4-97

A.H., on behalf of minor son, B.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged Board's residency determination that her son was not entitled to a free public education for the 1995-96 school year.

Administrative Law Judge found that petitioner had failed to prove that her son, B.H., was domiciled in the District. The ALJ concluded that B.H. was not living with, or supported by, a domiciliary of the District. Thus, the Board was entitled to tuition for B.H. in the amount of $6,755 for the 1995-96 school year.

Commissioner concurred with the ALJ's finding that petitioner failed to prove that B.H. was entitled to a free public education in respondent's District and directed petitioner to remit to the Board tuition owed for B.H.

January 9, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6604-96

AGENCY DKT. NO. 255-7/96

A.H., ON BEHALF OF MINOR SON B.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,

Respondent.

A.H., mother of **B.H.**, petitioner, *pro se*

Paul J. Carr, Esq., for respondent (Murray and Carr, attorneys)

Record Closed: October 15, 1996 Decided: November 20, 1996

BEFORE **KATHRYN A. CLARK**, ALJ:

A.H., on behalf of her son, B.H., has filed a petition claiming that B.H. is entitled to a free public education from the school district of Egg Harbor Township, pursuant to *N.J.S.A.* 18A:38-1. For the school year 1996-1997, A.H. has enrolled B.H. in Pleasantville High School, which is not within the Egg Harbor Township School District. In this action, Egg Harbor Township Board of Education is now seeking recovery of the tuition funds due to it, for B.H.'s attendance in school year 1994-1995 in Egg Harbor Township.

At the commencement of the hearing, A.H. said that she wanted to obtain counsel. She mentioned the name of an attorney, Jeffrey April, who she said she wanted to have represent her. It was later disclosed that Mr. April had represented her in her divorce. A.H. agreed that she had received the notices of this hearing, but said that she had not yet retained Mr. April to represent her. She asked for a postponement to arrange for counsel. Her request was denied, and the hearing proceeded.

The first witness to testify was Cynthia Hendrickson, Attendance Officer for Egg Harbor Township School District, who said that she and the school bus drivers witnessed B.H. being dropped off in the morning by A.H. in a small red car, license number FS852E, at the bus stop in front of 20 C. Drive, Egg Harbor Township. Ms. Hendrickson also said that she saw B.H. being picked up by A.H. in the same car at the bus stop in front of 20 C. Drive, Egg Harbor Township, in the afternoon. This car is registered to A.H, and the address on the registration for A.H. is 908 W. Avenue, Pleasantville. The house at 20 C. Drive, Egg Harbor Township, is the residence of M.H., A.H.'s separated husband and B.H.'s step-father. Ms. Hendrickson said that, on at least two occasions, she observed B.H. get off the school bus in front of 20 C. Drive, and that B.H. waited at the corner until 3:45 p.m. for his mother to pick him up. Ms. Hendrickson said that she never observed B.H. enter the house at 20 C. Drive.

Ms. Hendrickson said that when she followed the small red car after A.H. picked up B.H., the two would drive to 455 C. Avenue, Absecon. This Absecon address is in Pleasantville, and the house is owned by A.H.'s father. Ms. Hendrickson observed A.H. and B.H. leaving this house in the morning regularly to drive to 20 C. Drive in time for the school bus.

Ms. Hendrickson said that the house at 908 W. Avenue, Pleasantville (the address on the car registration) was rented to A.H.'s daughter. The small red car with license number FS852E was never observed at this address by Ms. Hendrickson.

Ms. Hendrickson said that these observances took place over a three and one-half month period, beginning in January, 1996, approximately every school day. Ms. Henrickson's report was admitted as R-6.

CONCLUSION

I **FIND** and **CONCLUDE** that B.H. is not domiciled in Egg Harbor Township. I further **FIND** and **CONCLUDE** that B.H. is not living with or supported by a domiciliary of Egg Harbor Township, as if B.H. were that domiciliary's own child. I **FIND** and **CONCLUDE** that respondent is entitled to prevail as a matter of law.

Respondent may now pursue an appropriate action before the Superior Court for the recovery of the tuition funds due to it, in the amount of $6,755.

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

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

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

DATE

KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

11/26/96

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 1996

DATE

Barbara A Kerner

OFFICE OF ADMINISTRATIVE LAW

ej

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Custody Agreement between A.H. and M.H.

For Respondent:

R-1 Registration card from Kindergarten

R-2 Birth Certificate

R-3 Health History

R-4 Accumulative Health Record

R-5 Continuing Pupil Record

R-6 Typed summary of Cynthia Hendrickson, attendance officer

R-7 Notice of legal action to evict

R-8 Release of records to Pleasantville High School

R-9 Letter, April 8, 1996, Dr. Heery to Mrs. H.

R-10 Letter, May 29, 1996, Dr. Heery to Mrs.H. (21 day notice)

R-11 Letter, September 13, 1996, Paul J. Carr, Esq. to Mrs. H.

R-12 Letter, September 20, 1996, Paul J. Carr, Esq. to Mrs. H.

R-13 Egg Harbor Township School's per pupil costs for 95/96 fiscal school year

R-14 Letter, September 18, 1996, Judge Clark to Mrs. H.

OAL DKT. NO. EDU 6604-96

A.H., on behalf of minor son, B.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner has failed to prove that B.H. is entitled to a free public education in respondent's District. Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, the Commissioner directs that petitioner remit to the Board tuition for B.H. in the amount of $6,755, for the 1995-96 school year.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Notwithstanding that the initial decision states on page 1 that the Board is seeking to recover tuition costs for school year 1994-95, both the Board's testimony and its exhibits indicate that it seeks recovery of costs for the 1995-96 school year. (Initial Decision at p. 3, and Exhibit R-13)

January 9, 1997
Date of Mailing, January 9, 1997

(SB) 5-97

SB #5-97

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE GLOUCESTER COUNTY : DECISION
CHARTER HIGH SCHOOL, GLOUCESTER :
COUNTY. :

Decided by the Commissioner of Education, January 14, 1997

For the Appellant, Albertson, Ward & McCaffrey (Eugene McCaffrey, Esq., Jr., of Counsel)

The Gloucester County Charter High School (hereinafter "appellant") filed an appeal to the State Board from a letter decision of the Commissioner of Education dated January 14, 1997 denying its application to establish a charter school in the 1997-98 academic year. In a statement of reasons dated February 14, 1997, the Commissioner indicated that the application contained inadequate or insufficient information in most program areas and had a weak financial plan, specifically, that no budget detail was provided, cash flow not calculated within Department of Education guidelines, and grants and donations made up 47% of the budget.

Appellant filed a brief in support of its appeal, along with a motion to supplement the record, pursuant to N.J.A.C. 6:2-1.9, with its mathematics and language arts curriculum and a proposed school calendar. A Deputy Attorney General representing the Commissioner filed an application to participate, along with a brief in response to the arguments supporting the appeal and in opposition to the motion to supplement.

3/26/97

In view of the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have determined to consider all of the documents that have been filed in this matter. In addition, we have reviewed the record provided to us on behalf of the Commissioner. After careful consideration of this matter under the terms of the pertinent statutes, we agree with the ultimate determination of the Commissioner to deny the charter in this case, but we modify his analysis.

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational improvement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the

admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff responsibilities and proposed qualifications, 9) a description of procedures to ensure parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing, 13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The Commissioner has the final authority to grant or reject a charter application, id, but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). In the absence of regulations, we find it necessary to consider the application under the terms of the pertinent statute.

The record reveals that the "Final Application" submitted by appellant on October 15, 1996 was assessed by two reviewers. Those reviewers identified the application as inadequate and/or failing to provide sufficient information in the following areas: goals and objectives, educational mission, governance structure, educational program, student assessment, student discipline, admission policy, meeting the needs of at-risk students, staff, parental involvement, transportation and insurance. The application was found to be "educationally weak."

A separate budget review found the overall quality of appellant's financial plan to be inadequate, finding the budget and anticipated revenues to be "bare bones" and indicating that the application lacked details and documentation.

A tally sheet dated November 8, 1996 summarized the "Final Application" as inadequate in its educational mission, goals and objectives, governance structure, educational program, student assessment, admission policy, discipline policy, at-risk students and parental involvement. The application was given an overall rating of inadequate, noting that all of the educational program elements, as well as the financial plan, were inadequate. A recommendation was made to reject the application.

Even taking into consideration the materials submitted by appellant as part of its motion to supplement the record, our own review of the record indicates that the application fails to satisfy the minimal statutory standards. While the application provides a description of and address for appellant's physical facility as required by N.J.S.A. 18A:36A-5, the application includes such programmatic and financial deficiencies as to preclude the grant of a charter to appellant at this time.

Consequently, we conclude that appellant has failed to demonstrate its entitlement to establish a charter school in 1997-98. We stress that our determination herein is limited to the 1997-98 school year and is without prejudice to appellant's ability to apply for a charter in any subsequent years.

March 26, 1997

Date of mailing MAR 3 1 1997

(SB) 6-97

DHPL #2-97
SB #6-97

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION

CATION FROM SCHOOL EMPLOYMENT : DECISION ON MOTION

OF C.W.R., JR. :

Decided by the Deputy Commissioner of Education, January 3, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Mary J. Hammer, Esq., of Counsel)

C.W.R., Jr. (hereinafter "petitioner") was disqualified by the Office of Criminal History Review of the Department of Education from continued employment as a teacher in the State's schools when a fingerprint search conducted pursuant to N.J.S.A. 18A:6-7.1 revealed a conviction for possession of marijuana following his arrest in October 1986. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated January 3, 1997, the Deputy Commissioner of Education upheld the disqualification,[1] finding that petitioner had failed to demonstrate clear and convincing evidence of his rehabilitation as required by N.J.S.A. 18A:6-7.1.

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[1] We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

4/2/97

Petitioner, now represented by counsel, filed the instant appeal to the State Board, along with a motion to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9 with additional letters of recommendation.

The State Board grants petitioner's motion and directs re-establishment of the briefing schedule, which had been placed in abeyance pending our determination of the instant motion. Petitioner's brief in support of his appeal is due within 20 days from the date of this decision.

April 2, 1997

Date of mailing APR 02 1997

6-97

EDU #1670-95
C # 9-97
SB # 10-97

CLARINDA BRUECK AND FREDERICK FOCHESATO,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 10, 1997

For the Petitioners-Respondents, Springstead & Maurice (Alfred F. Maurice, Esq., of Counsel)

For the Respondent-Appellant, Oury & Mizdol (Dennis J. Oury, Esq., of Counsel)

On January 10, 1997, the Commissioner of Education issued a decision in which he found that the Board of Education of the Borough of Fairview (hereinafter "Board") had violated the tenure and seniority rights of the petitioners, tenured teaching staff members, when it abolished their positions as the result of a reduction in force.

On February 10, 1997, the Board filed a notice of appeal with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), the Board's brief in support of its appeal was due on March 3, 1997, 20 days after the appeal was filed. The Board, however, failed to file a brief by that date. By letter dated March 10, 1997, the counsel for the State

5/7/97

Board notified the Board that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of its failure to perfect the appeal. The Board has still failed to file a brief in support of its appeal, more than two months after the deadline for such filing, or to offer any explanation for its failure to do so. Nor has it requested an extension of time for such filing.

Consequently, the State Board of Education dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

May 7, 1997

Date of mailing MAY 09 1997

(SB) 6-97

DHPL #2-97
SB #6-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF C.W.R., JR.

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, January 3, 1997

Decision on motion by the State Board of Education, April 2, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Mary J. Hammer, Esq., of Counsel)

C.W.R. (hereinafter "petitioner"), who was employed as a teacher by the Leonia School District, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted of possession of marijuana following an arrest in October 1986. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated January 3, 1997, the Deputy Commissioner of Education upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear and convincing evidence of his rehabilitation as required by N.J.S.A. 18A:6-7.1.

[1] We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

6/4/97

Petitioner filed the instant appeal to the State Board of Education, along with a motion to supplement the record with additional letters of recommendation. On April 2, 1997, we granted petitioner's motion.

After a thorough review of the record, including the additional documents submitted by petitioner, we reverse the decision of the Deputy Commissioner. We find that petitioner has demonstrated clear and convincing evidence of his rehabilitation.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

> e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
>
> 1. The nature and responsibility of the position which the convicted individual would hold;
> 2. The nature and seriousness of the offense;
> 3. The circumstances under which the offense occurred;
> 4. The date of the offense;
> 5. The age of the individual when the offense was committed;
> 6. Whether the offense was an isolated or repeated incident;
> 7. Any social conditions which may have contributed to the offense;
> 8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Petitioner's submissions include a number of letters of recommendation attesting to his character. Petitioner's supervisor at his position in Leonia praises him as "an

excellent teacher, caring about both the students and history. He, in fact, has taken on many out-of-classroom assignments, such as advisor to the Environmental Club and supervisor of our new after school Weight Room, that have greatly added to the quality of life at Leonia High School. Furthermore, I have always found [petitioner] to be totally professional and of high moral character and, again, would have no reservations about recommending him for a teaching position at Leonia High School." An observation report of petitioner's teaching abilities relates that he "has begun as a teacher of History at the high school in fine fashion. He is enthusiastic about his subject, and students respond to his enthusiasm with their own."

Petitioner's supervisor at a security company praises him as a "stable, hard working, dedicated, prudent, mature individual" who has "demonstrated an ability to perform his duties in a way that has brought credit to both him and our organization." The mayor of Hamilton Township, New Jersey commends petitioner as a "mature responsible adult."

Petitioner was 21 at the time of his arrest in 1986, and indicates that he had just completed two years of active duty in the Army. He subsequently graduated from Trenton State College in 1992 and earned a master's degree from the University of Connecticut in 1995. There have been no further arrests.

We find that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence in the record, we conclude that petitioner has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e). Accordingly, we reverse the

decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey as a teacher.

June 4, 1997

Date of mailing JUN 06 1997

7-97

7-97

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

SYNOPSIS

Petitioner, nontenured assistant principal, alleged the Board acted in an arbitrary and capricious manner in not renewing her employment for the 1995-96 school year. Petitioner contended there were violations of the Open Public Meetings Act and her First Amendment Rights.

ALJ concluded that petitioner was not entitled to reemployment or compensation for nonreemployment. The ALJ found that regardless of whether petitioner's political affiliation amounted to a protected affiliation, the Board still had a valid, and lawful, reason for nonreappointment -- unsatisfactory performance. Further, the ALJ found that petitioner was not entitled to reemployment or compensation due to the Board's failure to notify her of her discontinued employment within statutory constraints, in that petitioner's own inaction, pursuant to *N.J.S.A.* 18A:27-12, rendered the requirement inapplicable.

Commissioner adopted the initial decision as his own. Petition was dismissed.

January 10, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10172-95

AGENCY DKT. NO. #386-9/95

PHYLLIS YOUNG,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

James P. Granello, Esq., for respondent

Record Closed: October 16, 1996 Decided: November 22, 1996

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on September 22, 1995, when Phyllis Young (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order determining that the actions of the Board of Education of the Township of Willingboro (hereinafter respondent) in failing to continue her employment were arbitrary, capricious and unreasonable, were procedurally deficient, violated the Open Public Meetings Act and violated

her First Amendment rights to free speech and association. An answer on behalf of respondent was filed on October 17, 1995, and on October 23, 1995, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F- 1 to -13.

A prehearing conference was conducted on January 18, 1996, at which time it was determined that respondent would submit a motion for summary decision. Respondent's motion and supporting papers were received on February 1, 1996. A response in opposition to the motion on behalf of petitioner was filed on March 26, 1996. A letter brief in lieu of a more formal reply brief was filed on behalf of respondent on April 1, 1996. Petitioner responded by letter received April 4, 1996. Thereafter, oral argument took place by telephone conference call on June 6, 1996, and both parties filed additional submissions in response to questions raised during the oral argument. Petitioner sent letters dated August 17, 1996 and October 11, 1996. Respondent sent letters dated June 10, 1996, August 21, 1996 and October 15, 1996, the last of which was received on October 16, 1996, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner became employed by respondent in the position Director of Personnel, pursuant to an individualized employment contract which provided, inter alia, for a term of employment to run from October 17, 1992 to the thirtieth day of June 1995, at a salary of $65,000 per annum. The contract also provided that petitioner would be credited with 100 sick days as of her starting date, that she would receive written notice of any dissatisfaction with her performance with thirty days within which to address the problems noted and that the contract could be terminated without cause upon sixty days' written notice and the payment of one year's salary. As the Director of Personnel petitioner reported directly to the superintendent of schools. As a consequence, the superintendent of schools conducted periodic evaluations of petitioner's

performance. On or about November 12, 1993, the superintendent prepared a written evaluation of the petitioner in the position of Personnel Director, which covered the period August 1993 to November 12, 1993. The evaluation found petitioner's performance unsatisfactory in a number of areas; it began:

> During this evaluation period, I have observed Mrs. Young to be professional in her appearance and her demeanor, she works long hours, has a good sense of humor, and relates well to her co-workers.
>
> Mrs. Young admittedly, assumed her position as Director with limited experience and knowledge in the personnel area. This lack of experience and knowledge apparently has hindered her ability to revamp and organize her department. Mrs. Young has also been hampered continuously throughout her tenure in this position with inadequate clerical help.
>
> Mrs. Young's background coupled with her lack of adequate clerical assistance has gravely impacted on her performance and the total operation of her department. . . .

The evaluation, which was receipted by Ms. Young on November 24, 1993, concluded:

> In light of the difficulty Mrs. Young has been encountering, I offered Mrs. Young the opportunity to voluntarily transfer into another administrative position. Mrs. Young opted to remain in her current position as Director of Personnel with the full knowledge and understanding that failure to improve her performance and the Personnel Department would result in my recommendation to the Board that her position be terminated.
>
> Mrs. Young declined the option indicating that she would like to remain in her position as Director of Personnel in an effort to prove to me and to the Board of Education that she can do her job.

Another evaluation prepared on March 29, 1994 by the superintendent indicated slight improvement in petitioner's performance; however, a third evaluation prepared on April 21, 1994,

rated petitioner's performance unsatisfactory or below expected levels. That evaluation, which was receipted by petitioner on June 28, 1994, concluded:

> Given the time, to date, expended by Mrs. Young and the level of improvement still needed, Mrs. Young agreed that her skills would be better utilized as an Assistant Principal, effective September 1, 1994.

Accordingly, effective September 1, 1994, petitioner assumed the position Assistant Principal at the Memorial Junior High School. She functioned successfully in this position until the conclusion of the 1994-95 school year. The evaluations petitioner received from her supervisor, Mr. Bolden, the junior high school principal, were positive, and he recommended reemployment for petitioner for the following school year.

On or about June 14, 1995, petitioner received a notice from respondent that her reappointment might be discussed by the Board of Education at its conference meeting on June 20, 1995 and/or its public meeting of June 26, 1995. (Petitioner acknowledges that she received a notice concerning the June 26, 1995 meeting; since both the conference meeting of June 20, 1995 and the regular meeting were referenced in the same notice, she must have received notice of the conference meeting, as well.) The minutes of the conference meeting on June 20, 1995, reveal the following discussion concerning petitioner:

> Mr. Rodriguez: I asked for the last name (on page 11a Conference Agenda 6/20/95 to be separated. This individual was hired as Personnel Director. I felt this individual was initially hired as a political appointment of past Board members. I do not believe she should be reappointed.
>
> Mrs. Reynolds: Mrs. Carter.
>
> Mrs. Carter: I would like to hear from Dr. Foster.
>
> Mr. Rodriguez: What I'm saying is she should never have been hired as Personnel Director in the first place. I am also saying that when we released her from the Personnel Department, we should have released her from the district.

Mrs. Carter: There have been reports coming back that she was doing a good job.

Dr. Foster: To my knowledge for her name to appear here she would have to have had a favorable evaluation from Mr. Bolden.

Mr. Jamerson: I can only tell you that we did not receive any correspondence saying we should not renew her contract.

Dr. Foster: Also I asked Mr. Jamerson to check with every principal to see if they had any non renewals.

Mrs. Payne: I checked with her principal and he said he requests that she be rehired.

Mr. Rodriguez: These are my feelings for not reappointing her.

Mrs. Carter: My questions to you is, why would you want to effect a person's livelihood because you think that. . . .

Mr. Rodriguez: That individual affected someone else's livelihood.

Mr. John: This is the reason why I questioned earlier, can we look at employees' files, for whatever reason? I understand that for whatever reason, someone can be suited or not suited for the job. I hate to do things because of personal feelings to an individual. If we are in charge of appointing people to positions, we should have some knowledge of the person's files. . . . background.

Dr. Foster: I will check with Mr. Martinez as to what we can share and if he says we can make this information available then we will.

Mr. John: It's not. . . . It's just that I would like to know why I am saying "yes" to something.

Dr. Foster: The criteria for appointing her is, the supervisor has signed off saying, "I agree that this person should be reappointed."

Mr. John: I would feel more comfortable if I had some reason. . . .

Dr. Foster: What this list is supposed to represent is that their supervisor is saying they have performed satisfactorily. That is the process.

Mr. John: I would like to say, if I look at a person's record and it shows insubordination, then I can say that.

Mr. Davis: My concern on this is the initial appointment was certainly political. I think we have reached the decision that this person did not work out in the Personnel Office and we said where will we stick this person? Maybe, we said, she is satisfactory on that job--I kind of like Tony's idea to review the files.

Mrs. Carter: To piggy back on what Mr. John said, I have seen instances--take the Athletic person--we approved him for tenure. We voted to give him tenure and he was never evaluated.

Mrs. Reynolds: Anyone else?

Mrs. Wright: For the reappointment, shouldn't the people who are not tenured - shouldn't they be on a separate list?

Mrs. Reynolds: I support everything that Mr. Rodriguez said. I am the only person who did not vote for her--and she screwed up the Personnel office. She did not know what the negotiations were--did not know what the Sunshine Law was. Even after we were told this could harm the Board, they still voted for her. You wonder why we have problems at Memorial. How could you to that to this district--how could you do that to the kids! I voted and I am proud of it; I voted "no." I am not going to vote for this person, and you are not going to send her to the high school because Dr. Foster said she will go to the high school with the 9th graders.

Mrs. Smith: It is important that we be innovative and creative if we are going to make a difference. Our hiring policy, etc. We addressed this through Personnel and it was brought to our attention that that was not advisable because you get into personality. Everyone in this district had rosy evaluations! When you come up to these positions and when they get tenure, it is hard to get rid of them. Not that we don't trust administration, but in certain positions I think the Board has to look at the hiring practices a little.

Mrs. Carter: I've been saying that all along. . . .

Mr. John: I will bring as an example the statement made about Mrs. Young, the same statement is being made about another person who got a contract. The person is still here. There were

two people who were hired at that time. Maybe the second person is working all right now--maybe. . . .

Mr. Rodriguez: It's like apples and oranges.

Mr. John: It is the same idea.

Mr. Rodriguez: I. . .

Mrs. Carter: If you are talking that the contracts were illegal. . . .

Mr. Holley: Often time I think the Board members suffer from selective amnesia. Allowing them to get us into some very serious problems. When I was first on the Board there was a gentlemen who was running our Payroll Department. . . .

Mrs. Reynolds: Mr. Holley, stick to the issue. That person is not....

Mr. Holley: I think certain Board members have gone out on a witch hunt. I believe that we should follow the recommendation of the administration since we are always talking about doing what administration recommends. How is it that when you want to vote on something then you use that, and when you don't want to vote on something then you don't -- I don't understand that.

Mrs. Reynolds read the resolution to extend time for adjournment past 12:00 midnight. 7 voting: 7 voting in the affirmative.

At 12:56 a.m. (6/21/95) Mr. Holley moved to adjourn; seconded by Mrs. Wright. 8 voting: 8 voting in the affirmative.

The meeting adjourned at 12:56 a.m. 6/21/95.

On June 26, 1995 at the regular public meeting of the Board of Education, the motion to appoint the petitioner failed for the lack of a majority vote. Board members voting in favor of the motion to reappoint were Mr. Holley, Mrs. Carter, Ms. Collins and Mrs. Smith. Board members who abstained from the motion were Mrs. Reynolds, Mr. Davis, Mrs. Wright, Mr. John and Mr. Rodriguez.

On or about July 11, 1995, petitioner requested a written statement of reasons why she was not reappointed and on August 1, 1995, the board of education members who abstained from voting on her reappointment issued their statement during the public portion of the meeting which was at the petitioner's request. The reasons were confirmed in writing by letter dated August 2, 1995 to petitioner's attorney from respondent's counsel as follows:

> 1. Dr. Young would have received tenure within the district had she been reappointed. Tenure must be considered as giving someone permanent employment. A reappointment vote which will result in an administrator receiving tenure demands the highest level of scrutiny of the individual employee's entire employment history by any responsible board member. They would not grant tenure to anyone that they had concerns about.
>
> 2. Dr. Young was hired into the district under a multi-year contract to perform as the Director of Personnel. Dr. Young failed to complete the term of her contract in this position. Dr. Young did not manage this position adequately, resulting in inefficiencies and unnecessary liability to the district. Director of Personnel, the position that Dr. Young was hired to perform and spent most of her time in, is the most appropriate area to review her performance in regards to reappointment for purposes of tenure.

Although petitioner requested an informal appearance before the Board of Education (a "Donaldson hearing") she withdrew her request and instead submitted a written statement of position which provided as follows:

> As a follow-up to the letter sent to James Granello, Esq. by my Attorney on August 30th indicating that I no longer wish to have an informal appearance before the Willingboro Board of Education, I wish to submit the following explanation.
>
> The reason stated by the Board for non-reappointment was that I failed to complete a multi-year contract to perform as the Director of Personnel. Please be advised that I voluntarily transferred from Personnel to the position of Assistant Principal as of September 1, 1994. My evaluations in the position of Assistant Principal are

> more than satisfactory and resulted in my being recommended for re-employment by the Administration. Certainly, my immediate Supervisor at Memorial will attest to my performance in that position.
>
> Further, I wish to note that I have no desire to return to the position of Personnel Administrator and would have waived my rights to that position if that option had been presented.
>
> I regret any inconvenience that my decision may have caused.

A grievance filed by the Willingboro Educational Administrators' Association on or about July 31, 1995, on petitioner's behalf seeking her reemployment as an Assistant Principal was denied by Superintendent Foster by letter dated August 8, 1995, as follows:

> Please be advised that the above subject grievance is being denied on the basis that it was not submitted in a timely manner pursuant to Article X, Grievance Procedure, Subparagraph C.1.
>
> Additionally, Dr. Young failed to comply with the statutory requirement set forth in N.J.S.A. 18:27-12 of her acceptance of employment which was to be given, in writing, on or before June 1, 1995. In the absence of such notice, the state laws regarding re-employment no longer apply to this matter.
>
> Finally, the decision not to award tenure is a non-negotiable, non-arbitrable matter.

Although the Association president indicated that the grievance would nevertheless move to the next level as provided in the negotiated agreement, apparently no further action was ever taken with respect to appealing the superintendent's determination. Article X, section A.5 of the negotiated agreement provides, "The failure to appeal any decision upon the grievance, in accordance with these rules, to the next level, shall constitute acceptance of the answer not appealed." The within matter followed after petitioner filed the petition of appeal on September 22, 1995.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Insurance Company of America, and KRA Insurance Agency, Inc., 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exits a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

As noted hereinabove, the facts set forth in the findings of facts section of this opinion are not in dispute. In opposition to the motion for summary decision, petitioner submitted the affidavits of Frank Phillips, Edison Holley and Linda Taylor, wherein each explains that he or she had been affiliated with a number of other members of the Board of Education who became known as the "pro-education group." According to the affidavits this group included Linda Taylor, Victor Smith, Edison Holley and Dr. Pat LaRocca. During the period 1992-95, the affidavits continued to explain, the other members of the Board were affiliated with the "anti-tax group." According to the affidavits, after the school board election in April 1995, the anti-tax group held the majority of seats on the Board of Education. Each affidavit notes the positive performance evaluations petitioner received as the Assistant Principal and each concludes that the reason petitioner was not reappointed was her perceived affiliation with the "pro-education group" who had appointed her.* Since there are no additional facts in any of these affidavits which contradict or dispute the facts set forth as uncontested facts hereinabove, and since the opinions expressed in the affidavits, i.e., that the reason, or the only reason petitioner was not reappointed was her affiliation with the "pro-education group" are not facts but rather are conclusions which may or may not be supported by the facts, I **CONCLUDE** that this matter is ripe for summary decision.

In Donaldson v. Board of Ed. of No. Wildwood, 65 N.J. 236 (1974), when the Supreme Court determined that a local board of education should be required to provide a statement of reasons for non-renewal of non-tenured staff members, it did so with the explicit recognition of the local board's broad discretionary authority in the granting of tenure. Subsequent to Donaldson, the court in Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982), emphasized the broad nature of the board's discretion: "Implicit in this language (Donaldson's) is the recognition by the court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to

* The circumstances of petitioner's initial appointment are discussed in Davis v. Bd. of Ed. of Willingboro, et al., 95 NJAR 2d (EDU) 352. Any unresolved factual disputes concerning her initial employment are not material to the issues presented herein.

terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." N.J.A.C. 6:3-4.2 provides a procedure for non-tenured teaching staff members to appear before a district board of education upon receiving notice of non-reemployment. Once that procedure is completed, there is no right to a hearing before the Commissioner of Education under the school laws, unless of course a petitioner provides adequately-detailed allegations of proscribed conduct, i.e., unlawful discrimination, deprivation of constitutional rights, etc. See Nasuti v. Bd. of Ed. of West Amwell, 1979 S.L.D. 11, 18. Petitioner contends that respondent's only reason for failing to reappoint her for the 1995-96 school year was her perceived political affiliation with the "pro-education group." Non-reappointment on that basis alone constitutes a violation of her First Amendment rights to free speech and association, she says.

The Supreme Court has held that the dismissal of certain public employees solely because of their partisan political affiliation infringes their First Amendment rights of belief and association. Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). Party affiliation can be considered, however, if the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. Branti at 518. These principles are equally applicable to the failure to reappoint an employee at the end of the term as they are to dismissal from an at-will term of employment. Zold v. Township of Mantua, 935 F.2d, 633, 635-36 (3d Cir. 1991). In Robertson v. Fiore, 62 F.3d, 596, 597 (3d Cir. 1995), the court held that "the constitutional limitations on political patronage, [recognized in Elrod and Branti], extend to intraparty political disputes as well as interparty political disputes." The court wrote:

> The danger that employees will abandon the expression or exercise of their political beliefs to appease their supervisors is not diminished because a supervisor supports a different identifiable faction within a party as compared to a different party altogether. Whenever an employee, whose position does not require political decision making, yields his political will to his superior, the political process is harmed whether the employee is of the same or a different party.
>
> Because of the dominance of one political party in some locations, intraparty battles will sometimes overshadow interparty battles.

[Robertson v. Fiore, supra, 62 F.3d at 600 (citation omitted).]

