the ALJ erred in this respect. Further, citing Heavner v. Uniroyal Inc., 63 N.J. 130, 156 (1973), NJMEA advances the position that our courts and agencies look to the substance of the litigation, not its form. To not join NJMEA, that organization avers, would permit a petitioner to circumvent law and to ignore the rights of necessary parties to defend their interest. NJMEA adds that petitioner's claim that she seeks no relief against NJMEA and that she seeks relief only against a school teacher or school district is irrelevant, unsupported in the record and flies in the face of the law.

In reply to petitioner's exception that the ALJ erred in holding that jurisdiction lies in Superior Court, NJMEA admits that petitioner did not file the petition against it, but it submits that that omission cannot preclude the application of the governing law or result in jurisdiction where there is none. Relying on Vining v. New Jersey Music Educators Association et al., Superior Court, Chan.

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Div., decided November 12, 1982 and Lindsay v. Moravek et al., Docket No. C17600-88, Superior Court, Chan. Div., decided December 1, 1989, aff'd Superior Court, App. Div., Docket No. A2375-89T3 (unreported), decided October 19, 1990, NJMEA asserts the ALJ correctly concluded that given the absence of any indication that this respondent is subject to the Commissioner's oversight under N.J.S.A. 18A:11-3, it follows that NJMEA is a private organization not subject to the Commissioner's jurisdiction and, therefore, that the proper forum for this action is Superior Court.

In the alternative, NJMEA contends the ALJ was right in suggesting that N.J.S.A. 18A:11-3 provides that because this dispute involves a respondent which is not a school district or the like, the plain statutory language requires the conclusion that jurisdiction is vested in Superior Court. It cites Burnside v. New Jersey State Interscholastic Athletic Association, Superior Court, App. Div. Docket No. A62584-T7 (unreported), decided November 15, 1984 in support of this contention.

NJMEA summarizes its position by stating that the ALJ properly denied emergent relief and that his initial decision denying it should be affirmed. It notes in conclusion that if the Commissioner disagrees with Judge Carnes, it is necessary to remand the matter to OAL for a hearing and to elicit testimony from the parties regarding the elements which petitioner must prove to obtain emergent relief, because testimony was only taken on the jurisdiction question. The organization claims that even if the Commissioner has jurisdiction over this matter, a hearing on the Crowe v. DeGioia, 90 N.J. 126 (1982) factors must be held before petitioner's application can be considered. However, NJMEA

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reiterates its contention that the likelihood is that the Commissioner lacks jurisdiction, so that emergent relief was properly denied.

The Board filed a timely reply to the exceptions claiming that said exceptions are premature. The Board avers that no written decision has been issued from the ALJ, nor has a transcript been issued of an oral decision, nor has an order been executed in this matter. Noting that exceptions are not required to be filed until 13 days after the judge's decision has been mailed to the parties and that reply exceptions are then due within five days of receiving exceptions, it is the Board's position that it cannot submit an accurate response to petitioner's exceptions without having received the required written decision or transcript of the ALJ if no written decision is to be filed. Thus, the Board reserves the right to file exceptions within the time limits prescribed by N.J.A.C. 1:1-18.4.

Mrs. Hayne's counsel also filed timely reply exceptions. Said exceptions set forth her version of the procedural history of the matter at hand, as well as her version of the facts underlying the case. Mrs. Haynes, includes in said recitation the suggestion that J.L. appealed her decision not to sign the NJMEA Endorsement for New Jersey All-State Chorus to the Board, which replied on June 21, 1991 that it could not require Mrs. Haynes to execute the endorsement.

Respondent Haynes states at Point I of her reply exceptions that since petitioner has failed to provide the Commissioner of Education with a transcript of the hearing below, which is essential to a proper disposition, petitioner's exceptions must be rejected. Citing Morrison, supra, and noting that the ALJ's ruling was

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premised upon four hours of testimony bearing upon the jurisdiction issue of the case, Respondent Haynes contends that because petitioner has failed to file a transcript of the hearing below, her exceptions must be rejected.

Point II of Respondent Haynes' reply exceptions contends that based upon the facts adduced at hearing, the Commissioner of Education clearly lacks jurisdiction over the subject matter of this dispute. She submits her position has, in large part, been expressed in the brief filed by NJMEA, which she incorporates by reference in her reply exceptions, stressing that at all times material to this matter she was functioning within the rules and regulations of the NJMEA, of which she is a member. She claims her authority to sign the endorsement or to refrain from doing so stems directly from the NJMEA's rules and regulations, which she avers she has no authority to disregard or modify. Similarly, she argues, the Board has no supervisory authority over her in this matter because she is functioning as an agent of a private, nonprofit organization. She claims the testimony of Messrs. Davis and Boronow at the hearing underscored this point by their indicating that neither the State Board of Education, Commissioner of Education nor any local board of education has ever sought to exercise any degree of control over NJMEA, or for that matter, any involvement in the internal workings of the organization.

At Point III of her reply exceptions, Mrs. Haynes avers that since petitioner has slept upon any rights she may have had, any harm befalling petitioner herein or her son came as a result of their own inaction.

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Relying on her statement of facts, Mrs. Haynes claims that she declined to sign the NJMEA's endorsement form on April 23, 1991 and the Board advised petitioner that it could not require Mrs. Haynes to execute the endorsement by letter dated June 21, 1991. Thus, Mrs. Haynes claims that petitioner's application for interim relief does not even deserve consideration under Crowe, supra. She claims that petitioner should not be permitted to benefit from two months of inaction at this late date, and that her exceptions should be rejected.

Respondent states that for the reasons expressed above, as well as for those arguments expressed in the brief of NJMEA/New Jersey All-State Chorus, petitioner's exceptions should be rejected and the September 9, 1991 order of the ALJ be adopted by the Commissioner of Education.

Upon a careful and independent review of the instant motion for emergent relief and the record developed thus far, the Commissioner finds and determines that petitioner has failed to advance a cause of action for which the Commissioner is empowered to grant relief under the authority granted him pursuant to N.J.S.A. 18A:6-9.

Before discussing petitioner's prayer for relief, the Commissioner first notes his accord with the decision of the ALJ below to join the NJMEA/New Jersey All-State Chorus as a respondent.

In so deciding, it is observed that the record is devoid of either the order mentioned by the ALJ on the tape of the hearing conducted on September 5, 1991 addressing why he directed joinder of NJMEA or a written order explicating his rationale for joining said

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organization, the sponsor of the All-State Chorus. Moreover, N.J.A.C. 1:1-1 et seq. is silent on joinder. In such instances, N.J.A.C. 1:1-1.3 of the OAL rules refers to the Rules Governing the Courts of the State of New Jersey, 1992 West Publishing Co., St. Paul, Minn. Civil Practice Rules. R. 4:28-1 addresses Joinder of Persons Needed for Just Adjudication.

Subsection (a) states:

> Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or other inconsistent obligations by reason of the claimed interest. If the party has not been so joined, the court shall order that the person be made a party.*** (Rules of the Court, at 453)

Further, under R. 4:30A, the Entire Controversy Doctrine, "[n]on-joinder of clams or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine." (Id., at 457)

In the instant matter, the Commissioner finds NJMEA is an indispensible party for purposes of determining what relief, if any, is available to petitioner in this forum. As the discussion, ante, makes plain, without an understanding of the nature of the relationship Mrs. Haynes and the Board of Education has, if any, to NJMEA and All-State Chorus, petitioner's claims could not be addressed. Accordingly, the Commissioner rejects petitioner's exceptions objecting to such joinder and finds pursuant to R. 4:28-1

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that joinder of NJMEA was an appropriate and necessary procedure in this case.

As to petitioner's second exception arguing that the ALJ erred in holding that N.J.S.A. 18A:11-3 controlled this dispute and that jurisdiction lay with the Superior Court of New Jersey rather than with the Commissioner of Education, the Commissioner concurs that N.J.S.A. 18A:11-3 is not relevant to the inquiry herein. The first sentence of said statute states:

> 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. (emphasis supplied)

The record makes plain that the Board of Education is not a member of either NJMEA or All-State Chorus. See R-1. Rather, such organization is a private, nonprofit association of music educators. See, Vining, supra. Because the Board of Education holds no membership in said organization, N.J.S.A. 18A:11-3 is inapposite. Thus, the ALJ's reliance on language from the latter part of said statute, which explains which claims by board of education association members are to be heard by the Commissioner of Education compared to which are to be reviewed by Superior Court is not relevant in this case.

Moreover, a later sentence of N.J.S.A. 18A:11-3 states:

> No such voluntary association shall be operative without approval of its charter, constitution, bylaws, and rules and regulations by the Commissioner of Education.

The Commissioner of Education is without authority to approve the bylaws, charter, constitution and rules of NJMEA insofar as it is a private organization that public boards of education are not privileged to join.

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However, there are instances where the Commissioner's authority does reach to the issue of the reasonableness of decisions regarding voluntary associations, such as in the matter captioned J.B.A. and A.M.A. individually and as Guardians ad litem of A.H.A. v. Board of Education of the Borough of Bernardsville, 1981 S.L.D. 321, St. Bd. aff'd 339, App. Div. aff'd 1983 S.L.D. 1573. In that matter a question concerning a student's admission to the National Honor Society was found to be cognizable before the Commissioner because the local board of education sponsored a local board chapter of the society as a program of the school district. No such nexus exists in this case because Moorestown High School is not a member of NJMEA.

The question of whether N.J.S.A. 18A:6-9 applies to this matter is not so clear. The record developed thus far in this matter does not advance to the point of taking testimony from Mrs. Haynes, the respondent from whom petitioner seeks relief in the form of an "endorsement" to be signed by the member of NJMEA who directed the musical activity through which the candidate for All-State Chorus is "screened." Although Mrs. Haynes' participation in said association is not a matter cognizable before the Commissioner, J.L. cannot gain admittance into All-State Chorus except through the endorsement of his music director, in this case, Mrs. Haynes, an employee of a public school. A determination as to whether her refusal to endorse J.L. was arbitrary, capricious and unreasonable and whether the Board was reasonable in supporting her refusal may in fact lie within the Commissioner's jurisdiction, insofar as she is obliged to evaluate the candidate through his participation in school-sponsored activities, such as chorus.

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However, even assuming arguendo that the Commissioner were to entertain the issue of whether such evaluation were arbitrary pursuant to his authority under N.J.S.A. 18A:6-9, petitioner has not advanced a cause of action for which the Commissioner can grant relief.

The relief sought in this matter would compel Mrs. Haynes to sign an endorsement, R-3 in evidence, based on her personal assessment as a public school employee, of J.L.'s fitness and character to participate in All-State Chorus, an activity over which the Commissioner has no control or authority. This the Commissioner may not do because the school district has no control over the selection process of membership into the local board chapter of the organization unlike J.B.A., supra, the National Honor Society case mentioned earlier.

In so deciding, the Commissioner notes that argument raised at the hearing on September 5, 1991 concerning which party bears the burden of persuasion to establish jurisdiction before the Commissioner. The Commissioner rejects petitioner's contention that by transmitting a matter to the OAL for a hearing, jurisdiction is thereby presumed to exist, thus, shifting the burden of proving that jurisdiction does not lie with the Commissioner to respondents. No such burden is visited upon respondents. The Commissioner has in numerous cases transmitted matters to the OAL for such fact finding and conclusions of law as is necessary to determine whether the Commissioner's jurisdiction pursuant to N.J.S.A. 18A:6-9 is invoked. See, for example, Lesser Lindenbaum et al. v. Bd. of Ed. of the City of Somers Point et al., decided by the Commissioner March 17, 1983. The instant matter is another such example and the

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burden of proof in such matters rests solely upon petitioner in asserting a petition for the Commissioner's consideration.

In regard to the Board's exceptions, the Commissioner notes that an initial decision denying emergent relief has been issued from the OAL dated September 9, 1991 and, thus, it is not "premature" for the parties to file exceptions or reply exceptions to that decision. Further concerning that exception posed by both NJMEA and Mrs. Haynes and made in reliance upon Morrison, supra, suggesting that because petitioner did not provide transcripts of the hearing below the Commissioner should not consider her exceptions, it bears noting that the matter currently before the Commissioner seeks the extraordinary remedy of pendente lite restraints. In such emergent relief matters, it is highly unlikely that a full written decision summarizing the testimony and credibility of witnesses could be developed for the Commissioner's consideration. Rather, under such circumstances the Commissioner is provided a tape of the proceedings, which, as noted earlier, has been reviewed. Thus, transcripts are not only unnecessary, but might even be an impossible demand in emergent relief matters. Thus, the Commissioner finds NJMEA's exception, concurred with by Mrs. Haynes, to be without merit. That is not to say, however, under other circumstances, that were he to be sent a transcript or tapes from a party without the citations as prescribed by Morrison, supra, that he would consider said exceptions. The distinction to be made in this case is that the emergent nature of the instant proceeding precludes the possibility of production of the Morrison requirements and, further, that the Commissioner has the advantage of hearing the entire tape of the proceedings in such pendente lite situations.

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Accordingly, the initial decision on motion is adopted in part and rejected in part. The Commissioner finds that upon review of the record of this motion for emergent relief, the case must be and hereby is dismissed pursuant to N.J.A.C. 6:24-1.5 for failure to state a cause of action. In so directing, the Commissioner determines that the decision herein fully disposes of the controversies, ante, and that no further proceedings at the Office of Administrative Law shall be conducted.

Leo Klagholz

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 20, 1991

DATE OF MAILING - SEPTEMBER 20, 1991

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BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Jacob, Robinson & Ferrigno (Frederick A. Jacob, Esq., of Counsel)

Whereas, this matter was opened before the Commissioner of Education through the filing of a Petition of Appeal by the Fairfield Township Board of Education (Board) on June 25, 1991 under the provisions of N.J.A.C. 6:24-7.1 et seq. seeking review of the reductions made by the Fairfield Township Committee to the district's 1991-92 proposed budget which was defeated by the voters of Fairfield Township on April 30, 1991; and

Whereas, the Fairfield Township Committee reduced the proposed tax levy for current expense for the 1991-92 school year adopted by the Board from $613,676 to $541,098 as set forth below:

Proposed tax levy adopted by the district Board of Education	Amount of tax levy certified by governing body or bodies
Current expense $613,676	Current expense $541,098
Capital outlay $-0-	Capital outlay $-0-

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Proposed tax levy adopted by the district Board of Education	Amount of tax levy certified by governing body or bodies

Amount of reduction in the budget by governing body or bodies

Current Expense $72,578.00*

Capital outlay $-0-

Amount of reduction in dispute before the Commissioner

Current Expense $72,578.00*

Capital outlay $-0-

Whereas, the Fairfield Township Committee, through its attorney, Harold U. Johnson, Jr., notified the Board by letter dated July 24, 1991 that the Committee had resolved not to submit an answer to the Petition of Appeal; and

Whereas, the Board requested on August 13, 1991 that the Commissioner invoke his authority to decide the matter on a summary judgment basis due to the failure of respondent Committee to answer the petition, N.J.A.C. 6:24-1.4(e); and

Whereas, the above-cited regulation provides that each count of the petition shall be deemed admitted by respondent upon failure of said respondent to file an answer to the petition; and

Whereas, the Commissioner has reviewed the Petition of Appeal which includes the line item reductions made by the Fairfield Township Committee and the reasons for such reductions set forth in the Committee's resolution of May 21, 1991 establishing the tax levy

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* The amount of reduction in the governing body Resolution is in error. A reduction of $75,578.00 is indicated therein. However, the current expense to be raised by taxation is stipulated at $541,098 which actually constitutes a $72,578 reduction.

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for the 1991-92 school year at $541,098 and the Board's arguments as to why the reductions prevent it from providing a thorough and efficient education to the students of Fairfield Township; now therefore

IT IS ORDERED that the sum of $72,578 shall be immediately restored to the current expense tax levy for Fairfield Township for the 1991-92 school year; and

IT IS FURTHER ORDERED that the Cumberland County Board of Taxation shall make the necessary adjustments to the local tax levy for the Township of Fairfield to raise the sum of $613,676 for current expense purposes for the 1991-92 school year.

COMMISSIONER OF EDUCATION

SEPTEMBER 27, 1991

DATE OF MAILING - SEPTEMBER 27, 1991

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BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND BOROUGH COUNCIL OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Stephen R. Fogarty, Esq., for petitioner (Fogarty & Hara, Attorneys)

John V. McCambley, Esq., for respondent

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Oakland Board of Education (Board) on June 12, 1991 under the provisions of N.J.A.C. 6:24-7.1 et seq. The Board's appeal seeks to have the Commissioner restore $265,000 in the current expense tax levy cut by the Mayor and Borough Council (Borough) from the Board's proposed budget for the 1991-92 school year, urging that said monies are necessary for the provision of a thorough and efficient education to its students.

The aforesaid reductions in the proposed tax levy were imposed by the Borough after consultation with the Board pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 as a result of the voters' rejection of the Board's proposed tax levy for the 1991-92 school year on April 30, 1991. The proposed budget and reductions are set forth below:

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Proposed tax levy adopted by Board of Education		Amount of tax levy certified by governing body	
Current expense	$10,722,831	Current expense	$10,457,831
Capital Outlay	$ 255,825	Capital Outlay	$ 255,825

Amount of reduction in the budget by governing body

Current expense	$ 265,000
Capital Outlay	$ -0-

Amount of reduction in dispute before the Commissioner

Current expense	$ 265,000
Capital Outlay	$ -0-

On July 5, 1991 the Answer to the Petition of Appeal was filed by the Borough; thus, the pleadings were joined. Said Answer admitted the amounts as stated above but denied the Board's allegations that the $265,000 reduction in the current expense budget would prevent the Board from providing a thorough and efficient education to the students of the Borough of Oakland.

Through the filing of position papers, responses thereto, and final summations by the parties, the Commissioner will now consider individually each of the reductions and the arguments presented with respect to the reduction. In so undertaking an examination of this budget appeal, the Commissioner notes that the standard of review that prevails is whether the amount of monies available to the Board as a result of the Borough's actions are sufficient for the provision of a thorough and efficient education to the students of the Borough of Oakland for the 1991-92 school year. Board of Education, East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966)

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I. ACCOUNT J-213 (SALARIES-TEACHERS) - $50,000

The Board urges that the reduction of $50,000 from the teacher salary account will not enable it to pay the salaries of all the teachers contracted for the 1991-92 school year. It urges that the Borough failed to consider the impact of the recent closing of Our Lady of Perpetual Help School, a grades K-8 private nonpublic school located in the district. As a result of this closing, the Board has as of July 1991 enrolled 78 children who previously attended Our Lady of Perpetual Help School.

Due to the above-cited increase, the Board avers that it has had to add 2.1 teaching positions, i.e., a part-time teacher for kindergarten, a part-time teacher for grade 6, and a full-time guidance counselor for its middle school. It has provided the payroll data to the Borough to substantiate the need for the salaries.

It is the Borough's position that even after the $50,000 reduction to the teacher salary account is effectuated, there are more than enough funds available in the line item than the Board's budget worksheets show are needed. Thus, it avers that the reduction does not impede the provision of a thorough and efficient education nor will it require a reduction in the number of personnel.

Moreover, the Borough contends that the Board is and was amply prepared for the infusion of 75-100 new students as a result of Our Lady of Perpetual Help's closing, particularly as the closing was announced prior to the finalization of the proposed budget.

The Board avers that it did not have confirmation of the closing of the private school until after the election and that its proposed budget was based on 85.6 teachers. As a result of the new

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enrollments to the district after the closing, the teaching staff need has risen to 87.7. (Exhibit A, Board's Position) It is the Borough's position that this assertion flies in the face of the Board's own budget documentation which projected an enrollment of 1,249 students for 1991-92, an increase of 75 students. Further, the Board is said to have acknowledged to the county superintendent that the budget included a provision for two new teachers for the projected increase. In support of this, the Borough submits the schedule of Budgeted Positions filed with the county office which reflects 86 full-time and two part-time teachers for 1991-92. See Borough's reply to Board's position, Attachment 3. The Board rejects this assertion, pointing out that the supporting documentation to the county reflects no increase in staff since the same figures are reported for the 1990-91 school year and 1991-92 school year.

II. ACCOUNT J-630 - HEAT - $15,000

The $15,000 reduction effectuated by the Borough for the 1991-92 school year was based on the actual expenditures for 1990-91, plus a ten percent (10%) increase.

It is the Board's position that although the 10% increase is consistent with the estimated increase to all public agencies by Public Service Electric and Gas Company, it was improvident of the Borough to rely on the actual heating expenditures for the 1990-91 school year because the daily temperatures for that period were significantly below previous years. It maintains that the $120,000 budgeted for the 1991-92 school year is reasonable and necessary to insure a thorough and efficient operation of the district. In support of this, it points to the fact that the actual expenditure for heating in 1988-89 was $96,000 and $94,000 in 1989-90.

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The Borough avers that the account is over-budgeted and that a 10% increase over last year's expenditure is sufficient to cover contingencies. It maintains that the Board's addition of $15,000 to the line item on the belief that it would be colder in 1991-92 than in other years is speculative. Even reduced, the heating line item will not, according to the Borough, impede any educational program. Moreover, the Borough, through the certified statement submitted by the Borough's auditor, alleges that the expenditure figure for 1989-90 submitted by the Board is erroneous because the audit for that year determined an expenditure of $84,771 and that the 1991-92 surplus which remains after reduction is more than sufficient to meet the contingencies of a cold winter if such occurs.

It is the Board's position that its expenditure figure for 1989-90 is accurate because of a separate reserve account of approximately $10,000 which was completely expended for a total of $94,782 for heat. See Board's Summation, at page 5. Moreover, it avers that the Borough is incorrect in urging that surplus monies be used to finance anticipated expenditures rather than be reserved for unforeseen contingencies.

III. ADDITIONAL REVENUES - SURPLUS - $200,000

The Board acknowledges that the Borough has the right to consider the budget as a whole, Board of Education, Township of Branchburg, Somerset County v. Township Committee of the Township of Branchburg, 187 N.J. Super. 540, 545 (App. Div. 1983) but it nonetheless avers that this does not relieve the Borough of its responsibility established in East Brunswick, supra, to make specific line item reductions together with supporting reasons to

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which the reduction in surplus must apply. Board of Education of the Borough of Leonia v. Mayor and Council of the Borough of Leonia, decided by the Commissioner March 16, 1983.

With regard to the statement of reasons issue, the Board further argues that the Borough failed to meet the documentation requirements of N.J.A.C. 6:24-7.7 Also, it cites the New Jersey Supreme Court's holding in Board of Educ. v. Mayor and Council of Deptford, 116 N.J. 305, 317 (1989) relative to the Commissioner's entitlement to invoke every presumption against educational validity of proposed budget cuts if a municipality fails to submit reasons contemporaneously with the certification of the budget.

Moreover, it is the Board's position that the $200,000 reduction in surplus is unreasonable because its audited surplus of $322,904 at the end of the 1989-90 school year was only 2.5% of the total current expenses. With the additional $220,000 earned through investment, the surplus of $542,904 it planned for the 1991-92 school year represents only a free balance of 3.8% which is an appropriate surplus in light of Commissioner decisions approving surpluses of 4% to 6%. Leonia, supra; Board of Education of the Township of Lakewood v. Township Committee of Lakewood, 1976 S.L.D. 27, 29; Board of Ed. of the City of Perth Amboy v. Mayor and Council of the City of Perth Amboy, 1977 S.L.D. 228, 230 It further contends that the reasonableness of these decisions does not conflict with the requirements of the Quality Education Act, N.J.S.A. 18A:7D-1 et seq.

The Borough maintains that the $200,000 reduction to surplus it effectuated in no manner impedes the Board's ability to provide a thorough and efficient education and that the surplus

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which remains would still be in excess of the recommended county minimum of 3%. It also rejects the Board's implication that because the cases cited above approved surpluses in excess of 4%, the Commissioner should therefore approve the Board's proposed surplus. As to this, the Borough contends that case law prior to Branchburg, supra, is in error because there must now, as a result of the court's ruling in Branchburg, be a case-by-case determination on the merits and facts presented in each defeated budget relative to a municipality's appropriation of free balance.

The Borough also avers that it has more than amply complied with all Administrative Rules and Deptford, supra, relative to the providing of reasons for the appropriation of the $200,000 in surplus.

The Board in turn argues, inter alia, that even assuming arguendo the Borough acted properly to reduce the surplus by $200,000, that reduction will result in a surplus less than 3% of the total current expenses. If the reduction is not restored, avers the Board, the general fund free balance will be reduced to $342,904 which represents only 2.4% of the total current expenses, a level below 1990-91. (Board's Summation, at p. 3) The Board believes this would be unreasonable and contrary to good management and business practice.

IV. COMMISSIONER'S DETERMINATION

The Commissioner has carefully considered the arguments of the parties as expressed in their written submissions and the portions of the budget relative to the issues presented. As a result of this review, he reaches the following findings and conclusions with respect to the budget reductions effectuated by the Borough.

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As to the $50,000 reduction to the teacher salary account, the Commissioner finds and determines that the Board has met its burden to demonstrate that restoration is necessary for a thorough and efficient education. An increased enrollment of 78 students represents a substantive increase in school population in the Oakland school district. An additional 2.1 staff members is more than reasonable under the circumstances where there has been such a precipitous increase in enrollment caused by the closing of Our Lady of Perpetual Help School.