New Jersey courts have reached the same conclusion concerning the protection of intraparty political affiliation. See Battaglia v. Union County Welfare Board, 88 N.J. 48 (1981), cert. denied 456 U.S. 965, 102 S.Ct. 2045, 72 L.Ed.2d 490 (1982) (Plaintiff, a non-tenured attorney for the county welfare board, claimed that the failure to reappoint him stemmed from his opposition to the candidacy of the new Democratic County Chairman. The court considered Battaglia's political affiliation argument, which arose from an intra-party dispute, but found that Battaglia's position was one for which political affiliation could appropriately be considered.); Hudson County Board of Chosen Freeholders v. Clark, 203 N.J. Super. 102, 105 (App. Div. 1985), certif. denied 102 N.J. 340 (1985) (affirming the trial court's findings that political affiliation was relevant to the position of county administrator in a case in which a schism had developed between the Democratic county board and the Democratic county executive); Weisel v. Hooks, 277 N.J. Super. 78 (Chan. Div. 1994) (Plaintiff, a Democrat, served as a confidential secretary to the Secretary of State in the Florio administration and was replaced by another Democrat a few months after Governor Whitman took office. Plaintiff argued, among other points, that the fact that she was replaced by a Democrat indicated that party affiliation was not a necessary requirement for the position of confidential secretary. The court indicated that political affiliation could be interpreted more broadly than mere party affiliation. "[E]specially in the context of confidential relationships, any reference to political party or political loyalty need not be read as synonymous with partisan political motivations. The reasoning of the Supreme Court in Branti has been understood to apply to political differences of any kind including personal incompatibility, not merely differences in party membership." Id. at 86). See also Catterson v. Caso, 472 F.Supp. 833 (E.D.N.Y. 1979) (Court used political analysis to assess the termination of a Republican county attorney who refused to support the candidacy of the Republican county executive).

Petitioner points to the minutes of the June 20, 1995 executive session in support of her contention that respondent failed to reappoint her because of her perceived affiliation with the

"pro-education group." Even a casual reading of those minutes reveals that Board members Rodriguez and Reynolds were concerned about the circumstances surrounding petitioner's appointment. Whether petitioner was in fact awarded such a generous contract without interviewing with the Personnel Committee because of her association with the "pro-education group" or not, the circumstances might reasonably lead the other Board members to conclude so. Even assuming for purposes of determining this motion that petitioner's perceived association with the "pro-education group" was a reason Mr. Rodriguez and Mrs. Reynolds chose to abstain on the resolution to reappoint her for employment, there is absolutely no evidence from which to conclude that petitioner's perceived political affiliation was a reason for the votes of the other three Board members who chose to abstain or that it was the only reason or the overriding reason. Mrs. Reynolds' comments at the June 20, 1995 conference meeting also clearly reflect dissatisfaction with petitioner's performance as the Director of Personnel, the position she held for most of the time she was employed by the Board.

Even assuming that petitioner's perceived "pro-education group" affiliation amounted to a protected political affiliation and even assuming that such affiliation was a factor in respondent's determination not to renew her employment, where as here, it is clear that the employer would have made the same decision even in the absence of the protected affiliation, a claimant cannot prevail. Robertson v. Fiore, supra, 62 F.3d at 599. Contrary to petitioner's assertions that there were no reasons for failing to reappoint her as Assistant Principal, the statutory scheme governing tenure entitlements makes it clear that respondent's concerns with petitioner's performance in the title Director of Personnel constituted good and valid reason for her non-reappointment.

Pursuant to N.J.S.A. 18A:28-6, if respondent had reappointed petitioner to her position Assistant Principal for the 1995-96 school year, petitioner would have obtained tenure in the district and tenure as Director of Personnel. That statute provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board of such purpose; or

(b) employment for two academic years in the new position together with employment in the position at the beginning of the next succeeding academic year; or

(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion. (Emphasis added.)

Accordingly, if at some time after October 17, 1995, petitioner's position Assistant Principal were to be affected by a reduction in force, petitioner would be entitled to resume her position Director of Personnel to which she would then have a claim pursuant to her tenure and seniority rights. Since tenure is a statutory right and not a contractual one, petitioner could not bargain away those rights or waive them. The only way for respondent to avoid having petitioner obtain tenure as the Director of Personnel and nevertheless continue her employment in the district as an Assistant Principal for the 1995-96 school year would have been for petitioner to resign from her position Assistant Principal thereby terminating all calculations for tenure accrual and then to appoint her to the position as a new appointee. This, of course, did not happen, and

accordingly respondent had no choice, if it wished to avoid granting tenure to petitioner in the position Director of Personnel, but to decline to reappoint her for the 1995-96 school year.*

Petitioner's other claims are likewise without merit. She argues that those members of the Board who voted against her by abstaining on June 26, 1995, must have violated the Open Public Meetings Act, N.J.S.A. 10:4-12(a), by discussing her non-reappointment at a meeting which was not open to the public. Petitioner makes this conclusion because no discussion concerning the non-reappointment occurred on June 26, 1995, prior to the vote. Petitioner offers no facts to support this conclusion; her assumption that they must have talked to one another about abstaining prior to June 26, 1995, is just that, an assumption. Supposition and conjecture are not substitutes for legal proof. Ciuba v. Irvington Varnish and Insulator Company, 27 N.J. 127, 139-140 (1958). No reasonably prudent fact finder could conclude from the mere fact that five board members decided to abstain that they had conducted an illegal board meeting contrary to the dictates of the Open Public Meetings Act. In fact, we know that petitioner's employment was discussed prior to June 26, 1995, but not in violation of the Open Public Meetings Act. The minutes of the conference meeting which was conducted in accordance with the dictates of the Open Public Meetings Act are quoted in part hereinabove. Furthermore, although it is true that the Commissioner of Education has ancillary jurisdiction to consider Open Public Meetings Act violation questions, (Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979), N.J.S.A. 10:4-15 requires a petitioner, even in the education context, to seek relief prior to the expiration of the 45-day period of limitations set forth in that statute. McWilliams v. BOE Bridgewater-Raritan, 1980 S.L.D 1439, aff'd. St. Bd. 1981 S.L.D 1466. Petitioner filed the within action on September 22, 1995, 88 days after the June 26, 1995 meeting. Accordingly, the Commissioner may not entertain petitioner's claims of violations of the Open Public Meetings Act.

---

* Respondent argued, and petitioner did not dispute, that Director of Personnel was the kind of confidential position contemplated in Battaglia v. Union County Welfare Board, supra, for which consideration of political affiliation was not inappropriate or unlawful. Neither party asserted that this would be true with respect to the Assistant Principal position. Because petitioner would obtain tenure as the Director of Personnel upon reappointment (and subsequent service) as the Assistant Principal, even if her perceived political affiliation had been the reason for non-reappointment, pursuant to Battaglia it would not have been an unlawful reason.

Although it is also true as petitioner asserts in the petition of appeal that respondent violated its obligations under N.J.S.A. 18A:27-10, by failing to advise her on or before May 15, whether or not she would be offered a contract for the following school year, because petitioner herself failed to comply with the requirements of N.J.S.A. 18A:27-12, by notifying respondent in writing on or before June 1, 1995, that she accepted the offer of employment statutorily provided by respondent's failure to act in a timely fashion, respondent's lack of diligence provides petitioner with no right to reemployment.

The only other argument remaining to be addressed is respondents's argument that petitioner is contractually estopped from challenging her non-reappointment. Respondent's argument in this regard is based upon the provisions of the negotiated agreement which indicate that petitioner's failure to appeal the superintendent's decision to the next level, i.e., arbitration, constitutes acceptance of the decision not appealed. Considering the fact that the superintendent's August 8, 1995 denial of the grievance specifically advised that the decision not to award tenure is a non-negotiable, non-arbitrable matter, it appears that pursuing the grievance appeal to arbitration would have been a fruitless effort, and therefore petitioner should not have been required to pursue that matter before appealing to the Commissioner of Education.

For all of the foregoing reasons, respondent's motion for summary decision dismissing the within petition of appeal is hereby **GRANTED** and the within proceedings are hereby **CONCLUDED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

NOV 22, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

Nov. 27 1996
DATE

D. N. Gantamaitis/lr
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 03 1996
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

cc

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

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions incorporate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that petitioner is entitled to remain employed within respondent's District, as the Board may not remove her from employment based on political patronage in that "***[p]arty affiliation has nothing to do with, or should have nothing to do with, how one's job performance is evaluated in either the position of Assistant Principal or Director of Personnel.***" (Petitioner's Exceptions at pp. 6-7) Petitioner argues that this must be so as tenure attaches to a director title just as it does to an assistant principal position. (*Id.*) Further, petitioner excepts to the ALJ's awarding of summary judgment, averring that there remain issues of material fact to be determined and that the ALJ wrongly concluded that summary judgment was appropriate. (*Id.* at p. 7) Lastly, petitioner contends she was entitled to be notified no later than May 15, 1995, that her employment contract would not be renewed for the 1995-96 school term, pursuant to *N.J.S.A.* 18A:27-10. To elaborate this point she submits, "***[h]istorically, *N.J.S.A.* 18A:27-10 has been interpreted to provide teaching staff members with either 60 days notice, or in the absence of such notice, commensurate compensation." (Petitioner's Exceptions at p. 9) In that petitioner was not told until June 26, 1995, that her

contract would not be renewed, she seeks, if she is not entitled to reemployment, compensation equal to the 60-day notice to which she was entitled under statute and under the specific terms of her employment contract. (*Id.* at pp. 9-10)

In reply, the Board notes that the ALJ "discounted the affidavits submitted by the petitioner in opposition to the Board's motion for summary judgment because they contained 'conclusions which may or may not be supported by the facts'***." (Reply Exceptions at p. 1) Respondent further avers that the Commissioner should deny petitioner's claim to reject the motion in that, "***petitioner had ample opportunity to present *material* facts in dispute which required resolution by plenary hearing but failed to do so." (emphasis in text) (*Id.*) In sum, respondent contends the points raised by petitioner were thoroughly addressed by the ALJ and that the Commissioner should adopt the determination of the ALJ dismissing the present Petition of Appeal. (*Id.* at p. 2)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is not entitled to reemployment or compensation for the reasons expressed therein. The Commissioner is satisfied that the ALJ fully considered and rejected the claims presented in petitioner's exceptions, including petitioner's assertions that summary judgment was inappropriate and that her termination based on political affiliation was wrongful in that such affiliation is constitutionally protected. (Initial Decision at pp. 10-14) The Commissioner adopts the ALJ's analysis of these claims against the applicable case law, as well as her finding that regardless of whether petitioner's affiliation amounted to a protected affiliation, respondent still had a valid, and lawful, reason for petitioner's nonreappointment. (*Id.* at p. 14) Further, the Commissioner concurs that petitioner is not entitled to reemployment or compensation due to the Board's failure to notify her of her discontinued employment within statutory constraints, in that petitioner's own inaction, pursuant to *N.J.S.A* 18A:27-12, renders this requirement inapplicable.

Accordingly, the Commissioner affirms the decision of the ALJ and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 1997
Date of Mailing, January 10, 1997

7-97

EDU #10172-95
C # 7-97
SB # 13-97

PHYLLIS YOUNG,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 10, 1997

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, James P. Granello, Esq.

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

June 4, 1997

Date of mailing JUN 06 1997

(SB) 7-97

SB #7-97

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION :
OF THE CHARTER SCHOOL FOR THE : STATE BOARD OF EDUCATION
HUMANITIES AND TECHNOLOGY AT : DECISION
JARRETS RUN, ATLANTIC COUNTY. :

Decided by the Commissioner of Education, January 14, 1997

For the Appellant, Sarah Rennick, pro se

The Charter School for Technology and the Humanities at Jarrets Run (hereinafter "appellant" or "Jarrets Run") filed an appeal to the State Board from a letter decision of the Commissioner of Education dated January 14, 1997 denying its application to establish a charter school in the 1997-98 academic year. In a statement of reasons dated February 14, 1997, the Commissioner indicated that appellant was not eligible for a charter since it was an existing private school applying for charter school status.

Appellant filed a brief in support of its appeal, and a Deputy Attorney General representing the Commissioner filed an application to participate and a brief in response to the arguments supporting the appeal.

In view of the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have determined

to consider all of the documents that have been filed in this matter. In addition, we have reviewed the record provided to us on behalf of the Commissioner. After careful consideration of this matter under the terms of the pertinent statutes, we agree with the decision of the Commissioner to deny the charter in this case.

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational improvement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff responsibilities and proposed qualifications, 9) a description of procedures to ensure

parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing, 13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The Commissioner has the final authority to grant or reject a charter application, id, but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). In the absence of regulations, we find it necessary to consider the application under the terms of the pertinent statute.

N.J.S.A. 18A:36A-4(a) provides that "[a] private or parochial school shall not be eligible for charter school status." In this instance, the Commissioner determined that appellant was an existing private school applying for charter school status. In that we find that appellant has failed to establish that it is an entity which is entirely separate and distinct from the existing private school, we agree with the Commissioner that appellant is not eligible for a charter in 1997-98.

March 26, 1997

Date of mailing MAR 3 1 1997

8-97

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW J. RUSSO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
RED BANK REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, MONMOUTH COUNTY.	:	
	:	

January 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12505-95
AGENCY DKT. NO. 439-11/95

IN THE MATTER OF THE TENURE HEARING OF ANDREW J. RUSSO, BOARD OF EDUCATION OF THE RED BANK REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.

James P. Granello, Esq., for petitioner

Thomas W. Cavanagh, Jr., Esq., for respondent (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: November 18, 1996 Decided: December 4, 1996

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

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on December 7, 1995, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

After notice, an in-person settlement conference was held. It was then agreed that an evaluation by a health care professional was essential to resolution of the matter. The matter was held until the evaluation was done.

Since receiving the evaluation, counsel have worked diligently and have produced the attached resolution and memorandum.

I have reviewed the record and the papers submitted and I **FIND**:

1. The parties have voluntarily agreed to the settlement as indicated by their signatures or their representatives' signatures.

2. The agreement is comprehensive, carefully drawn and impinges on no powers of the district board of education, the Commissioner of Education or the State Board of Examiners.

3. The agreement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

4 DECEMBER 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

RESOLUTION AND MEMORANDUM OF UNDERSTANDING

WHEREAS, Andrew J. Russo is a tenured physical education teacher employed with the Red Bank Regional school district for the past twenty-four (24) years. During that time, Mr. Russo was never suspended or disciplined in any formal fashion. He served as a varsity football coach for eleven (11) years and in two (2) of those years he acted as head coach. During the time he was an assistant coach, the team won a Group Two Divisional State Championship. He also coached boys' basketball as an assistant varsity coach for seven (7) years, during which time the team won several shore conference divisional titles, and for five (5) years he was the head coach for Freshmen and Junior Varsity Boys Baseball. He served as assistant varsity basketball coach for the girls' team for five (5) years, during which time the team won two (2) shore conference divisional titles, and as the head coach for the varsity girls' softball team for fourteen (14) years, during which time the team participated in State playoffs on eleven (11) occasions. He was instrumental in starting the Lady Buc Girls' Softball Tournament in 1987 and served as the director of same through 1995; and

WHEREAS, on September 22, 1995 tenure charges of unbecoming conduct and of sexual harassment were filed against him by Dr. Robert M. Nogueira, High School Principal for the Red Bank Regional school district; and

WHEREAS, on November 8, 1995, the Red Bank Regional High School Board of Education certified those charges to the State Commissioner of Education and suspended Mr. Russo without pay pursuant to N.J.S.A. 18A:6-14 and did not receive his payroll check beginning on November 16, 1995; and

WHEREAS, while this matter was pending hearing before the Office of Administrative Law, Mr. Russo voluntarily requested a psychological evaluation from Dr. Jeffrey B. Allen, a licensed psychologist of the State of New Jersey, to determine whether any psychological factors or conditions might be present that could have contributed to Mr. Russo's behavior in the incidents that led to the tenure charges filed against him; and

WHEREAS, after conducting evaluation studies on Mr. Russo on July 8 and 22, 1996, Dr. Allen issued a written psychological evaluation dated September 5, 1996 in which he found that Mr. Russo fit the diagnostic criteria for "Frotteurism," a sexual paraphilia as described in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, (4th Edition), or DSM-IV. Dr. Allen recommended counselling treatment for Mr. Russo for at least a six (6) month period and that he not return to classroom teaching or coaching involving female students until treatment has been administered and successfully concluded. A true copy of Dr. Allen's report is attached hereto; and

WHEREAS, Mr. Russo has requested a medical leave of absence retroactive to the date when his suspension without pay began (November 8, 1995) up to and including April 30, 1997 for the purpose of obtaining counselling by Dr. Howard D. Silverman pursuant to Dr. Allen's recommendation and the use of his accumulated sick leave days applied retroactively from November 8, 1995 forward as will allow him either partial (one-half day) or full pay by using his two hundred and thirty one (231) accrued sick days until April 30, 1997; and

WHEREAS, Mr. Russo intends to submit a written letter of retirement after the approval of this settlement by the Commissioner of Education to be acted upon by the Board of Education immediately thereafter and effective May 1, 1997; and

WHEREAS, Mr. Russo agrees to allow the Commissioner of Education to determine whether to refer this matter further to the State Board of Examiners for action as it deems appropriate with respect to his teaching certificate. Mr. Russo has no present intention to return to employment in the public or private school sector in the future, and the final decision in that regard will depend upon the actions of the Commissioner and the State Board of Examiners.

NOW, THEREFORE, BE IT RESOLVED that the Red Bank Regional High School Board of Education, being mindful of its obligations under the Americans with Disabilities Act of 1990

(42 U.S.C. sec. 12101 et seq.), hereby grants a rescission of the suspension without pay entered on November 8, 1995, and further grants a medical leave of absence to Andrew J. Russo retroactive from November 8, 1995 to April 30, 1997 for the purpose of obtaining counselling through Dr. Howard D. Silverman; and further be it

RESOLVED, the Board hereby grants to Mr. Russo the right to use his accrued sick leave days retroactive to November 8, 1995, the date of his separation from active employment and prospectively until April 30, 1997, the last day of active employment before he retires on May 1, 1997. The Red Bank Regional High School Board of Education resolves to pay Pension and Contributory Insurance premiums for Mr. Andrew Russo for the period November 16, 1995 - February 29, 1996 at the rate of 4% which was his full pension rate and 4/10 of 1% which is his contributory insurance rate based on a monthly salary of $5,874. The Board furtner agrees to continue to compensate Mr. Russo at the full rate of pay he is entitled to receive through April 30, 1997, as well as other contractual emoluments, which payment is in accordance with the depletion of the balance of his accrued sick days; and it is

Understood, that this grant of leave is with the understanding that Mr. Russo intends to submit to counselling through Dr. Howard D. Silverman during this period of time as

prescribed by Dr. Allen and that he has no present intention to return to employment in public or private school education in the future; and further it is

Understood and agreed by Mr. Russo that he holds the district harmless from any and all claims and conditions which may arise by reason of his State TPAF pension benefits and rights and that this school district has made no representations or promises to Mr. Russo as to what amount his pension may be or when he may be entitled to it, it being acknowledged that Mr. Russo has had the assistance of his own legal counsel and the NJEA representative in that regard; and it is further

Understood that the rate of pay to be used in this agreement is based on the annual salary of $58,748 and that Mr. Russo will not contest the absence of an increment in the 1996-97 salary computation; and it is further

Understood that the terms of this settlement are subject to review by The Honorable Bruce Campbell, A.L.J. and the approval of the State Commissioner of Education and that none of these terms will become operative until such formal approval is obtained. This matter has been placed on the inactive trial list for six (6) months until March 19, 1997 for the purpose of effectuating a settlement between the parties and the formal dismissal of the tenure charges against Mr. Russo pursuant to N.J.A.C. 1:1-19.1.

These terms represent the complete understanding of the parties with regard to this settlement. There are no other

terms or conditions, express or implied, which constitute part of this settlement.

APPROVED AND ADOPTED BY THE RED BANK REGIONAL BOARD OF EDUCATION ON THIS 21st DAY OF November, 1996.

Kenneth Townsend

Board Secretary, Red Bank Regional High School Board of Education

APPROVED

By: Andrew J. Russo
ANDREW J. RUSSO

Marjorie M. Cunningham

Witness

Dated: 11/18/96

OAL DKT. NO. EDU 12505-95

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW J. RUSSO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
RED BANK REGIONAL HIGH SCHOOL	:	DECISION
DISTRICT, MONMOUTH COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, 1990 *S.L.D.* 842, 846. This matter is hereby dismissed, subject to compliance with the terms of the settlement. However, in view of the seriousness of the charges brought by the Board in this matter, the Commissioner determines to forward this matter to the State Board of Examiners for action as deemed appropriate, pursuant to *N.J.A.C.* 6:11-3.6.

COMMISSIONER OF EDUCATION

January 10, 1997

Date of Mailing, January 10, 1997

9-97

CLARINDA BRUECK AND FREDERICK FOCHESATO,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, tenured teaching staff members, asserted that the Board violated their tenure and seniority rights by terminating them pursuant to RIFs and delegating responsibility for the instruction of health, physical education and music to other teachers having less seniority and/or without tenure.

ALJ concluded that petitioners should not have been subject to the RIFs in question as they had greater entitlement to at least some positions existing at the time of the Board's actions subjecting them to RIFs. A nontenured teacher cannot have seniority over a tenured individual and a teacher having only elementary category experience cannot be assigned a secondary position over another teacher with secondary category seniority. *Bednar*; *Unterberger.* ALJ ordered petitioners reinstated with mitigated compensation. Requests for interest were denied as there was no evidence of bad faith and award of such was premature.

Commissioner adopted findings and determination in the initial decision as his own. Board was directed to reemploy petitioners with retroactive compensation, assigning both the classes which they were entitled to teach by virtue of their seniority. Such retroactive compensation should not include either pre-judgment or post-judgment interest, but be subject to mitigation by actual earnings, as well as what could have been earned with reasonable and diligent efforts. *Unterberger.*

January 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1670-96

AGENCY DKT. NO. 29-/96

CLARINDA BRUECK AND FREDERICK FOCHESATO,

Petitioners,

v.

FAIRVIEW BOARD OF EDUCATION,

Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead and Maurice, Esqs.)

Francine Del Vescovo, Esq., for respondent
(Oury and Mizdol, P.C., attorneys)

Record Closed: October 9, 1996 Decided: November 25, 1996

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

Connie Norris (Norris), Clarinda Brueck (Brueck or petitioner), and Frederick Fochesato (Fochesato or petitioner) filed a petition with the State Department of Education (DOE) on January 29, 1996, seeking relief from the Fairview Board of Education (Board or respondent). Petitioners sought emergency relief, which request was denied by the Commissioner of the DOE (Commissioner) on February 22, 1996. In

the interim, respondent field an answer with the DOE on February 6, 1996. The DOE transmitted the matter to the Office of Administrative Law (OAL) on February 15, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A conference was conducted on April 17, 1996. Counsel for petitioners represented that the petition filed on behalf of Norris was withdrawn. A hearing scheduled for June 3, 1996 was subsequently adjourned at the request of the parties, based upon a determination that the matter could be decided on stipulations. Stipulations of facts and documents were subsequently filed. The parties filed initial briefs; and petitioners, a reply brief. The record was closed on October 9, 1996, the date of additional communications with the parties.

NATURE OF THE CASE

In December 1995, the Board notified petitioners that their positions with respondent would be eliminated as the result of a reduction in force (RIF) effective January 19, 1995. Petitioners argued in their petition that their tenure and seniority rights were violated because respondent employed other individuals, having less seniority and/or without tenure, in positions of employment. Petitioners also argued that respondent failed to maintain an accurate seniority list and/or preferred eligibility list for reemployment of tenured teachers who were subject to the RIF. Petitioners requested appropriate positions in the Board's employ for the 1995-96 school year, and each succeeding, school year; applicable benefits and emoluments; a directive ordering the Board to grant appropriate pension and seniority credits to petitioners for the period in question; interest pertinent to any back pay awarded; and an order directing respondent to prepare and maintain a seniority list accurately reflecting the seniority entitlements of all certified personnel and to prepare and maintain a preferred eligibility list for reemployment of all tenured staff subject to a RIF accurately reflecting the seniority of all staff members in each employment category. Petitioners also argued that respondent failed to give them adequate notice of the RIF.

Respondent, in its answer, denied the substantive allegations. The Board also argued that the applicable employment contracts were silent on the issue of adequate notice of a contemplated RIF and that when a contract is silent, past practices, in this case, 30 days' notice, applies. At the direction of this judge, petitioners provided notice of the proceedings to individuals whose employment status with the Board could be affected if petitioners prevailed.

The parties did not address in their briefs issues pertinent to whether the Board provided timely notice to petitioners of the RIFs. The parties also did not discuss claims raised by petitioners that the seniority lists maintained by the Board are inaccurate and that respondent should be ordered to revise such lists. It is therefore presumed that petitioners have determined not to prosecute those issues, and I will not address them.

STIPULATIONS

The parties stipulated to the following facts:

1. On or about December 6, 1995, by resolution, respondent eliminated the Physical Education, Health, and Music programs.

2. As a matter of practice, Physical Education, Health and Music programs continued to be offered through classroom teachers, not specialists.

3. Brueck was a tenured Physical Education and Health Instructor in the Board's employ who was the subject of a RIF on January 15, 1996.

4. Brueck was first employed by the Board on September 1, 1982 and earned 13 years and 6 months of seniority credit at the time of her RIF as a K-8 Health and Physical Education teacher.

5. On or about December 13, 1995, Brueck received a notice dated December 12, 1995, notifying her of her RIF effective January 15, 1996.

6. Fochesato was a tenured teacher of Music Education in the Board's employ who was the subject of a RIF on January 15, 1996.

7. On or about December 13, 1995, Fochesato received a notice dated December 12, 1995, advising that he was the subject of a RIF effective January 15, 1996.

8. Fochesato was first employed by the Board as a teacher of Music on or about September 1, 1974 and accrued 21 years and 6 months of seniority credit as a teacher K-12 of Music at the time of the RIF.

9. Petitioners were dismissed by the Board on January 15, 1996 as the result of the RIF.

10. The Board operates a K-8 school district with departmentalized seventh and eighth grades.

11. Brueck holds a Certification as a teacher of Physical Education and Health K-12 issued by the Board of Examiners (Examiners).

12. Fochesato holds a Certification as a teacher of Music K-12 issued by the Examiners.

13. A seniority list dated December 15, 1995 and prepared by respondent is as stated in Exhibit J-6.

14. Staff member Mark Peterski (Peterski) is a tenured staff member with six years of seniority credit as a teacher of Physical Education and Health.

15. As of January 16, 1996, Peterski was assigned three classes of Physical Education for eighth graders. His schedule is as stated in Exhibit J-17.

16. Staff member Joseph Olivelli (Olivelli), as of January 16, 1996, was assigned 15 classes of seventh and eighth grade Physical Education per week, 12 classes of Computer Instruction to seventh and eighth grades, and 3 classes of Humanities to eighth graders. His schedule is as stated in Exhibit J-8.

17. Olivelli does not hold a Physical Education nor Health Certificate from the Examiners. Olivelli holds 19 years of seniority as a teacher of Elementary Education.

18. Howard Gonzalez (Gonzalez) is a non-tenured teacher in the Board's employ, with Certifications in Elementary and English as a Second Language (ESL) with a bilingual endorsement.

19. Commencing January 16, 1996, Gonzalez was assigned eight periods of Health Education per week to seventh and eighth graders. Gonzalez does not hold a Certificate as either a Health or Physical Education instructor.

20. Norris has withdrawn her petition. She was reemployed on March 7, 1996, with no loss in seniority.

21. On January 16, 1995, there were non-tenured elementary and secondary staff members employed by the Board.

22. On April 26, 1996, prospective intervenors were served by regular and certified mail with notice of their rights to intervene. The list of prospective intervenors is as stated in Exhibit J-10. The form of notice to intervenors is as stated in Exhibit J-11.

FINDINGS OF FACT

Based upon a review of the documentary evidence, I **FIND** the following to be additional facts.

The resolution adopted by the Board on December 6, 1995, was designated as a budget deficit resolution and referenced certain financial considerations, *i.e.*, a failed budget in April of 1995; a decrease in the budget by the Commissioner of $350,984; an increase of 37 students for the 1995-96 school year, resulting in $212,000 in additional tuition charges; and an anticipated budget deficit of $550,000 to $600,000 for the 1995-96 school year. Board members resolved, as a result, to take certain action, for the remainder of the 1995-96 school year "or until such time as the budget shortfall facing the district is satisfactorily resolved." (Exh. J-1, p.2). These included elimination, effective January 15, 1996, of the Physical Education, Health, Music, and Art programs and a decision that certain specified tenured teachers receive RIF notices. These were Brueck (Physical Education/Lincoln School), Peterski (Physical Education-health/District), Fochesato (Music-District) and Norris (Home Economics/Lincoln School).

The Examiners issued to Brueck a Certification as an Elementary school teacher in April 1996.[1] The Examiners issued a Certification as an Elementary school teacher to Fochesato in May 1996.[2]

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A.* 18A:6-9. Applicable statutes and regulations address certification, tenure, and seniority.

No teaching staff member shall be employed in the public schools to teach, administer, direct or supervise teaching instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of a nursing service to pupils in public schools, unless he/she is the holder of a certificate, if any, as may be required by law. *Id.* at §26-2. The services of teaching staff members, as well as any other employees in positions requiring appropriate certificates issued by the Examiners, shall be under tenure during good behavior and efficiency. *Id.* at §28-5 (Supp 1996). Tenure attaches after employment in a district by a local board for three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or the equivalent of more than three academic years within a period of any four consecutive years. *Ibid.*

All teaching staff members who worked in positions for which a certificate is required, who hold valid certificates, and who have worked the required number of years are eligible for tenure unless they fall within an explicit statutory exception. Tenure provisions should be liberally construed to further the purpose of affording

[1] Respondent filed a copy of the Certification with its brief. Petitioners did not object to consideration of the document, and it is deemed to be in evidence as Exhibit R-1.

[2] Respondent also submitted a copy of this Certification with its brief. It was not objected to by petitioners, and it is deemed to be in evidence as Exhibit R-2.

security to staff who meet the required standard of length of service. *Bednar v. Westwood Bd. of Ed.,* 221 *N.J. Super.* 239 (App. Div. 1987) *certif denied*, 110 *N.J.* 512 (1988) (*Bednar*). Remedial and supplemental teachers, even those reimbursed on an hourly basis, are afforded tenure. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982).

Tenured employees shall not be dismissed nor reduced in compensation except for inefficiency, incapacity, or unbecoming conduct and then only in a prescribed manner. *N.J.S.A.* 18A:28-5 (Supp 1996). *N.J.S.A.* 18A:6-10 to 18.1. However, a local board of education can reduce the number of teaching staff members whenever, in the board's judgment, it is advisable to abolish such positions for reasons of economy because of a reduction in the number of pupils, a change in the administrative or supervisory organization of the board, or for other good cause. *N.J.S.A.* 18A:28-9.