As to the line item for heating, the Commissioner finds the Board has failed to demonstrate that a reduction of $15,000 would impede the provision of a thorough and efficient operation of its district. Even with the reduction, there remains a sum of $105,000 for heat. This figure represents not only an increase of at least 10% over the 1990-91 expenditure but also approximately 10% over the highest heating expenditure cited by the Board, $96,071.40 in 1988-89.

In assessing the arguments with respect to the reduction made by the Borough to the Board's surplus, the Commissioner finds as meritless the Board's arguments that the Borough failed to meet the requirements of Administrative Rules, East Brunswick, supra, or Deptford, supra, insofar as the statement of reasons is concerned. See in particular the Certification of Gary J. Vinci, the Borough's accountant, pages 1 and 2. The record more than amply supports that the Borough fulfilled its duty to balance the interest of the voters whom it represents and the constitutional requirements for a thorough and efficient education.

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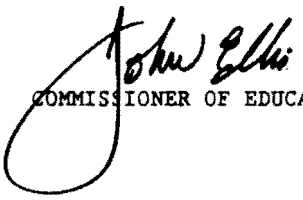
In weighing the need of the Board for the surplus allocation found in its proposed budget, the Commissioner is mindful that it is well established that a board of education is empowered to maintain a reasonable surplus to meet unforeseen contingencies. Fair Lawn Bd. of Ed. v. Mayor and Council of Fair Lawn, 143 N.J. Super. 259 (Law Div. 1976) Further, the Commissioner has held as a general proposition that a 3% surplus for unforeseen contingencies is reasonable. See N.J.A.C. 6:20-2.14 and Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, Middlesex County, decided by the Commissioner December 2, 1987.

A review of the record convinces the Commissioner that the Board has failed to demonstrate that a $200,000 reduction in surplus would be an impediment to the provision of a thorough and efficient education in the Oakland school district. As pointed out by the Borough, the amount of surplus which remains after the $200,000 reduction merely brings the surplus figure to that which was contemplated in the Board's own proposed budget. See Support Documentation for 1991-92 Annual School Budget, Borough's reply, Attachment 2. The Board acknowledges at page 5 of its position paper that it had a general fund free balance of $542,904 at the end of the 1990-91 school year. A $200,000 reduction brings the free balance figure to $342,904 which exceeds by some $20,000 the surplus anticipated in the Board's proposed budget for 1991-92. Therefore, the Commissioner will not order a restoration of monies that would bring the surplus to a higher figure than that advertised by the Board with respect to its proposed budget for 1991-92.

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Accordingly, for the reasons stated herein, the Commissioner orders the Bergen County Board of Taxation to make the necessary adjustments to the tax levy for the Borough of Oakland to reflect a local tax levy of $10,507,831 for current expense purposes for the 1991-92 school year, a $50,000 increase over the amount certified by the Borough.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

SEPTEMBER 27, 1991

DATE OF MAILING - SEPTEMBER 27, 1991

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4885-90
AGENCY DKT NO. 193-6/90

QUALITY ROOFING COMPANY, INC.,
Petitioner,
v.
TENAFLY BOARD OF EDUCATION AND
F & R ROOFING COMPANY,
Respondents.

John H. Kopp, Esq., for Quality Roofing Company, Inc , petitioner
(Thomas P. DeVita, attorney)

Lawrence Jaskot, Esq., for R & F Roofing Company, respondent
(Jaskot & Evertz, attorneys)

James L. Plosia, Jr., Esq , for Tenafly Board of Education, respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P A , attorneys)

Record Closed: May 17, 1991 Decided: August 15, 1991

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

Quality Roofing Company, Inc. (petitioner or Quality Roofing) filed a petition for declaratory judgment with the Commissioner of the Department of Education (Department) on June 21, 1990 Quality Roofing sought emergent relief

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in the form of an order enjoining the Tenafly Board of Education (Tenafly or respondent) from awarding roof repair bids on a combined basis to F & R Roofing Company (F & R). The Department subsequently transmitted the matter to the Office of Administrative Law (OAL) on June 25, 1990 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

Oral argument was held before this judge on June 27, 1990, at which time the motion for emergent relief was denied. A written order memorializing the denial was issued on June 28, 1990. Petitioner subsequently appealed the denial of interim relief to the Commissioner of the Department (Commissioner), which appeal was opposed by respondent. On July 26, 1990, the Commissioner affirmed my decision to deny emergent relief. Tenafly thereafter filed an answer to the underlying petition on August 15, 1990. The matter was retransmitted to the OAL for a plenary hearing.

Several telephone and in-person conferences were held. The parties made great efforts to stipulate as many facts and documents as possible. Hearings addressing facts not stipulated were conducted on April 11 and April 18, 1991. F & R Roofing did not participate, nor was it represented, at the hearings.

Petitioner and Tenafly filed initial and reply briefs subsequent to the close of hearings. The last reply brief was received on May 17, 1991, on which date the record was closed. The deadline for the filing of an initial decision was extended to August 15, 1991.

NATURE OF THE CASE

The dispute focuses upon the award of a bid by Tenafly to F & R for the repairing of roofs on two of the public schools located in the Borough of Tenafly (Borough), the J. Spencer Smith Elementary School (Smith School) and the Borough Middle School (Middle School). Petitioner raises three broad challenges to the awarding of the bid in question to F & R. As is addressed hereinafter in the stipulations and findings of fact, the initial bid specifications called for bids on basic and alternate bases. Petitioner argues that the award of a contract to F & R is null because F & R did not bid the alternates and therefore did not meet the bid specifications. Petitioner also challenges substantively Tenafly's specification for the

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use of what is referred to as the Tremco Cold Applied Built-Up Roof System (Tremco System) on the Smith School roof. Thirdly, petitioner challenges the awarding of a contract to F & R on the basis of F & R's combined bid.

A related issue which must be resolved is whether Quality Roofing's challenge of respondent's specification of the Tremco System was waived because it was not timely made. Respondent argues in favor of waiver, citing Department decisions standing for the general proposition that such challenges must be made prior to the awarding of bids. Petitioner seeks to distinguish several of these cases and also argues that, based upon the facts of this case, waiver principles should not be imposed.

Finally, respondent argues, in light of the fact that the contract in question has already been executed, and the fact that the Department cannot grant monetary damages, that the matter is moot and petitioner does not have standing to raise the issues indicated. Respondent argues in this respect that although the Commissioner may issue a declaratory ruling, the proper procedure for the issuance of such a ruling has not been followed in this case. Petitioner, in effect, argues for a declaratory ruling. As noted hereinabove, this matter was transmitted to the OAL subsequent to the Commissioner's affirmance of my decision to deny emergent relief. It is reasonable to infer that the Commissioner seeks a ruling on the merits. Respondent's arguments in this respect are therefore not addressed, and a decision on the substantive issues raised will be rendered. For the reasons hereinafter discussed, I am persuaded that respondent should prevail on all issues.

STIPULATIONS OF FACTS

The parties stipulated to the following **FACTS**:

1. In the spring of 1990, Tenafly determined to repair the roofs on two of its schools, the Smith School and the Middle School. In the resolutions authorizing the submission of this work to bid, Tenafly specified that pursuant to *N.J.S.A.* 18A:18A-15d, there was a special need for the use of the Tremco System on the Smith School roof. The Smith School already had a Tremco roof at the time of these resolutions.

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2. Fred H. Thomas, with offices at 2560 North Triphammer Road, Ithaca, New York, and 666 Old Country Road, Garden City, New York, as well as 742 Alexander Road, Princeton, New Jersey, was the architect on the project.

3. Bid specifications let out by Tenafly for alterations to the Middle School and the Smith School were contained in a document dated April 9, 1990 calling for a bid opening of June 7, 1990 at 10:00 a.m.

4. Bids were intended to be bid in the forms of bid for roof work construction package A, roof work construction package B, and a combined bid thereof.

5. The bid specifications stated that interested bidders were invited to submit bids "for any, or all, of the following Prime Contracts": Roof A, which was the Smith School roof, Roof B, which was the Middle School roof, or a combined bid, which was the work on both the Smith School and Middle School roofs.

6. Petitioner's and F & R's bids were as follows:

	Quality Roofing	F & R
Roof A (Smith School)	$ 595,000	$ 596,000
Roof B (Middle School)	189,000	154,500
Combined Bid	777,000[1]	750,000

7. If Tenafly had awarded the Roof A work to Quality Roofing and the Roof B work to F & R, the total cost of the work would have been approximately $1,000 less than if the work had been awarded on a combined bid basis. Tenafly awarded the bid on a combined bid basis to F & R.

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[1] The combined bid of Quality Roofing was not equal to that for Roof A plus Roof B because petitioner bid on alternate systems.

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8. Not all of the bidders on the roofing projects bid on all the alternates provided for in the bid specifications. F & R did not bid on all the alternates.

9. Quality Roofing did not challenge Tenafly's specification of the Tremco System until after the bid was awarded.

10. After the contract was awarded on a combined bid basis to F & R, F & R completed the work and has received full payment for said work.

11. Quality Roofing was qualified to submit a bid based upon the Tremco System and, in fact, did submit a bid on this basis.

12. Tenafly did not award any bids based upon the alternate systems. F & R did not bid on all the alternates. Quality Roofing did not challenge F & R's failure to bid upon all the alternates until after the bid was awarded.

FINDINGS OF FACT

Based upon a review of the entire record, including the initial and reply briefs filed by the parties, I **FIND** the following to be **FACTS**

A document referenced as Drawing No. A-2 was included in the bid specifications which were let out by Tenafly on April 9, 1990. Drawing No. A-2 incorporated notes which, in pertinent part, stated that: "13. ON THIS ROOF PLAN, AFTER A BOARD RESOLUTION ONLY, TREMCO ROOFING SYSTEM WILL BE ACCEPTED." (Ex. R-5, p. 2). A Project Manual for alterations to the two schools in question was issued on April 9, 1990 (Project Manual). The content of the Project Manual is as stated in Exhibit P-1.

At a public meeting held on May 14, 1990, Tenafly approved a resolution reflecting a determination that repairs must be made to the roof of the Smith School; a determination, pursuant to *N.J.S.A.* 18A:18A-15d, that there was a special need for the use of the Tremco System for the Smith School; directing its Secretary to advertise for bids to perform roof repairs utilizing the Tremco System for the Smith

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School; and directing that such advertisements be published at least ten days prior to the date fixed for receipt of the bids. It was further resolved that bids were required to be received no later than 10:00 a.m. on June 7, 1990, at which time the Secretary would unseal such bids and publicly announce their contents, and that no bid would be accepted which did not conform to the specifications, including, but not limited to, the specification for the Tremco System. Minutes were taken at the meeting and were approved June 18, 1990. Although the minutes were approved on June 18, 1990, the resolution in question was voted on and approved at the meeting held on May 14, 1990.

F & R, Quality Roofing, Canella Roofing (Canella), Continental Roofing and Barrett Roofing (Barrett) submitted bids for the Smith School contract. F & R submitted no bids on the alternates, petitioner submitted bids on the Tremco System and the alternatives, and Canella submitted no bids on the Tremco System. F & R, Quality Roofing and Barrett submitted bids for the Middle School contract. F & R and Quality Roofing submitted combined bids. The awarding of a bid on a combined basis facilitated monitoring by Tenafly and its architect of the progress of the work in question.

William Scrivens (Scrivens), petitioner's Quality Vice President, was responsible for the underlying cost estimates, preparation of Quality Roofing's bid, and submission of the bid. It is reasonable to infer that Scrivens had knowledge of respondent's specification of the Tremco System for the Smith School at the time of preparation of petitioner's bid.

CONCLUSIONS

BID SPECIFICATIONS

Pursuant to the Public Schools Contract Law, *N.J.S.A.* 18A:18A-1 *et seq.* *(Act)*, contracts or agreements for the performance of work or the furnishing or hiring of materials or supplies, the costs of the contract price thereof which is to be paid with or out of school funds, generally are required to be made and awarded only after public advertising for bids and bidding thereof, *Id.* §4. Advertisements for

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bids are generally required to be published in a newspaper sufficiently in advance of the date fixed for receiving bids, but in no event less than ten days prior to such date. The advertisement must designate the manner of submitting and receiving bids and the time and place at which they will be received. *Id.* §21. Bids must conform to bid specifications: "No bid shall be accepted which does not conform to the specifications furnished therefore." *Id.* §22.

The testimony of the witnesses offered on behalf of both parties focussed upon the substantive merits of the requirement for the Tremco System for the Smith School. The evidence, as well as the briefs, do not address the reasons for the timing of the applicable resolution nor events occurring between issuance of the initial bid specifications and the resolution. However, I am persuaded that petitioner has not met its burden in this respect, and that, in any event, the applicable legal principles support a determination that alternate bidding was not required for the Smith School in light of the resolution.

In general, a contract may not be awarded on terms different from those on which bidders were invited to bid. *Hillside Twp. v. Sternin*, 25 *N.J.* 317 (1957) (Hillside), *Kay v. Board of Education*, 83 *N.J.L.* 551 (Sup. Ct. 1912) (Kay); *Borroughs Corp v. Camden Freeholders Bd.*, 181 *N.J. Super.* 492 (Law Div 1981 (Borroughs) As a general matter, an unsuccessful bidder may challenge an award on the basis of its entitlement to the award. *Saturn Constr. Co. v. Middlesex Cty Freeholders*, 181 *N.J. Super.* 403 (App. Div. 1981) (Saturn).

The April 1990 bid specifications and Project Manual on their face required the submission of bids on both the Tremco System and alternates for both schools. However, as found, at a May 14, 1990 public meeting, Tenafly adopted a resolution specifying the Tremco System for the Smith School. Petitioner's point to no principle, and do not overtly argue, prohibiting what was, in effect, an amendment of the bid specifications prior to the submission of bids. I am persuaded that there is no such prohibition applicable in this case.

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The legal principles applicable to both bidding in the educational context, as well as public bidding in general, involve requirements for bidding consistent with public advertisement and the awarding of bids consistent with specifications and to the lowest responsible bidder. *See, e.g., Hillside, supra, Kay, supra.* The terms of plans and specifications are important to competitive bidding in order to provide "reasonable assurance that all bidders are competing upon the same basis and without favoritism and that no fraud enters into the award." *Kay* at 556.

The general prohibition of awarding a contract on terms deviating from specifications reflects a public policy "that each bid, actual or possible, shall be put upon the same footing." *Id.* at. 557 (citation omitted). In order to facilitate this public policy, the general judicial policy is to limit the discretion of local government entities regarding deviations from specifications, *Borroughs, supra.*

However, the emphasis in the case law is upon the provision of notice of bid requirements prior to the submission of bids, not the form such notice takes. Before a bid is accepted, it must have been the lowest bid in response "to an advertisement and conform to the specifications furnished." *Kay* at 554 "The law is clear that bids must meet the terms of the notice." *Hillside* at 324 The method used to articulate specifications must result in all bidders being acquainted with the specifications in their entirety. In this respect, a bid is not competitive if there is no opportunity to compete because of a lack of "definite specifications open to all bidders and to which all could conform " *Kay* at 555. The importance of the content of plans and specifications is obvious, not only to allow all bidders to compete upon the same basis and without favoritism, but also to insure that fraud does not enter into the award of a contract. *Id.* at 556. Therefore, the bid awarded and resulting contract must conform to the plans, specifications and the advertisement *Ibid*

An advertised public notice soliciting bids may reference specifications and forms available in a governmental office, *See, Hillside, supra.* However, such advertisements can "contain the specifications and all of the conditions upon which proposals are sought." *Hillside* at 322. The publishing of an advertisement reflecting the terms and specifications for a bid contained in a resolution is not *per se* impermissible, *See, Camden Plaza Parking v. City of Camden*, 16 *N.J.* 150,

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159 (1954). The focus of determining whether the successful bid deviates from material specifications is upon the content of "advertised conditions." *See, Palamar Const. Inc. v. Tp. of Pennsauken*, 196 *N.J. Super.* 241, 256 (App. Div. 1983).

The language of *N.J.S.A.* 18A:18A-22 is not inconsistent with these general principles. As noted hereinabove, the statutory prohibition is upon the acceptance of bids not conforming to the specifications "furnished therefore." Although a strict construction generally applies to deviations from bid specifications, applicable statutes should be interpreted "sensibly, the purpose and reason for the legislation controlling." *Borroughs* at 501 (citation omitted). The specification of the Tremco System for the Smith School was, as found, contained in a resolution approved on May 14, 1990, prior to the submission of bids, which was required to be publicly advertised at least ten days prior to such deadline. Petitioner presented no evidence that the requirement for newspaper advertisement was, in fact, not met nor does it make such an argument. The adoption of the resolution at a public meeting with subsequent newspaper advertisement provided sufficient notice to all potential bidders, including Quality Roofing, as to the specification of the Tremco System. In addition, such specification was referenced in a drawing incorporated in the initial bid specifications in April 1990, with reference to the possibility of such a resolution subsequently being adopted. There is no persuasive argument for concluding that there was a requirement for bidding on alternates for the Smith School.

As respondent argues, the bid specifications did not require bidders to bid on each of the three prime contract possibilities, that is, there was nothing to prevent bidding on the Smith School, the Middle School, and/or a combined bid Such a specification is permissible if bidders are clearly noticed that they can select one or several options on which to bid. *Pucillo v. Mayor and Council of Borough of New Milford*, 73 *N.J.* 349 (1977). In addition, there is no evidence nor argument of fraud, collusion, *etc.*

Based upon the foregoing, I **CONCLUDE** that the resolution adopted by Tenafly on May 14, 1990 providing for the submission of bids for the Smith School on the basis of the Tremco System provided sufficient notice to potential bidders of such requirement, the fact that F & R did not bid alternates for the Smith School did not constitute a deviation from the bid specifications, and the award of the Smith

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School contract to F & R was not contrary to the bid specifications. In light of this determination, it is not necessary to consider the merits of respondent's argument that, even assuming bidders were required to bid alternates for the Smith School, such requirement was not material and could be waived by Tenafly.

CHALLENGE TO SPECIFICATION OF TREMCO SYSTEM

The provision for acquisition specifications is limited in certain respects by the Act. More specifically applicable to this proceeding, no specifications may:

> Require, with regard to any purchase, contract or agreement, the furnishing of any "brand name," but may in all cases require "brand name or equivalent," except that if the materials to be supplied or purchased are patented or copyrighted, such materials or supplies may be purchased by specification in any case in which the resolution authorizing the purchase, contract, sale or agreement so indicates, and the special need for such patented or copyrighted materials or supplies is directly related to the performance, completion or undertaking of the purpose for which the purchase, contract or agreement is made; *N.J.S.A.* 18A:18A-15d (emphasis added).

It is axiomatic that a public bidder must challenge the validity or the propriety of specifications prior to the award of a bid:

> . . . whenever there is any question of the validity of specifications or the manner in which competitive bids are sought, the complainant should make timely protest and not wait until bids are awarded Such objections should be made before the bid is submitted. *Consumers Ice Cream Co. v. Camden Board of Ed.*, 1960, *S.L.D.* 212, 213 (citations omitted). *Accord*, *Andrews v. Camden Board of Education*, 1966 *S.L.D.* 147.

This principle has been reiterated by the Commissioner in more recent cases. *See, e.g. Nu-Way Concessionaires, Inc. v. Board of Education of the City of Union City and Service Dynamics Corp.*, 1985 *S.L.D.* Sept. 19, 1985, *aff'd State Board of Ed.* (March 7, 1986) The Commissioner's decisions in this respect are consistent with the principles applicable to bidding in general, *See, e.g. Saturn, supra.*

Respondent complied with the requirement for public advertisement of bids at least ten days prior to the date set for receipt of bids. The public meeting at

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which the resolution specifying the Tremco System was adopted was conducted well in advance of the date scheduled for receipt of bids. Although its position in this respect is not entirely clear, petitioner appears to infer that weight should be placed upon the fact that the minutes reflecting this meeting were not approved until June 18, 1990. I am not persuaded by such an analysis.

N.J.S.A. 18A:18A-15d requires that the specification for patented or copyrighted materials or supplies must be made in the resolution authorizing the purchase, contract, or agreement. This requirement was met in this case. In addition, as found, the bid specifications for the Smith School incorporated a provision regarding the requirement of the Tremco System, and it is reasonable to infer that Scrivens had knowledge of such requirement when petitioner's bid was prepared. Petitioner has advanced no persuasive rationale for not applying in this case the well-established principle that challenges to bid specifications must be made before the awarding of a bid.

I **CONCLUDE** that petitioner's challenge to respondent's bid specifications requiring the Tremco System for the Smith School roof were not timely made and therefore should be dismissed. I therefore make no findings and conclusions regarding Quality Roofing's argument that there were no special needs supporting the specification in question.

AWARD OF BID ON COMBINED BASIS

The Act mandates that all purchases, contracts or agreements requiring public advertisement for bids be awarded to the lowest responsible bidder, *N.J.S.A.* 18A:18A-37. However, all parts of the same statute must be read *in pari materia,* and a statute is presumed not to contain useless language. *Alling Street Urban Renewal Co. v. City of Newark*, 204 *N.J. Super.* 185 (App. Div. 1985) *certif. den.* 103 *N.J.* 472 (1986). *N.J.S.A.* 18A:18A-37 must be construed in conjunction with provisions pertaining to the preparation of specification plans in separate rather than combined formats. *N.J.S.A.* 18A:18A-18 requires that:

> In the preparation of plans and specifications for the construction, alteration or repair of any building by a board of

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education, when the entire cost of the work and materials[2] will exceed the amount set forth in, or calculated by the Governor pursuant to, *N.J.S.A.* 18A:18A-3[3] separate plans and specifications shall be prepared for each of the following, and all work and materials kindred thereto to be performed or furnished in connection therewith:

a. The plumbing and gas fitting work;
b. The heating and ventilating systems and equipment;
c. The electrical work, including any electrical power plant;
d. The structural steel and ornamental iron work;
e. All other work and materials required for the completion of the project [4]

The board of education or its contracting agent shall advertise for and receive, in the manner provided by law, (1) separate bids for each of said branches of work, and (2) bids for all the work and materials required to complete the building to be included in a single overall contract. There will be set forth in the bid the name or names of, and evidence of performance security from, all subcontractors to whom the bidder will subcontract . . . each of which subcontractors shall be qualified in accordance with this chapter.

Contracts shall be awarded to the lowest responsible bidder. The contract shall be awarded in the following manner: If the sum total of the amounts bid by the lowest responsible bidder for each branch is less than the amount bid by the lowest responsible bidder for all the work and materials, the board of education shall award separate contracts for each of such branches to the lowest responsible bidder therefor, but if the sum total of the amount bid by the lowest responsible bidder for each branch is not less than the amount bid by the lowest responsible bidder for all the work and materials, the board of education shall award a single overall contract to the lowest responsible bidder for all of such work and materials. In every case in which a contract is awarded under (2) above, all payments required to be made under such contract for work and materials supplied by a subcontractor shall, upon the certification of the contractor of the amount due to the subcontractor, be paid directly to the subcontractor. *N.J.S.A.* 18A:18A-18.

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2 "'Work' includes services and any other activity of a tangible or intangible nature provided pursuant to a contract or agreement with a board of education". *N.J.S.A.* 18A:18A-2(k). "'Materials" includes goods and properties subject to the Uniform Commercial Code--Sales. *Id.* §(f) *See, also* Notes to *N.J.S.A.* 18A:18A-2.

3 The applicable statutory amount is $7500. *N.J.S.A.* 18A:18A-3.

4 "'Project" is defined as "any work, undertaking, construction or alteration." *Id.* §2(i).

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A statutory interpretation which renders a provision redundant should be avoided. All provisions of a statute should be related and given effect if reasonably possible. *In re 1984 Maple Shade General Election*, 203 *N.J. Super.* 563 (Law Div. 1985). The references in *N.J.S.A.* 18A:18A-18 to the methodology for the awarding of bids leads to a conclusion that "all other work and materials" is not intended to be all inclusive of any work not specifically enumerated, but that those categories specified in *a* through *d* are the only "branches" for which separate plans and specifications must be prepared. The specification of one item usually implies the exclusion of another. *Squires v. Atlantic Cty. Freeholder Bd.*, 200 *N. J. Super.*, 496 (Law Div. 1985). I am persuaded that the omission of any reference to roofing work from the specification of branches evidences a legislative intent that plans and specifications pertaining to roof bids can be on a combined basis. It follows that the awarding of a bid based upon which is lowest on a combined basis complies with the requirement that bids in general shall be awarded to the lowest responsible bidder.

As respondent argues, it could have bid the job in question separately or only on a combined basis without violating *N.J.S.A.* 18A:18A-18. The language of that provision permitting the awarding of a combined bid only if the bid is lower than if bids had been awarded separately is therefore not applicable in this case. The reasons why respondent sought and awarded bids on a combined basis are persuasive and are reflected in the findings of fact articulated hereinabove.

I **CONCLUDE** that respondent was not required pursuant to *N.J.S.A.* 18A:18A-18 to bid the work in question on the basis of separate and combined bids and that the award of the bid to F & R on the basis that its combined bid was the lowest of the combined bids received was not in violation of *N.J.S.A.* 18A:18A-37.

ORDER

Petitioner's challenge to the award of a contract by respondent to F & R for the Smith School and the Middle School is hereby **DISMISSED WITH PREJUDICE**

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I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Aug 15, 1991
Date

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

Aug. 19, 1991
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 21 1991
Date

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner:
William Scrivens

For Respondent:
Michael Moore

LIST OF EXHIBITS IN EVIDENCE

P-1	Bid Specifications
P-2	Chart constructed by petitioner of the bids submitted by all bidders
R-1	Resolution F-3
R-2	Bid specifications with the roof projects on the Smith School and the Middle School
R-3	The bid of R & R Roofing Company
R-4	The bid of Quality Roofing Company
R-5	Drawing Number A-2, with notes*

* Respondent filed Exhibit R-5 with its post-hearing briefs. Petitioner did not object, and the document is deemed to be in evidence.