Any such RIFs shall be made on the basis of seniority, *Id.* at §10, which shall be determined by the local board of education. *Id.* at §11. A person dismissed as a result of a RIF shall remain on a preferred eligibility list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person is qualified. He/she shall be only reemployed if and when such vacancy occurs. In determining seniority, and computing length of service for reemployment, full recognition shall be given to previous years of service. *Id.* at §12 (Supp 1996).

The obligation of a board of education to recall an employee from a preferred eligibility list occurs whenever a vacancy comes into existence. *Mueller v. Hunterdon Central Regional High School Dist. Bd. of Ed.,* 93 *N.J.A.R.* 2d. (Volume 4A) 419 (Dept. of Ed.) (*Mueller*). Seniority only applies to certain rights of tenured personnel and has meaning only when a RIF is necessary. *Philip Howley & Dewey Bookholdt v. Ewing Twp. Bd. of Ed.,* 1982 *S.L.D.* 1328, *affirmed* 1983 *S.L.D.* 1954.

Seniority cannot limit a tenured employee's rights over non-tenured individuals. *Mueller, supra.* Seniority does not create employment rights for non-tenured employees and cannot justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. *Bednar, supra.* A tenured teacher seeking

reinstatement within the endorsements of his/her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification. *Capodilupo v. W. Orange Tp. Ed. Bd.*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. denied* 109 *N.J.* 514 (1987).

A tenured individual has the ultimate burden, when contesting an action by a board of education, of demonstrating that his/her seniority rights were violated and that he/she suffered harm so as to entitle him/her to redress. *James Parker and Joseph Pellegrino v. Bd. of Ed. of the Matawan-Aberdeen Regional School Dist.*, 1990 *S.L.D.* 1778. A person holding employment in a public system of the State who is illegally dismissed or suspended is entitled to compensation for the period covered by the illegal dismissal or suspension if such is finally determined to have been without good cause. *N.J.S.A.* 18A:6-30. A prevailing individual contesting local board action is entitled to an appointment to an available position, back pay, and other economic emoluments of employment, including appropriate pension fund adjustments. *Mueller, supra.*

The Commissioner may award pre-judgment and/or post-judgment interest in certain circumstances. *N.J.A.C.* 6:24-1.16(a). "Pre-judgment interest" is interest awarded for the period of time prior to the adjudication of a monetary claim. *Id.* at §(b)(1). "Post-judgment interest" is interest determined to be due to a petitioning party for the period of time after a claim has been successfully adjudicated but remains unsatisfied. *Id.* at §2.

Pre-judgment interest shall be awarded when there is a conclusion that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule. *Id.* at §(c)(1). Post-judgment interest shall be awarded when a respondent is determined, through adjudication, to be responsible for such payment, the precise amount of such claim has been established, or could have been established, and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of the decision but has failed to satisfy a claim within 60 days of its award. *Id.* at §2.

However, an individual subject to dismissal or suspension has a duty to mitigate damages. *Mullen v. Bd. of Ed. of Jefferson Twp.*, 81 *N.J. Super.* 151 (App. Div. 1963). Any actual pay that the employee earned must be set off from an award of back pay. *West Orange Supplemental Instructors Assoc. v. Bd. of Ed., Twp. of West Orange*, 1991 *S.L.D.* 1 (October 12, 1990), *affirmed* 1991 *S.L.D.* 99 (State Board of Education July 3, 1991), *appeal dismissed*, A-6033-90T1 (App. Div., October 1991). Mitigation is not limited to what an individual earned from outside employment but what could have been earned with reasonable and diligent efforts. *Unterberger v. Metuchen Bor. Board of Education*, 93 *N.J.A.R. 2d* (EDU) (63) (*Unterberger).*

Petitioners do not argue that an economic situation supporting RIFs, in general, did not exist, and the evidence supports a contrary conclusion. Resolution of the issues focuses on seniority determinations pertinent to the individuals in question.

Seniority is determined according to the number of academic or calendar years of employment, or a fraction thereof, in a school district in specific categories. *N.J.A.C.* 6:3-5.1(b). Full recognition shall be given to previous years of service within a district. *Id.* at §(c). Whenever a person holds employment simultaneously under two or more subject area endorsements, or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he/she is or has been employed. For purposes of calculating seniority entitlement, there are no distinctions between academic and calendar years. *Id.* at §(f).

Whenever any individual's particular employment shall be abolished in a category, he/she shall be given that employment in the same category to which he/she is entitled by seniority. *Id.* at §(I). If he/she has insufficient seniority for employment in the same category, he or she shall revert to the category in which he/she held employment prior to employment in the same category and shall be placed, and remain, upon the preferred eligible list of the category from which he/she reverted until a vacancy occurs in such category to which his/her seniority entitles him/her. *Ibid. See* also, *N.J.A.C.* 6:3-5.1(j)(k).

The pertinent regulations also set forth the specific applicable categories. These include, in pertinent part, the provision that 'secondary' includes grades 9 through 12 in all high schools, grades 7 and 8 in junior high schools, and grades 7 and 8 in elementary schools "having departmental instruction." *N.J.A.C.* 6:3-5.1(l)(17). '[E]lementary' includes kindergarten, grades 1 through 6, and grades 7 and 8 "without departmental instruction." *Id.* at §18.

Any individual holding an instructional certificate with the subject area endorsements shall have seniority within the secondary category only in such subject area endorsements in which he/she has actually served. *Id.* at §17(1). Whenever a person is reassigned from one subject area endorsement to another, all periods of employment in the new assignment shall be credited towards seniority in all subject area endorsements in which he/she previously held employment. *Id.* at §(iii). Persons employed in providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis. *Id.* at §(iv).

Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational service or certificate or special subject field endorsement. *Id.* at §18(ii). Persons employed in providing service on a district-wide basis under a special field endorsement or an educational service certificate shall acquire seniority on a district-wide basis. *Id.* at §(iii).

The requirement of certification applies to any individual employed by a district board of education to perform duties that are regulated through certification regulations. *N.J.A.C.* 6:11-3.1(a). Every newly employed or reassigned teaching staff member shall have an appropriate certificate before such member assumes responsibility for the performance of regulated duties. *Id.* at §(b). A standard certificate

is a permanent certificate issued to candidates who have met all requirements for State certification. *Id.* at §4.1.

A teaching endorsement is required for the corresponding teaching assignment. Each endorsement is valid for all levels, except that the elementary endorsement is valid for grades nursery through 8. *Id.* at §11-6.1(a). Teachers with elementary endorsements are not allowed to devote more than one-half time to teaching Art, Music, Health, Home Economics, Industrial Arts, or Physical Education in the elementary grades. Teachers with elementary endorsements may teach the common branch subjects, *e.g.,* Reading, Writing, Arithmetic, and Spelling in the secondary school, grades 7 through 12. (*Id.* at §(b). Teachers with English endorsements who taught reading prior to February 1976 may continue to do so but after that date, teachers of reading shall hold the appropriate endorsement. *Id.* at §(c).

An endorsement in Art authorizes the holder to teach Art in all public schools. *Id.* at §6.2(a)(2). A Bilingual-Bicultural Education endorsement authorizes the holder to teach Bilingual-Bicultural Education in all public schools. *Id.* at §(iii). An endorsement in Elementary Education authorizes the holder to serve as an elementary school teacher in grades nursery through 8 in all public schools. Teachers with such endorsements are not allowed to devote more than one-half time to teaching Art, Music, Health, Home Economics, Industrial Arts, or Physical Education in the elementary schools. As indicated, such teachers are authorized to teach the common branch subjects. *Id.* at §(vi). Endorsements in English and ESL authorize the holders to teach English and ESL, respectively, in all public schools. *Id.* at §§7 & 8. A Health Education endorsement authorizes the holder to teach Health Education in all public schools, *Id.* at §10, and an endorsement in Health and Physical Education authorizes the holder to teach Health and Physical Education in all public schools. *Id.* at §11. The Music endorsement authorizes the holder to teach Vocal and Instrumental Music and related theory in all public schools. *Id.* at §16. Similarly, the Physical Education endorsement authorizes the holder to teach Physical Education in all public schools. *Id.* at §17. An educational services certificate is issued to applicants who have completed an approved educational services programs. *Id.* at §10.1(a).

As Brueck argues, she, in effect, has 13 years and 6 months of seniority credit in both the Elementary and Secondary categories because the Board has a departmentalized seventh and eighth grade.[3] As discussed hereinabove, applicable regulations provide that "secondary" includes grades seven and eight in elementary schools having departmental instruction. Peterski has six years of seniority credit as a teacher of Physical Education and Health. The seniority list maintained by respondent indicates that he was appointed September 1, 1990. However, the bulk of his assignments are in the teaching of Science. A teaching endorsement is required for this teaching assignment. It is therefore assumed that Peterski has a teaching endorsement in the areas of Physical Education and Health. However, as Brueck argues, he has less seniority in those areas than does petitioner. The applicable regulation, *N.J.A.C.* 6:11-6.1, does not address a situation of teachers with secondary endorsements teaching Physical Education and Health. Brueck therefore has more seniority in that respect than Olivelli. As petitioner argues, in addition, Olivelli's seniority as a teacher of Elementary Education does not defeat petitioner's claim to seniority in this case. Because the Board has compartmentalized seventh and eighth grade classes, it is deemed to be a secondary facility in that respect. A teacher having only an elementary category experience cannot be assigned a secondary position over another teacher with secondary category seniority. *Unterberger, supra.*

It is also clear that Brueck has seniority over Gonzalez, who is a non-tenured teacher. As discussed hereinabove, a non-tenured teacher cannot have seniority over a tenured individual. In *Bednar, supra,* the court held that the hours of a tenured teacher holding an Instructional Certificate with a comprehensive subject field endorsement in Art, which teacher had worked as a full-time elementary art teacher, could not be reduced, when another individual, who had been employed as a high school or seventh or eighth grade art teacher, but who did not have tenure, was retained. The court noted in this respect that applicable statutory provisions do ". . . not

[3]The Board's argument that the seventh and eighth grades are not truly departmentalized is not persuasive. The Board is bound by its stipulations in this respect.

authorize regulatory dilution of tenure rights by affording a non-tenured teacher 'seniority.'" (*Bednar* at 243).

As petitioner notes, the aggregate number of teaching periods in question among Peterski, Olivelli, and Gonzalez is 41, which exceeds a full-time assignment. Brueck, who has seniority status over the three in question, should not have been dismissed. An alternative approach would have been to give her a full-time assignment. In the event of a RIF, a tenured teacher has a right to have part-time positions, taught by non-tenured individuals, for which the teacher is certified, consolidated into a full-time position. *Taxman v. Piscataway Twp. Bd. of Educ.*, 93 *N.J.A.R. 2d* (EDU) (189). The seniority sheet maintained by respondent references only one individual as being assigned to a Music position, Anthony Signa, a non-tenured individual, with a one-fifth position at the Lincoln School. As an individual with tenure, Fochesato clearly has entitlement to that position. Peterski, Olivelli, and Gonzalez were not assigned Music classes and, as respondent argues, Fochesato did not obtain certification as an Elementary school teacher until May of 1996. The record does not establish whether any individuals other than the three in question referenced on the seniority record maintained by the Board teach Music as part of their overall classroom duties. Many of the individuals who are tenured obtained their positions prior to Fochesato.

Olivelli clearly has more seniority as a teacher of Elementary Education than does Fochesato. Petitioner's argument that the Board dismissed Fochesato while assigning secondary classes to Olivelli has no merit, regardless of the fact that the Board appears to have assigned Olivelli more Physical Education classes than permissible. Peterski has seniority as a teacher of Physical Education and Health, an area in which Fochesato was not certified. Fochesato therefore has no entitlement to the equivalent positions in Science to which Peterski was assigned. Although Gonzalez does not have tenure, Fochesato is not certified as a Bilingual teacher nor in Health and has no entitlement to the positions to which Gonzalez were assigned. However, the pertinent regulations do not incorporate a specific Certification for computers. In light of the fact that Fochesato has accrued more seniority in Music than

Olivelli had in Elementary Education, petitioner had entitlement to the computer positions taught by Olivelli.

The fact that available positions may only have been of less than full time in nature is not determinative. If petitioners had been reemployed in the positions indicated, they would have continued to incur seniority with the Board. As noted hereinabove, seniority can be obtained for fractions of an academic or calendar year. *N.J.A.C.* 6:3-5.1(b).

Petitioners are clearly entitled to the requested relief of reemployment and retroactive compensation, salary, benefits, and seniority credit lost as a result of the Board's actions in subjecting them to a RIF, and any and all of the emoluments of employment, including pension adjustments.

The stipulations and documentary evidence do not address any income earned by petitioners nor any mitigation efforts by them during the period in question. As discussed hereinabove, however, compensatory back pay is subject to mitigation by actual earnings or those subject to mitigation. If the parties cannot subsequently reach agreement on questions pertinent to mitigation, it is recommended that the Commissioner transmit those issues to the OAL as a contested case.

CONCLUSIONS

I **CONCLUDE** that petitioners had greater entitlement to at least some positions existing at the time of respondent's actions subjecting them to RIFs as set forth hereinabove and that they are therefore entitled to reinstatement, compensation and related emoluments and seniority credits, including appropriate pension adjustments, for the period from January 15, 1996 until the dates of their reinstatements. However, I am persuaded that interest should not be awarded. Petitioners have not established bad faith nor a deliberate violation of statute or rule by respondent. *N.J.A.C.* 6:24-

1.16(c)1. In addition, it is premature, considering the regulatory guidelines, to determine an award of post-judgment interest at this time. *Id.* at §2.

I **CONCLUDE** that petitioners should not have been subject to the RIFs in question and that they are therefore entitled to reinstatement and compensation, as well as related emoluments and seniority credits, including appropriate pension adjustments, for the period from January 15, 1996 until the dates of their reinstatements; I also **CONCLUDE** that the awards of compensation should be computed subject to mitigation; that petitioners' requests for an award of pre- and post-judgment interest should be denied; and that the other relief requested in the petition should be dismissed.

ORDERS

It is hereby **ORDERED** that petitioners be reinstated; that they be awarded compensation for the period from January 15, 1996 until the dates of their reinstatement; subject to mitigation; and that petitioners be awarded associated emoluments, including seniority credits and pension adjustments, for the period in question. It is also **ORDERED** that petitioners' requests for pre- and post-judgment interest be denied, that the other relief requested in the petition be denied, and that Norris' claims be dismissed.

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

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

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

November 25, 1996
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

Nov. 27, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Exhibits in Evidence:

J-1 Resolution

J-2 Memorandum dated December 12, 1995

J-3 Certification pertinent to Brueck

J-5 Certification pertinent to Fochesato

J-6 Seniority List

J-7 Peterski's schedule

J-8 Olivelli's schedule

J-9 Gonzalez's schedule

J-10 List of Prospective Intervenors

J-11 Letter dated April 26, 1996 & copies of return receipts

R-1 Certification as Elementary Teacher pertinent to Brueck

R-2 Certification as Elementary Teacher pertinent to Fochesato

CLARINDA BRUECK AND FREDERICK FOCHESATO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Both petitioners and respondent filed exception arguments, and petitioners filed a reply, pursuant to *N.J.A.C.* 1:1-18.4.

The Board's exceptions are essentially a reiteration of those arguments raised before the Administrative Law Judge (ALJ), primarily contending that it properly effectuated a reduction in force, pursuant to *N.J.S.A.* 18A:28-9, as compelled by budget constraints. The Board reasons that, upon the elimination of petitioners' positions, it delegated responsibility for the instruction of health, physical education and music to other teachers. The Board asserts that while the ALJ "***found that the evidence supported the conclusion that the reductions in force were necessitated by the economic situation, *** the Court erred in not applying the economic reasons to its opinion." (Board's Exceptions at p. 2) Thus, the Board urges the Commissioner to reverse the initial decision of the ALJ.

In reply, petitioners note that while they take no issue with respect to the Board's authority to effectuate reductions in staff for economic reasons, the Board is nevertheless compelled to follow seniority regulations when doing so. (Petitioners' Reply at p. 1) Petitioners emphasize that the Board operates a departmentalized 7th and 8th grade and, therefore, tenured staff members must be assigned duties based upon their respective seniority in the secondary category. Since the Board has stipulated that Petitioner Brueck holds greater seniority as a secondary physical education and health instructor than any of the intervenors, petitioners assert that the Board's exception arguments are without merit. Petitioners also note that, with respect to Petitioner Fochesato, they raise no issue regarding the ability of elementary teachers in self-contained classrooms to teach music. Rather, petitioners contest the assignment of 7th and 8th grade music instruction to homeroom teachers enjoying less seniority than Fochesato, or who are not certified to teach music. (*Id.* at p. 2)

Although petitioners are in general agreement with the initial decision, they present several issues in their exception arguments, which, they assert, should be addressed by the Commissioner. Initially, petitioners observe that, in spite of Stipulation 1 indicating that the Board has eliminated its physical education, health and music programs, as a matter of practice, these programs, as noted in Stipulation 2, continue to be offered through classroom teachers, rather than specialists. (Petitioners' Exceptions at p. 1) Petitioners further note that respondent "***acknowledged that 7th and 8th grade homeroom teachers were assigned to teach music." (*Id.* at p. 2) Thus, petitioners warrant that, to the extent this is so, Petitioner Fochesato has superior secondary seniority as a teacher of music and an award should be fashioned entitling him to teach such classes. (*Id.*) Finally, petitioners contend that the ALJ failed to address the assignment of secondary computer education and humanities to Intervenor Olivelli. Inasmuch as Olivelli's

seniority is solely as an elementary teacher, petitioners conclude that Fochesato should have been assigned these subjects as they require no specific endorsement. (*Id.*)

Upon careful and independent review of the record in this matter, the Commissioner adopts the initial decision of the ALJ, with clarification as provided herein.

Petitioners correctly recognize that the seniority evaluation herein must consider that they have attained seniority in the secondary category. That is, prior to January 15, 1996, petitioners were employed at the secondary level by virtue of their service in grades 7 and 8 in a district having departmentalized instruction, and these positions required special subject field endorsements. *N.J.A.C.* 6:3-5.1(l)17(iii).

While Petitioner Fochesato has greater seniority in the secondary category than Petitioner Brueck, he is not appropriately certified to claim the teaching assignments of either Piterski[1] or Gonzalez. However, as the ALJ noted, Fochesato is entitled to employment in the remaining one-fifth music position in the District held by Anthony Signa, who is not an intervenor in this matter. (Initial Decision at p. 13) Additionally, Fochesato's secondary seniority credit entitles him to be assigned the computer classes and the humanities classes currently taught by Olivelli, a teacher with *no* seniority in the secondary category, *N.J.A.C.* 6:3-5.1(l)18(ii), since neither the computer class nor the humanities class requires specific certification. (Respondent's Trial Brief at p. 3) Moreover, as petitioners note, to the extent other appropriately certified teachers are providing music instruction to 7th and 8th graders and such teachers have less secondary seniority than Fochesato, these music classes should properly be assigned to Fochesato.

Additionally, it is clear that Petitioner Brueck is entitled to be assigned the health and physical education courses currently taught by Piterski, Olivelli and Gonzalez. Not only is Brueck

[1] The Board's submissions reveal that Intervenor Piterski's name is spelled as reflected herein, rather than as shown in the Initial Decision.

properly certificated to teach these courses, but she enjoys greater seniority in the secondary category than Piterski, who has six years of seniority in the secondary category and Olivelli, whose seniority is exclusively elementary. Gonzalez is a nontenured teacher. As the ALJ instructs, "Seniority does not create employment rights for non-tenured employees and cannot justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher.***" (Initial Decision at p. 7) Moreover, as Brueck asserts, these health and physical education assignments, in the aggregate, constitute a full-time position to which she is entitled. *Taxman, supra.*

Therefore, the Commissioner finds that the Board must reemploy petitioners, assign both the classes which they are entitled to teach by virtue of their seniority, and retroactively compensate them with salary, benefits, any and all emoluments of employment, including pension adjustments and seniority credit lost as a result of the Board's actions in subjecting them to the reduction in force. Such retroactive compensation shall not include either pre-judgment or post-judgment interest, but is subject to mitigation by actual earnings, as well as what could have been earned with reasonable and diligent efforts. *Unterberger, supra,* at 69[2].

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, with clarification as provided above. The Board is hereby directed to reemploy petitioners upon the conditions stated.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 10, 1997
Date of Mailing, January 10, 1997

[2] As correctly noted by the ALJ, any disputes about amounts due may be brought to the Commissioner as a separate cause of action, pursuant to *N.J.A.C.* 6:24-1.1 *et seq.*

10-97

IN THE MATTER OF THE TENURE	:	
HEARING OF BRENDA JOHNSON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF LONG BRANCH, MONMOUTH	:	
COUNTY.	:	
	:	

January 10, 1997

IN THE MATTER OF THE TENURE	:	
HEARING OF BRENDA JOHNSON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF LONG BRANCH, MONMOUTH	:	
COUNTY.	:	
	:	

For the Board, Richard D. McOmber, Esq.

This matter having been opened before the Commissioner of Education on September 6, 1996, through certification of tenure charges of excessive absenteeism, unbecoming conduct, and neglect of duties against respondent, a tenured custodian of the Board of Education of the City of Long Branch; and

The Commissioner having directed respondent on September 11, 1996 and October 16, 1996, to file an Answer to the tenure charges against her in conformance with *N.J.A.C.* 6:24-1.4; and

Subsequent to her receipt of these notices, respondent filed a letter in response to such tenure charges which did not conform to the requirements for an Answer, in that such submission did not specifically admit or deny each of the Board's charges as required by *N.J.A.C.* 6:24-1.4, but, rather, merely alleged that she had been unfairly treated by the Board; and

Respondent was advised on November 4, 1996, via both certified and regular mail, the former received by her on November 7, 1996, that unless her submission was amended to conform to the requirements of *N.J.A.C.* 6:24-1.4, the Commissioner of Education may decide the charges against her on a summary basis; and

Respondent having failed as of this date to comply with the directive of the Commissioner, each count of the charges against her is deemed to be admitted; now therefore

IT IS ORDERED this 10th day of January 1997 that summary judgment shall be granted to the Board and Brenda Johnson shall be dismissed from her tenured position as a custodian in the Board's employ as of the date of this order.

COMMISSIONER OF EDUCATION

January 10, 1997
Date of Mailing, January 10, 1997

11-97

11-97

LINDA KRULIKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

January 13, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10044-96

AGENCY DKT. NO. 472-10/96

LINDA KRULIKOWSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

Richard A. Friedman, Esq., for the petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

David H. Coates, Esq., for the respondent (Turp, Coates, Essl & Driggers, attorneys)

Record Closed: November 25, 1996 Decided: December 6, 1996

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

This matter concerns the petitioner's assertion that the Board of Education hired a non-tenured teacher therefore violating her tenure rights pursuant to N.J.S.A. 18A:28-5 and 18A:28-12. The matter was transmitted to the Office of Administrative Law on November 4, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The signed stipulation is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

December 6, 1996
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

12/9/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 11 1996
DATE

Barbara A Rosner
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

FILED
STATE OF N.J.
OFFICE OF ADMIN. LAW
Nov 25 11 23 PM '96

TURP COATES ESSL & DRIGGERS, P.C.
170 South Main Street
P.O. Box 191
Hightstown, New Jersey 08520
(609) 448-0016
Attorneys for Respondent

LINDA KRULIKOWSKI, Petitioner vs. BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY, Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY DOCKET NO: EDUOR 10044-96S **STIPULATION OF SETTLEMENT AND STIPULATION OF DISMISSAL**

The parties in the above referenced matter, having reviewed the pleadings and underlying facts, have decided to amicably resolve the underlying dispute between them as follows:

The Petitioner, Linda Krulikowski, shall be recognized as tenured in a full time teaching position as a secondary English and Latin teacher and shall accrue seniority in that position from the commencement of the 1996/1997 school year with full time salary and other benefits of full time employment, if any, to be paid Petitioner from November 1, 1996 onward. It is understood that salary and benefits are to be paid prospectively, and not retroactively.

In that the parties have amicably resolved the dispute between them, both parties request that this matter be dismissed wit

prejudice, subject to the terms of this Stipulation, and contingent upon the Commissioner's approval of this Stipulation.

DATED: November 1, 1996

TURP COATES ESSL & DRIGGERS
Attorneys for Respondents

DAVID H. COATES, ESQ.

ZAZZALI, ZAZZALI, FAGELLA
& NOWAK
Attorneys for Petitioner

RICHARD A. FRIEDMAN, ESQ.

LINDA KRULIKOWSKI, Petitioner

OAL DKT. NO. EDU 10044-96

LINDA KRULIKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the terms of the settlement appear to already have been effectuated through the Board's payment of full-time salary and other benefits to petitioner from November 1, 1996 onward, and he, thus, admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent his approval, pursuant to *N.J.A.C.* 1:1-19.1

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

January 13, 1997
Date of Mailing, January 13, 1997

(SB) 11-97

SB #11-97

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE TRENTON INTERNATIONAL : DECISION
CHARTER SCHOOL, MERCER COUNTY. :

Decided by the Commissioner of Education, January 14, 1997

For the Appellant, Melissa Benford, pro se

The Trenton International Charter School (hereinafter "appellant") filed an appeal to the State Board from a letter decision of the Commissioner of Education dated January 14, 1997 denying its application to establish a charter school in the 1997-98 academic year. In a statement of reasons dated February 18, 1997, the Commissioner indicated that the application contained inadequate or insufficient information in most program areas and a weak financial plan, specifically, no cash flow analysis and little or no detail documenting revenues or expenditures.

Appellant filed a brief in support of its appeal, and a Deputy Attorney General representing the Commissioner filed an application to participate and a brief in response to the arguments supporting the appeal.

In view of the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have determined to consider all of the documents that have been filed in this matter. In addition, we

Mar. 26, 1997

have reviewed the record provided to us on behalf of the Commissioner. After careful consideration of this matter under the terms of the pertinent statutes, we agree with the ultimate determination of the Commissioner to deny the charter in this case, but we modify his analysis.

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational improvement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff responsibilities and proposed qualifications, 9) a description of procedures to ensure

parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing, 13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The Commissioner has the final authority to grant or reject a charter application, id, but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). In the absence of regulations, we find it necessary to consider the application under the terms of the pertinent statute.

The record reveals that the "Final Application" submitted by appellant in October 1996 was assessed by two reviewers. Those reviewers identified the application as inadequate and/or failing to provide sufficient information in the following areas: educational mission, academic and non-academic goals and objectives, description of founders, governance structure, student assessment, student discipline policy and self-evaluation. Both reviewers gave the application an overall rating of inadequate.

A separate budget review found that appellant had failed to provide sufficient information, and indicated, in particular, that there was no cash flow analysis, little or no detail and documentation of revenues or expenditures and that start-up costs were not addressed.

A tally sheet dated November 7, 1996 summarized the "Final Application" as inadequate in its goals and objectives, description of founders, governance structure, student assessment, discipline policy, staff and self-evaluation, and indicated that appellant had failed to provide sufficient information in a number of other areas. The application was given an overall rating of inadequate, and a recommendation was made to reject the application.

Our own review of the record indicates that the application fails to satisfy the minimal statutory standards. Given the inadequacies identified in the application, we find that it includes such programmatic and financial deficiencies as to preclude the grant of a charter to appellant at this time.

Consequently, we conclude that appellant has failed to demonstrate its entitlement to establish a charter school in 1997-98. We stress that our determination herein is limited to the 1997-98 school year and is without prejudice to appellant's ability to apply for a charter in any subsequent years.

March 26, 1997

Date of mailing MAR 3 1 1997

12-97

12-97

M.R., on behalf of minor, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 13, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6250-96

AGENCY DKT. NO. 258-7/96

M.R. ON BEHALF OF MINOR S.R.,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Arsen Zartarian, Esq., for petitioner (McOmber & McOmber, attorneys)

James E. Collins, Esq., for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: November 25, 1996 Decided: December 3, 1996

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

This matter was transmitted to the Office of Administrative Law on July 9, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is incorporated herein by reference and attachment.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

December 3, 1996

DATE

Bruce R. Campbell

BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/5/96

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 09 1996

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

ml

CERRATO, DAWES, COLLINS, SAKER & BROWN
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FREEHOLD, NEW JERSEY 07728
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ATTORNEYS FOR
Respondent

S.R., a minor by his parent and natural guardian, M.R. Petitioner, vs. THE BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, IN THE COUNTY OF MONMOUTH, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO. EDU 6250-96 AGENCY DKT. NO. 258-7/96 STIPULATION OF SETTLEMENT

The parties hereby agree to settle the above-captioned matter in accordance with the following terms and conditions:

1. The parties stipulate that S.R. is currently a day student at Middlesex County Vocational School.

2. The Freehold Regional High School District Board of Education shall pay all tuition costs for said placement.

3. The Freehold Regional High School District Board of Education will also pay and/or provide, at its sole option, transportation for S.R. to attend the Middlesex County Vocational School.

4. This settlement is a compromise of disputed claims and shall never be treated as an admission of liability by either party for any purpose.

5. All parties shall bear their own attorneys' fees, costs, expert witness fees and/or other related costs of evaluations for the entirety of any actions or matters related to the foregoing matter. It is expressly stated and agreed that neither party is the prevailing party for any purpose, including attorneys' fees, costs, expert witness fees and/or costs of evaluations.

Dated: 11/18/96

ARSEN ZATARIAN
Attorney for Petitioner

Dated: 11/19/96

JAMES E. COLLINS
Attorney for Respondent

LAW OFFICES
CERRATO, DAWES, COLLINS, SAKER & BROWN
A PROFESSIONAL CORPORATION

OAL DKT. NO. EDU 6250-96

M.R., on behalf of minor, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

January 13, 1997
Date of Mailing, January 13, 1997

(SB) 12-97

SB #12-97

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION :
OF THE NEW HORIZON ACADEMY : STATE BOARD OF EDUCATION
CHARTER SCHOOL, MONMOUTH : DECISION
COUNTY. :

Decided by the Commissioner of Education, January 14, 1997

For the Appellant, Mel Reid, pro se

The New Horizon Academy Charter School (hereinafter "appellant") filed an appeal to the State Board from a letter decision of the Commissioner of Education dated January 14, 1997 denying its application to establish a charter school in the 1997-98 academic year. In a statement of reasons dated February 18, 1997, the Commissioner indicated that the application contained inadequate or insufficient information in many program areas and a weak financial plan, specifically, that the budget and cash flow did not match.

After a careful review of the record under the terms of the pertinent statutes, we agree with the ultimate determination of the Commissioner to deny the charter in this case, but we modify his analysis.[1]

[1] We note that appellant did not file a brief in support of its appeal.

MAY 26, 1997

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational improvement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff responsibilities and proposed qualifications, 9) a description of procedures to ensure parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing,

13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The Commissioner has the final authority to grant or reject a charter application, id, but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). In the absence of regulations, we find it necessary to consider the application under the terms of the pertinent statute.