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QUALITY ROOFING COMPANY, INC., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY, AND F & R ROOFING COMPANY, RESPONDENTS.	:	DECISION

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Board was not required pursuant to N.J.S.A. 18A:18A-1 et seq. to bid the work in question on the basis of separate and combined bids. He further concurs that the award of the bid to F & R on the basis that its combined bid was the lowest of the combined bids received was not in violation of N.J.S.A. 18A:18A-37.

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

SEPTEMBER 27, 1991

DATE OF MAILING - SEPTEMBER 27, 1991

COMMISSIONER OF EDUCATION

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B.C., by his guardian, C.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION ON MOTION
RESPONDENT.	:	

This matter having come before the Commissioner by way of Petition of Appeal and Notice of Motion for Emergent Relief on September 26, 1991, pursuant to N.J.A.C. 6:24-1.5 seeking an order staying the determination of the NJSIAA Eligibility Appeals Committee on September 18, 1991 declaring that B.C. had transferred for athletic advantage from Asbury Park High School to Neptune High School in violation of Article V, Section 4K(6) of the NJSIAA Bylaws, thus, rendering him ineligible to participate in fall sports, specifically, football, at Neptune High School; and

Whereas, petitioner further seeks a hearing on the merits of his claims and a declaration that B.C. is eligible to begin the 1991 athletic season at Neptune High School until a fair and impartial hearing may be had on the merits of the case; and

Whereas, NJSIAA submitted its Answer to said Petition of Appeal and Motion for Emergent Relief, on September 27, 1991 denying the allegations as to B.C.'s eligibility as set forth in the petition and seeking a dismissal of the instant Motion for Emergent

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Relief for failure to meet the standards for pendente lite restraints as articulated in such cases as Crowe v. DeGioia, 90 N.J. 126 (1982); and

Whereas, the Commissioner has reviewed the brief in support of the Motion for Emergent Relief, as well as the petition and answer filed in the matter; and

Whereas, the Commissioner has reviewed the standards to be met for the provision of the extraordinary remedy of a stay; and

Whereas, the Commissioner has determined that petitioner has failed to demonstrate irreparable harm, likelihood of success on the merits of his claim and that the balance of equities enures in his favor in that B.C.'s claim to participation in fall sports as an opportunity that, once lost, may never be recaptured does not bespeak a right forfeited, see B.C., on his behalf and on behalf of his minor son, C.C. V. Board of Education of the Cumberland Regional School District et al. and NJSIAA, decided by the Commissioner May 19, 1986, aff'd N.J.Superior Court September 23, 1987; and

Whereas, neither has there been sufficient demonstration by petitioner that the determination of NJSIAA was arbitrary, capricious or unreasonable, see D.J.K. and H.J.K. v. NJSIAA decided by the Commissioner February 3, 1987; and

Whereas, neither has petitioner demonstrated that the harm to B.C., should the stay be denied, outweighs the harm to NJSIAA in upholding the rules and regulations of the Association for all members of the organization; now therefore

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The Commissioner directs on this 27th day of September 1991 that the instant Motion for Emergent Relief is hereby DENIED. IT IS further ORDERED that this matter proceed on the papers filed to an adjudication before the Commissioner in the usual course.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 27, 1991

DATE OF MAILING - SEPTEMBER 27, 1991

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

B.C., by his guardian, C.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

This matter has come before the Commissioner of Education by way of Petition of Appeal and Notice of Motion for Emergent Relief on September 26, 1991, seeking an order staying the determination of the NJSIAA Eligibility Appeals Committee (hereinafter EAC) rendered on September 18, 1991 declaring that B.C., a sophomore currently attending Neptune High School transferred from Asbury Park High School on May 1, 1991 to Neptune High School for athletic advantage in violation of Article V, Section 4K(6) of the NJSIAA Bylaws, thus, rendering him ineligible to participate in fall sports, specifically football, at Neptune High School. Petitioner further sought a hearing on the merits of his claims and a declaration that B.C. is eligible to begin the 1991 athletic season at Neptune High School until a fair and impartial hearing is had on the merits of the case.

On September 27, 1991 NJSIAA submitted its Answer to said Petition and Motion for Emergent Relief, denying petitioner's

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allegation that B.C. did not receive a fair and impartial hearing and further denying that the decision of the EAC is contrary to the facts as set forth at the hearing. NJSIAA also denied petitioner's allegation that "[B.C.] did not transfer for athletic advantage from Asbury Park High School to Neptune High School but rather transferred because of the environment in which he was living while attending Asbury Park High School and the academic problems that he encountered while attending Asbury Park High School." (See Petition of Appeal, at p. 2, Paragraph 8.)

By way of affirmative defenses, NJSIAA cites Article V, Section 4E of its Bylaws and the more stringent Athletic Academic Eligibility Policy adopted by the Asbury Park Board of Education on February 15, 1990 which prohibits athletic participation if any student is failing more than two subjects in any marking period. It claims that as a result of this policy, student-athletes at Asbury Park must adhere to a higher standard than that imposed by the minimum NJSIAA standard, which is predicated on semesters, rather than marking periods.

NJSIAA further claims by way of affirmative defenses that in the marking period ending April 17, 1991, B.C. was failing all but one of his academic courses, and was consequently advised on April 22, 1991 that he was not eligible to participate in interscholastic sports at Asbury Park. NJSIAA thereafter advances the position that within four days of such notice, B.C. left Asbury Park and enrolled at Neptune High School. Based on an appeal before the EAC, on notice to all parties, wherein sworn testimony and cross-examination was had on September 11, 1991, the EAC unanimously determined that B.C.'s transfer was in violation of Article V,

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Section 4K(6) of the NJSIAA Bylaws. B.C. was thus declared ineligible to participate in fall sports at Neptune High School.

On Friday, September 27, 1991 the Commissioner of Education denied emergent relief in this matter, finding that B.C., through his guardian, had failed to meet the standards for pendente lite restraints as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). The Commissioner held that petitioner failed to demonstrate irreparable harm in that there is no right to participate in extracurricular activities as determined in the case B.C., on his behalf and on behalf of his minor son, C.C. v. Board of Education of the Cumberland Regional School District et al. and NJSIAA, decided by the Commissioner May 19, 1986, aff'd N.J. Superior Court September 23, 1987.

The Commissioner further found that petitioner failed to demonstrate that the determination of NJSIAA was arbitrary, capricious or unreasonable, based on the limited record before him, and cited D.J.K. and H.J.K. v. NJSIAA, decided by the Commissioner February 3, 1987. Finally, the Commissioner's Decision on Motion found petitioner failed to demonstrate that the harm to B.C., should the stay be denied, outweighed the harm to NJSIAA in upholding the rules and regulations of the Association for all members of the organization.

The matter is now before the Commissioner on the merits of petitioner's claims. In reviewing the matter, the Commissioner first notes that the standard of review in considering a matter pursuant to N.J.S.A. 18A:11-3, is that once due process has been exhausted through the appeal process extant within NJSIAA, the Commissioner sits in review of NJSIAA determinations, but will not

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substitute his judgment, absent arbitrary, capricious or unreasonable action on the part of NJSIAA. See, for example, D.J.K. and H.J.K., supra. It bears noting that petitioner in this matter is not entitled to a de novo hearing through the Office of Administrative Law. Rather, the Commissioner conducts an appellate review of the final determination of NJSIAA. N.J.S.A. 18A:11-3

The rule at issue herein states:

> K. Transfers - After his/her initial enrollment in a secondary school, as provided for in Article V, Section 4G(2) of the Bylaws, a student is subject to the following transfer rules:
>
> (1) A student who transfers from one secondary school to another because of a bona fide change of residence by his/her parents or guardians, or through assignment by the Board of Education, becomes eligible to represent his/her new school immediately upon entrance unless recruitment or transfer for athletic advantage is proven and provided all other eligibility regulations are satisfied. A student who becomes emancipated shall be deemed not to have made a bona fide change of residence absent proof that the change of residence was compelled by circumstances beyond his/her control.
>
> ***
>
> (2) A student transferring from one secondary school to another, except for the cases provided for in Paragraph (1) of these transfer provisions shall be eligible after the expiration of 30 calendar days during the school year provided that both principals and athletic directors sign an appropriate waiver form indicating that there has been no recruitment or transfer for athletic advantage.
>
> CL 1 Notwithstanding the provisions of (1) and (2) of Section 4.K, a student may be declared ineligible for violations of the recruiting or transfer for athletic advantage regulation.
>
> CL 2 The transfer waiver form must be processed whenever a student transfers from one secondary school to another without a change of residence having been made by his/her parents.

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> ***
>
> CL 3 Date of entrance means registration plus actual class attendance. For those students transferring after May 1 during the second semester, the thirty calendar days will not commence until the student attends class during the next semester unless the present school provides documentation that they were able to grant second semester grades and credits for the transfer student.
>
> ***
>
> (6) Any evidence of a transfer for athletic advantage shall subject the athlete to a prompt determination of eligibility by the Eligibility Appeals Committee and may subject the school and the athlete to appropriate disciplinary proceedings as set forth in Article X herein. A transfer for athletic advantage is defined as, but not limited to:
>
> ***
>
> (d) seeking a means to nullify punitive action by the previous school.
>
> (NJSIAA Bylaws, at pp. 44-46)

Following a plenary hearing before the EAC, which was transcribed by a court reporter and made a part of the record before the Commissioner, the EAC issued its letter decision finding, in pertinent part, the following:

> The Committee determined that this transfer was clearly for an athletic advantage. It based its decision on the following. First, the transfer occurred at a very unusual time, with only weeks remaining in the [student's] Freshman year at Asbury Park. Second, the transfer came within days of the young man being advised that he was academically ineligible to participate in sports at Asbury Park. Apparently, Asbury Park has an academic requirement higher than Neptune's for participation in interscholastic sports. Third, it was brought out at the hearing that the student's siblings all remained at Asbury Park, and there was simply no plausible reason for one member of this family transferring abruptly to a neighboring school.

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> The Committee is most sympathetic with the circumstances in which this young man found himself. Accordingly, it will not rule him ineligible for the remainder of the school year, but will render him ineligible for Fall sports. He may begin participation in sports at Neptune High School for the Winter 1991 sports program, if he is otherwise eligible under the NJSIAA rules and regulations.
> (NJSIAA Brief dated September 27, 1991, at pp. 4-5, quoting letter of September 18, 1991)

Petitioner claims the EAC's three factors for ruling B.C. ineligible were arbitrary, capricious and unreasonable. In response to the first factor, that the transfer occurred at an unusual time, petitioner contends such conclusion is sheer assumption and speculation on EAC's part. Petitioner states B.C. was failing all of his courses at Asbury Park High School and had no encouragement at home to do work or succeed. Petitioner claims that upon B.C.'s transfer, and with his guardianship, B.C.'s grades improved dramatically, and he passed all of his subjects at year's end. Thus, petitioner claims, B.C. was eligible to participate in fall sports at Neptune. Petitioner submits that to avoid the transfer occurring at such an unusual time, the EAC would apparently rather have the student stay at Asbury Park High School and fail.

In response to the EAC's second factor, that the transfer occurred within days of the young man's being advised that he was academically ineligible to participate in sports at Asbury Park High School, petitioner queries whether the EAC feels it is better to transfer the student or wait until the student fails for the year to try to change things to help the student. In response to the EAC's third factor, that is, that all the student's siblings remained at Asbury Park High School and that there was no reason for one member of the family to transfer abruptly to another school district,

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petitioner states the plausible reasons for B.C.'s transferring are the results of his move. Petitioner stresses that B.C. is motivated and trying to be successful.

Thus, petitioner submits that the determining factors contained in the decision of the EAC are arbitrary and capricious and should not serve as the reasons for declaring B.C. ineligible for participation in fall sports.

By way of added submission dated September 30, 1991, petitioner claims that because B.C. did not participate in spring athletics at Neptune High School he did not therefore transfer to Neptune High School in an attempt to gain athletic advantage or to "nullify punitive action by the previous school." (Petitioner's submission dated September 30, 1991, at p. 3, quoting NJSIAA Bylaws) Petitioner argues that B.C. complied with the declaration of ineligibility at Asbury Park High School by not participating in spring sports at Neptune during the following marking period which was exactly the same penalty that he would have been subjected to had he remained at Asbury Park High School.

Thus, petitioner asks that the Commissioner determine that the decision of the EAC was in error. He seeks a reversal of said determination and a declaration that B.C. is eligible to participate in fall sports at Neptune High School.

Upon a careful and independent review of the record of this matter, the Commissioner finds and determines that the decision of the EAC must stand. In considering the arguments raised by the parties in this matter, the Commissioner first expresses his concern over the reasons tendered by Asbury Park School District in refusing to sign the waiver form required by Article V, Section 4G(2), which states that:

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> a student transferring from one secondary school to another *** shall be eligible after the expiration of 30 calendar days during the school year provided that both principals and athletic directors sign an appropriate waiver form indicating that there has been no recruitment or transfer for athletic advantage.

Both at the hearing and in his correspondence to the principal of Neptune High School, Mr. Mann, the principal at Asbury Park High School, explained that his reasons for refusing to sign B.C.'s waiver form were not based on his conviction that B.C. transferred for athletic advantage. Rather, Mr. Mann stressed that his justification for failing to sign the waiver was because

> ***I didn't want to place myself in a position of signing the waiver with these questions in mind and end up having to face the criticisms possibly from the NJSIAA as well as my own board members and community.
>
> So, I'm here at this for a decision to be rendered by the Committee which would show that the decision in no way would be biased on my part or Mr. DeLuca's part. (9/11/91 Tr. 9-10)

Mr. Mann's concern with his own school's reputation was emphasized in his letter dated September 9, 1991 to Mr. DeLuca, principal at Neptune High School, wherein he stated:

> As I explained in our telephone conversation, I did not sign the waiver because it wasn't clear as to why B.C. withdrew and, in light of the enclosed documentation, I did not want to be criticized by NJSIAA or the community for disregarding standard procedure regarding school transfers in these kinds of situations.

From the exhibits the Commissioner has gleened an understanding that Mr. Mann's investigation into the allegations as to whether B.C. transferred from Asbury Park High School to Neptune High School for athletic advantage were, at best, fleeting forays to the community grapevine. For example, in the transcript, Mr. Mann states: "***talk in the community came to my attention that, you

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know, [B.C.] had moved, and hearsay has it that he moved for athletics***." (Tr. 9) It is the Commissioner's judgment that based on such scant investigation, he must reject that statement made in NJSIAA's Answer at paragraph 10 of its Affirmative Defenses wherein it is stated: Asbury Park School District determined that the transfer was for athletic advantage, and refused to sign the requisite Transfer Waiver Form, requiring a hearing by the NJSIAA Eligibility Appeals Committee (EAC). Mr. Herbert, counsel for NJSIAA, more correctly characterized the Asbury Park School District's stance in failing to sign the waiver form at the hearing in this matter, wherein he stated:

> Basically, as we understand, Asbury Park is concerned because there's an indication that the youngster was deemed ineligible to participate in sports at that school and may well have transferred to Neptune where he would be eligible. I must tell you that if that is the case, that would be a transfer for athletic advantage. There may be other explanations. That's why we're here today. (Tr. 8)

At first blush, the Commissioner was gravely concerned that the instant hearing was fatally flawed because the Board's refusal to sign the waiver was not supported by sound evidence that athletic advantage was the reason for the refusal to sign the waiver. In this matter, Asbury Park Board's real concern appears to have been its own reputation, not whether B.C. transferred for athletic advantage. Had the Commissioner been convinced that the only way a hearing concerning violations of the transfer for athletic advantage regulation could be had was through a challenge of the evidence submitted by the local district refusing to sign a transfer waiver, B.C. would be declared eligible to participate in fall sports. The Commissioner so finds because Mr. Mann had no substantive

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information in refusing to sign the waiver. Rather, Mr. Mann relied on gossip from the community suggesting the possibility that B.C. might have transferred for athletic advantage.

However, the Commissioner's careful perusal of the NJSIAA regulation indicates that at Article V, Section 4K(2) CL 1 of NJSIAA's Bylaws it is stated:

> Notwithstanding the provisions of (1) and (2) of Section 4.K, a student may be declared ineligible for violations of the recruiting or transfer for athletic advantage regulation.

The Commissioner determines that based on the above language, NJSIAA has the power to independently arrive at a determination regarding allegations of transfer for athletic advantage through its own fact-finding mechanism before the EAC.

As to the merits of whether B.C. in fact transferred for athletic advantage, the Commissioner reiterates that the burden is upon petitioner to persuade him that the decision rendered by the EAC was arbitrary, capricious or unreasonable. Had this record provided a residuum of credible evidence that petitioner's assuming custody for B.C. was made in an effort to salvage B.C.'s floundering academic career, the matter may have resulted in a judgment in favor of B.C. However, none of the evidence submitted, nor the testimony adduced at hearing, provides such demonstration. In particular, it is observed that while petitioner repeats the fact that he secured custody of B.C. before the actual date of B.C. attending Neptune High School on May 1, it is plain that assumption of custody was accomplished only just before the transfer occurred. Upon being questioned about B.C.'s status as C.H.'s ward, a member of the EAC asked C.H.:

> Who presently has legal guardianship?

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C.H.: I do.

Mr. Herbert: Did you obtain the legal guardianship before the transfer?

C.H.: Yes.

Mr. Herbert: When was that, sir?

Dr. Harmon [A member of EAC]: I'd say April. I don't know exact dates.

Mr. Herbert: It wasn't several weeks or months before the transfer? Just before the transfer?

C.H.: Before the transfer. (Tr. 24)

The transcript also states that both C.H. and B.C.'s mother, M.C., were aware of his academic peril from early on in the year, but both C.H. and M.C. decided to wait until one month before the end of the year to act on his status. See Transcript at page 21, wherein C.H. stated:

> Well, you keep waiting, figuring things would change, and it wasn't changing. It was getting worse. So, rather than have him lose a whole entire year, there was still time to save him. So, that was why we waited as long as we could. We discussed it earlier, but you feel you wait a little longer, it might change and it doesn't.

It is simply not credible that no documents were produced to substantiate that the custody proceedings were initiated prior to the declaration of ineligibility. All that was brought to the record was vague recollection.

The Commissioner finds it was not unreasonable for the EAC to conclude that the abrupt termination of his schooling at Asbury Park High School, within days of B.C.'s having been notified that he had been declared ineligible to participate in sports at Asbury Park High School due to his having failed three subjects at the end of the third marking period is too coincidental to dismiss as being solely or primarily for academic reasons absent proof that his

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parents and C.H. were in the process of transferring him for academic reasons earlier than late April of the same school year.

As to petitioner's argument that he would have been penalized for his academic shortcoming during the spring and would, in light of his later improved academic record, have been eligible for participation for fall sports at either school, such assumption in the Commissioner's opinion, constitutes "Monday morning quarterbacking." The NJSIAA Bylaws make plain that violation of the provisions of Article V, Section 4K(6) may result in the athlete's being declared ineligible to participate in sports. Article V, Section 4E(1) of its Bylaws notes that

> To be eligible for athletic competition during the first semester (September 1 to January 31) of the 10th grade or higher*** a pupil must have passed 25% of the credits required by the State of New Jersey for graduation, during the immediately preceding academic year.

At the time of B.C.'s transfer for athletic advantage, he did not meet that requirement.

Moreover, at the time of his transfer from Asbury Park High School, that school's policy adopted on February 15, 1990 prohibits athletic participation if any student is failing more than two subjects in any marking period. NJSIAA's policy is based on semester accomplishments. Asbury Park's policy is predicated on marking period achievement. While NJSIAA's Bylaws speak to assessing a 30-day penalty against students who transfer after May 1 of the second semester commencing at the start of the next semester for violation of the transfer for athletic advantage regulation, ineligibility is prescribed, but the duration of ineligibility appears to be at the discretion of the EAC. Hence, petitioner's suggestion that B.C.'s eligibility at Neptune High School at the end

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of the fourth marking period does not absolve him of the penalty for having transferred for athletic advantage at the end of the third marking period when he was failing all but one of his academic subjects. Further, that the EAC assessed a penalty of ineligibility for the fall sports season was not only within its authority, and in the Commissioner's judgment, was reasonably based on B.C.'s infraction of the rules, but also was apparently perceived by the Committee as a lesser penalty than it might have imposed. (See Transcript 28. See also NJSIAA's letter dated September 18, 1991.)

Accordingly, the Commissioner finds and determines that based on the record before him, petitioner has failed to demonstrate that the determination of the EAC was arbitrary, capricious or unreasonable. Accordingly, the decision of the EAC is adopted by the Commissioner as his own, with the penalty assessed, declaring B.C. ineligible to participate in fall sports at Neptune High School.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1991

DATE OF MAILING - OCTOBER 4, 1991

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BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY, RESPONDENT.	:	DECISION

For Petitioner, Sidney A. Sayovitz, Esq. (Greenwood, Young, Tarshis, Dimiero and Sayovitz)

For Respondent, Michael B. Kates, Esq. (Harker, Nashel, Kates, Modarelli and Nussman)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed by the Board on June 18, 1991, seeking restoration, on the grounds of necessity for a thorough and efficient education, of reductions by the Township Council in the tax levy for the 1991-92 school year. These reductions were made pursuant to N.J.S.A. 18A:22-37 and N.J.A.C. 6:24-7.2(b)2 following voter rejection of the Board's proposed budget on April 30, 1991 and after consultation with the Board as required by law.

The total proposed and certified budgets, as well as the amounts in dispute in this matter, are set forth below:

Proposed Tax Levy adopted by the Board	Amount of Tax Levy Certified by Governing Bodies
1. Current Expense $34,384,232.00	1. Current Expense $34,084,232.00

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2. Capital Outlay $1,000,000.00	2. Capital Outlay $ 800,000.00

Amount of reduction by governing body

Current Expense - $300,000.00
Capital Outlay - $200,000.00

Amount of reduction in dispute before the Commissioner

Current Expense - $300,000.00
Capital Outlay - $200,000.00

The reductions at issue were effectuated by the Council for the reasons stated in Resolution No. 196-91 dated May 21, 1991 which reads in pertinent part:

> Capital outlay - The Superintendent's capital outlay budget recommendation of $1,400,000, on which the capital budget of $1,000,000 was predicated, includes a $200,000 item for "Repaving - various schools," which the Council considers to be excessive and could, in any event, be staged [in] over several years. No effort has been made by the Board to justify to the Township Council any of the capital items. Further, the Board anticipates the sale this year of the Washington-Irving School for an additional $1,400,000. The Board has indicated that the proceeds of sale are pledged to capital improvements as part of a district reorganization, without specifying in its presentation to Council the application of those funds. These proceeds serve as an additional source for capital development. For all of these reasons, a $200,000 reduction is deemed to be justifiable, without impairing the capital development of the school district.
>
> Current expense:
>
> | | |
> |---|---|
> | Administration - | Lines 49 (Salaries), 50 (Legal Fees), 51 (Purchased Other Professional/Technical Services) and 52 (Other Expenses). |
> | ($50,000) | Reduce Subtotal of Lines 49 through 52 from $1,631,340 to $1,560,340 [sic; actually $1,581,340], a reduction of $50,000, to be allocated as the Board determines. |

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Analysis		This represents a 3% reduction in "Administration" line items. Recognizing the longevity of the persons occupying managerial and confidential positions, the Council nevertheless believes that the budgeted salary ranges are excessive. Further, legal fees (Line 50) appear to be excessive. Council believes that the employment of legal counsel at an hourly rate for basic services rather than a fixed sum annual retainer for basic services (excluding litigation) contributes in part to excessive legal fees.
Instruction	-	Lines 54, 55, 56 and 57a.
($150,000)		Reduce Subtotal of Lines 54 through 57a from $15,459,458 to $15,309,458, a reduction of $150,000, to be allocated as the Board determines.
Analysis		This represents a 0.9% reduction in "Instruction" line items. Last year, the budgeted amounts for Instruction were not fully expended. Through good management, approximately $300,000 was not expended. The Council believes the same management can effect a savings of half that amount, without adversely effecting [sic] the delivery of educational services.
Undistributed Instruction	-	Lines 58 through 68
($50,000)		Reduce Subtotal of Lines 58 through 68 from $6,840,925 to $6,790,925, a reduction of $50,000, to be allocated as the Board determines.

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Analysis		This represents a 0.7% reduction in "Undistributed Instruction" line items. The Council believes that the budgeted salary ranges for principals, supervisors of instruction and other instructional staff are excessive, notwithstanding the longevity of certain of the administrators in these positions. The Council also believes that effective management can effect the modest reduction proposed herein.
Maintenance of Plant	-	Lines 96 through 101.
($50,000)		Reduce Subtotal of Lines 96 through 101 from $1,196,748 to $1,146,748, a reduction of $50,000, to be allocated as the Board determines.
Analysis		This represents a 0.4% reduction in "Maintenance of Plant" line items, and is considered minimal. The Council notes the significant reduction in these budget items (of approximately $500,000 from last year's revised appropriation) but asks the Board to focus the remaining reductions in this area rather than in further programmatic service cuts. (At pages 2-4)

On June 20, 1991, the Council filed an answer admitting the amounts and reasons set forth above, but denying that its actions in making the reductions were arbitrary and that restoration of the disputed funds was necessary to enable the district to provide a thorough and efficient education. Position papers were subsequently filed by the parties pursuant to N.J.A.C. 6:24-7.8, and upon expiration on August 5, 1991 of the period for submission of

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responses and final summations, the record of this matter was closed by the Commissioner.