The record reveals that the "Final Application" submitted by appellant in October 1996 was assessed by two reviewers. Those reviewers identified the application as inadequate and/or failing to provide sufficient information in the following areas: description of founders, governance structure, educational program, admission policy, at-risk students, staff, parental involvement, facility, financial plan, self-evaluation and transportation. A separate budget review found that appellant had failed to provide sufficient information.

A tally sheet dated November 7, 1996 summarized the "Final Application" as inadequate in its description of founders, governance structure, educational program, admission policy, at-risk students, staff, parental involvement, facility and transportation. The application was given an overall rating of inadequate, and the tally noted that the application required major revisions. A recommendation was made to reject the application.

Our own review of the record indicates that the application fails to satisfy the minimal statutory standards. Given the inadequacies identified in the application, we find that it includes such programmatic and financial deficiencies as to preclude the grant of a charter to appellant at this time.

Consequently, we conclude that appellant has failed to demonstrate its entitlement to establish a charter school in 1997-98. We stress that our determination herein is limited to the 1997-98 school year and is without prejudice to appellant's ability to apply for a charter in any subsequent years.

March 26, 1997

Date of mailing MAR 3 1 1997

14-97

JOSEPH H. WEBB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOWNE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 14,, 1997

OAL DKT. NO. EDU 10006-95
AGENCY DKT. NO. 390-9/95

JOSEPH H. WEBB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOWNE, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 14, 1997
DATE OF MAILING JANUARY 14, 1997

(SB) 14-97

SB #14-97

IN THE MATTER OF THE DENIAL OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE EAST ORANGE HEADSTART : DECISION
CHARTER SCHOOL, ESSEX COUNTY. :

Decided by the Commissioner of Education, January 14, 1997

For the Appellant, Robert Taylor, Esq.

The East Orange Headstart Charter School (hereinafter "appellant") filed an appeal to the State Board from a letter decision of the Commissioner of Education dated January 14, 1997 denying its application to establish a charter school in the 1997-98 academic year. In a statement of reasons dated February 18, 1997, the Commissioner indicated that there was no clear separation of appellant from the East Orange Child Development Corporation, and that the application contained inadequate or insufficient information in many program areas and a weak financial plan, specifically, no cash flow analysis, overestimated revenues and revenues which appeared to be insufficient to cover initial expenditures.

Appellant filed a brief in support of its appeal, and a Deputy Attorney General representing the Commissioner filed an application to participate and a brief in response to the arguments supporting the appeal.

3/26/97

In view of the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have determined to consider all of the documents that have been filed in this matter. In addition, we have reviewed the record provided to us on behalf of the Commissioner. After careful consideration of this matter under the terms of the pertinent statutes, we agree with the ultimate determination of the Commissioner to deny the charter in this case, but we modify his analysis.

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational improvement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the

admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff responsibilities and proposed qualifications, 9) a description of procedures to ensure parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing, 13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The Commissioner has the final authority to grant or reject a charter application, id, but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). In the absence of regulations, we find it necessary to consider the application under the terms of the pertinent statute.

The record reveals that the "Final Application" submitted by appellant on October 15, 1996 was assessed by two reviewers. Those reviewers identified the application as inadequate and/or failing to provide sufficient information in the following areas: academic and non-academic goals and objectives, educational mission, governance structure, educational program, student assessment, admission policy, student discipline policy, at-risk students, staff, transportation, self-evaluation and insurance.

A separate budget review found that appellant had failed to provide sufficient information, and indicated, in particular, that there was no cash flow analysis and that appellant's revenue appeared to be insufficient to cover initial expenditures.

A tally sheet dated November 7, 1996 summarized the "Final Application" as inadequate in its goals and objectives, governance structure, student assessment, at-risk students and transportation, and indicated that appellant had failed to provide sufficient information in a number of other areas. The application was given an overall rating of inadequate, and a recommendation was made to reject the application.

Our own review of the record indicates that the application fails to satisfy the minimal statutory standards. While the application provides a description of and address for appellant's physical facility as required by N.J.S.A. 18A:36A-5, the application includes such programmatic and financial deficiencies as to preclude the grant of a charter to appellant at this time.

Consequently, we conclude that appellant has failed to demonstrate its entitlement to establish a charter school in 1997-98. We stress that our determination herein is limited to the 1997-98 school year and is without prejudice to appellant's ability to apply for a charter in any subsequent years.

March 26, 1997

Date of mailing MAR 31 1997

15-97

DIANE BASANESE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 14, 1997

OAL DKT. NO. EDU 7546-94
AGENCY DKT. NO. 252-6/94

RONNE BASSMAN-AGINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 16, 1997
DATE OF MAILING JANUARY16, 1997

19-97

THOMASINA LEMON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 16, 1997

OAL DKT. NO. EDU 11611-94
AGENCY DKT. NO. 440-11/94

THOMASINA LEMON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 16, 1997
DATE OF MAILING JANUARY 16, 1997

20-97

20-97

W.C., on behalf of minor, N.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 16, 1997

OAL DKT. NO. EDU 5536-96
AGENCY DKT. NO. 106-3/96

W.C., on behalf of minor, N.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 16, 1997

DATE OF MAILING JANUARY 16, 1997

(SB) 20-97

SB #20-97

IN THE MATTER OF THE GRANT OF :

THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION

OF THE RED BANK CHARTER SCHOOL : DECISION

ASSOCIATION, MONMOUTH COUNTY. :

Decided by the Commissioner of Education, February 21, 1997

Decision on motion by the Commissioner of Education, March 10, 1997

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

For the Respondent, Michael Moore, pro se

By letter dated February 21, 1997, the Commissioner of Education notified the Red Bank Charter School Association ("Charter School") that he had approved its application for establishment of a charter school to begin operation in the 1997-98 school year. Such approval was stated as being "contingent upon receipt of outstanding documentation not included in your application and detailed in Section 19 of the New Jersey Charter Schools Application," which includes a fire certificate, a health inspection certificate, proof of compliance with health and safety regulations, by-laws, contracts, incorporation documents, and any leases.[1] In a statement of

[1] We note, however, that in his decision of March 10, 1997 denying the Red Bank Board's motion for a stay of the decision granting the charter, the Commissioner characterized his grant of the charter as "final as of February 21, 1997," Commissioner's decision, slip op. at 4 (emphasis added), adding that documentation was still required to be submitted with regard to the facility in which the school would be located. The record does not include any indication of the date by which the documentation was to be provided or make any provision for review and evaluation of these submissions.

4/2/97

reasons dated February 28, 1997, the Commissioner stressed that the following strengths had contributed to his approval of the application: a mission fostering the values of respect, personal responsibility and good citizenship, a plan for parental and community involvement and educational goals encompassing the New Jersey Core Curriculum Content Standards and integrating technology in all areas of study.

On February 26, 1997, the Red Bank Board of Education challenged the Commissioner's determination by filing a notice of appeal to the State Board of Education as provided in N.J.S.A. 18A:36A-4(d). On March 5, 1997, the Red Bank Board filed its arguments in support of the appeal. On March 10, a Deputy Attorney General representing the Commissioner filed a motion to participate in the matter and a brief in response to the appeal.

On March 10, 1997, the Commissioner denied a motion filed by the Red Bank Board for a stay of his grant of the charter. Accordingly, the Red Bank Board sought a stay from the State Board by filing a motion for emergent relief on March 12. On March 13, the Deputy Attorney General representing the Commissioner filed a motion to participate in the emergent relief and a brief in response to the motion. On the same date, both the Red Bank Board and the Commissioner submitted supplemental certifications relating to the motion.

In view of the importance of the issues raised and the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have determined to decide the matter today. Hence, we need not decide the Red Bank Board's motion for emergent relief. However, in deciding the merits of the Red Bank Board's appeal, we have considered all of the

documents which have been filed in the matter.[2] In addition, we have reviewed the record provided to us on behalf of the Commissioner with extreme care.

After considering this matter under the terms of the pertinent statutes and for the reasons that follow, we reverse the Commissioner's determination to approve the grant of a charter to the Red Bank Charter School Association for the 1997-98 school year.

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational improvement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the

[2] Although we have reviewed the papers filed by the New Jersey Education Association in support of its request to appear as amicus curiae in this matter, we do not have the discretion to delay our decision so as to allow it the time necessary to file a brief on the substantive issues it is now raising.

admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff responsibilities and proposed qualifications, 9) a description of procedures to ensure parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing, 13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The district board has 60 days from receipt of the application to forward a recommendation thereon to the Commissioner. Id. The Commissioner has the final authority to grant or reject a charter application, id, but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). The legislation requires the State Board to render a decision within 30 days of receipt of the appeal. Finally, a charter school may not have an enrollment in excess of 500 students or greater than 25% of the student body "of the school district in which the charter school is established," whichever is less. N.J.S.A. 18A:36A-4(e).

Initially, we reject the contention that the Commissioner did not have the authority to approve a charter school application in the absence of the adoption of implementing regulations by the State Board. However, in the absence of regulations,

we are forced to consider the appropriateness of the Commissioner's approval in this case under the terms of the pertinent statute.

The record indicates that the Charter School submitted a "Preliminary Application" on September 1, 1996. The Charter School was provided with a "Preliminary Application Feedback Form" from the Department which indicated that the application was inadequate in the following areas: goals and objectives, governance structure, educational program, student assessment, student discipline criteria, parental involvement, facility, financial plan and timetable. The comments indicated that there was no description of the curriculum development process.

The Charter School thereafter submitted its "Final Application" on October 15, 1996, seeking approval of a charter based on an anticipated enrollment of 220 students in grades five through eight. The record shows that this application was assessed by two reviewers. The first reviewer indicated that the "Final Application" was inadequate as follows: academic and non-academic goals and objectives; revision was needed to address the curriculum in the specific grade levels; the admission policy and criteria were questionable, especially with regard to ensuring diversity and preventing discriminatory impact; and the financial plan needed revisions and was missing items. The reviewer also indicated the applicant had not identified a facility.

The second reviewer found that the financial plan was inadequate, that the projected first-year enrollment of 220 students exceeded the statutory limit in that it represented more than 25% of the student population in the public school district, that goals and objectives were inadequate, that grade levels were not designated and class projections not given, that specifics were needed with respect to the educational

program, that more detail was needed with respect to student assessment, and that the admission policy and criteria were inadequate. Like the first reviewer, the second also indicated that no facility had been identified.

A separate budget review rated the overall financial plan as "inadequate." The reviewer specified that "other sources of revenue," which represented almost half of the total operating budget, needed "much more detail," that there was no grade level breakdown of projected enrollment, that there was insufficient detail concerning a proposed 30-year mortgage, that no mortgage interest had been budgeted, and that there was no cash flow analysis. The budget reviewer also pointed out that the projected enrollment of 220 students appeared to exceed the statutory maximum. The reviewer found the overall quality of the budget in all major areas–revenues, expenditures and cash flow–to be inadequate.

A tally sheet dated November 7, 1996 reflects the inadequacies indicated by the reviewers with respect to the Charter School's goals and objectives, educational program, admissions policy and criteria, and financial plan. Nonetheless, the tally sheet includes a recommendation that the application be approved conditional on receipt of documentation and revisions.

The Charter School was then provided with "Final Review Feedback" forms by the Department and permitted to revise its "Final Application" by the submission of addenda.[3] The "Final Review Feedback" provided on November 20, 1996 indicated, inter alia, that the Charter School was proposing enrollment in excess of 25% of the

[3] We note that none of the charter school applications on appeal to the State Board which were rejected by the Commissioner were provided with a "Final Review Feedback" by the Department or given the opportunity to amend their applications.

student population in the public school district, that it failed to specify grade levels to be served over the period of the charter, needed to expand the goals and objectives to focus on student achievement, needed to explain the governance structure, and needed to explain its admission criteria.

A separate "Final Review Feedback" form dealing with the Charter School's budget indicated that the Charter School had overestimated local/state share revenues by approximately $242,000 and categorical aid revenues by approximately $317,000; that there was no substantiation for the receipt of "other sources of revenue," which represented 48% of the budget; that the mortgage terms were not sufficiently detailed; that nearly all line items could not be reviewed for reasonableness since no backup was supplied; and that no cash flow analysis was provided.

The Department received two addenda from the Charter School in the first half of December. However, a review of the revised materials by the Department on December 11 indicates that the financial plan was still inadequate, noting that details to calculate the number of teachers and their average salary had not been supplied, that there was no substantiation for anticipated grants in the amount of $250,000, that backup was still not supplied for nearly all line items, and that no cash flow analysis had been provided. The reviewer also indicated concern regarding the fact that there was no explanation for the Charter School's revised plans for financing a facility, noting that the amounts of $375,000 and $400,000, which had been budgeted in the Charter School's "Final Application" for building purchase and mortgage payments, were now shown as $0. The reviewer "assumed" that, in its place, the Charter School had budgeted $93,750 for the rental of land and building.

On December 26, the Department received a third addendum from the Charter School, which reduced its projected student enrollment for 1997-98 to 214 students.

On December 10, 1996, the Red Bank Board notified the Department that it could not support the grant of a charter and requested that the proposal be held for one year. After the submission of the third addendum on December 26, the Red Bank Board was given 30 days to review the addenda.

On February 4, 1997, the Charter School informed the Department that it was willing to modify its application by further limiting first-year enrollment to 80 students. As previously indicated, the application was approved on February 21, 1997. However, "given the important and legitimate concerns expressed by the Red Bank Board regarding the impact upon the existing educational system in the school district," the Commissioner granted the Charter School approval to admit a maximum of 60 students in 1997-98, with reassessment of that issue to be conducted in January 1998.

As detailed above, the Charter School's "Final Application" submitted on October 15, 1996 did not satisfy the requirements of statute. As late as early February 1997, the Charter School was still proposing to enroll more than 200 students in grades five through eight. This, as observed by the Department's reviewers, exceeded the statutory limit of 25% of the student population of the public school district. Indeed, the Charter School's application indicated that "[t]he enrollment number of 220 has the potential to reach approximately 90% of the existing Middle School population." In that context, we note that the Charter School's offer in February 1997 to limit its first-year enrollment to 80 students would also appear to exceed the 25% limitation.

We stress that the enrollment limitation established by N.J.S.A. 18A:36A-4(e) is one of the statutorily-established criteria for eligibility. Yet, despite its ongoing failure to bring the application into conformity with the statutory criteria, as well as the persistence of other inadequacies in its application, the Charter School was permitted to submit addenda through December 26, 1996, and to make extensive modifications to its proposal until early February 1997. Even then, the Commissioner was compelled to lower the Charter School's proposed enrollment from eighty to sixty before approving the grant of a charter.

We cannot lightly dismiss the failure of the Charter School's application to meet the threshold statutory criteria. As demonstrated by the need for revisions and the submission of extensive substantive addenda through December, it is evident that the October 15 submission did not satisfy the statutory criteria, thereby precluding meaningful assessment of the school's "Final Application" at that time.

Moreover, even if we were to consider the revisions included in the Charter School's addenda, the application still fails to meet minimal statutory standards. The most glaring example of this is the fact that the Charter School has still not provided "a description of, and address for, the physical facility in which the charter school will be located," as required by N.J.S.A. 18A:36A-5(j). Without such information, it is impossible to assess with any confidence the sufficiency of the Charter School's financial plan, which in this case had anticipated obtaining a building and mortgage in the amounts of $375,000 and $400,000 respectively. Those amounts were thereafter reduced to $0 in addenda submitted by the Charter School subsequent to its "Final Application" without any explanation or specifications as to a revised plan. As

previously noted, a Department reviewer raised "concerns" regarding this modification and "assumed" that the Charter School had budgeted $93,750 for rental of land and building in its place. This problem is underscored by the fact that the Charter School's own "Timetable" included with its addenda indicates its intention to secure a facility "through lease or sale." (Emphasis added.) Nor can it be determined without a description and address for the facility whether the school would be situated in a "suitable location," as required by N.J.S.A. 18A:36A-10.

In this respect, we stress also that, contrary to the Commissioner's assertion in his decision denying the Red Bank Board's motion for a stay, it is possible for a charter school applicant to identify a facility prior to the granting of a charter and to develop a proposal on that basis, as several of this year's applicants have clearly demonstrated. See, e.g., In the Matter of the Denial of the Charter School Application of the East Orange Headstart Charter School, decided by the State Board, March 26, 1997; In the Matter of the Denial of the Charter School Application of the Gloucester County Charter High School, decided by the State Board, March 26, 1997. In both of those applications, which were rejected by the Commissioner, the applicant provided a description and address for a facility, as required by the statute.

We find that the need for caution is heightened in a case where, as here, the grant of a charter will have an impact on a small public school district which, it is undisputed, is already struggling to achieve academic improvement within tight fiscal constraints. While the legislation is aimed at encouraging charter schools with the hope of realizing reform in our system of public education as a whole and improvement in student achievement, we cannot ignore our responsibility to insure the adequacy of the

education provided to both the students who will attend the charter schools and those who will attend the public schools for which the district board is primarily responsible. Given our obligations, we cannot overlook the glaring inadequacies of the Charter School's "Final Application" and the fact that significant inadequacies persisted despite repeated submissions after October 15, especially with respect to the Charter School's financial plan. N.J.S.A. 18A:36A-5(l). In fact, the revisions submitted by the Charter School in December 1996 were extensive, and were required in such critical areas as curriculum, N.J.S.A. 18A:36A-5(d), and admissions policy, N.J.S.A. 18A:36A-5(e).

Further, there is no indication in the record that any final or comprehensive analysis of the materials, including the budgetary revisions, was conducted by the Department after the last addendum had been submitted. This cannot be ignored in view of the significant changes made by the Charter School and the fact that serious budget concerns were still being raised by the Department's reviewer even after the Charter School had revised its "Final Application." Moreover, we find no explanation in any of the Charter School's addenda to alleviate the reviewer's concerns regarding its plans for financing a facility.

These failures are not minor. Without the information required by the statute, it is impossible for us to insure that the Charter School's financial plan is adequate or to assess the impact on the district board involved in this appeal. Under these circumstances, and given our responsibilities for assuring that the children attending the charter school, as well as those in the affected public school district, are provided with a constitutionally adequate education, e.g., Robinson v. Cahill, 62 N.J. 473 (1973), we cannot affirm the Commissioner's grant of the charter at this time. We stress that our

determination herein is limited to the 1997-98 school year and is without prejudice to the Charter School's ability to apply for a charter for any subsequent school year.

Robert A. Woodruff, Maud Dahme, Jean Alexander, Margaret M. Bennett, Ronald K. Butcher, and Thomas P. McGough join in the opinion of the State Board.

Wendel E. Daniels recused himself from the deliberations in this matter.

March 26, 1997

Date of mailing APR 02 1997

Anne S. Dillman, S. David Brandt, Orlando Edriera, Daniel P. Moroney, and Corinne M. Mullen dissenting:

On Wednesday, March 26, 1997, the State Board of Education voted 7-5 to reject its Legal Committee's recommendation to affirm the Commissioner of Education's approval of the Greater Brunswick Regional Charter School. The board also rejected by a vote of 6-5-1 its Legal Committee's recommendation to affirm the Commissioner's approval of the Red Bank Charter School.

We the undersigned board members wish to file this dissenting opinion because the State Board had less than one day to consider the written recommendations of the Legal Committee, and the reasons offered by board members for rejecting both the recommendations of its legal Committee and the Commissioner's decisions are factually erroneous and legally infirm.

The Charter School statute (N.J.S.A. 18A:36A) adopted on December 11, 1995, and signed into law by Governor Whitman on January 11, 1996, clearly intended that

charter schools would be implemented in or before the 1997-98 school year. In this regard, the statute authorizes the Commissioner of Education to establish charter schools "...during the 48 months following the effective date of this act (8A:36A-3b)," and it states that "that this act shall take effect immediately (18A:36A-l9)."

It is also clear that the authors of the statute intended that the Commissioner of Education's judgment would be the ultimate criterion for approving or disapproving the applications of individual charter schools. The statute states at 18A:36A-3 that "A charter school shall be a public school operated under a charter granted by the Commissioner ..." and at 8A:36A-4(c), "The Commissioner shall have final authority to grant or reject a charter application."

Further, it is clear that the process used by the Commissioner in exercising this statutorily assigned responsibility was reasonable.

The following are our positions on the each of the major issues raised by board members to explain why they voted to reject the recommendation of the Legal Committee that the Commissioner's approval of the two schools be affirmed.

Application Booklet

It was indicated that the provisions in the Commissioner's charter schools application booklet were not identical to those in the statute. However, the provisions of any law as complex as the charter school statute require interpretation, and the Commissioner's method of developing such interpretations in carrying out his statutorily assigned responsibility to implement the charter school law was extraordinarily thorough.

The Commissioner developed and published a charter school application booklet (copy attached) in order to interpret specific provisions of the statute and to guide prospective charter school sponsors in the preparation of their applications. To begin this task, the Commissioner appointed a committee of Department of Education staff members, each of whom possesses expertise in a relevant area. The committee's membership included a former staff member of the State Assembly who assisted in writing that body's version of the law. The committee studied the statute and prepared an initial draft of the application booklet.

The Commissioner then met with the legislative authors of the statute, Senator John Ewing, and Assemblymen Joseph Doria and John Rocco, to review the initial draft that the committee had prepared. The purpose of this meeting was to assure that each interpretation contained in the application booklet was fully consistent with the provisions of the statute and with the underlying legislative intent. Several changes were made in the application booklet as a result of this meeting.

The Commissioner then shared the booklet with the major state education associations that had followed the progress of the legislation before its enactment, and he met with representatives of those associations to obtain their comments and suggestions. A nationally recognized expert on charter schools, who had also consulted during the preparation of the statute, was asked to review the booklet to identify any important issues that might have been overlooked. At the Commissioner's direction, Department of Education staff also shared the booklet with prospective charter school applicants to determine whether it communicated instructions clearly and would, therefore, elicit the proper information.

Through this process the application booklet was continually refined and then shared a final time with the legislative authors to assure the consistency of its interpretations with the literal provisions of the statute and the underlying legislative intent. The authors affirmed that the booklet was consistent with the statute in all aspects. A copy of the final booklet was forwarded to the sponsors upon its publication. (See attached letter dated June 26, 1996.) Further, State Board of Education members received a copy of the final application, as well, on the same date. Board members were informed that the booklet "...was developed with input from the legislative sponsors, major education associations, prospective charter school applicants, field representatives, and key department staff (see attached memo dated June 26, 1996).

Evaluation Process

It was indicated that the evaluation process was invalid because it applied different standards and procedures to different applications. It was stated that some charter school applicants had numerous opportunities to amend their applications while others did not. This conclusion is incorrect for the following reasons.

First, the statute specifically empowers the Commissioner to evaluate the charter school applications and it does not constrain the Commissioner with respect to the process that he may use in evaluating applications. Under those circumstances, the State Board would exceed its role if it were to substitute its evaluation preferences for those of the Commissioner.

Second, the process that the Commissioner chose to use is reasonable. In order to obtain approval in time to open in September 1997, prospective charter school

applicants were required to submit their applications by October 15, 1997. However, the statute is clear in its intent that the state play more than a passive role of simply receiving and evaluating applications. The act states that "...the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools (18A:36A-2)."

To affect this public policy and to address the fact that the charter school initiative is new and innovative, a voluntary deadline of September 1, 1996 was set for any applicant who wanted to submit a draft application early in order to obtain the review and advice of those Department of Education staff who are responsible for providing technical assistance in the creation of charter schools.

The opportunity for voluntary early submission was equally available to all prospective applicants. Twenty-eight preliminary applications were submitted, including those of the Greater Brunswick and Red Bank Charter Schools. In each case, the department's technical assistance staff provided appropriate advice without the Commissioner's involvement. All applicants then had the opportunity to revise their plans before meeting the final submission date.

As stated above, the Greater Brunswick and Red Bank Charter School sponsors took advantage of the opportunity for assistance based on voluntary early submission, which was available to all prospective applicants, and like all others who did so, they were able to revise their plans accordingly before the final deadline for formal submission. Therefore, it is inaccurate to suggest that these applicants were somehow accorded an unfair advantage.

Following the first round of review of the thirty-seven applications submitted by October 15, 1996, eighteen were identified as demonstrating sufficient potential to be strong charter schools to warrant a second round of technical assistance. During this second round of technical assistance, all applicants submitted addenda upon the request of department reviewers. Eight of the eighteen applicants under consideration submitted three addenda, including the Red Bank and Greater Brunswick Regional Charter Schools.

The above notwithstanding, the matter before the board did not require a determination as to whether some charter school applicants were treated "more fairly" than other applicants. It is only to determine whether there was any violation of statute in the evaluation of the Greater Brunswick and Red Bank applications. Clearly there was not.

Incomplete Documentation

It was indicated that the two applicants had been granted charters without submitting all of the documentation required by the statute. In particular, they did not identify the location of their facilities.

During the development of the application booklet, it was determined that certain documentation could not be obtained by the applicants until they received their charters from the Commissioner. In particular, while the statute requires applicants to provide the addresses of their facilities, charter schools would be unable to contract for facilities until they were approved to exist.

This would place the applicants in a "catch-22" situation of simultaneously being unable to obtain documents until they were approved to exist and being unable to obtain approval without submitting the documents. Therefore, the process was designed to base evaluation and approval on the quality of each applicant's substantive educational and financial plans, and to grant such approval contingent on the submission of any outstanding documentation prior to implementation.

This method of addressing the submission of certain documentation was established at the outset after discussion with the legislative sponsors, and it was communicated clearly and consistently throughout the process. The application booklet states on page 5 that, "Commissioner's approval can be conditional in instances such as if the applicant has yet to acquire facilities or to provide documentation of teachers yet to be hired." On page 20 of the charter schools application in the section which specifies required information regarding facilities it states, "If you do not have a facility, describe your present options for designating a school facility." Further, the letter of approval given to each applicant states "When the approval of charter schools for 1997-98 was announced on January 14, 1997, that approval was contingent upon receipt of outstanding documentation not included in your application. A list of this required documentation is enclosed." (See attached copy of letter dated January 31, 1997.) In the section of the application which deals with Questions and Answers, the following question is raised (page 5 of Appendix C): "Can a charter school be approved if a facility has not yet been acquired?" The answer provided: "Yes. The charter would be granted conditionally on the basis that the school would be housed in an approved facility." Finally, the charter certificate states on its face that "Approval is contingent

upon receipt of the necessary documentation listed in Section 19 of the New Jersey Charter Schools Application."

"Region of Residence"

It was stated that because the Greater Brunswick Charter School is designed to serve a region that encompasses four school districts, it is ineligible for approval since the statute does not specifically provide for the creation of multi-district charter schools. To address this lack of clarity, the Commissioner, exercising his statutorily assigned responsibility to implement the law, defined the "region of residence" of students to be served by a charter school to include contiguous district boards of education as well as single district boards. This definition was developed in consultation with counsel, and it was presented to the legislative authors of the statute to determine its consistency with legislative intent. The definition was applied consistently in the review of the current applications, and it was incorporated in regulations that the Commissioner has proposed that the State Board adopt to guide consideration of applications in future years.

Enrollment

It was argued that the Red Bank Charter School application should not have been approved because the Red Bank School District's enrollment is too small to absorb the loss of students who would enroll in the charter school. This argument is statutorily erroneous since, as approved, the Red Bank Charter School's maximum enrollment is well within the limits imposed by the statute.

Regulations

It was argued that in the absence of regulations approved by the State Board, the Commissioner was bound to adhere to the literal language of the statute. However, the statute does not preclude the Commissioner from interpreting or implementing its provisions until after the enactment of rules. In addition, the Commissioner exercised his authority to do so only after consulting with the authors of the statute to verify legislative intent.

For these reasons, we the undersigned members of the State Board of Education hereby advance the dissenting opinion that the Commissioner of Education's approval of the Greater Brunswick and Red Bank Charter Schools was consistent with the literal provisions of the statute and based on reasonable interpretations of statutory language that were affirmed by the authors of the legislation.

Perhaps more importantly, charter schools are an important innovation that has the potential to provide the children they serve with an improved education, as well as the potential to stimulate improvements in the broader system of public education. As the statute states, "...the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools (18A:36A-2)." At the very heart of the charter school initiative is the concept of flexibility in implementation. Further, by authorizing the creation of charter schools over an initial four-year period, the statute recognizes that the initiative is an exploration, one which is intended through flexible implementation to generate refinements over time.

Given the educational significance of the initiative and the fact that it is intended to be a flexible exploration, we believe that it is inappropriate to block implementation of the new charter school initiative without clear and compelling evidence of a major impropriety or a blatant and direct violation of statute.

April 2, 1997

Date of mailing APR 02 1997

(SB) 20-97

SB #20-97

IN THE MATTER OF THE GRANT OF :
THE CHARTER SCHOOL APPLICATION : STATE BOARD OF EDUCATION
OF THE RED BANK CHARTER SCHOOL : DECISION ON MOTION
ASSOCIATION, MONMOUTH COUNTY. :

Decided by the Commissioner of Education, February 21, 1997

Decision on motion by the Commissioner of Education, March 10, 1997

Decided by the State Board of Education, March 26, 1997

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

For the Respondent, McCarter & English (David C. Apy, Esq., of Counsel)

On March 26, 1997, the State Board of Education reversed the determination of the Commissioner of Education approving the grant of a charter to the Red Bank Charter School Association ("Charter School"). On April 15, 1997, David C. Apy, Esq. filed a motion on behalf of the Charter School seeking reconsideration of our decision. By that motion, the Charter School seeks reversal of our March 26 decision. In the altemative, the Charter School seeks a stay of our decision. Additionally, the Charter School has moved to disqualify Margaret M. Bennett, a member of the State Board, from participation with respect to the relief requested based upon "a conflict of interest arising from an appearance of impropriety."

5/7/97

Because our determination as to whether the State Board of Education should grant the Charter School's motion to disqualify Ms. Bennett from participating in the motion to reconsider may affect our deliberations on that motion, we would ordinarily consider it first. However, the Charter School has presented no independent basis for precluding Ms. Bennett from participating in the motion to reconsider. Rather, it appears that the Charter School seeks to disqualify Ms. Bennett from participating in this motion on the grounds that she should have been disqualified from voting on the substantive appeal on March 26, 1997. We question whether it would be appropriate for the State Board of Education to preclude one of our members from participating in our decisionmaking, and, in the absence of a clear legal preclusion, would decline to do so. However, in reviewing the papers submitted by counsel for the Charter School in support of its motion to reconsider, we have carefully considered the issues raised concerning Ms. Bennett's vote of March 26.

The Charter School has moved for reconsideration on two separate grounds: 1) that Ms. Bennett should not have been permitted to vote on March 26, and 2) that we applied the wrong standard of review when we decided the appeal. It contends that Ms. Bennett should have been precluded from voting because she had a conflict of interest. It argues that such conflict was present because her husband is a state senator. In support of this claim, the Charter School makes various factual allegations concerning both Ms. Bennett and her husband. See Brief and Affidavit of David C. Apy.