Upon careful review of the arguments of the parties, which are incorporated herein by reference, and being mindful that the standard by which budget appeals must be judged pursuant to Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) is whether the amount of moneys available to the Board as a result of the Council's actions is sufficient for provision of a thorough and efficient education, the Commissioner makes the following determinations.

I. REDUCTION TO CAPITAL OUTLAY

The Commissioner directs restoration of the full $200,000 reduced by the Council in this account, as the Board has convincingly demonstrated through photographs and excerpts from a 1988 facilities study that its proposed repaving project (which extends to the sidewalks and throughways of four schools) is both necessary for student safety and an important component in the District's carefully structured long-term maintenance plan, so that the deferral proposed by the Council is neither educationally nor fiscally sound. The Commissioner further concurs with the Board that its budgeted amount of $200,000 is not excessive in view of this project having been estimated to cost $198,800 in 1988. Finally, the Commissioner is not persuaded that the possibility, or even the certainty, of a building sale later this year (expected to bring in additional revenues) constitutes a reason to defer the Board's ongoing obligation to provide a safe environment for students and reasonably maintain the District's physical plant.

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II. REDUCTIONS TO CURRENT EXPENSE

A. Administration, including lines 49-52 (Salaries, Legal Fees, Purchased Other Professional/Technical Services and Other Expenses)

The Council's $50,000 (3%) reduction in this area was targeted to "excessive" administrative salaries and legal fees. However, the Board has demonstrated that the amount budgeted for salaries ($983,390) represents the exact amount of contractual obligations existing at the time of the election and the Council has offered no proposal to eliminate position(s) or effectuate other reductions that might be found permissible upon review by the Commissioner. With respect to legal fees, the Commissioner finds that the Board's budgeted amount ($287,900) is reasonable in view of the District's recent litigation history and, indeed, represents a substantial reduction from last year's expenditures ($420,000) as a result of the District's efforts to control litigation costs and find more economical modes of legal insurance. The Board having thus budgeted a reasonable amount for a necessary operational expenditure, with no specific proposals for further cost savings or alternative sources of funding offered by the Council, the Commissioner must likewise find unacceptable any reduction in this account. Accordingly, the entire $50,000 reduced by Council in the area of Administration is to be restored.

B. Instruction, including lines 54, 55, 56 and 57a (Contracted Salaries, Substitutes, Conferences, Summer Workshops and Team Teaching)

The Council here recommended a reduction of $150,000 or 0.9% on the grounds that, because last year's expenditures were under budget by $300,000 due to good management, there was no reason

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why continued vigilance could not effect a further savings of half that amount. The Board has demonstrated, however, that the amount budgeted for salaries represents existing contractual obligations, and that the slightly increased amounts for conferences are necessary to assist students and parents in dealing with the 1991-92 reorganization of the District to incorporate the middle school concept and alleviate overcrowding through reassigning classes among buildings. The Board has further demonstrated that the amount budgeted for team teaching reflects no increase other than contractual salary growth and maintains the same level of team teaching utilized successfully in past years, and that its costs for substitutes are based on demonstrated prior need assessments. With regard to summer workshops, the Board argues that this item has already been reduced by about $82,000 from last year ($206,499 to $124,778) and that further reductions are inappropriate.

Upon review, the Commissioner finds that with respect to salaries, conferences and substitutes, the Board has carefully delineated the bases for its budgetary calculations and that these calculations do in fact reflect the amounts necessary to provide a thorough and efficient education. With respect to summer workshops, the Commissioner notes that the Board has already made a significant (about 40%) decrease in expenditures as compared to prior years and concurs that any further decrease in the current year would have too sudden and adverse an impact on the staff networking opportunities essential for maintenance of a thorough and efficient instructional program. Moreover, the Council has offered no specific basis on which costs in the area of instruction could be reduced, relying

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instead on an unsupported assumption that last year's underexpenditure (already factored into the Board's calculation of this year's proposed line item amounts) automatically implies that prior economies can not only be sustained, but actually expanded by 50%. Accordingly, the Commissioner holds the Council's reduction to be arbitrary and directs restoration of the entire $150,000 reduced from instructional accounts.

C. Undistributed Instruction, including lines 58-68 (Principal, Supervisor, Other Instructional and Clerical Salaries, Textbooks, Library Materials, Teaching Supplies, Professional Services and Other Expenses)

The Commissioner fully concurs with the Board's position that salary accounts are based on negotiated salaries and that in the absence of recommendations to eliminate particular position(s), an arbitrary dollar or percentage reduction is not sustainable. The Commissioner notes, however, that the Board has made no showing whatsoever that the full $1,257,953 remaining in accounts other than salary (line items 63-68) is necessary for a thorough and efficient education, and the flexible nature of these accounts renders reasonable the Council's assumption that a total cut of $50,000 could be absorbed without significant adverse impact. Accordingly, the Council's $50,000 reduction is sustained as applied to lines 63 through 68.

D. Maintenance of Plant, including lines 96-101 (Salaries, Contracted Services, Replacement of Equipment, Purchase of New Equipment, Other Expenses, Purchased Professional/Technical Services)

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In this area, where the Council made an unspecified overall cut of $50,000, the Board has demonstrated that its salary projections are based on existing contractual agreements, and that its projections for overtime and enhanced construction and mechanical costs are a direct result of facilities needs associated with the District's 1991-92 grade-level reorganization and so are necessary for a thorough and efficient education. Further, the District must be in compliance with asbestos regulations by July 1992, so that its line 101 appropriation for an asbestos consultant is likewise necessary. The Board has not, however, explained the need for its full appropriations in new and replacement equipment purchase and other expenses lines, accounts which total $325,337. Given the fluid nature of these accounts and the Board's lack of explication for them, the Commissioner does not find unreasonable the Council's position that a total reduction of $50,000 could be absorbed without adversely affecting the District's ability to offer a thorough and efficient education. Accordingly, this reduction is sustained as applied to lines 98 through 100.

Therefore, for the reasons expressed herein, the Commissioner directs restoration of the Council's $200,000 reduction to capital outlay and $200,000 of its reduction to current expense. He sustains, however, $100,000 of the reduction to current expense.

Consequently, the Bergen County Board of Taxation is directed to strike a local tax levy for Teaneck Township reflecting restorations as indicated below:

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	TAX LEVY CERTIFIED BY GOVERNING BODY	AMOUNT RESTORED	TAX LEVY AFTER RESTORATION
CURRENT EXPENSE	$34,084,232	$200,000	$34,284,232
CAPITAL OUTLAY	$ 800,000	$200,000	$ 1,000,000

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 4, 1991

DATE OF MAILING - OCTOBER 4, 1991

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BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, PETITIONER-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
NEPTUNE TOWNSHIP EDUCATION ASSOCIATION, NEPTUNE TOWNSHIP GENERAL SUPERVISORS ASSOCIATION, NEPTUNE TOWNSHIP DEPARTMENT CHAIRPERSONS ASSOCIATION AND NEPTUNE TOWNSHIP PRINCIPALS ASSOCIATION, RESPONDENTS-MOVANTS.	:	DECISION ON MOTION

For Movant Education Association, Stephen B. Hunter, Esq. (Klausner and Hunter)

For Co-Movant Supervisors, Chairpersons and Principals Associations, Wayne J. Oppito, Esq. (New Jersey Principals and Supervisors Association)

For Respondent Board of Education, James T. Hundley, Esq. (Patterson and Hundley)

Whereas, this matter was opened before the Commissioner of Education by way of a Petition for Declaratory Judgment filed by the Board on July 26, 1991, wherein the Board sought a ruling that the payroll deduction crediting method to which it was ordered to return by PERC and the Courts (following an unfair practice complaint filed by the Teachers Association upon the District's abandonment of this method) was contrary to N.J.S.A. 18A:66-127 and the constitutional prohibition against advancing monies for work not performed; and

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Whereas, on August 23, 1991, the Teachers Association filed an Answer with Motion to Dismiss denying the Board's legal contentions and arguing that the matter should be dismissed without further proceedings on the grounds that the issues raised had all been addressed in prior litigation, that the matter did not constitute a controversy within the intent of school law and that the Board had at no time in prior proceedings alleged that the Commissioner had jurisdiction over the matter; and

Whereas, on September 3, 1991 the remaining respondents filed a joint answer likewise denying the Board's legal contentions and raising affirmative defenses, followed by notice dated September 9, 1991 that they wished to join in the Education Association's Motion to Dismiss; and

Whereas, on September 25, 1991 the Board filed a brief in opposition to the Motion to Dismiss, arguing that neither PERC nor the Courts had addressed its constitutional claim, that while no facts are in dispute a legal controversy clearly exists and fully warrants declaratory judgment, that the public interest dictates the Commissioner's entertaining this matter notwithstanding prior litigation and that because co-movants were not parties to the prior litigation they cannot raise procedural defenses based upon it; and

Whereas, the Commissioner has carefully considered the filings of the parties and finds that while the Board's claim with respect to N.J.S.A. 18A:66-127 was fully addressed by PERC and the Courts, its constitutional claim was not raised before PERC and therefore not addressed by the Courts; that the constitutional claim arises from prior Commissioner's decisions having similar fact patterns and is therefore appropriate for judgment by the

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Commissioner by way of N.J.A.C. 6:24-2.1 et seq.; and that co-movants alleged inability to raise procedural defenses, even if conceded, does not constitute a basis on which to strike those defenses in this context or bifurcate proceedings with respect to the various respondents; now therefore

IT IS ORDERED this 31st day of October 1991 that the motion is GRANTED with respect to dismissal of the Board's petition as it pertains to N.J.S.A. 18A:66-127 and DENIED with respect to the Board's constitutional claim. Accordingly, this matter is to be transmitted to the Office of Administrative Law for hearing strictly on the issue of whether the District's present deduction/crediting system is in violation of the New Jersey Constitution, Article VIII, Section III, Paragraphs 2 and 3.*

COMMISSIONER OF EDUCATION

OCTOBER 3, 1991

DATE OF MAILING - OCTOBER 4, 1991

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* The Commissioner notes receipt on September 30, 1991 of a request from movant to reply to the Board's opposition papers. Because regulation makes no provision for such replies, the request is herein denied.

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6429-90
AGENCY DKT. NO. 230-7/90

MARY VAN DYKE,
NORMA CHRISOMALIS,
EDWARD FAUERBACH,
CARMELA R. GIANNASIO AND
MATTHEW PASTORE,
Petitioners,
v
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,
HUDSON COUNTY,
Respondent

Philip Feintuch, Esq., for petitioners
(Feintuch, Porwich & Feintuch, attorneys)

David F. Corrigan, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed August 15, 1991 Decided: August 26, 1991

BEFORE JAMES A. OSPENSON, ALJ:

Five tenured teaching staff members employed by the State-Operated School District of the City of Jersey City, Hudson County, alleging each was tenured in the position of supervisor in the District, filed petitions before the Commissioner of the Department of Education. They alleged they were unlawfully and improperly removed from their respective supervisory positions by the State-Operated [illegible]

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on, about or after April 4, 1990, reduced in salary and transferred involuntarily to other teaching staff positions, contrary to their rights of tenure and seniority, including, but not limited to, those under N.J.S.A. 18A:6-11 et seq. and N.J.S.A. 18A:28-9 and 12. They sought reinstatement to former positions, differential back pay, restoration of emoluments and such other relief as under the circumstances is just. The State-Operated School District admitted generally petitioners were tenured in supervisory positions but said that each was transferred to other teaching staff positions at lesser compensation, respectively and variously, only as a result of mandated reorganization of the District's supervisory staff undertaken by the District in 1990 pursuant to N.J.S.A. 18A:7A-44(b, c). Since action was taken by the District pursuant to N.J.S.A. 18A:7A-34 et seq., and was in compliance therewith, District action was not violative of petitioners' tenure or seniority rights. The District alleged any of petitioners' rights of tenure and/or seniority were subject to actions taken by it under the power, authority and obligation of the District pursuant to N.J.S.A. 18A:7A-44(b, c).

The petitions of appeal were filed in the Bureau of Controversies and Disputes of the Department of Education on July 3, 1990; the District's answer was filed there on July 24, 1990; the Commissioner transmitted the matters as consolidated to the Office of Administrative Law on August 13, 1990, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. The District filed an amended answer there on January 16, 1991 at prehearing.