We do not view lightly allegations of conflicts of interest. While we recognize that administrative adjudication such as that involved here "constitutes a form of judicial mimicry" so as to be characterized as quasi-judicial rather than judicial, City of Hackensack v. Winner, 82 N.J. 1, 29 (1980), the State Board of Education has always been firmly committed to

performing our adjudicative role with unquestionable integrity, objectivity and impartiality as great as that of judges. See Kremer v. City of Plainfield, 101 N.J. Super. 346, 352 (Law Div. 1968); Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237, 243 (App. Div. 1981).

It is well established that it is within the sound discretion of the judge in the first instance to determine whether he should recuse himself. State v. Walker, 33 N.J. 580 (1960); Matthews v. Deane, 196 N.J. Super. 441 (Ch. Div. 1984). Accordingly, we have given Ms. Bennett the opportunity to determine whether she wishes to recuse herself from participating in this motion. As reflected by her statement today, which we are appending to our decision, and for the reasons articulated in that statement, Ms. Bennett has decided to recuse herself . Hence, we will now consider the substance of the Charter School's motion to reconsider.

Initially, we deny that portion of the motion which would have us reconsider our decision by invalidating our vote of March 26. Nothing in the papers presented to us identifies any direct financial benefit from our decision of March 26 that might have accrued to either Ms. Bennett or her husband. Indeed, leaving aside the accuracy of the factual underpinnings of the Charter School's motion or any of its allegations concerning the conduct of either spouse, careful scrutiny fails to identify any concrete benefit that would result to either. Hence, as the Deputy Attorney General representing the State Board advised Ms. Bennett prior to our March 26 meeting, it was not improper for her to vote. Nor has the Charter School presented anything to us in these proceedings that would warrant revisiting our March 26 decision on the basis of Ms. Bennett's participation. In point of fact, Mr. Apy concedes in his affidavit in support of the motion that the Charter School has no evidence of

any direct communication between Ms. Bennett and the Red Bank Board or its counsel. Affidavit of David C. Apy, at 6.

Furthermore, we would not alter our conclusion on the basis of bare allegations made in Mr. Apy's affidavit that there may have been "such communications" subsequent to our March 26 meeting. Id. In this respect, we stress that disqualification rules are to be strictly construed in order to safeguard the State Board from attacks upon our dignity and to avoid interruption to our proper functioning. Cf. Matthews v. Deane, supra, at 446-47. By means of a motion supported only by newspaper articles and bare assertions, the Charter School is seeking to have the State Board act to invalidate the vote of one of our members and, then, on that basis, to change our decision. Consideration of this aspect of the Charter School's motion has diverted our resources from the substantive matters still pending before us and has interrupted our ordinary and proper functioning.

We turn now to the Charter School's contention that we should reconsider our decision on the grounds that we failed to apply the correct standard of review in deciding the appeal. After reviewing the arguments of counsel, we find no reason to revisit the substance of our determination of March 26. In doing so, we strongly emphasize that the State Board of Education is the head of the Department of Education. N.J.S.A. 18A:4-1. Hence, in addition to our supervisory powers, the State Board has jurisdiction to consider appeals from any determination of the Commissioner, N.J.S.A. 18A:6-27, and it has been well established in a wide range of contexts that the State Board of Education is the ultimate administrative decisionmaker in school matters. E.g., In re Masiello, 25 N.J. 590 (1958); Laba v. Newark Board of Education, 23 N.J. 364 (1957); Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), cert. denied, 121 N.J. 615 (1990); Dore v. Bedminster Tp. Bd. of

Ed., 185 N.J. Super. 447, 452 (App. Div. 1982); East Windsor Reg'l Bd. of Ed. v. State Bd. of Ed., 172 N.J. Super. 547 (App. Div. 1980). The Red Bank Charter School Association has not pointed to anything that would require us to apply a different standard when deciding appeals under N.J.S.A. 18A:36A-1 et seq. Moreover, it has failed to convince us that enactment of this legislation altered our agency's "comprehensive system of internal appeals" by which we assure that final agency decisions of the Department of Education are arrived at fairly and justly, and are in accord with the education laws. See e.g., Masiello, supra; Laba, supra.

As indicated by our decision today, we have not found oral argument to be necessary in order to fairly decide this motion, and we therefore deny the Charter School's request for oral argument. Finally, inasmuch as the Red Bank Charter School Association has failed to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its request for a stay of our decision dated March 26 in this matter.

Margaret M. Bennett and Wendel E. Daniels recused themselves from the deliberations. Daniel J.P. Moroney abstained.

May 7, 1997

Date of mailing MAY 09 1997

STATEMENT OF MARGARET M. BENNETT
RECUSING HERSELF FROM THE DELIBERATIONS

On the advice of the Attorney General's office, I have decided to recuse myself in the Red Bank Charter School's motion for reconsideration. I have not participated in either the Legal Committee or Executive Session discussions on the motion. I will not participate in either the public discussion or the vote.

When I voted the first time this case was considered, I did so after I sought the advice of the Attorney General's office. I was told then that it was not improper for me to vote. The Attorney General's office has reaffirmed that original advice.

A central issue in the motion for reconsideration is the validity of my original vote. That has placed me at the center of the controversy over whether the case should be reconsidered. The Attorney General's advice is that it would be appropriate for me to remove myself as the issue on this motion. I can best do that by not participating in the decision.

I think that every case should be decided on the merits and appear to be decided on the merits. I do not want anyone to think that any vote I would cast on reconsideration would have been in any way affected by the fact that my earlier vote has been challenged.

I hope that it is clear that my decision today does not reflect any second thoughts as to the correctness of my decision to vote on the first hearing of the case. My conduct was not under challenge the first time. It is now, that change in circumstances is the only reason that I believe it is proper for me not to participate now.

Margaret M. Bennett

May 7, 1997

21-97

21-97

ARLENE FRANOLICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 16, 1997

OAL DKT. NO. EDU 7844-95
AGENCY DKT. NO. 244-7/95

ARLENE FRANOLICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 16, 1997
DATE OF MAILING JANUARY 16, 1997

(SB) 21-97

SB #21-97

IN THE MATTER OF THE GRANT OF	:	
THE CHARTER SCHOOL APPLICATION	:	STATE BOARD OF EDUCATION
OF THE GREATER BRUNSWICK	:	DECISION ON MOTION
REGIONAL CHARTER SCHOOL,	:	
MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, January 31, 1997

Decision on motions by the State Board of Education, March 4, 1997

Decided by the State Board of Education, March 26, 1997

Decision on motion by the State Board of Education, April 2, 1997

Decision on motion by the Appellate Division, May 1, 1997

For the Appellant Highland Park Board of Education, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Respondent, Philip Allan Borow, Esq.

For the Milltown Board of Education, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl (Anthony B. Vignuolo, Esq., of Counsel)

On March 26, 1997, the State Board of Education reversed the determination of the Commissioner of Education approving the grant of a charter to the Greater Brunswick Regional Charter School ("Charter School").

On April 1, 1997, the Charter School filed a motion with the State Board seeking a stay of our decision on an emergent basis. By decision of April 2, we denied that

6/4/97

motion, finding that the application failed to meet the standards that would entitle the Charter School to relief.

On April 22, 1997, the Charter School filed an appeal to the Appellate Division challenging our March 26 determination and seeking emergent relief from the Court in the form of a stay or accelerated review. On May 1, 1997, the Appellate Division denied the Charter School's application for emergent relief.

On May 15, 1997, the Charter School withdrew its appeal to the Appellate Division, and on May 16 filed the instant motion with the State Board seeking reconsideration of our March 26 determination.[1] In response, the Highland Park Board has moved for dismissal of the Charter School's motion for reconsideration.

It is well settled that an administrative agency has the inherent power, in the absence of legislative restriction, to reopen or modify a previous determination. Duvin v. State, 76 N.J. 203, 207 (1978). Such power, however, must be exercised reasonably and invoked only for good cause shown. Id.

After a careful review of the papers filed in this matter, we deny the Charter School's motion. As set forth in our written decision issued on April 2, our determination was based on the terms of the applicable statutes because we had not yet adopted regulations implementing those statutes. As detailed in our decision, we found that the Charter School's application failed to meet minimal statutory standards even considering the addenda which the Charter School had provided to the Commissioner. The Charter School has not provided any new information in support of the instant motion which would give us cause to revisit that determination, and we

[1] Although the Charter School captioned its motion as "a motion for relief from judgment," the relief it is seeking is reconsideration.

therefore deny the motion. Given our disposition of this motion, we need not consider Highland Park's counter-motion to dismiss.

S. David Brandt and Daniel J. P. Moroney abstained.

June 4, 1997

Date of mailing JUN 06 1997

(SB) 21-97

SB #21-97

IN THE MATTER OF THE GRANT OF	:	
THE CHARTER SCHOOL APPLICATION	:	STATE BOARD OF EDUCATION
OF THE GREATER BRUNSWICK	:	DECISION ON MOTION
REGIONAL CHARTER SCHOOL,	:	
MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, January 31, 1997

Decided by the State Board of Education, March 26, 1997

For the Appellant Highland Park Board of Education, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Respondent, Andrew C. Fisk, pro se

For the Milltown Board of Education, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl (Anthony B. Vignuolo, Esq., of Counsel)

Inasmuch as the Greater Brunswick Regional Charter School's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny the motion for a stay.

S. David Brandt, Anne S. Dillman, Daniel J. P. Moroney and Corinne M. Mullen opposed.

April 2, 1997

Date of mailing APR 02 1997

(SB) 21-97

SB #21-97

IN THE MATTER OF THE GRANT OF	:	
THE CHARTER SCHOOL APPLICATION	:	STATE BOARD OF EDUCATION
OF THE GREATER BRUNSWICK	:	DECISION
REGIONAL CHARTER SCHOOL,	:	
MIDDLESEX COUNTY.	:	

Decided by the Commissioner of Education, January 31, 1997

Decision on motion by the State Board of Education, March 4, 1997

For the Appellant Highland Park Board of Education, Apruzzese, McDermott, Mastro & Murphy (James L. Plosia, Jr., Esq., of Counsel)

For the Respondent, Andrew C. Fisk, pro se

For the Milltown Board of Education, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl (Anthony B. Vignuolo, Esq., of Counsel)

By letter dated January 31, 1997, the Commissioner of Education notified the Greater Brunswick Regional Charter School ("Charter School") that he was approving its application for establishment of a charter school for the 1997-98 academic year, contingent on receipt of outstanding documentation which had not been included in its application.[1] In a statement of reasons dated February 27, 1997, the Commissioner stressed that the following strengths had contributed to his approval of the application:

[1] The enclosed list required the following documentation: Certificate of Occupancy, Annual Fire Inspection Certificate, Health Inspection Certificate, By-laws, Contracts, Certificate of Incorporation. The record does not include any indication of the date by which the documentation was to be provided or make any provision for review and evaluation of these submissions.

4/2/97

the mission defined by the broad theme of child-directed learning, a high degree of parental and community involvement, and educational goals encompassing intellectual development, socio-economic growth, community relationships and civic responsibility.

On February 25, 1997, the Highland Park Board of Education challenged the Commissioner's determination by filing a notice of appeal to the State Board as provided in N.J.S.A. 18A:36A-4(d). On March 3, 1997, Andrew C. Fisk filed a motion to dismiss the appeal and for emergency relief on behalf of the Charter School. By letter decision, the State Board denied the motion on March 4. On March 5, the Highland Park Board filed arguments in support of its appeal. On March 7, the Milltown Board of Education filed a motion to intervene and arguments in support of the appeal. On March 10, Mr. Fisk filed a response on behalf of the Charter School, and a Deputy Attorney General representing the Commissioner filed an application to participate and a brief in response to the arguments supporting the appeal. On March 19, the Highland Park Board filed additional arguments in support of its appeal. On March 20, the Deputy Attorney General representing the Commissioner and the Charter School filed additional arguments in response. On March 21, the New Brunswick Board filed a motion to participate and arguments in support of its position.

In view of the importance of the issues raised by these appeals and the extremely stringent time limit under which the Legislature has required us to decide appeals of this type, N.J.S.A. 18A:36A-4(d), we have determined to consider all of the documents that have been filed in this matter. In addition, we have reviewed the record provided to us on behalf of the Commissioner.

After careful consideration of this matter under the terms of the pertinent statutes and for the reasons that follow, we are compelled to reverse the Commissioner's determination to approve the grant of a charter to the Greater Brunswick Regional Charter School for the 1997-98 school year.

In enacting the Charter School Program Act of 1995 ("Act"), N.J.S.A. 18A:36A-1 et seq., the Legislature found that charter schools could assist educational reform and improve student achievement by providing a variety of educational approaches which might not be available in the traditional public school classroom. In order to encourage the establishment of such schools, the Act directs the Commissioner to establish a program for the approval and granting of charters pursuant to the Act. N.J.S.A. 18A:36A-3. It also delineates the procedure for establishing a charter school and establishes criteria for eligibility. N.J.S.A. 18A:36A-4.

In addition, the Act mandates the specific information which must be included in an application for a charter school. That information, which is expressly enumerated in N.J.S.A. 18A:36A-5, includes: 1) identification of the charter applicant, 2) the name of the proposed charter school, 3) the proposed governance structure of the school, including a list of the proposed members of the board of trustees or a description of their qualifications and method of appointment or election, 4) the school's educational goals, the curriculum to be offered and the methods of assessing whether students are meeting educational goals, 5) the admission policy and criteria for evaluating the admission of students, 6) the age or grade range of students to be enrolled, 7) the school calendar and school day schedule, 8) a description of the charter school staff responsibilities and proposed qualifications, 9) a description of procedures to ensure

parental involvement, 10) a description of and address for the physical facility in which the school will be located, 11) information on how community groups will be involved in the planning process, 12) the financial plan for the school and provisions for auditing, 13) a description of and justification for any waivers of regulations which the school will request, and 14) such other information as the Commissioner may require.

The application, as defined in N.J.S.A. 18A:36A-5, must be submitted to the Commissioner and the local board for review in the school year preceding that in which the charter school will be established. N.J.S.A. 18A:36A-4(c). The district board has 60 days from receipt of the application to forward a recommendation thereon to the Commissioner. Id. The Commissioner has the final authority to grant or reject a charter application, id, but a district board or a charter school applicant may appeal his decision to the State Board. N.J.S.A. 18A:36A-4(d). As previously indicated, the legislation requires the State Board to render a decision within 30 days of receipt of the appeal. Finally, a charter school may not have an enrollment in excess of 500 students or greater than 25% of the student body "of the school district in which the charter school is established," whichever is less. N.J.S.A. 18A:36A-4(e).

Initially, we reject the contention that the Commissioner did not have the authority to approve a charter school application in the absence of the adoption of implementing regulations by the State Board of Education. However, in the absence of regulations, we must consider the appropriateness of the Commissioner's approval in this case solely under the terms of the pertinent statute.

The record indicates that the Greater Brunswick Regional Charter School filed a "Preliminary Application" on August 29, 1996. The record includes four checklists

noting a lack of student focus, a lack of measurable goals and objectives, and the fact that no financial plan had been submitted. The Department provided a "Preliminary Review Feedback" to the Charter School in September 1996, indicating that Part I of the application was incomplete in that projected enrollment, location and founders were required. The preliminary feedback also indicated that the application was inadequate in the following areas: educational mission, goals and objectives, founders and partnerships, governance structure, educational program, student assessment, admission policy and criteria, student discipline, at-risk and disabled students, school staff, community involvement, facility, financial plan and transportation.

On October 15, 1996, the Charter School submitted its "Final Application." The record indicates that it was assessed by two reviewers. The first reviewer identified the following areas as inadequate: academic and non-academic goals and objectives, no identification of the school district in which the school would be located, a board of trustees had not been chosen, partnerships to enhance student achievement, the admission process, including a plan to attract students, and foster diversity, student discipline and expulsion policy, at-risk and disabled students, proposed qualifications for teachers and certificates, facility, financial plan and transportation. The first reviewer also questioned whether there was a well rounded group of founders and whether this was a valid application in that the proposal involved multiple school districts.

The second reviewer rated the following areas as inadequate: identification of schools where the children of the parent founders attended, partnerships, whether there was a well-rounded group of founders, information on trustees and how the board

would be chosen, admission policy and criteria, student discipline and expulsion policy, no facility, financial plan, and transportation. The second reviewer commented that the application needed revisions and that there should be a careful review for compliance with the charter law because the Charter School was not associated with any one school district.

A separate budget review found that the overall financial plan was inadequate, that resident and non-resident enrollment projections were needed, and that the school districts involved had not been identified. The budget reviewer commented that it was necessary for the applicant to identify a district of residence for the school and to provide a cash flow analysis.

A tally sheet dated November 7, 1996 summarized the following areas as inadequate: description of founders, admission policy and criteria, financial plan, transportation, and documentation. There was also a note on the tally sheet questioning whether this was a valid application. In addition, the tally sheet included the comment that the revisions that had been submitted still did not address the financial concerns, that there was no cash flow analysis, and that the applicant had not designated a district of residence. Nonetheless, a recommendation was made to approve the application conditional on receipt of necessary documentation and further revisions.

The Charter School was provided with a "Final Review Feedback" form by the Department on November 26, 1996 and permitted to revise its application by the submission of addenda.[2]

During November, the Charter School submitted additional material, including an endorsement letter from the Urban Ecology Program at Rutgers. Additionally, the record includes a letter from the Charter School dated November 3, 1996 indicating that it had decided to revise its enrollment distribution from K through 4 to K through 6.

On December 5, the Charter School submitted an "Addendum Application." The "Addendum Application" included a revised financial plan and introduced the term "region of residence," noting that it was doing so "in light of the AG's ruling." On December 6, the Charter School submitted a "programmatic addendum to final application" addressing curriculum delivery for grades 7 through 9.[3]

Although the record does not include an assessment of the December 5 "Addendum Application," the Charter School submitted another addendum to the financial plan at the request of the Department on December 17, 1996. This submission includes revenue projections on the basis of a projected first year enrollment of 100 students in grades K through 6. Additionally, while the Charter School identified four districts in its submission from it had determined its projected enrollment, it stated in the same document that it planned to appeal to the

[2] We note that none of the charter school applications on appeal to the State Board which were rejected by the Commissioner were provided with a "Final Review Feedback" by the Department or given the opportunity to amend their applications.

[3] We note that the Charter School indicated in its application that it intended to add a new grade to the school each year.

Commissioner "to require the resident school district (New Brunswick) to provide the full 100% of the T&E amount for each student."

In a letter to the Commissioner dated December 12, the Milltown Board raised nineteen questions relating to approval of the Charter School. On December 13, the Highland Park Board indicated that it could not recommend approval without answers to the questions it raised. On December 13, the Edison Board indicated that it had voted not to endorse the application, noting the "unclear relationship between the Red Oak Charter School and the Federalist Center" as one of the reasons. On November 19, the New Brunswick Board indicated that it supported the concept of the school, but was concerned about the financial impact.

As set forth above, the Commissioner approved the grant of a charter on January 31, 1997.

As a preliminary matter, we observe that the "Final Application" submitted by the Charter School on October 15, as embodied in the reviews, did not include adequate educational goals, did not provide adequate methods of assessing student performance or curriculum, or provide an adequate description of staff responsibilities. In addition, the financial plan was found to be inadequate. In our view, that "Final Application" did not satisfy the requirements of N.J.S.A. 18A:36A-5. For example, the application did not include a proposed governance structure. Nor is there any indication that the applicant provided any description or address for a physical facility, and there was no school calendar or school day schedule. These deficiencies are not de minimis. To the contrary, without the information required by the statute, and as evidenced by the

Department's continuing requests for revisions and corrections, an adequate assessment of the Charter School's proposal could not be made.

Even if we consider the addenda provided by the Charter School, the application still fails to meet minimal statutory standards. For example, nowhere in the record is there any "description of, and address for, the physical facility in which the charter school will be located," as required by N.J.S.A. 18A:36A-5(j). Without such information, it is impossible to assess with any confidence the sufficiency of the Charter School's financial plan. Moreover, the applicant has never even identified the district in which the Charter School would be located. Nor can it be determined without such information whether the school would be situated in a "suitable location," as required by N.J.S.A. 18A:36A-10.

These failures are not minor. Without the information required by the statute, it is impossible to insure that the Charter School's financial plan is adequate or to assess the impact on the district boards involved in this appeal. Moreover, without a district of residence, the statute cannot be properly implemented, and the statute does not make any provision for establishing a multi-district charter school. In this respect, we cannot ignore that the enrollment limitation of N.J.S.A. 18A:36A-4(e) is determined by the student body "of the school district in which the charter school is established." Similarly, N.J.S.A. 18A:36A-8 provides that "[p]reference for enrollment in a charter school shall be given to students who reside in the school district in which the charter school is located," and, pursuant to N.J.S.A. 18A:36A-13, students who reside "in the school district in which the charter school is located" must be provided transportation on the

same terms as students attending the district's schools, while any entitlement of non-resident students is to be determined by regulations.

Under these circumstances, and given the fact that the record provided to us does not include any final or comprehensive evaluation of the Charter School's submissions to date, we cannot affirm the Commissioner's grant of the charter at this time. In reaching this conclusion, we have been mindful of our responsibilities for assuring that the children attending charter schools, as well as those in the affected public school districts, are provided with a constitutionally adequate education. E.g., Robinson v. Cahill, 62 N.J. 473 (1973). See N.J.S.A. 18A:4-10. We would not be discharging those responsibilities in this case if we were to affirm the grant of the charter on the basis of the record before us. Nor would we be furthering the purpose of the Charter School Program Act by approving this grant. However, we stress that our determination herein is limited to the 1997-98 school year and is without prejudice to the Charter School's ability to apply for a charter for any subsequent school year.

Robert A. Woodruff, Maud Dahme, Jean Alexander, Margaret M. Bennett, Ronald K. Butcher, Wendel E. Daniels and Thomas P. McGough join in the opinion of the State Board.

March 26, 1997

Date of mailing APR 03 1997

Anne S. Dillman, S. David Brandt, Orlando Edriera, Daniel P. Moroney, and Corinne M. Mullen dissenting:

On Wednesday, March 26, 1997, the State Board of Education voted 7-5 to reject its Legal Committee's recommendation to affirm the Commissioner of Education's approval of the Greater Brunswick Regional Charter School. The board also rejected by a vote of 6-5-1 its Legal Committee's recommendation to affirm the Commissioner's approval of the Red Bank Charter School.

We the undersigned board members wish to file this dissenting opinion because the State Board had less than one day to consider the written recommendations of the Legal Committee, and the reasons offered by board members for rejecting both the recommendations of its legal Committee and the Commissioner's decisions are factually erroneous and legally infirm.

The Charter School statute (N.J.S.A. 18A:36A) adopted on December 11, 1995, and signed into law by Governor Whitman on January 11, 1996, clearly intended that charter schools would be implemented in or before the 1997-98 school year. In this regard, the statute authorizes the Commissioner of Education to establish charter schools "...during the 48 months following the effective date of this act (8A:36A-3b)," and it states that "that this act shall take effect immediately (18A:36A-l9)."

It is also clear that the authors of the statute intended that the Commissioner of Education's judgment would be the ultimate criterion for approving or disapproving the applications of individual charter schools. The statute states at 18A:36A-3 that "A charter school shall be a public school operated under a charter granted by the

Commissioner ..." and at 8A:36A-4(c), "The Commissioner shall have final authority to grant or reject a charter application."

Further, it is clear that the process used by the Commissioner in exercising this statutorily assigned responsibility was reasonable.

The following are our positions on the each of the major issues raised by board members to explain why they voted to reject the recommendation of the Legal Committee that the Commissioner's approval of the two schools be affirmed.

Application Booklet

It was indicated that the provisions in the Commissioner's charter schools application booklet were not identical to those in the statute. However, the provisions of any law as complex as the charter school statute require interpretation, and the Commissioner's method of developing such interpretations in carrying out his statutorily assigned responsibility to implement the charter school law was extraordinarily thorough.

The Commissioner developed and published a charter school application booklet (copy attached) in order to interpret specific provisions of the statute and to guide prospective charter school sponsors in the preparation of their applications. To begin this task, the Commissioner appointed a committee of Department of Education staff members, each of whom possesses expertise in a relevant area. The committee's membership included a former staff member of the State Assembly who assisted in writing that body's version of the law. The committee studied the statute and prepared an initial draft of the application booklet.

The Commissioner then met with the legislative authors of the statute, Senator John Ewing, and Assemblymen Joseph Doria and John Rocco, to review the initial draft that the committee had prepared. The purpose of this meeting was to assure that each interpretation contained in the application booklet was fully consistent with the provisions of the statute and with the underlying legislative intent. Several changes were made in the application booklet as a result of this meeting.

The Commissioner then shared the booklet with the major state education associations that had followed the progress of the legislation before its enactment, and he met with representatives of those associations to obtain their comments and suggestions. A nationally recognized expert on charter schools, who had also consulted during the preparation of the statute, was asked to review the booklet to identify any important issues that might have been overlooked. At the Commissioner's direction, Department of Education staff also shared the booklet with prospective charter school applicants to determine whether it communicated instructions clearly and would, therefore, elicit the proper information.

Through this process the application booklet was continually refined and then shared a final time with the legislative authors to assure the consistency of its interpretations with the literal provisions of the statute and the underlying legislative intent. The authors affirmed that the booklet was consistent with the statute in all aspects. A copy of the final booklet was forwarded to the sponsors upon its publication. (See attached letter dated June 26, 1996.) Further, State Board of Education members received a copy of the final application, as well, on the same date. Board members were informed that the booklet "...was developed with input from the legislative

sponsors, major education associations, prospective charter school applicants, field representatives, and key department staff (see attached memo dated June 26, 1996).

Evaluation Process

It was indicated that the evaluation process was invalid because it applied different standards and procedures to different applications. It was stated that some charter school applicants had numerous opportunities to amend their applications while others did not. This conclusion is incorrect for the following reasons.

First, the statute specifically empowers the Commissioner to evaluate the charter school applications and it does not constrain the Commissioner with respect to the process that he may use in evaluating applications. Under those circumstances, the State Board would exceed its role if it were to substitute its evaluation preferences for those of the Commissioner.

Second, the process that the Commissioner chose to use is reasonable. In order to obtain approval in time to open in September 1997, prospective charter school applicants were required to submit their applications by October 15, 1997. However, the statute is clear in its intent that the state play more than a passive role of simply receiving and evaluating applications. The act states that "...the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools (18A:36A-2)."

To affect this public policy and to address the fact that the charter school initiative is new and innovative, a voluntary deadline of September 1, 1996 was set for

any applicant who wanted to submit a draft application early in order to obtain the review and advice of those Department of Education staff who are responsible for providing technical assistance in the creation of charter schools.

The opportunity for voluntary early submission was equally available to all prospective applicants. Twenty-eight preliminary applications were submitted, including those of the Greater Brunswick and Red Bank Charter Schools. In each case, the department's technical assistance staff provided appropriate advice without the Commissioner's involvement. All applicants then had the opportunity to revise their plans before meeting the final submission date.

As stated above, the Greater Brunswick and Red Bank Charter School sponsors took advantage of the opportunity for assistance based on voluntary early submission, which was available to all prospective applicants, and like all others who did so, they were able to revise their plans accordingly before the final deadline for formal submission. Therefore, it is inaccurate to suggest that these applicants were somehow accorded an unfair advantage.

Following the first round of review of the thirty-seven applications submitted by October 15, 1996, eighteen were identified as demonstrating sufficient potential to be strong charter schools to warrant a second round of technical assistance. During this second round of technical assistance, all applicants submitted addenda upon the request of department reviewers. Eight of the eighteen applicants under consideration submitted three addenda, including the Red Bank and Greater Brunswick Regional Charter Schools.

The above notwithstanding, the matter before the board did not require a determination as to whether some charter school applicants were treated "more fairly" than other applicants. It is only to determine whether there was any violation of statute in the evaluation of the Greater Brunswick and Red Bank applications. Clearly there was not.

Incomplete Documentation

It was indicated that the two applicants had been granted charters without submitting all of the documentation required by the statute. In particular, they did not identify the location of their facilities.

During the development of the application booklet, it was determined that certain documentation could not be obtained by the applicants until they received their charters from the Commissioner. In particular, while the statute requires applicants to provide the addresses of their facilities, charter schools would be unable to contract for facilities until they were approved to exist.

This would place the applicants in a "catch-22" situation of simultaneously being unable to obtain documents until they were approved to exist and being unable to obtain approval without submitting the documents. Therefore, the process was designed to base evaluation and approval on the quality of each applicant's substantive educational and financial plans, and to grant such approval contingent on the submission of any outstanding documentation prior to implementation.

This method of addressing the submission of certain documentation was established at the outset after discussion with the legislative sponsors, and it was

communicated clearly and consistently throughout the process. The application booklet states on page 5 that, "Commissioner's approval can be conditional in instances such as if the applicant has yet to acquire facilities or to provide documentation of teachers yet to be hired." On page 20 of the charter schools application in the section which specifies required information regarding facilities it states, "If you do not have a facility, describe your present options for designating a school facility." Further, the letter of approval given to each applicant states "When the approval of charter schools for 1997-98 was announced on January 14, 1997, that approval was contingent upon receipt of outstanding documentation not included in your application. A list of this required documentation is enclosed." (See attached copy of letter dated January 31, 1997.) In the section of the application which deals with Questions and Answers, the following question is raised (page 5 of Appendix C): "Can a charter school be approved if a facility has not yet been acquired?" The answer provided: "Yes. The charter would be granted conditionally on the basis that the school would be housed in an approved facility." Finally, the charter certificate states on its face that "Approval is contingent upon receipt of the necessary documentation listed in Section 19 of the New Jersey Charter Schools Application."

"Region of Residence"

It was stated that because the Greater Brunswick Charter School is designed to serve a region that encompasses four school districts, it is ineligible for approval since the statute does not specifically provide for the creation of multi-district charter schools. To address this lack of clarity, the Commissioner, exercising his statutorily assigned

responsibility to implement the law, defined the "region of residence" of students to be served by a charter school to include contiguous district boards of education as well as single district boards. This definition was developed in consultation with counsel, and it was presented to the legislative authors of the statute to determine its consistency with legislative intent. The definition was applied consistently in the review of the current applications, and it was incorporated in regulations that the Commissioner has proposed that the State Board adopt to guide consideration of applications in future years.

Enrollment

It was argued that the Red Bank Charter School application should not have been approved because the Red Bank School District's enrollment is too small to absorb the loss of students who would enroll in the charter school. This argument is statutorily erroneous since, as approved, the Red Bank Charter School's maximum enrollment is well within the limits imposed by the statute.

Regulations

It was argued that in the absence of regulations approved by the State Board, the Commissioner was bound to adhere to the literal language of the statute. However, the statute does not preclude the Commissioner from interpreting or implementing its provisions until after the enactment of rules. In addition, the Commissioner exercised his authority to do so only after consulting with the authors of the statute to verify legislative intent.

For these reasons, we the undersigned members of the State Board of Education hereby advance the dissenting opinion that the Commissioner of Education's approval of the Greater Brunswick and Red Bank Charter Schools was consistent with the literal provisions of the statute and based on reasonable interpretations of statutory language that were affirmed by the authors of the legislation.

Perhaps more importantly, charter schools are an important innovation that has the potential to provide the children they serve with an improved education, as well as the potential to stimulate improvements in the broader system of public education. As the statute states, "...the establishment of a charter school program is in the best interests of the students of this State and it is therefore the public policy of the State to encourage and facilitate the development of charter schools (18A:36A-2)." At the very heart of the charter school initiative is the concept of flexibility in implementation. Further, by authorizing the creation of charter schools over an initial four-year period, the statute recognizes that the initiative is an exploration, one which is intended through flexible implementation to generate refinements over time.

Given the educational significance of the initiative and the fact that it is intended to be a flexible exploration, we believe that it is inappropriate to block implementation of the new charter school initiative without clear and compelling evidence of a major impropriety or a blatant and direct violation of statute.

April 2, 1997

Date of mailing APR 0 2 1997

22-97

22-97

WILLIAM J. SKOWRONSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 16, 1997

OAL DKT. NO. EDU 8801-94
AGENCY DKT. NO. 266-6/94

WILLIAM J. SKOWRONSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 16, 1997

23-97

BARRE & CANNONE, C.P.A.'S,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

JANUARY 16, 1997

OAL DKT. NO. EDU 3491-95
AGENCY DKT. NO. 52-3/95

BARRE & CANNONE, C.P.A.'S,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 16, 1997
DATGE OF MAILING JANUARY 16, 1997

24-97

24-97

BENJAMIN H. SOOY, III, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

DONALD LEVY, PRESIDENT AND THE BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY, : DECISION

RESPONDENTS. :

:

SYNOPSIS

Petitioning Board member alleged the Board violated its own bylaws by failing to hold an agenda meeting in January 1996, prior to its regular monthly meeting.

ALJ found that the Board met its statutory duty on January 16, 1996, date of regularly scheduled meeting; that the Board complied with the statutory provisions of the Open Public Meetings Act; that the Board reasonably canceled its agenda meeting scheduled prior to its regularly scheduled meeting due to inclement weather which would have been hazardous to attendees. There is no statutory mandate which requires the Board to conduct an agenda meeting prior to its regular monthly meeting. *N.J.S.A.* 10:4-18. Thus, the ALJ concluded that the Board did not violate its bylaws when it canceled its agenda meeting prior to it s regular meeting. Summary decision was entered on behalf of the Board; the petition was dismissed.

Commissioner concurred with the ALJ's determination that the Board acted within its bounds in conducting its January 16 regular meeting, absent a regularly scheduled agenda meeting. Even had the Commissioner found violation of the bylaws, such violation would have been *de minimis* in that the Board's actions did not cause harm to the public, to any particular individual, or to Board members, nor did they contravene, directly or indirectly, any existing statute.

January 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 4548-96

AGENCY REF. NO. 90-3/96

BENJAMIN H. SOOY, III,

Petitioner,

v.

DONALD LEVY, PRESIDENT AND THE BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

Benjamin H. Sooy, III, petitioner, pro se

Louis J. Greco, Esq., for respondent

Record Closed: November 27, 1996 Decided: December 3, 1996

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a member of the Board of Education of the Mainland Regional High School District (Board), alleges that the Board violated its own bylaws when it failed to hold an agenda meeting in January 1996, prior to its regular monthly meeting.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on August 21, 1996, at which, among other things, the issues to be determined by this tribunal were agreed upon by the parties and a hearing date was scheduled for February 27, 1997. The respondent Board was granted leave to propound and serve its Notice of Motion to Dismiss or, in the alternative, for Summary Decision pursuant to N.J.A.C. 1:1-12.5.

The parties submitted their respective briefs of law with other documents and the record closed on November 27, 1996.

ISSUES

The issues to be determined by this tribunal, as agreed to by the parties, are these:

1. Whether the Board violated its own bylaws by not holding an agenda meeting in January 1996, prior to the regular monthly meeting?

2. Whether the Board has the legal powers to waive its bylaws?

MOTION FOR SUMMARY DECISION

The parties agree that there are no genuine issues to material facts in this matter. I **FIND and CONCLUDE**, therefore, that the instant matter meets the criteria for summary judgment as established by our Supreme Court in Judson v. Peoples Bank & Trust Co.of Westfield, 17 N.J. 67 (1957).

THE BOARD'S POSITION

PROCEDURAL HISTORY

This is a petition of appeal filed by a Board member of the Mainland Regional High School District Board of Education alleging numerous facts and legal conclusions set forth in seven "Counts." While the petition names only the Board President as respondent, this motion is being submitted as if the Board was named respondent. We hereby also consents to the court's sua sponte amendment of the proceedings to include the Board as respondent, if deemed appropriate.

In that the counts include a mix of both factual and legal statements, and are somewhat overlapping, they are summarized as set forth below.

Petitioner's argument is bottomed on his misinterpretation of Board Policy 9321 which petitioner erroneously believes to be mandatory in requiring that the Board can conduct a regular business meeting only after it has first conducted an "agenda meeting" one week prior to the regular business meeting. Assuming petitioner's conclusion to be accurate, he argues that the Board's waiver of this supposed "requirement" renders its activities at a January 16 regular meeting which was not preceded by an agenda meeting to be nugatory. Petitioner argues that he was deprived of his opportunity to research, he was possibly deprived of available confidential information, he was deprived of an "opportunity to reflect," he was misled, and "last minute items" were added to the agenda.

While in the petition of appeal petitioner asks whether a Board can waive a bylaw when it has no provision in its bylaws to waive a bylaw, at the time of the prehearing conference and in the pretrial order the single issue now sought to be litigated by petitioner is "whether the Board violated its own bylaws by not holding an agenda meeting in January, 1996, prior to the regular monthly meeting?"

The matter now comes before the court on a motion to dismiss, or in the alternative, a motion for summary judgment in that there appear to be no material facts in dispute. The only item in dispute appears to be petitioner's legal conclusion in interpreting the bylaw in question.

STATEMENT OF FACTS

The relevant and significant factual history of the dispute is set forth in detail in two affidavits filed with the court in support of the motion:

First, the affidavit of the Business Administrator/Board Secretary, Charles Muller, and second, the affidavit of Donald Levy, President of the respondent Board. A brief summary of these facts is as follows:

In January of 1996 the Mainland Regional High School District had a Board policy in effect (9321) which provided at that time in relevant part as follows:

"4. Agenda Meetings: Agenda meetings shall be held on the Monday before the Board's regular monthly business meeting and shall commence not later that 8:00 p.m."

Petitioner has interpreted this language to mean that unless this agenda meeting is held one week prior to the regular meeting then the Board is powerless thereafter to conduct a regular meeting on the third Monday of the month which was also provided for in the same bylaw.

On January 8, 1996, when the agenda meeting was originally scheduled, there was a severe storm which rendered travel unsafe and resulted in the agenda meeting being canceled.

During the week between the canceled agenda meeting and the regular meeting petitioner Sooy took it upon himself to advise the Board President that the Board could not proceed with its regular meeting on the following Monday because the agenda meeting had been canceled, and, in accordance with petitioner's interpretation of the pertinent bylaw, the Board simply could not conduct business without first holding an agenda meeting. This declaration caused the Board President to contact the school district solicitor who issued an opinion to the Board that it could waive its bylaw unless someone's property interest was implicated.

Prior to the agenda meeting and again prior to the regular meeting comprehensive written agenda and materials were distributed to each board member, including petitioner, in accordance with the district's normal business practices.

On January 6th the beginning portion of the meeting was spent discussing petitioner's interpretation of the applicable bylaw and whether or not the board meeting should proceed. It was argued by other Board members that because the regular meeting of January 16 had been properly advertised in accordance with the Open Public Meetings Act that the Board should proceed with the regular meeting and in fact the Board by a vote of six to three adopted a Resolution as follows:

> Motion that this meeting is a regular business meeting as advertised and be treated as such.

In addition, the Board President recited as a part of this threshold decision that should there be an issue in that night's agenda needing more discussion or reviewing it could be deferred until another meeting or to the February meeting, which in fact occurred on a couple of items as explained in the detailed affidavits furnished to the court.

Of interesting note is that the only matter decided upon by the Board at the January 16 meeting which arose to the level of policy making included a second reading on a civil rights policy which was introduced and moved by petitioner, without a request for its deferral, and it was adopted unanimously by the Board. Also interesting to note, is that petitioner fully participated in the meeting, cast votes on all items presented, and did not ask for any of the items

acted upon by the Board to be deferred to another meeting for further reflection, research, or the accumulation of confidential materials.

Thereafter, the minutes of January 16 meeting were approved by all Board members, including petitioner, at the Board's meeting of March 18, 1996. At that time, no request was made by any Board member, including petitioner, that any item approved in the minutes of the January 16 meeting be made the subject of further Board study, reconsideration, or other further inquiry.

An examination of the affidavits and minutes of the January 16 meeting will indicate that all items acted upon by the Board were matters of routine business, and no item rose to the level of such import as to implicate either harm to the public or to the rights of any particular individual.

The court's attention is further invited to the Bylaw 9321(4) text where it discusses the purpose of the agenda meeting to be:

"... The purpose of the agenda meeting is to:

A. Construct the Board's monthly business meeting agenda based on the Board committee's recommendations.

B. Provide Board members with information related to each proposed motion or resolution.

C. Provide the Board with an executive session, before the monthly business meeting, so Board members can be advised of all confidential matters that require Board action.

D. Provide the Board with an opportunity to inquire, deliberate, and debate school affairs, whether related to an agenda item or not ..."

The intent of the agenda meeting is solely for the benefit of Board member information and is not intended to be a vehicle of advance public notice as petitioner argues in the petition. By their vote of six to three to proceed with business the Board effectively acknowledged that they had sufficient information on which to proceed and did not need an agenda meeting.

LEGAL ARGUMENTS

POINT I. PETITIONER HAS MISINTERPRETED BYLAW 9321. AN "AGENDA MEETING" IS NOT MANDATORY IN ORDER TO CONDUCT BUSINESS AT A REGULAR MEETING.

Petitioner's entire legal and procedural argument is bottomed on his erroneous interpretation of the bylaw in question. The bylaw in its full text is attached to the affidavit of Charles Muller furnished to the court in support of this motion. In particular, Section 2 of the Bylaw provides for the scheduling of regular meetings of the Board on the third Monday of each month, while Section 4 provides for the scheduling of agenda meetings on the preceding Monday of each month.[1] As also pointed out in the affidavit of Charles Muller, the January 16, 1996, meeting of the Board was duly included in the annual meeting Resolution which the Board had adopted at its annual re-organization meeting in April of 1996, and, as such, the scheduling of the meeting fully complied with all requirements of the Open Public Meetings Act. According to statute, this annual notice, by itself, predicated the Board's power to act upon any items brought before the Board without regard to whether or not they had been included in any previously published agenda document or had been discussed at a prior meeting. See, N.J.S.A. 10:4-18.

Focusing on Section 4 of the policy, which states that "agenda meetings shall be held on the Monday before the Board's regular monthly business meeting ...." the petitioner concludes that such language makes the conduct of an agenda meeting absolutely mandatory to the extent that it would limit the Board's power to conduct a regular business meeting which otherwise complied in all respects with all the requirements of statutory law in order to enable the Board to

[1] Note that the provision for a regular meeting makes no mention of the agenda meeting and does not establish the agenda meeting to be a prerequisite to holding the regular meeting as petitioner argues.

conduct that meeting. Specifically, petitioner's reasoning would require the court to find that a Board can impose upon itself further limitations prior to conducting a business meeting which are not provided for in the State's Open Public Meetings Act. Such a conclusion flies in the face of all applicable statutory and case law as will be further amplified under other sections of this brief.

POINT II. THE JANUARY 16, 1996, MEETING OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION COMPLIED IN ALL RESPECTS WITH ALL STATUTORY REQUIREMENTS NECESSARY TO ENABLE THE BOARD TO TAKE ACTION AT A REGULAR BUSINESS MEETING.

Local Public Entities such as a Board are governed by a myriad of statutory provisions, including the Open Public Meetings Act, N.J.S.A. 10:4-7, et seq. The Act includes a comprehensive set of rules which a local entity must follow in conducting its business, including a specific delineation of all notices required by the statute as a predicate for the conduct of business. In all respects, the meeting in question held by the respondent Board on January 16, 1996, was in full compliance with these statutory requirements. The regular meeting was also in full compliance with Section 2 of the Board Bylaw 9321 which is the only portion of the bylaw addressing the subject of the regular meeting.

Specifically, as reflected in the affidavit of Charles Muller, Business Administrator for the District, the January 16, 1996, meeting was included as a regular meeting in the annual meeting authorization Resolution adopted by the Board at its 1996 re-organization meeting held on April 24, 1996. This being so, in accordance with the Open Public Meetings Act requirement at N.J.S.A. 10:4-18, virtually all statutory requirements necessary in order to enable the local entity to conduct any business which it had legal authority to conduct on January 16, 1996, had been fully complied with and thus empowered the Board to take such action at that meeting, independent of any bylaw which might state otherwise (which it does not). The applicable case law cited in the next section of this brief makes it clear that local public entities can not impose upon itself restrictions against doing business which are in contravention of any applicable statutory rules set forth by the State legislature. Even if you were to accept the petitioner's argument that holding an agenda meeting is "mandatory," you nonetheless would have to

conclude that the mandatory nature of the bylaw would not be enforceable because it constitutes an attempt by the local entity to further restrict statutory rules that have been enunciated by the state legislature.

It is interesting to note when examining the minutes of the meeting together with the affidavit of Board President Levy that it as the compliance with the Open Public Meetings Act regular meetings requirements that was argued by several Board members in support of the Board's decision to proceed with regular business independent of petitioner's overly restrictive reading of the bylaw in question.

POINT III. ASSUMING AN AGENDA MEETING IS MANDATED BY THE LOCALLY ADOPTED BYLAW, IT CAN NONETHELESS BE WAIVED SINCE FAILURE TO FOLLOW THE BYLAW DID NOT RESULT IN HARM TO THE PUBLIC OR TO THE RIGHTS OF A PARTICULAR INDIVIDUAL.

In the petition of appeal and in other pieces of correspondence and memoranda generated by petitioner since the filing of his appeal, petitioner cites dicta from two cases on the concept of whether or not a public body can waive its bylaws. The dicta cited simply is not interpretive of the substance of either decision, and, in any event, even if the dicta were a substantive part of the decision, it has been substantively overridden by New Jersey case law as will be further discussed below.

The first case on which petitioner relies is Eggers v. Newark, 77 N.J.L. 198 (S. Ct. 1908). The Eggers decision discusses a Board of Water Commissioners bylaw requiring that ordinances be read at two regular meetings before adoption. The Court held that the Board could not waive the bylaw because of its obvious intent to give notice to the public. The facts of Eggers are far afield of those now before the court.

The second case which the petitioner cites in his petition is a Wisconsin decision titled Walters' Appeal (Endeavor-Oxford Union Free High School District v. Walters'), 270 WIS 561, 72 N.W. 2d. 535 (1955). The substance of the Walters' decision discusses what the quorum

would be to conduct a valid vote by a local public entity in existence in the State of Wisconsin in 1955. The substance of the case did not touch any of the issues raised by petitioner in the matter now before the court. Dicta in the Walters' case discussed a bylaw that required action by a public entity to be considered at two regular meetings, however, there is no such bylaw in issue in the case now before the court.

While both Eggers and Walters' might be interesting reading for somebody doing exhaustive research on the development of the application of rules of procedure to public bodies in the United States, neither one of these decisions holds any current import in the State of New Jersey, and in fact, the applicable legal concepts for local Boards in the State of New Jersey has been specifically overridden by subsequent New Jersey case law, cited below.

The Commissioner of Education and the State Board of Education of the State of New Jersey have for many years affirmed that a local Board is not bound by its bylaws and may alter them and/or waive them as it deems necessary or appropriate to the conduct of its statutorily authorized business up to and including minor modifications to this rule in 1991.

Specifically, the following decisions are reflective of the basic rule applied by the State Board of Education: Greenway v. Camden Bd.of Ed., 1939-49 S.L.D. 151, aff'd State Board 1939-49, S.L.D. 155, aff'd 129 N.J.L. 46 (S. Ct. 1942), aff'd 129 N.J.L. 461 (Errors and Appeals 19943); In the Matter of Potkay, 79 S.L.D. 29 (Nov. 1979); Belmont, 1980 S.L.D. 30 (Dec. 1980); Blessing v. Board of Education of the Borough of Palisades Park and Frank Pallotta, 1974 S.L.D. 1133, 1136.

This rule has been universally applied by the Commissioner of Education and the State Board of Education, without substantive modification until 1991 when a matter raised the viability of this rule subsequent to a 1988 Appellate Division decision placing some substantive limitations on the waiver of bylaws where public harm and individual rights might be implicated.

In the Matter of Matawan Regional Teachers' Association v. Matawan-Aberdeen Regional School District, 223 N.J. Super. 504 (A.D. 1988) the Appellate Division of New Jersey Superior Court decided a case which had arisen when a Board waived a bylaw that required that

any item of local school district bylaw adoption would require a two thirds vote of the full board and must be conducted at two regular meetings. The Board in question had waived the bylaw and attempted to adopt a bylaw at only one meeting rather than two. Faced with this set of facts, the Appellate Division modified the bylaw waiver privileges of local public entities and found that, in the absence of any statute to the contrary, the Board's bylaw requiring two regular public meetings to adopt a bylaw was binding. It must be noted at this point that the respondent Mainland Regional High School District has no such bylaw. It is only petitioner's narrow view of Bylaw 9321 that has even raised the argument that any such status could be placed upon the "agenda" meeting contemplated in the Mainland Regional bylaw under review in this case.

The other portion of the Matawan decision that is of interest is the court's holding that where a subject is addressed in the enabling legislation governing a public entity, that the substance of such rules can not be further limited or changed by local public entity bylaw adoption. This portion of the Matawan case is consistent with prior New Jersey case law which is cited in the opinion. The court noted that a Board derives its authority to conduct its business from a number of statutes including 18A:11-1c and 18A:11-1d which provide that the Board can perform all acts and do all things "consistent with law ..." in the conduct of its business. For this reason, the court in Matawan found that a Board could not adopt an enforceable bylaw that required an enhanced vote of more than a majority of its legal quorum.

There are two substantive points to be made in applying Matawan to the present case, first: that it is only upon a finding of a specific bylaw touching a matter of significant public importance that the court can even begin to entertain the question of whether or not such a bylaw can be waived. In this case, the Mainland Board of Education had no such bylaw on its books requiring that items of general business be acted upon at two regular public meetings. It is only petitioner's self-serving and overly restrictive interpretation of the bylaw in question that even raises the argument. Secondly, Matawan tells us that a Board cannot adopt rules that are so restrictive that they limit the authority of the majority in accordance with legislative enactments that govern the manner of the conduct of public business. Specifically, petitioner's interpretation of the agenda meeting bylaw in question would have the Mainland Board placing upon itself restrictions that are not required under the Open Public Meetings Act. Such an interpretation of the Board's rule would render it unenforceable under this portion of the Matawan ruling.

In a 1991 decision of the State Department of Education the rules enunciated by the Appellate Division in Matawan were applied to the long standing rules providing that boards of education can waive bylaw. Specifically, In the Matter of Linda DiMare, et al v.Board of Education of Holmdel, decided March 25, 1991, Commissioner's decision on remand decided May 1, 1991, Matawan was interpreted in its application to boards of education conducting business in accordance with Title 18 and other applicable portions of New Jersey State Law. The Commissioner's decision on remand in DiMare notes that the holding of the Appellate Division in Matawan is limited only to bylaws that do not conflict "directly or indirectly" with any statue. Even if you assume that petitioner's interpretation of the bylaw as mandatory is accurate, we need go no further than to consider the Commissioner's interpretation of Matawan in this particular. To suggest that the requirement of an agenda meeting would render a board of education powerless to conduct its regular meeting advertised in accordance with the Open Public Meetings Act would place restrictions in the bylaw upon the public body which limit its authorities under the Open Public Meetings Act. As such, petitioner's interpretation would have to fail under this aspect of the Matawan rule as applied by the Commissioner in DiMare.

In addition, however, it is interesting to note that the Commissioner's interpretation of Matawan and DiMare includes the conclusions that bylaws of a board of education can still be waived so long as the waiver did not result in harm either to the public interpretation of Matawan as applied by the Commissioner in DiMare is totally consistent with the legal opinion given to the respondent Board by the board solicitor which is attached to Mr. Levy's affidavit as Exhibit A. This interpretation is also totally consistent with the New Jersey School Boards Association view expressed in its sample bylaw on point, also attached to the Levy affidavit.

In applying the substantive rule of the Commissioner in DiMare to the actions taken by the Board at its January 16, 1996, meeting the court will note that all of the items acted upon by the Board were matters of routine school board business and none of them could even remotely be argued to have resulted in harm to the public or to the rights of a particular individual. In particular, it should also be noted to the court that the Board President specifically made provision to the board members, which is reflected in the minutes, that if any substantive items merited further reflection or a delay in taking action that they could easily be adjourned to a

subsequent board meeting which was in fact done with at least two of the items before the Board at that time. A more clear effort on the part of the Board to comply with the substance of Matawan and DiMare could not be demonstrated.

The court should also note that the petitioner himself moved the only policy level decision made by the Board that evening which was a second reading of a policy to be adopted by the Board. It is difficult to fathom how petitioner could proceed with making his motion and voting on it favorably under circumstances which he truly believed at the time would render questionable the Board's action with respect to that policy. In any event, petitioner also proceeded to approve the minutes of the January 16, 1996, meeting as reflected in the March 18, 1996, vote on those minutes, which minutes are also supplied to the Court in Mr. Muller's affidavit.

Even if the court were to apply petitioner's arguments as enunciated, the case would now be nonetheless moot in that the points raised by petitioner in criticism of the Board's bylaws have now been clarified with amended bylaws which provide that the Board indeed may consider waiver of its bylaws and further making it clear that the holding of agenda meetings is not mandatory and may be waived. These new bylaws are attached to the affidavit of Mr. Muller at Exhibit D.

POINT IV. CONCLUSION

In sum, the petitioner of appeal should be dismissed by the court for any one of the following reasons: (1) Board Bylaw 9321, as it existed on January 16, 1996, did not make mandatory the holding of an agenda meeting prior to a regular meeting, and, even if it did, it would be in derogation of the Board's powers and authorities granted to it under the Open Public Meetings Act which was fully complied with by the Board and empowered it to proceed with the regular meeting business as scheduled. (2) Assuming the bylaw was mandatory, applying the reasoning of the Appellate Division in Matawan, supra., as interpreted by the Commissioner of Education in DiMare, supra., the Board substantively complied with all requirements of law in waiving the bylaw in that all actions taken by the Board at its meeting did not result in either harm to the public or to the rights of any particular individual. (3) Assuming that the bylaw was

mandatory and that the Board did not comply with DiMare, since petitioner has not sought any substantive change to the actions taken by the Board in these proceedings the technical point of argument is now both moot and de minimis having been modified by the subsequent adoption of bylaw changes by the Board.

PETITIONER'S POSITION

PROCEDURAL HISTORY

This is a petition placed before the New Jersey Commissioner of Education to decide if Mainland Regional High School (MRHS) Board of Education violated its bylaws when it did not hold an agenda meeting before January's 1996 regular public meeting, as directed in Bylaw #9321 titled, "Time, Place, Notification of Board Meetings." The petitioner is an elected member of the MRHS Board, Chairman of the Policy Committee, and Parliamentarian for said Board.

The respondent, Donald Levy, President of the Board, called the petitioner on January 11, the Thursday before the Monday meeting and stated that he was not going to have an agenda meeting at all because of a snow storm and just hold one meeting, the regular meeting, and asked for the petitioner's opinion, as Parliamentarian and Chairman of the Policy Committee, in this matter. It is the function of the Chairman of Policy Committee to oversee that Board bylaws, policy and regulations are followed. In addition, the petitioner, a professional parliamentarian and in, but not limited to, that capacity shall correctly interpret bylaws. After reviewing Bylaw 9321, the advice to the respondent was, that the bylaws required and agenda meeting one week before the regular meeting. The respondent asked if the bylaws can be suspended and the reply was "only if there is a clause allowing such action." In the MRHS Board's bylaws, there was no such provision. The respondent then was advised that if he wanted such a clause, the policy committee would work on it; but, it would have to be an amendment to the bylaws, which requires approval at two public readings. The respondent then agreed, stating that he would instruct the Business Administrator/Board Secretary to advertise the change and why. It was the understanding of the petitioner that the matter was closed. At the January 16, 1996 meeting it was announced that there would be no agenda and the Board would have only a regular meeting. A letter from the

Board's attorney, who was absent that meeting, contained a legal opinion that in effect, bylaws (and rules) can be waived by a simple majority vote. The petitioner disagreed and stated that you cannot suspend bylaws unless there is a clause allowing such, and that this Board's bylaws did not have such a clause. Furthermore, the petitioner stated this would be a violation and the consequences from such a move. There was a motion made for only a regular meeting instead of an agenda meeting, discussion followed and the vote was six "yea's' to three "no's." It is noted that the petitioner was not alone in this position. At that time, the petitioner had no choice but to continue as if the meeting was legal and let the matter be decided by a higher level of authority. The petitioner filed a petition with the New Jersey Commissioner on March 8, 1996. The respondent failed to answer in the required 20 days as pursuant to N.J.A.C. 6:24-1.4. On April 8, 1996, the Bureau of Controversies and Disputes sent another letter requiring a response by April 18, 1996, and the respondent again failed to comply. After the third notice, dated April 29, 1996, that if there was to be no response within ten days, the matter would be decided by a Summary Judgment, the respondent finally replied via the Board's attorney on May 2, 1996. However, on June 17th the petitioner approached the Board with a compromise by way of a Resolution to resolve the matter without creating any more expense to the taxpayers on a weak position. The Board turned down the purpose resolution.

At first the question placed before the Commissioner was "Can the Mainland Regional High School Board of Education suspend its Bylaws when there are no provisions in its Bylaws to do so?" The petitioner believes that the question of. "Whether the Board violated its own bylaw by not holding an agenda meeting in January, 1996, prior to the regular monthly meeting?" serves the same purpose. On September 30, the respondent's attorney had moved a Motion to Dismiss/Summary Judgment. This brief is the petitioner's opposition to the Motion to Dismiss/Summary Judgment.

STATEMENT OF FACTS

The difficulty of this petition appears to center around the conflicting opinions between the expertise of the Board's attorney and the Board's Chairman of Policy/Parliamentarian. The instrument that created the problem is the January 16, 1996, letter of legal opinion that the attorney sent to the Board involving the ability to circumvent the bylaws of the Board and do what a majority of the Board wished. The petitioner had the opinion that the question placed to the Board attorney about the January meeting was not, "what is the right thing to do," but "how do we do what we want to do regardless."

The Board's attorney, (previously named as respondent's attorney, and whose opinion the Board is now defending) stated in the January 16th letter to the effect that Roberts Rules are notwithstanding when dealing with State statutes. To this the petitioner agrees. However, the attorney also mistakenly takes the position that bylaws, policy and regulations are subject to suspension by a mere majority vote. Where policy and regulations are subject to suspension; bylaws are not by virtue of their level of authority. This petition is not about Robert Rules, but bylaws that go back to England's Common Law which dates before Sir William Blackstone (1723-80). In modern times, court precedents have upheld the requirement that Boards of Education heed their bylaws. Bylaws are the law that the Board has contractually consented to bring upon themselves and the public has the right to expect them to follow their own agreement. Such a decision is in Eggers v. Newark, 77 N.J.L. 198 (Sup. Ct. 1908) the court stated that:

> ...if they (bylaws) can be rendered nugatory by the suspension of a mere rule of order, the bylaws are little more than a suggestion instead of being, as they should be, a set of regulations for the transaction of public business by a public body, on which regulations the public itself has a right to rely.

The Board attorney's opinion is in direct conflict with that court decision. The Board attorney also in the letter of January 16th keeps mixing bylaws and rules as if they are the same. Here is the major problem of his argument. His legal opinion would have been correct if he had stated in the January 16th letter, "...providing there is a clause in the bylaws allowing such suspension of the bylaws." However, if he did that, then it would have been clear that to suspend the bylaws

without such a clause would have been illegal. It is also noted that if the Board's attorney was correct in his letter as it now stands, then there would have been no need for a bylaw change in August 1996, allowing the Board to suspend any part of the bylaws whenever five members of the Board feel a need to do so. The new amendment was passed at the recommendation of the Board's attorney which is going against his own legal opinion and in effect, supporting that of the petitioners.

Once more referring to the letter of January 16th, the Board's attorney states that Roberts Rules of Order "cannot be employed in such a way as to substantively modify statutory law, administration decision, or court decision." The petitioner agrees, but again, as stated previous, this petition is not about Roberts Rules procedure but a bylaw violation.

On paragraph four of the aforementioned letter, the Board's attorney once again refers to Roberts to support his opinion. The petitioner has made this point quite clear as to what the petition is about and it's not Robert's procedure but bylaws of the Board. Nothing would have interfered with the legal process previously agreed to by the Board to have two meetings in one month. Such is mentioned in Walters' Appeal (Endeavor-Oxford Union Free High School District v. Walters), 270 WIS 561, 72 N.W. 2d. 535 (1955).

> 2. By contrast, the bylaw requiring that action on non-emergent matters of policy be considered at two public meetings does not conflict directly or indirectly with any statute. Its purpose is not to remove the responsibility and authority to act from those members of a local board who are authorized by state law to act. Rather, its purpose is to assure that those having that responsibility and authority act only upon due deliberation after notice to the public and interested third parties. Our courts have long compelled public bodies to adhere to such bylaws.

The petitioner brings the court's attention to "public meetings" not "regular meetings" as the respondent's attorney refers to his Point III. Again the Board's attorney, in his argument, is in clear conflict of this court's decision.

The respondent's attorney invites the court's attention to Bylaw 9321(4) and discusses the purpose of the agenda meeting. What the attorney does not include is the two parts of the meeting open for comments from the public. At these two parts, the public may inquire about

expenditures of their tax money, have time to research and return the following week with either more questions or suggestions as to how their money is being spent. Board members also use the agenda meeting to hear the public's point of view, which, in turn, may affect they way they vote. The agenda book is available to the public and all matters that can be discussed in public are there for their review. If the agenda meeting's sole purpose was just to inform the Board, there wouldn't be any place for public input. In general, the "Sunshine Law" does not guarantee input from the public, just their presence. The six to three vote the respondent's attorney refers to as "By their vote of 6-3 to proceed with business the Board effectively acknowledged that they had sufficient information on which to proceed and did not need an agenda meeting." This statement is incorrect. The attorney was not at this meeting, and with a vote of six to three obviously all the Board was not satisfied. The main factor in acquiring the majority vote was the Board attorney's letter of legal opinion. However, the Board attorney's opinion is only advisory and the final decision rests with the Board which, in fact, violated its bylaws.