On notice to the parties, the matter came on for prehearing conference in the Office of Administrative Law on January 16, 1991, and an order was entered establishing, inter alia, hearing dates beginning June 12, 1991. The issues were outlined as follows:

1. Whether petitioners shall have proven by a preponderance of the credible evidence that respectively they were unlawfully transferred, demoted to positions at lesser pay in violation of N.J.S.A. 18A:28-9, 12, and N.J.S.A. 18A:28-6 and N.J.S.A. 18A:6-10 et seq.; and

2. Whether actions in reorganization taken by the District were lawful under N.J.S.A. 18A:7A-34, 44(b, c); and

3. If petitioners' rights shall have been violated, whether they are entitled to relief as demanded.

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The parties were directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact. Such stipulations were prepared and filed. Thereafter, since there remained no genuine, material triable issues of fact, the matters at issue were addressed and resolved as if on cross-motions for summary decision, based on pleadings, admissions, stipulations, documentation and memoranda of law, in accordance with N.J.A.C. 1:1-12.5. The time for submission of memoranda of law having elapsed on August 15, 1991, the record closed then.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. On October 4, 1989, the Jersey City Board of Education was taken over by the State-Operated School District of Jersey City pursuant to N.J.S.A. 18A:7A-34 et seq.

2. The State Board of Education appointed Dr Elena J Scambio as State District Superintendent pursuant to N.J.S.A. 18A:7A-35

3. Pursuant to N.J.S.A. 18:7A-44(b and c), the State District Superintendent abolished the positions of all of the central administrative and supervisory staff on April 4, 1990.

4. All petitioners were tenured in their respective abolished positions under N.J.S.A. 18A:28-6.

As to Mary Ann Van Dyke

1. Petitioner Mary Ann Van Dyke has been employed by the Jersey City School District (hereinafter "District") since September 1967 (J-1)

2. Petitioner Van Dyke received a standard Principal/Supervisor certificate in January of 1983. (J-2)

3. Petitioner Van Dyke has been an Acting Supervisor of Special Education in the Jersey City public schools since February 24, 1988. (J-1)

4. On or about November 30, 1989, Petitioner Van Dyke received a memo from the State District Superintendent advising her that her

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position would be abolished. The memo further advised that evaluations would be conducted, pursuant to N.J.S.A. 18A:7A-44, which will be considered as a basis for rehiring staff for the reorganized school district. (J-3)

5. In accordance with N.J.S.A. 18A:7A-44, on or about March 23, 1990, Petitioner Van Dyke was evaluated by the State District evaluation team. The evaluation team found her performance was, for the most part, weak. (J-4)

6. Petitioner Van Dyke disagreed with her evaluation and drafted a response on March 29, 1990. (J-5)

7. On or about April 4, 1990, Petitioner Van Dyke received notice that her position as a Supervisor of Special Education would be abolished as of April 4, 1990. She was offered the position of a Learning Disability Teacher Consultant at a lesser salary. (J-6)

8. Petitioner Van Dyke accepted the position of Learning Disability Teaching Consultant. (J-1)

As to Norma Christomalis

1. Petitioner Christomalis has been employed by the Jersey City School District since September of 1963. (J-7)

2. Petitioner Christomalis received a standard Supervisor certificate in May of 1975. (J-8)

3. Petitioner Christomalis has been employed as an Assistant Supervisor of Special Education since December 16, 1974. (J-7)

4. On or about November 30, 1989, Petitioner Christomalis received a memo from the State District Superintendent advising her that her position would be abolished. The memo further advised that evaluations would be conducted pursuant to N.J.S.A. 18A:7A-44 which will be considered as a basis for rehiring staff for the reorganized school district. (J-3)

5. In accordance with N.J.S.A. 18A:7A-44, on or about March 27, 1990, Petitioner Christomalis was evaluated by the State District evaluation team. The evaluation team found her performance was, for the most part, adequate. (J-9)

6. Petitioner Christomalis disagreed with her evaluation and, therefore, she prepared a response dated May 8, 1990. (J-10)

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7. On or about April 4, 1990, Petitioner Christomalis received notice that her position was abolished as of April 4, 1990. She was offered the position of Learning Disability Teaching Consultant at a lesser salary. (J-11)

8. Petitioner Christomalis accepted the position of a Learning Disability Teaching Consultant. (J-7)

As to Edward Fauerback

1. Petitioner Fauerback has been employed by the Jersey City School District since October 16, 1978. (J-12)

2. Petitioner Fauerback received a standard Supervisor certificate in May of 1983. (J-13)

3. Petitioner Fauerback has been employed as an Supervisor of Special Education since September of 1985. (J-12)

4. On or about November 30, 1989, Petitioner Fauerback received a memo from the State District Superintendent advising him that his position would be abolished. The memo further advised that evaluations would be conducted pursuant to N.J.S.A. 18A:7A-44 which will be considered as a basis for rehiring staff for the reorganized school district. (J-3)

5. In accordance with N.J.S.A. 18A:7A-44, on or about March 27, 1990, Petitioner Fauerback was evaluated by the State District evaluation team. The evaluation team found his performance was, for the most part, adequate. (J-14)

6. On or about April 4, 1990, Petitioner Fauerback received notice that his position was abolished as of April 4, 1990. He was offered the position of classroom teacher at a lesser salary. (J-15)

7. Petitioner Fauerback accepted the position of classroom teacher. (J-12)

As to Carmela R. Giannasio

1. Petitioner Giannasio has been employed by the Jersey City School District since September of 1962. (J-16)

2. Petitioner Giannasio received a standard Supervisor certificate in November of 1971. (J-17)

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3. Petitioner Giannasio has been employed as a Supervisor of Special Education since September, 1973. (J-16)

4. On or about November 30, 1989, Petitioner Giannasio received a memo from the State District Superintendent advising her that her position would be abolished. The memo further advised that evaluations would be conducted pursuant to N.J.S.A. 18A:7A-44 which will be considered as a basis for rehiring staff for the reorganized school district. (J-3)

5. In accordance with N.J.S.A. 18A:7A-44, on or about March 23, 1990, Petitioner Giannasio was evaluated by the State District evaluation team. The evaluation team found her performance was, for the most part, adequate. (J-18)

6. On or about April 4, 1990, Petitioner Giannasio received notice that her position was abolished as of April 4, 1990. She was offered the position of Learning Disability Teaching Consultant at a lesser salary. (J-19)

7. Petitioner Giannasio accepted the position of a Learning Disability Teaching Consultant. (J-16)

As to Matthew Pastore

1. Petitioner Pastore has been employed by the Jersey City School District since September of 1975. (J-20)

2. Petitioner Pastore received a standard Supervisor certificate in August of 1980. (J-21)

3. Petitioner Pastore has been employed as a Supervisor of Special Education since March 16, 1981. (J-20)

4. On or about November 30, 1989, Petitioner Pastore received a memo from the State District Superintendent advising him that his position would be abolished. The memo further advised that evaluations would be conducted pursuant to N.J.S.A. 18A:7A-44 which will be considered as a basis for rehiring staff for the reorganized school district. (J-3)

5. In accordance with N.J.S.A. 18A:7A-44, on or about March 23, 1990, Petitioner Pastore was evaluated by the State District evaluation team. The evaluation team found his performance was, for the most part, adequate. (J-22)

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6. On or about April 4, 1990, Petitioner Pastore received notice that his position was abolished as of April 4, 1990. He was offered the position of classroom teacher at a lesser salary. (J-23)

7. Petitioner Pastore accepted the position of classroom teacher at a lesser salary. (J-20)

DISCUSSION

Essential material facts are not in dispute. In brief, after the Jersey City Board of Education was abolished and replaced by the State-Operated School District, pursuant to N.J.S.A. 18A:7A-34 et seq., all petitioners were advised their tenured supervisory positions were abolished as of August 4, 1990 under a reorganization of the District's central administrative and supervisory staff, pursuant to N.J.S.A. 18A:7A-44 (b and c). J-24, 25, 26; and see supra, para. 3 at 5. They were advised they would be evaluated and might be rehired. None of the petitioners was offered supervisory positions after reorganization and re-evaluation, instead, all five were returned to other prior tenured positions.

Claims that their tenure and seniority rights are thus abridged are answered by express language of the statute. N.J.S.A. 18A:7A-44(c) provides:

> Notwithstanding any other provision of law or contract, positions of central administrative and supervisory staff, instructional and non-instructional, . . . shall be abolished upon the reorganization of the State-Operated School District's staff. The State district superintendent may hire and individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein. [Emphasis added.]

Petitioners' only basis for claim, it would seem, is statutory language conferring right to claim "any position or to placement upon a preferred eligibility list for any

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position to which the employee may be entitled by virtue of tenure or seniority within the district." Reasonable construction and interpretation of the language cannot be twisted to suggest that petitioners' somehow bootstrap rights to the very positions abolished. Such tortured construction of statutory language is laid at rest by statements of both the Senate Education Committee and the Assembly Education Committee when N.J.S.A. 18A:7A-34 et seq. was enacted. The Senate Education Committee said:

> . . . Affected employees will be given 60 days' notice or 60 days' pay and will retain "bumping rights" for other positions in the district for which they may have seniority. J-27 at 1. [Emphasis added].

The Assembly Education Committee repeated the statement. J-28.

CONCLUSION

I **CONCLUDE** that legislative history as well as clear statutory language expressly disentitles petitioners from claiming tenure or seniority rights (1) to their former abolished supervisory positions or (2) to preferment in supervisory positions not abolished or (3) in supervisory positions to which present incumbents have been rehired by the district superintendent under N.J.S.A. 18A:7A-44(c). They only retain, and on evidence here have been afforded, rights of re-employment and preferred eligibility for any other positions to which they may be entitled by virtue of tenure or seniority. The petitions of appeal are **DISMISSED**.

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I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within 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.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 26, 1991
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 30 1991
Date

OFFICE OF ADMINISTRATIVE LAW

amr

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LIST OF EXHIBITS

Mary Ann Van Dyke

J-1 Mary Ann Van Dyke Salary Card

J-2 Mary Ann Van Dyke Supervisory Certificate

J-3 November 30, 1989 letter announcing reorganization

J-4 March 27, 1990 Evaluation Report

J-5 March 29, 1990 Response to J-4

J-6 April 4, 1990 letter from Scambio

Norma Christomalis

J-7 Norma Christomalis Salary Card

J-8 Norma Christomalis Supervisory Certificate

J-9 March 27, 1990 Evaluation Report

J-10 May 8, 1990 Response to J-4

J-11 April 4, 1990 letter from Scambio

Edward Fauerbach

J-12 Edward Fauerbach Salary Card

J-13 Edward Fauerbach Supervisory Certificate

J-14 March 27 Evaluation Report

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J-15 April 4, 1990 letter from Scambio

Carmela R. Giannasio

J-16 Carmela Giannasio Salary Card

J-17 Carmela Giannasio Supervisory Certificate

J-18 March 23, 1990 Evaluation Report

J-19 April 4, 1990 letter from Scambio

Matthew Pastore

J-20 Matthew Pastore Salary Card

J-21 Matthew Pastore Supervisory Certificate

J-22 March 23, 1990 Evaluation Report

J-23 April 4, 1990 letter from Scambio

J-24 Board of Education Organization Prior to Takeover

J-25 Public Schools Interim Organizational Chart (Oct. 4, 1989 - April 4, 1990)

J-26 April 4, 1990 Reorganization

J-27 Senate Education Committee Statement dated December 7, 1987, to Assembly, No. 4644

J-28 Assembly Education Committee Statement dated December 4, 1986, to Assembly, No. 2927

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MARY ANN VAN DYKE, NORMA CHRISOMALIS, EDWARD FAUERBACH, CARMELA R. GIANNASIO AND MATTHEW PASTORE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were not filed within the timelines required by N.J.A.C. 1:1-18.4. The initial decision was mailed to the parties on August 30, 1991. N.J.A.C. 1:1-18.4 requires that exceptions be filed with the Commissioner within thirteen days of the mailing of the initial decision to the parties. Petitioners' exceptions were not filed with the Commissioner, however, until September 16, 1991 and are thus untimely.

Upon independent review of the record in this matter, the Commissioner agrees with and adopts the findings and conclusions of the Administrative Law Judge. Contrary to petitioners' arguments otherwise, the plain language of N.J.S.A. 18A:7A-44(c) compels dismissal of the petition; the wording of which bears repeating here

> Notwithstanding any other provision of law or contract, positions of central administrative and

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> supervisory staff, instructional and noninstructional *** shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. ***Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein. (emphasis added)

As clearly and plainly stated in the last sentence in the statute, no employee whose position is abolished under the provisions of N.J.S.A. 18A:7A-44(c) retains any right to tenure or seniority in the abolished position. As applied to the instant matter, petitioners retained no tenure or seniority rights to a supervisor position. Thus, the only "bumping" rights they could exert would relate to nonsupervisory positions to which their tenure or seniority entitled them.

The Administrative Law Judge's analysis is well-reasoned and his legal conclusions correct. The Commissioner, therefore, adopts the recommended decision to dismiss the petition for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

OCTOBER 9, 1991

DATE OF MAILING - OCTOBER 9, 1991

Pending State Board

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