RESPONSE TO LEGAL ARGUMENTS

POINT I. PETITIONER HAS MISINTERPRETED BYLAW 9321. AN "AGENDA" MEETING IS NOT MANDATORY IN ORDER TO CONDUCT BUSINESS AT A REGULAR MEETING

The respondent's attorney is confused in Point I because he has moved into an unfamiliar area to even the best attorneys, which is bylaws interpretation. The petitioner is a certified parliamentarian with experience of 20 years of writing, correcting, interpreting bylaws and advising numerous professional organizations, such as the New Jersey School Board Association. The bylaw statement to the agenda meeting is very clear as to what "shall" is, rather than "should" or "may." If this one point of the petitioner's opposition for dismissal is maintained, then Points II, III and IV of the respondent's attorney are moot.

Mr. Muller, MRHS Business Administrator, advertised after the April 1995 Organization Meeting that there would be an agenda meeting for January 1996. At no place is there any mention about canceling for weather. It is well understood, and agreed to, that the snow storm of January 1996 would stop any meeting scheduled for January 8. However, nothing prevented the

MRHS Board from holding the agenda meeting, as had been the past practices, at another time; thus, giving those having the responsibility and authority to act only upon due deliberation after notice to the public and interested third parties. Such is mentioned for two public meetings in: Walters' Appeal (Endeavor-Oxford Union Free High School District v. Walters), 270 WIS 561, 72 N.W. 2d. 535 (1955).

> 2. By contrast, the bylaw requiring that action on non-emergent matters of policy be considered at two public meetings does not conflict directly or indirectly with any statute. Its purpose is not to remove the responsibility and authority to act from those members of a local board who are authorized by state law to act. Rather, its purpose is to assure that those having that responsibility and authority act only upon due deliberation after notice to the public and interested third parties. Our courts have long compelled public bodies to adhere to such bylaws.

In addition, items that were not on the agenda meeting, were added at the last minute without normal time for review. Some members, including the petitioner abstained from voting rather than to vote for items that were added hastily to the agenda. From this incident, the public was denied the past practice of careful review of the disbursement of their tax money. The creators of the bylaws stated that "An Agenda Meeting **shall** be held one week before the Regular Meeting." Their reasoning and point was quite clear. Therefore, if it was not mandatory to hold an agenda meeting, the word in place of "shall" would have been "should" or "may." Those who wrote the bylaw were not attorneys, rather plain people writing bylaws for the general public to understand. It could be concluded from this point that the authors of Bylaw 9321 intended the public and other Board members to have sufficient time to review and ask questions. This can not be adequately done at one meeting.

POINT II. THE JANUARY 16, 1996, MEETING OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION COMPLIED IN ALL RESPECTS WITH ALL STATUTORY REQUIREMENTS NECESSARY TO ENABLE THE BOARD TO TAKE ACTION AT A REGULAR BUSINESS MEETING

The point of respondent's attorney has strayed from the question at hand before the court. However, since the respondent's attorney has raised it for whatever reason, the petitioner will comment.

Inasmuch as the Business Manager/Board Secretary had advertised according to the "Sunshine Act" for a meeting under normal circumstances, the Business Manager/Board Secretary failed to advertised that the agenda meeting would not be held at all in January and that there would be only one meeting for the month. The public had a right to expect two meetings for January as advertised. Furthermore, as stated in the previous point, there was mention in the Organization meeting's announcement of future meetings that an agenda meeting may be canceled because of hazardous weather conditions, rather than being rescheduled. Not to forget that Bylaw 9321 states that there shall be an agenda meeting one week before the regular meeting, thus leaving the public to conclude that there would be two meetings in January, an agenda and regular.

POINT III. ASSUMING AN AGENDA MEETING IS MANDATED BY THE LOCALLY ADOPTED BYLAW, IT CAN NEVERTHELESS BE WAIVED SINCE FAILURE TO FOLLOW THE BYLAW DID NOT RESULT IN HARM TO THE PUBLIC OR TO THE RIGHTS OF A PARTICULAR INDIVIDUAL

As stated previous, harm was done to taxpayers and interested third parties. In other words, to say, "we can violate our Bylaws when no harm, no foul," is foolish at best. The harm may not be noticed at first and if the Board does not want to see harm, they won't. A more appropriate philosophical phase with this logic would be "...it's right when it suits our purpose." To subscribe to this philosophy would introduce chaos to the public's business. That is the reason courts have long compelled public bodies to adhere to such bylaws." Walters' Appeal (Endeavor-Oxford Union Free High School District v. Walters), 270 WIS 561, 72 N.W. 2d. 535 (1955).

In Point III of the respondent's attorney states that the previous case mentioned (Walters' Appeal) does not touch on any items raised by the petitioner. The petitioner submits that the comments of the court touches on bylaws and that public bodies are to adhere to them. This is the basic core of what the petitioner is addressing. That (1) the Bylaw 9321 of MRHS Board states that there shall be an agenda meeting one week before the regular; and (2) the bylaws must be followed until amended or repealed; and (3) that if you belatedly ignore them, you have an illegal action which compromises the public's interest. These are the reasons this petition is

before the court. The respondent's attorney also states that "Eggers v. Newark facts are afar afield of those before this court" because it has to do with two "regular" meetings. However, the quote actually is "two public meetings," not "regular meetings." Both the Agenda and Regular meetings are public meetings at MRHS Board. The point of Eggers is well taken for the petition now before this court since it was their bylaws that compelled them to do so. The court upheld the bylaw and set aside the ordinance in question. Contrary to the respondent attorney's comment, both Eggers and Walters were of interest in New Jersey by way of the Matawan Teachers Ass'n v. Bd.of Ed., 223 N.J. Super. 504, 538 A. 2d. 1331, decided March 14, 1988. All three cases supported the adhering to bylaws.

In reference to The Matter of Linda DiMare, et al v. Board of Education of Holmdel, as mentioned in the respondent attorney's argument, revolves around Robert's Rules of Order which is a procedural matter that is not addressed in this petition. Also parts of Matawan decision that has to do with voting are not in this petition, but the remaining parts pertaining to bylaws are in this issue. The petitioner believes that the respondent's attorney makes some interesting legal points, however, they do not apply to this petition. Again the respondent's attorney is mixing procedural matters with a bylaw issue. This is the source of the problem.

In addressing the statement of the respondent, Donald Levy, that his decision was consistent with the New Jersey School Board Association view in its sample bylaw, the petitioner can state from first hand experience that there are many inconsistencies in their publication. In the year of 1992, the petitioner was the New Jersey School Board Association's professional parliamentarian. One of the projects slated for correction and update was their manuals as the respondent attorney has mistakenly relied on. It is also noted that the New Jersey School Board Association is only an advisory association and not a regulatory agency. When the petitioner became an elected board member, he stopped as Parliamentarian for the New Jersey School

Association. The sample bylaw, as described, was not corrected to read that suspending any part of Bylaw can only occur when there is a provision to do so. Other than that, Bylaws may be amended repealed or replaced in a described fashion, but not suspended.

POINT IV. CONCLUSION

The petitioner opposes the Motion to Dismiss/Summary Judgment, based on: (1) the complexity and contradiction of past legal decisions; (2) that the attorney for the respondent has failed in his attempt to show "Hornbook Law" support for his argument and neutralizing of the legality of the petition. It a BOE can suspend their bylaws any time said bylaws stand in the self serving way of the Board, then there is not longer an orderly public meeting but a public gather with a mob mentality whose actions are without responsibility or accountability. The decision of this question will serve over 600 other Boards of Education in the State of New Jersey that had, or will have, a similar situation. There is additional evidence to support the petitioner's stand that could not be detailed in a brief of opposition. The issue worthy of a hearing and not the legal sandbagging and misinterpretations of bylaws in defense of a misguided legal opinion. Issues have been raised and comments made by the respondent's attorney that do not address this petition that is now before the court and has failed to support the respondent's position. Whenever the rights of the taxpayers are the issue, a full hearing should be held in protection of those rights. Therefore, the petitioner is in opposition of the Motion to Dismiss/Summary Judgment and move that it be denied.

DISCUSSION AND CONCLUSIONS

Local boards of education have authority to make, amend, and repeal rules for its own government. N.J.S.A. 18A:11-1 provides that:

> The board shall ---
> a. Adopt an official seal;
> b. Enforce the rules of the state board;
> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and

for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and

d. Perform all acts and do all things, consistent with the law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

In the matter of Albert D. Angell, Jr., et al v. Board of Education of the City of Newark, Essex County, 1959-1960 S.L.D. 141, the Commissioner established a three-prong test of validity of a local board's rule or regulation. Therein the Commissioner said:

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

In Audrey Siegfried v. Board of Education of the Borough of Shrewsbury, et al 1976 S.L.D. 2. The Commissioner applied the Angell test where he said:

> The Commissioner has carefully considered the facts in the record and the arguments and citations of law and equity set forth by the parties. The Commissioner finds the three-pronged test of validity of a board's rules as set forth in Angell, supra., is applicable herein. This test of validity requires that a rule be reasonable, consistent with the provisions of both the education laws and the rules of the State Board, and directed toward maintaining and supporting a thorough and efficient system of public education. Angell at 143-147. It logically follows that the interpretation and application of a rule or policy by the Board must pass these same tests. 1976 S.L.D. at 4.

Pursuant to N.J.S.A. 18A:11-1, the Mainland Board has, among other things, adopted rules or bylaws for its own government. Notwithstanding his holding in Angell, supra. the Commissioner has held, in the matter of Gerald F. Blessing v. Board of Education of Palisades Park, et al, 1974 S.L.D. 1133, as follows:

> The Commissioner has reviewed the applicable case law and can find no authority that would require a board of education to be absolutely bound by its own policies. Greenway, supra. To the contrary, it has been consistently held that a local board of education is not bound by its policies and rules when no vested rights are involved. Polansky, supra.; Noonan and Arnot v. Paterson City Board of Education, 1938 S.L.D. 331 (1925), affirmed State Board of Education, 1938 S.L.D. 336 (1925); Silvestris v. Bayonne Board of Education, 1959-60 S.L.D. 184.

Therein, the Commissioner relied upon, in part, the matter of Greenway, supra., where our Appellate and Supreme Courts held that a local board of education is not bound by its bylaws and may alter or waive such as it deems necessary and appropriate for the conduct of its statutorily authorized business.

Petitioner complains that the Board was in violation of its bylaws when if failed to conduct an agenda meeting prior to the regular business meeting of the Board in January 1996. The statutory requirement for local board of education meetings is found at N.J.S.A. 18A:10-6, and provides as, in part, follows:

> All board meetings shall be public and each board shall hold a meeting at least once every two months during the period in which the schools in the district are in session.

Petitioner holds himself out as a professional parliamentarian, a title not recognized under Title 18A of the New Jersey Statutes nor Title 6 of the New Jersey Administrative Code. For the intent and purpose of these proceedings, petitioner is a layman, incompetent to interpret statutes or their applications. This is a matter of statutory dimensions.

The Board met its statutory duty on January 16, 1996. The Board also adhered to the statutory provisions of the Open Public Meetings Act (OPMA) N.J.S.A. 10-1 to -21. There is no dispute that the Board has complied with N.J.S.A. 18A:10-6 or the OPMA. The Board, reasonably, canceled its agenda meeting scheduled on the Monday prior to its regularly scheduled meeting held on January 16, 1996, due to inclement weather which would have been hazardous

for Board members and the public alike to attend. There is no statutory mandate which requires the Board to conduct an agenda meeting prior to its regular monthly meeting. N.J.S.A. 10:4-18.

I **CONCLUDE**, therefore, that the Board did not violate its bylaws when it cancel its agenda meeting prior to its regular meeting scheduled for January 16, 1996. The Board complied with all of the prevailing statutory requirements in the conduct of its business on January 16, 1996, notwithstanding any bylaws it may have had on its books at the time of the January 16, 1996, meeting. It had business to conduct and it conducted its business to the extent it deemed necessary toward maintaining and supporting a thorough and efficient system of public education. N.J.S.A. 10:4-18, N.J.S.A. 18A:10-6.

I **CONCLUDE** that petitioner's Petition of Appeal is without merit and, therefore, Summary Decision is hereby entered on behalf of the Respondent Board of Education of the Mainland Regional High School District.

ORDER

Accordingly, it is **ORDERED** that **SUMMARY DECISION** is hereby entered on **behalf of the Board** and that the instant **Petition of Appeal is DISMISSED.**

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

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

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

3 December 1996
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12/5/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 09 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 4548-96
AGENCY DKT. NO. 90-3/96

BENJAMIN H. SOOY, III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DONALD LEVY, PRESIDENT AND THE BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were timely filed by petitioner.

Petitioner excepts that the Administrative Law Judge's (ALJ) reference to him as a "layman" who is unable to interpret statutes is incorrect in that he was advised by attorneys and he possesses expertise in bylaw interpretation. He notes that he is a certified parliamentarian by the nationally and internationally recognized Institute of Parliamentarians. (Petitioner's Exceptions at pp. 1-2) Petitioner further excepts to the ALJ's interchanging of the terms "policies and rules" and "Bylaws", illustrating that they are distinct. He writes, "In the policy books of boards of education, there are sections for policies and rules and a separate place for Bylaws." (*Id.* at p. 2) Petitioner next explains that rights of individuals will be trampled if bylaws are not followed,

> If the boards of education are allowed to suspend their Bylaws whenever the majority of the Board *** members wish to do so, then this State will have a mob mentality with private agendas running the school systems. *** To suspend a Right on a moment's notice is a disservice to the public as well as minority Board members.*** (*Id.* at pp. 2-3)

Petitioner cites a Wisconsin case, *Walters' Appeal, infra*, wherein a bylaw requirement was upheld to buttress his arguments. *Endeavor-Oxford Union Free High School District v. Walters.* In that this argument has already been raised and considered by the ALJ, it will not be detailed herein. 270 *Wis* 561, 72 *N.W.* 2d 535 (1955). Lastly, petitioner objects to the ALJ's awarding of summary judgment contending that he intended to offer a better presentation of his position at hearing in February 1997. (Petitioner's Exceptions at pp. 3-4)

Upon a careful and independent review of the record, the Commissioner determines to affirm the determination of the ALJ that the respondent Board acted within its bounds in conducting its January 16, 1996 regular meeting, absent a regularly scheduled agenda meeting. The Commissioner finds that nothing in the bylaws would act to prevent the Board from holding a duly advertised meeting because a scheduled agenda meeting was forced to be canceled for good cause. This is particularly so in circumstances such as are described herein where, in accordance with the ALJ's factual findings, the Board took care to assure that to the extent that there was any possibility of harm to the public, any particular individual, or Board members, such would be minimized by the manner in which it conducted its regular meeting.

Moreover, even had the Commissioner found the Board's bylaws to have been violated, such violation would have been *de minimis* in that the Board's actions did not cause harm to the public, to any particular individual, or to Board members, nor did they contravene, directly or indirectly, any existing statute. See *In the Matter of Matawan Regional Teachers' Association v. Matawan-Aberdeen Regional School District,* 223 *N.J. Super.* 504 (App. Div. 1988). Thus, any violations found would not have risen to the level of warranting voiding of actions taken by the Board at its January 16, 1996 meeting.

Accordingly, the initial decision of the OAL as further explicated herein is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 17, 1997
Date of Mailing, January 17, 1997

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CATHERINE SPRUILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

January 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6579-95
AGENCY DKT. NO. 184-5/95

CATHERINE SPRUILL,
Petitioner,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE and MAPLEWOOD,
Respondent.

Augustine U. Uzodike, Esq., for petitioner

Joanne L. Butler, Esq., for respondent,
(Young, Dimiero & Sayovitz, attorneys)

Record Closed: November 14, 1996 Decided: December 4, 1996

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

Statement of Facts

This is an appeal brought on behalf of three students seeking enrollment in respondent school district for 1994-95. The school district has counterclaimed seeking payment of pro-rated tuition. Basically, the issue is when the three children became domiciled in the district. Petitioner enrolled her three children in the School District of South Orange and Maplewood in September 1994. She contends that she contracted to purchase a house in the district in May 1994 and actually moved into the district in or

about December 1994. The Board maintains that the contract of purchase was in someone else's name and that petitioner did not actually reside in Maplewood until March 1995. Therefore, the Board seeks payment of tuition for the three children from the start of school in September 1994 until the date that petitioner moved into the district.

For the reason which follows, petitioner abandoned the hearing request before the hearing was over. Consequently, the Board is entitled to judgment on its counterclaim.

Procedural History

On or about May 31, 1995, petitioner filed a verified petition with the Commissioner of Education ("Commissioner") claiming residency in Maplewood. The Board of Education of the School District of South Orange and Maplewood ("Board") filed its amended answer and counterclaim on June 16, 1995. Thereafter, on July 3, 1995, petitioner filed an answer to the counterclaim. Meanwhile, on June 2, 1995, the Board agreed to admit the three children to school in the district pending the outcome of this appeal.

Subsequently, on June 23, 1995, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held two days of hearing on May 7 and 8, 1996. Initially, the hearing was rescheduled for February 1997, but the OAL advised both parties that an earlier date would be scheduled if the calendar permitted it.

On September 13, 1996, the OAL notified both counsel by telephone that the hearing had been scheduled for November 14 and 15, 1996. In addition, on September 13, 1996 the OAL sent written notice to both counsel confirming the two November hearing dates and directing counsel to notify their witnesses to be ready to proceed on those dates. Moreover, on September 17, 1996, the Clerk of the OAL sent written

notice to counsel of the November hearing dates. Thus, both counsel received three separate notifications that the hearing would continue on November 14 and 15, 1996.

Board counsel appeared on November 14, 1996, accompanied by a Board representative. Neither petitioner nor her counsel appeared. For the reasons which follow, the petitioner's claim will be dismissed for failure to prosecute her appeal. The Board is entitled to judgment on its counterclaim.

Findings of Fact

I **FIND** the following facts:

Board Policy No. 5118(a) provides that students moving into the district within ten weeks of the start of the school year may be admitted on a tuition-paying basis. Further, the policy states: "If such students have not established district domicile by the close of the ten week period, they may be allowed to continue on a temporary tuition basis, if, in the opinion of the superintendent, the delay has been unavoidable and the district domicile will be established in the current school year."

Catherine Spruill applied to register her children, T.S., T.H. and M.D. in the district starting September 4, 1994. At the time of registration, Ms. Spruill submitted a form in which she swore under oath that she owned the home at 97 Rutgers Street in the Township of Maplewood. She verbally advised the district staff that she did not yet reside at the Rutgers Street address, but that she had a contract to purchase that house. However, she provided a copy of a contract of sale which did not name her as the purchaser. Instead, the contract listed one Frederick Springer and W. and T. Spruill as the buyers. It appears that Frederick Springer is an employee who works for Catherine Spruill at the local Burger King. W. Spruill is Catherine Spruill's brother and T. Spruill is her sixteen-year-old daughter.

Thereafter, the district staff continued to request proof that Catherine Spruill had purchased the Maplewood property. On October 7, 1994, petitioner's attorney wrote to the Board acknowledging that there had been a delay in the closing due to problems in obtaining a mortgage. Further, the attorney indicated that the closing was expected to take place by "the end of this month." Meanwhile, school officials had reason to believe that petitioner was not living in Maplewood. Mail sent to the house had been returned undelivered. One of the children was regularly late for school and told school staff that the family was still living in Jersey City.

When petitioner failed to submit any further information, the Board wrote to her on November 1, 1994 requesting documentation concerning the status of her closing. Petitioner did not respond to this request. Consequently, on December 6, 1994, the district's business office wrote to Ms. Spruill demanding payment of three-months tuition by December 16, 1994.

Before December 16, a realtor telephoned the business office on petitioner's behalf. The realtor represented that a lease agreement had been reached allowing Ms. Spruill to move into her new home prior to the closing. On December 13, 1994, the business office wrote to Ms. Spruill requesting a copy of the lease agreement by December 16 and copies of all closing documents no later than December 28. Again, the letter warned that, if this deadline was not kept, the children would be denied access to school and the mother would be billed for all tuition due.

On January 4, 1995, the realtor faxed to the Board a copy of what purports to be a lease between Ms. DeSilva as landlord and Catherine Spruill as tenant for the premises at 97 Rutgers Street. The term of the lease was sixty days beginning December 15, 1994 and ending February 14, 1995 at a rent of $500 per month. However, the lease turned out to be fraudulent. At the hearing, Catherine Spruill admitted that she never paid any rent to Ms. DeSilva.

After the lease had supposedly expired, the Board sent its investigator Edward Larkin, a retired police officer, to conduct a residency check at 97 Rutgers Street. On

March 14, 1995 Larkin visited the property and spoke with Ms. DeSilva, the owner of the property. Ms. DeSilva stated that she was still waiting to close on the house and that Catherine Spruill was not yet living in the house. Accordingly, on March 15, 1995, the district billed Catherine Spruill for tuition through March 1995 in the amount of $6,230 for the child attending sixth grade, $6,282.50 for the child attending ninth grade and $6,282 for the child attending eleventh grade.

Catherine Spruill's name does not appear in the chain of title for the property until a deed dated March 29, 1995. Insofar as the record reflects, this deed has never been properly recorded with the Essex County Register. The Board has been unable to obtain any independent verification that Ms. Spruill took possession of the property prior to March 31, 1995.

Conclusions of Law

I **CONCLUDE** that petitioner failed to appear at the hearing on November 14, 1996 without good cause and that this nonappearance constitutes an abandonment of the hearing request.

N.J.A.C. 1:1-14.4(a) provides:

> If, after appropriate notice, neither a party nor a representative appears at any proceedings scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may, pursuant to *N.J.A.C.* 1:1-3.3(b) and (c), direct the Clerk to return the matter to the transmitting agency for appropriate disposition.

Ordinarily, when the judge receives a satisfactory written explanation within the time limit, the hearing will automatically be rescheduled. However, *N.J.A.C.* 1:1-14.4(b)(2) specifies that:

> If the judge concludes from the explanation received that the nonappearing party or representative is intentionally attempting to delay the proceeding, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for the conclusion that there has been an intentional delay.

Despite adequate notice, petitioner and her attorney failed to appear at the continued hearing on November 14, 1996. When in inquiry was made by telephone, a secretary in the law office of petitioner's counsel was unable to provide a satisfactory explanation of why petitioner's counsel did not appear in response to three separate notices. Records of the Office of Administrative Law reflect telephone notice of the November hearing dates to petitioner's counsel on September 13, 1996 and written notices sent to petitioner's counsel on September 13, 1996 and September 17, 1996. This is not the first time that petitioner sought delay by failing to comply with procedures for an orderly and expeditious hearing. A hearing scheduled for May 10, 1996 had to be adjourned when petitioner's counsel failed to make a timely appearance.

Petitioner's counsel cannot legitimately claim that he did not receive notice of the hearing. Certainly any lack of diligence on counsel's part does not rise to the level of unforeseen "exceptional circumstances" necessary to obtain an adjournment. *N.J.A.C.* 1:1-9.6(a).

Moreover, the existing record clearly demonstrates that Catherine Spruill never entered into a contract to purchase a home in Maplewood, that she did not lease the property, and that she did not actually reside at the address prior to March 31, 1995.

Under the totality of the circumstances, I **CONCLUDE** that petitioner is intentionally attempting to delay the proceeding and that further adjournment of this matter cannot be justified.

It is, therefore, **ORDERED** that petitioner's request for relief is denied for lack of diligent prosecution.

And further **ORDERED** that petitioner pay the sum of $18,795 to the School District of South Orange and Maplewood, with interest at the prevailing rate to accrue starting forty-five days from date of entry of this initial decision.

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

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

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

Dec. 4, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX
List of Witnesses

1. Joan Milillo, registrar, School District of South Orange and Maplewood

2. Edward Larkin, investigator, School District of South Orange and Maplewood

3. Dr. Jacqueline Cusack, assistant superintendent, School District of South Orange and Maplewood

4. Catherine L. Spruill

List of Exhibits

No.		Description
P-1	Id.	Copy of letter to the school district of South Orange and Maplewood from Sabrina Corum, dated May 16, 1995
P-2	Id.	Computer printout, dated May 7, 1996
P-3	Id.	Copy of petition in the matter entitled *Catherine Spruill v. Board of Education of the School District of South Orange and Maplewood*, OAL Dkt. No. EDU 6579-95, dated May 24, 1995
R-1		Copy of registration packet for T.S.
R-2		Copy of registration packet for T.H.
R-3		Copy of registration packet for M.D.
R-4		Copy of first information request to the parent/guardian from the school district of South Orange and Maplewood, dated September 29, 1994

R-5 Copy of second information request to the parent/guardian from the school district of South Orange and Maplewood, dated October 5, 1994

R-6 Copy of letter to the school district of South Orange and Maplewood from Augustine U. Uzodike, dated October 7, 1994

R-7 Copy of request for residency check, dated October 31 [1994]

R-8 Copy of third information request to parent/guardian from the school district of South Orange and Maplewood, dated November 1, 1994

R-9 (a) Copy of fax transmittal to Carol Vagas from Re/Max Realty Associates, dated January 4, 1995

(b) Copy of letter to Ms. Vagas from Sabrina Corum, dated January 3, 1994

(c) Copy of apartment lease between Ms. DeSilva as landlord and Catherine Spruill as tenant, dated December 15,1 994

R-10 Copy of residency check report, dated March 14, 1995

R-11 Copy of deed between Jairo Gomes DeSilva and Natalina Leal DeSilva as grantors and Jo-Ann Beckles and William Spruill as grantees, dated March 24, 1995

R-12 Copy of residency check report, dated March 31, 1995

R-13 Copy of contract of sale between Fredrick Springer and W. & T. Spruill as buyers and Natilina & Jairo DeSilva as sellers, dated May 8, 1994

R-14 Copy of check in the amount of $2,684 payable to the South Orange-Maplewood Board of Education and drawn on the account of Catherine Louise Spruill, dated September 8, 1994

R-15 Copy of policy on nonresident students adopted by the board of education of the school district of South Orange and Maplewood on September 11, 1989

R-16 (a) Copy of letter to Catherine Spruill from Richard Rosenberg, dated December 6, 1994

(b) Copy of 1994-95 tuition bill for T.S., dated December 6, 1994

(c) Copy of 1994-95 tuition bill for T.H., dated December 6, 1994

(d) Copy of 1994-95 tuition bill for M.D., dated December 6, 1994

R-17 Copy of letter to Catherine Spruill from Richard Rosenberg, dated December 13, 1994

R-18 (a) Copy of letter to Catherine Spruill from Richard Rosenberg, dated March 15, 1995

(b) Copy of 1994-95 tuition bill for T.S., dated December 16, 1994 (sic)

(c) Copy of 1994-95 tuition bill for T.H., dated March 15, 1995

(d) Copy of 1994-95 tuition bill for M.D., dated March 15, 1995

(e) Copy of envelope marked return to sender, post marked March 15, 1995

R-19 (a) Copy of letter to Catherine Spruill from Jacqueline L. Cusack, Ed. D. dated April 4, 1995

(b) Copy of receipt for certified mail, stamped April 4, 1995

(c) Copy of envelope marked unclaimed, postmarked April 4, 1995

R-20 Copy of residence credit certificate from New Jersey Bell, dated December 1994

R-21 Id. Copy of document addressed to Whom It May Concern from Public Service EG Co., dated December 27, 1994

R-22 (a) Copy of letter to Catherine Spruill from Jacqueline L. Cusack, Ed D., dated April 19, 1995

(b) Copy of receipt for certified mail, stamped April 19, 1995

R-23 Copy of resolution No. 612B of the Board of Education of the school district of South Orange and Maplewood, adopted May 1, 1995

R-24 Copy of letter to Catherine Spruill from Ralph Lieber, dated May 2, 1995

R-25 Copy of fax transmittal sheet to Dr. Lieber from Re/Max Realty Associates, dated May 24, 1995

R-26 Copy of deed from Jo-Anne Beckles and William Spruill as grantors and Catherine Spruill and William Spruill as grantees, dated March 29, 1995

R-27 Copy of letter to Catherine Spruill from Jacqueline L. Cusack, Ed.D., dated June 1, 1995

R-28 Copy of resolution No. 487C setting 1994-95 tuition rates adopted by the board of education of the school district of South Orange and Maplewood on March 21, 1994

CATHERINE SPRUILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs that petitioner, by her failure to appear before the OAL, has abandoned her request for a hearing in this matter.

Accordingly, the initial decision of the ALJ affirming the Board's determination that petitioner's children, T.S., T.H. and M.D. were ineligible to attend school in the District from September 1994 through March 31, 1995 is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, petitioner is directed to remit $18,795 to the Board of Education, representing tuition for her three children for the aforementioned period of ineligible attendance in the District.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Pursuant to *N.J.A.C.* 6:24-1.16(a), inasmuch as the Board did not specifically seek relief which included either pre-judgment or post-judgment interest, the Commissioner does not direct the award of such interest.

January 17, 1997
Date of Mailing, January 17, 1997

(SB) 25-97

SB #25-97

IN THE MATTER OF THE REFINANCING	:	
OF THE 1994 LEASE PURCHASE	:	
AGREEMENT BY THE BOARD OF	:	STATE BOARD OF EDUCATION
EDUCATION OF FAIRVIEW, BERGEN	:	DECISION
COUNTY.	:	

Decided by the Commissioner of Education, February 14, 1997

For the Appellant, Oury & Mizdol (Dennis J. Oury, Esq., of Counsel)

On February 14, 1997, the Commissioner of Education issued a letter decision in which he denied the request by the Board of Education of the Borough of Fairview (hereinafter "Board") to refinance a lease purchase agreement pursuant to N.J.A.C. 6:22A-1.3.

On March 4, 1997, the Board filed a notice of appeal with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), the Board's brief in support of its appeal was due on March 24, 1997, 20 days after the appeal was filed. The Board, however, failed to file a brief by that date. By letter dated March 31, 1997, the counsel for the State Board notified the Board that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of its failure to perfect the appeal. The Board has still failed to file a brief in support of its appeal, 2½ months after the deadline for such filing and more than two months after it was given written notice of such failure. Nor did the Board respond to that notice or

6/4/97

provide any explanation for its failure to file a brief until yesterday when its counsel indicated in a letter to the State Board that this matter had "slipped between the cracks." He explained that "a few weeks ago I was on trial in South Dakota for over one week and frankly this matter was not attended to by my staff in my absence since I am the individual responsible for the Board of Education work."

We conclude that the belated explanation offered by the counsel for the Fairview Board does not, under the circumstances, excuse or justify his failure to file an appeal brief for more than two months or to request an extension. See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993). Consequently, we find no basis for relaxing the rules, and dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

June 4, 1997

Date of mailing JUN 06 1997

(SB) 25-97

SB #25-97

IN THE MATTER OF THE REFINANCING OF THE 1994 LEASE PURCHASE AGREEMENT BY THE BOARD OF EDUCATION OF FAIRVIEW, BERGEN COUNTY.	:	STATE BOARD OF EDUCATION DECISION ON MOTION

Decided by the Commissioner of Education, February 14, 1997

Decided by the State Board of Education, June 4, 1997

For the Appellant, Oury & Mizdol (Dennis J. Oury, Esq., of Counsel)

On February 14, 1997, the Commissioner of Education issued a letter decision in which he denied the request by the Board of Education of the Borough of Fairview (hereinafter "Board") to refinance a lease purchase agreement pursuant to N.J.A.C. 6:22A-1.3. On March 4, 1997, the Board filed a notice of appeal with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), the Board's brief in support of its appeal was due on March 24, 1997. The Board, however, failed to file a brief by that date. By letter dated March 31, 1997, we notified the counsel for the Board that no appeal brief had been filed and that this matter was therefore being referred to our Legal Committee for consideration of the Board's failure to perfect the appeal. Yet, the counsel for the Board still failed to file a brief in support of the appeal, 2½ months after the deadline for such filing and more than two months after he was given written notice of such failure.

Nov. 5, 1997

Nor did the counsel for the Board respond to that notice or provide any explanation for his failure to file a brief until June 3, the day before this matter was scheduled for consideration by the State Board, when he indicated in a letter to the State Board that this matter had "slipped between the cracks." He explained that "a few weeks ago I was on trial in South Dakota for over one week and frankly this matter was not attended to by my staff in my absence since I am the individual responsible for the Board of Education work."

We concluded that the belated explanation offered by the counsel for the Board did not, under the circumstances, excuse or justify his failure to file an appeal brief for more than two months or to request an extension for such filing. Consequently, on June 4, 1997, we dismissed the appeal pursuant to N.J.A.C. 6:2-1.12(a), which authorizes dismissal of an appeal for failure to meet the filing deadline for an appeal brief. See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

On August 27, 1997, the Board filed the instant motion for reconsideration of that decision. The counsel for the Board again explains his failure to file a brief by indicating that he had been "on trial in South Dakota at the time and was not able to tend to the matter." He also argues that this case presents a matter of public importance warranting a determination on the merits.

After a review of the papers submitted, we find no basis for reconsidering our decision.

As the Court observed in Paszamant, supra, slip op. at 3, "[a]n entity such as the State Board of Education has to be free to enforce its own procedural rules, providing

that it does not do so in a manner which is arbitrary, capricious or unreasonable." It was the obligation and responsibility of the counsel for the Board to assure compliance with the regulations, and, under the circumstances, we find no basis for reconsidering our decision to dismiss the appeal. Nor do we find this case to be a matter of such public importance as to compel resolution. See Abel v. Elizabeth Bd. of Works, 63 N.J. Super. 500 (App. Div. 1960). We note in that regard that the Board waited more than 2½ months after its appeal was dismissed to file the instant motion.

Consequently, we deny the Board's motion for reconsideration of our decision dated June 4, 1997 in this matter.

November 5, 1997

Date of mailing NOV 07 1997

26-97

D.M., on behalf of A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent sought to have her child's (A.M.) chemistry grade expunged and replaced with her subsequent grade. Petitioner contended the grade in question was due to the Board's inappropriate placement of A.M. in Honors Chemistry.

ALJ dismissed the matter as untimely filed as the petition was clearly filed well beyond the 90-day requirement in regulation from the date of the action contested. A.M. was placed in the class in September 1994 and retained in the class in Spring 1995; the petition was not filed until May 24, 1996.

Commissioner concurred with the findings and conclusions of the ALJ. The petition was dismissed as untimely.

January 17, 1997

State of New Jersey
Office of Administrative Law

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 9936-96
AGENCY DKT. NO. 209-6/96

D. M., ON BEHALF OF A.M.,

Petitioner,

v.

BOARD OF EDUCATION OF PEQUANNOCK,

Respondent.

D. M., Petitioner, *pro se*

Anthony Sciarrillo, Esq., for Respondent

Record Closed: November 15, 1996 Decided: December 3, 1996

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE **MARIA MANCINI LAFIANDRA,** ALJ:

We are back on the record in the matter of EDU 9936-96. We took a break in order that I might consider Mr. Sciarrillo's application, which is now moot in view of the decision that I am about to render.

That application was to dismiss the petition for failure to make a *prima facie* case. There is no need to reach that issue because I have decided to dismiss this petition on the basis of the failure to comply with the regulatory requirement which states that the Petitioner shall file a petition no later than the

90th day from the receipt of the notice of a final order ruling, or, and this is the part that is pertinent to this action, other action by the district board of education, individual party or agency which is the subject of the contested case hearing. In this case, as we discussed during the prehearing conference immediately preceding this hearing and during some part of the hearing itself, the issue is whether the school system acted in an arbitrary and capricious manner in placing the Petitioner, A.M., in an honor chemistry class and, further, whether it was arbitrary and capricious of the school authority to keep her in that honor class after request for a change had occurred.

There is no need to reach the merits of those issues because the placement occurred, at the latest, in September 1994 and probably before that. The decision to retain her in the class, by the testimony of all three of Petitioner's witnesses, occurred some time in the Spring of 1995. The petition in this matter was filed, I believe the date is May 24, 1996, clearly well beyond the 90-day requirement in the regulation, which is found at *N.J.A.C.* 6:24-1.2(c).

On that basis, I am **DISMISSING** the petition.

I advise the Petitioner that she has the right to object to this decision. This will be a written decision which you will receive shortly in the mail. At the end of the decision there will be an address to which you can write your objections to what I have said and you can address them to the person mentioned in that final paragraph of my decision.

The Commissioner of Education will have the opportunity either to adopt my decision as a whole, modify my decision in some way, or reject my decision and write a whole new decision.

I am reserving the right to edit what I said so that it is coherent when I am finished with it.

The matter is **DISMISSED** and we are adjourned.

END OF TRANSCRIPT

I, Jane R. Pearson, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Maria Mancini LaFiandra's oral decision rendered in the above matter on November 15, 1995.

12/3/96
DATE

Jane R. Pearson
Jane R. Pearson

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

Within thirteen (13) days from the date on which this recommended oral decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, 8th Floor, West, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/3/96
DATE

Maria M LaFiandra
MARIA MANCINI LAFIANDRA, ALJ

Receipt Acknowledged:

Dec. 6, 1996
DATE

D. M. Contaminatis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 9936-96
AGENCY DKT. NO. 209-6/96

D.M., on behalf of A.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the transcript of the oral initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed thereto.

Petitioner avers that the substantive issues raised in her appeal regarding her child's placement in honors chemistry should be addressed in that a failing grade has had a devastating effect on her minor child's grade point average. She seeks that the petition not be dismissed for untimeliness contending that the 90-day timeline tolled at the close of the 1995-96 school year, not before, nor upon, her minor's placement in the honors chemistry class.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the Petition of Appeal was filed out of time and that no relaxation or waiver of *N.J.A.C.* 6:24-1.2(c) is warranted in this instance.

Accordingly, for the reasons expressed therein, the Commissioner adopts the oral initial decision of the OAL that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 17, 1997
Date of Mailing, January 17, 1997

(SB) 27-97

DHPL #94-97
SB #27-97

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF T.R.B. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, February 28, 1997

For the Petitioner-Appellant, T.R.B., pro se

T.R.B. (hereinafter "petitioner"), who was employed as a bus aide for the Franklin Township Board of Education, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed convictions following arrests in January 1990 for possession of cocaine and in June 1991 for possession of cocaine with intent to distribute. Petitioner sought to overturn her disqualification on the basis of rehabilitation.

In a letter decision dated February 28, 1997, the Deputy Commissioner of Education upheld the disqualification,[1] concluding that while petitioner had shown progress towards rehabilitation, she had failed to demonstrate clear and convincing evidence of her rehabilitation as required by N.J.S.A. 18A:6-7.1.

[1] We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

6/4/97

Petitioner filed the instant appeal to the State Board of Education.

After a careful review of the record, we reverse the decision of the Deputy Commissioner. We find that petitioner has demonstrated clear and convincing evidence of her rehabilitation.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

> e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
>
> 1. The nature and responsibility of the position which the convicted individual would hold;
> 2. The nature and seriousness of the offense;
> 3. The circumstances under which the offense occurred;
> 4. The date of the offense;
> 5. The age of the individual when the offense was committed;
> 6. Whether the offense was an isolated or repeated incident;
> 7. Any social conditions which may have contributed to the offense;
> 8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Petitioner's submissions include a letter from her supervisor at the school in which she had been employed prior to her disqualification, who praises petitioner as a "most competent and pleasant employee." She indicates that petitioner "has proven to be a great asset to my department, and I would be more than willing to reinstate her when this matter is resolved. Now that I am aware of her past problems, I respect the

way she has worked to turn her life around." A former co-worker lauds petitioner as a "very reliable, responsible, and hard worker." The human resources director of a pharmaceutical company who entrusts her three children to petitioner's care commends her as "dependable, caring, articulate, thorough and passionate....She has struggled with physical and mental barriers and has come through with flying colors. You could not have a more qualified individual on your staff." The record also indicates that petitioner spent one month at a substance abuse facility following her June 1991 arrest. There have been no further arrests.

Petitioner explains that her drug dependency followed a medical diagnosis of kerateconis, a condition which she indicates would have left her blind in both eyes without a transplant. She indicates that she has now undergone thirteen operations and lost the vision in one eye.

While the gravity of petitioner's offenses is apparent, we find that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence in the record, including the recommendation of petitioner's supervisor and her completion of a substance abuse program, we conclude that petitioner has demonstrated clear and convincing evidence of her rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e).

Accordingly, we reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey as a bus aide.

June 4, 1997

Date of mailing JUN 06 1997

28-97

28-97 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF S.E.R.	:	DECISION
_____	:	

January 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 10401-96
and
OAL DKT. NO.: EDU 10402-96
AGENCY DKT. NO. DHP #88-96

SCOTT E. RIXFORD,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Richard L. Gruber, Esq., appeared for petitioner

John K. Worthington, Deputy Attorney General, appeared for respondent
(Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: December 18, 1996 Decided: January 6, 1997

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF CASE

In this matter, the petitioner, Scott E. Rixford, who had been hired as an elementary school teacher in March 1996 by the Board of Education of Paterson, contests his disqualification from school employment.

On September 26, 1996, the Department of Education notified Mr. Rixford that a criminal history investigation revealed a conviction for vehicular homicide in Massachusetts. Pursuant to *N.J.S.A.* 18A:6-7.1 et seq., he was being disqualified from the teaching profession.

On October 3, 1996, Commissioner Leo Klaghoz granted a Motion for a Stay of Mr. Rixford's disqualification pending appeal.

On November 7, 1996, following further investigation by the Criminal History Division of the Department of Education, Mr. Rixford was notified that a conviction for possession of a controlled dangerous substance had been reported by the state of Massachusetts, leading to another disqualification.

Rixford again sought a stay of the disqualification from the acting Commissioner of the Department of Education, a request which was this time denied.

Rixford petitioned the Appellate Division of the Superior Court on November 20, 1996, requesting a Stay of the Disqualification. The Stay was denied. The Appellate Division did, however, order that the matter be sent to the Office of Administrative Law for an expedited hearing.

A hearing was scheduled for December 18, 1996. Prior to the hearing date, petitioner filed a Motion for Summary Decision contending that vehicular homicide was not a disqualifying offense and that *N.J.S.A.* 18A:6-7.1 constitutes an unconstitutional *ex post facto* law when applied to a drug conviction that preceded the enactment of the amended statute.

Both the Motion for Summary Decision and the plenary hearing were heard and completed on December 18, 1996.

ISSUES

On initial review, several issues were posed: (1) is vehicular homicide a disqualifying crime or offense under *N.J.S.A.* 18A:6-7.1 et. seq.; (2) is a conviction for possession of CDS that predates the enactment of the amendment to *N.J.S.A.* 18A:6-7.1 disqualifying applicants

an *ex post facto* law and therefore unconstitutional; (3) if either of the offenses are disqualifying has Mr. Rixford been rehabilitated pursuant to the requirements of *N.J.S.A.* 18A:6-7.1e?

The Motion for Summary Decision on the issue of whether or not a conviction for vehicular homicide is a disqualifying conviction was denied preliminarily because there were facts in dispute surrounding the charge in question.

Before resolving the issues, a closer look at *N.J.S.A.* 18A:6-7.1A to 7.1d is warranted. The statute reads as follows:

> A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18, shall not employ or contract for the services of any teaching staff member . . . unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists . . . which would disqualify that individual from being employed. . . . An individual other than a school bus driver shall be disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction of any of the following crimes and offenses: . . . (b) a crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the *New Jersey Control Dangerous Substance Act, P.L. 1970 c. 226 (C 24:21-1 et seq.); or (c).(1)* a crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, aggravated assault, kidnapping, arson, manslaughter and murder; or (2) a simple assault involving the use of force which results in bodily injury; or (d). in any other state or jurisdiction, a conviction involving conduct which, if committed in New Jersey, would constitute any of the crimes or disorderly person offenses described in this section of this Act.

Not disputed in this matter is the fact that on April 28, 1992, Mr. Rixford pled guilty to vehicular homicide in the state of Massachusetts.

Neither the Attorney General's Office or the petitioner were able to produce the police reports comprising the foundation for that conviction. In the absence of any report, the only avenue that remained to elicit the facts surrounding the offense was the testimony of Mr. Rixford himself.

Mr. Rixford indicated that in June 1990, he was traveling on Route 495 in Havril, Massachusetts at approximately 10:00 a.m. in the morning. He recalls making a lane change from the center lane of the three lane highway to the fast lane and looking in his rear view mirror. He looked into his rear view mirror at an undisclosed distance from the point at which he made the lane change and saw the end result of an accident. Not believing that he was involved in or in any way caused the accident, Mr. Rixford continued on his way.

It was not until approximately 15 months later, in August 1991, that Mr. Rixford discovered that he was the subject of an investigation into the death of a driver of a motor vehicle which he allegedly impeded at the time of his lane change. Mr. Rixford was arrested in September 1991.

A review of the Massachusetts's statute[1] indicates that a conviction for vehicular homicide can encompass reckless driving, negligent driving or driving under the influence. It is apparent from Mr. Rixford's version of the accident that it was at best an act of negligence on his part that caused the accident. There is absolutely nothing in the record to contradict this assertion and **I FIND** as a matter of fact that the vehicular homicide to which Mr. Rixford pled guilty was caused by his negligence and not any recklessness or drugs or alcohol.

---

[1] Chapter 90, §24G of the Massachusetts statutes provides in part:

Homicide by Motor Vehicle; Penalty

(b) Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor or marihuana, narcotic drugs, depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by such operation causes the death of another person, shall be guilty of homicide by a motor vehicle and shall be punished by imprisonment in a jail or house of correction for not less than thirty days nor more than two and one half years, or by a fine of not less than three hundred nor more than three thousand dollars, or both.

N.J.S.A. 18A:6-7.1c requires the use of force or threat of force upon a person or property to result in a disqualification and then delineates specific crimes. Though I do not believe the list of crimes delineated in the statute was intended to be exhaustive, I do agree that negligent vehicular homicide, such as the one described by Mr. Rixford, does not involve the type of force or threat of force contemplated by the Legislature.

There is no case law which interprets the foregoing statutory sections thus, the first step in interpretation is ". . . consideration of its plain language." *Lammers v. Board of Ed, 134 NJ 264, 267 (1993)*. "Absent a legislative intent to the contrary, such language should be given its ordinary meaning". *Id.* at 268. Based on the statutes plain language and the committee statement noted, *supra.*, it is reasonable to conclude that a disqualifying crime or offense is limited to those expressly enumerated in the statute. **I FIND** therefore that under the factual circumstances as related by Mr. Rixford, an account which stands unrebutted, he did not commit a crime or offense which is disqualifying.

***EX POST FACTO* LAW**

I comment on Mr. Rixford's argument that his drug conviction should not be disqualifying for it is an unconstitutional exercise of an *ex post facto* law only briefly for **I FIND,** as a matter of fact, that he has presented clear and convincing evidence of his rehabilitation.

The New Jersey Supreme Court in *John Doe v. Poritz, 142 N.J. 1 43-46 (1995)* determined that the question of whether a law is an unconstitutional *ex post facto* law is determined primarily on whether the legislative intent is regulatory or punitive.

N.J.S.A. 18A:6-7.1 was originally enacted in 1986. In 1989, the statute was amended to expand and clarify the grounds under which an individual may be disqualified by specifically

identifying the crimes or offenses. *Senate Education Committee Statement 2S.3056. L.1989. C104.*

Mr. Rixford's drug offense took place in 1984. Drug violations were added to the statute in 1989. But, it is undeniable that the purpose of *N.J.S.A.* 18A:6-7.1 is to protect school children from exposure to harm by precluding those with nefarious backgrounds from having the opportunity to exert their influence in a position of authority and admiration. As stated in. for *Adler v. Board of Ed of the City of New York is 342 U.S. 485, 493 (1952)*.: "A teacher works in a sensitive area in a school room. There he shapes the attitudes of young minds toward the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of adult society, cannot be doubted."

It is thus clear that an application of the principles enunciated in *Doe v. Poritz, supra* leads to the conclusion that the enactment of *N.J.S.A.* 18A:6-7.1 was remedial and not punitive. It would not therefore be an unconstitutional exercise of an ex post facto law.

REHABILITATION

Scott Rixford graduated the University of Miami in 1983 and returned to Massachusetts (his home state). After spending some time as a hairdresser, he got involved with, and actually shared, a residence with a family that actively participated in the drug culture.

In May 1984 the police, while executing a search warrant on the premises of Mr. Rixford's "landlord", the Boviers, found a marijuana cigarette and a very small amount of cocaine on a nightstand next to Rixford's bed. He was arrested and subsequently pled guilty to possession of both drugs and paid a fine of $1250.

At the time of his sentencing, he was under the impression that the judge had indicated that his guilty plea would be sealed, an impression that was subsequently confirmed by his attorney.

Immediately after the sentencing, Mr. Rixford entered therapy and continued the therapy from June 1984 until approximately June 1985. The therapy was successful, according to Mr. Rixford, in that he has not taken drugs of any kind since 1984.

Shortly after his conviction he became employed by the American Diabetes Association, beginning for the most part with public relations work, and progressing to the point where he was the Director of Development and Fund Raising when he left in September 1986. He left when he started SER Corporation, a menswear clothier. The business was based in Boston and San Diego. Unfortunately, after some initial success, the business was unceremoniously closed in 1989 and Mr. Rixford returned to Portsmouth, New Hampshire. He opened a hair salon, a salon by which he was employed when the vehicular homicide in June 1990 occurred. He testified that he was, in fact, on his way to purchase supplies for the business when he made the negligent lane change, which though it did not result in any contact to the vehicle he was driving, did result in the death of another driver. Though Mr. Rixford was initially aware that an accident had occurred, he maintained that he was unaware of his involvement.

After his arrest, he pled guilty to vehicular homicide which, as explained to him by his attorney, was an offense comprised of his negligence. He was sentenced to four months in jail and three years probation. He was actually in custody for 30 days and then electronically monitored for 60 days. It was at that point that he moved to New York (October 1992) and his probation was transferred to New York City.

He was able to find employment with Bloomingdales as a salesman, but was more interested in pursuing a career in education. In furtherance of that goal, he returned to Rutgers University in 1994 and completed his Masters in education in May 1995. After student teaching for four months at Fort Lee High School, he applied to the Paterson School District for a job as an elementary school teacher.

Although he did disclose the vehicular homicide on his application, he did not disclose the two minor drug offenses. His explanation for this failure was that he believed that the records with respect to the drug offenses had been sealed and therefore he had no obligation to disclose them. He did, in fact, indicate that, as far as he was concerned, the vehicular homicide was the more serious of the offenses, and having disclosed that, it would seem logical that he would have disclosed the minor drug offenses had he not believed that they were sealed.

In March 1996, he took over a fourth grade class at Public School 3 in Paterson. His supervisor in that position was Grisell Hernandez, the principal of the school. Ms. Hernandez has been principal of Public School 3 for approximately four years but has 25 years teaching experience. As principal it was her obligation and duty to evaluate Mr. Rixford. Her testimony concerning Mr. Rixford's performance was unhesitatingly complimentary. She gave him an outstanding evaluation and characterized him as extremely cooperative. Even after finding out about Mr. Rixford's prior convictions, she unequivocally voiced her complete support for him and was unquestionably very confident that Mr. Rixford would pose no danger to the students and that he would make an excellent teacher.

Shirley Glaubach, a reading teacher in the Paterson School District, was assigned as Mr. Rixford's "mentor teacher". She described a "mentor teacher" as a "big sister" who would be available to advise Mr. Rixford on procedural issues, educational contents and all aspects

of teaching. She met with him on a regular basis several times a day over a period of several months. Ms. Glaubach found Mr. Rixford to be extremely receptive and open to suggestions and was "extremely pleased with his performance and believed he would be an excellent teacher".

Ms. Diane Cross, a school teacher for 43 years, was the teacher that Mr. Rixford was to replace during her illness. Ms. Cross was obviously very protective of her students and insisted on meeting and working with Mr. Rixford before he was assigned the duty of taking over her class. Ms. Cross was very impressed with Mr. Rixford and was delighted to leave her students in his charge.

THE LAW

The last section of *N.J.S.A.* 18A:6-7.1, part -7.1e; provides the standards that must be met in order to prove rehabilitation. Under this section an individual has the opportunity to overcome a disqualifying crime or offense by "affirmatively demonstrating to the Commissioner of Education by clear and convincing evidence of his or her rehabilitation". The higher burden of proof required to show rehabilitation is necessary in light of "the public policy of the State of New Jersey to protect children from unrehabilitated persons working in public schools." *Application of V.S. 258 N.J. Super. 348, 352-53 (L.Div. 1992).*

Clear and convincing evidence means more than a preponderance. *State v. Cale, 19 N.J. Super. 397, 400 (App. Div. 1952).* Under this standard the fact finder must be reasonably certain or have a firm belief or conviction that the contested factual assertion is true. *Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 161 (App. Div. 1960).*

Determining whether the rehabilitation requirements established under *N.J.S.A. 18A:6-7.1e* have been satisfied requires a review of this section:

> (e) notwithstanding the provisions of this section an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
> 1) the nature and responsibility of the position which the convicted individual would hold;
>
> (2) the nature and seriousness of the offense;
>
> (3) the circumstances under which the offense occurred;
>
> (4) the date of the offense;
>
> (5) the age of the individual when the offense was committed;
>
> (6) whether the offense was an isolated or repeated incident;
>
> (7) any social conditions which may have contributed to the offense;
>
> (8) any evidence of rehabilitation including good conduct in prison or in the community, counseling, or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Simply put, 16 years ago at the age of 20, Mr. Rixford was convicted of a relatively minor drug offense. He professes no further involvement with drugs and there is no indication whatsoever that there has been. The offense under those circumstances would have to be considered an isolated incident. The evidence of rehabilitation presented by his witnesses was compelling and convincing. Besides the actual testimony of the live witnesses, Mr. Rixford presented proof that he successfully completed his probation and has successfully pursued a Masters degree in education.

I FIND the evidence presented with respect to the above eight factors to be clear and convincing evidence that Mr. Rixford has reached an admirable level of rehabilitation.

CONCLUSION

In conclusion, **I FIND** that the vehicular homicide to which Mr. Rixford pled guilty was not a disqualifying crime or occurrence. **I FURTHER CONCLUDE** that though his drug offense of 1984 was disqualifying, despite the argument that the law itself was an ex post facto unconstitutional exercise of power, he has, by clear and convincing evidence, established his rehabilitation.

ORDER

It is **ORDERED** that Scott E. Rixford has established his rehabilitation from a disqualifying offense and is hereby allowed to pursue the profession of public school teacher.

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

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

Jan 6 97
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NOS. EDU 10401-96 AND 10402-96
AGENCY DKT. NOS. DHP 73-96 AND 88-96

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF S.E.R.	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, and based upon the credibility determinations of the ALJ and the absence of any evidence to rebut appellant's account of the arrests underlying his 1984 convictions for possession of controlled dangerous substances and his 1992 conviction for vehicular homicide, the Commissioner concurs with the ALJ's conclusion that appellant's 1992 vehicular homicide offense is not disqualifying under the pertinent statute. As the ALJ determined, such offense involved negligent, rather than reckless conduct and, thus, did not involve the use of force or threat of force as specifically required by the plain language of the statute in order to be disqualifying. Further, the ALJ found that there was no alcohol or drug use involved. As to appellant's 1984 convictions for possession of controlled dangerous substances, while these are disqualifying offenses, the Commissioner concurs that appellant has demonstrated rehabilitation within the intendment of the criminal history record check statutes set forth at *N.J.S.A.* 18A:6-7.1 *et seq.*

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and appellant is hereby deemed eligible for school employment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 17, 1997
Date of Fax, January 17, 1997, Mailed January 21, 1997

29-97

29-97

THEODORE WURSTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning high school science teacher alleged he was wrongfully denied military service credit in violation of *N.J.S.A.* 18A:29-11. Petitioner sought back pay and salary adjustment.

ALJ concluded that petitioner was given proper credit for his military service when he was hired. ALJ found that petitioner was placed on the same initial step on the salary guide in 1990-91 as the District would have placed any other newly hired teacher with 10 years experience. Petitioner had 7 years of prior teaching experience and 3 years of military service. Petition was dismissed.

Commissioner adopted the findings and determination in the initial decision as his own.

January 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7967-95
AGENCY DKT. NO. 227-6/95

THEODORE WURSTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SCOTCH PLAINS-FANWOOD, UNION COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen attorneys)

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: November 4, 1996 Decided: December 3, 1996

BEFORE **EDITH KLINGER**, ALJ:

On June 23, 1995, petitioner Theodore Wurster filed a verified petition with the Bureau of Controversies and Disputes, Department of Education, alleging that respondent failed to give him credit for his military service in violation of *N.J.S.A.* 18A:29-11 when it placed him on the wrong step on the salary guide at the beginning of his employment in the school district in 1990. He seeks the difference in back pay from

1990 and a salary adjustment which will place him on the appropriate step of the salary guide. On July 25, 1995, respondent filed its answer and on August 3, 1995, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

During a telephone conference held with the parties on September 21, 1995, it was determined that the following issues were to be decided at hearing:

1) Has petitioner already received credit for his three years of military service?
2) Is petitioner's claim barred by *N.J.A.C.* 6:24-1.2(c), the ninety-day rule?
3) Is petitioner barred from seeking relief by application of the doctrine of laches?
4) Is petitioner barred by any other statutory or regulatory limitation of action?
5) To what relief, if any, is petitioner entitled?

The hearing was held on October 3, 1996, and the record closed on November 4, 1996, when the final posthearing submission was received.

THE RELEVANT STATUTE

N.J.S.A. 18A:29-11 provides that anyone who has served in the military is entitled

> to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.

REVIEW OF EVIDENCE

Petitioner, Theodore M. Wurster, has been employed by respondent, the Board of Education of the School District of Scotch Plains-Fanwood (Board), as a secondary science teacher since the 1990-91 school year.

The parties agree that, at the time he was first employed by the District, Wurster had 6.9, that is, 7, years of prior public school teaching experience. He also had 3 years of military service.

When he was hired by the District in 1990, he was placed on step 7 of the salary guide and he received $29,889 for his first year of employment. He claims that he should have started at step 10 based upon his 7 years of prior public school experience and his 3 years of military service. In that case, his starting salary would have been $32,843. Each succeeding year he moved up one level on the salary guide. He argues that, if he had received the correct salary at the outset, he would be at a step higher than 13 for the 1996-97 school year.

The Board argues that there is not a one-to-one correspondence between the steps on the salary guide and a teacher's prior years of public school teaching experience. It has the power to negotiate a teacher's starting salary. Consequently, newly-hired teachers are not always given full credit for prior teaching experience, excluding credit for military service, because it might cause them to be paid more than their value to the District. Other teachers are brought in on higher steps than their experience warrants if there is a great need to fill vacant positions. The initial placement of a teacher on the salary guide is "at such point as may be agreed upon by the [teacher] and the employing board of education." *N.J.S.A.* 18A:29-9.

The District's salary guide was completely revised in the collective bargaining agreement between the Board and the Scotch Plains-Fanwood Education Association, Inc., effective July 1, 1985, to June 30, 1988. This revision was necessary because of new legislation, *N.J.S.A.* 18A:29-5.6(b), which required that public school teachers be paid a minimum salary of $18,500 beginning with the 1984-85 academic year. Nineteen steps on the old salary guide were compressed into fifteen steps in such a manner that the full change would be phased in over a period of fifteen years.

The phase-in occurred in accord with the following compression schedule. During the 1985-86 school year, a teacher coming to the District with 1 to 3 years of prior public school teaching experience was placed on the first step of the guide, one with 4 to 6 years of prior experience was placed on the second step, and all other steps, for the most part, corresponded to actual years of prior experience. During the 1986-87 school year, a teacher coming to the District with 2 to 4 years of prior public school teaching experience was placed on the second step of the guide, one with 5 to 7 years of prior experience was placed on the third step, and all other steps, for the most part, corresponded to actual years of prior experience. By the 1990-91 school year, when Wurster began, a teacher coming to the District with 6 to 8 years of prior public school teaching experience was placed on the sixth step of the guide, one with 9 to 11 years of prior experience was placed on the seventh step, and all other steps, for the most part, corresponded to actual years of prior experience. R-3.

Robert Raiford, who has been employed by the Board as a personnel specialist for over fourteen years, interviewed Wurster when he applied for the teaching position and placed him on the appropriate step of the guide in accordance with the compression schedule and the collective bargaining agreement in effect between July 1, 1988, and June 30, 1991. He saw that Wurster had 7 years of prior teaching experience and 3 years of military service and determined that this was the equivalent of 10 years of prior teaching experience. He determined from the phase-in schedule

that petitioner should, therefore, be placed on step 7 because he had between 9 and 11 years of experience.

Wurster is convinced that Raiford did not take his military service into account because, in July 1994, he received a proposed Seniority List of secondary science teachers and he was credited with only 4 years of service in the District toward his seniority. It should have been 7 years if his military service were included, but the error did not affect his seniority relative to the other secondary science teachers. When he called the mistake to Raiford's attention, it was quickly corrected, but Raiford asked him for documentation (DD214) showing the length of his military service. From this, Wurster assumed that Raiford did not know that he had served in the Marine Corps and had not started him on the right step of the salary guide when he was hired.

Raiford explained that an error was made on the Seniority List because there was a failure to cross-reference Wurster's military service record in his file. Raiford corrected the error as soon as it was called to his attention; however, he realized that the District had never asked Wurster to document his military service and, in the interest of completing the record, requested the DD214. The incident was completely irrelevant to the initial calculation of Wurster's salary at the time he was hired. Raiford produced his notes from his employment interview with petitioner and they reflect that Raiford was aware that Wurster had 3 years of military service.

Petitioner testified that he did not know of the existence of *N.J.S.A.* 18A:29-11 until April 1994 when he learned about it in a course on law that he was taking to get a higher degree. From that time he has repeatedly and unsuccessfully asked the District to correct his salary and restore his back pay.

The collective bargaining agreement for July 1, 1985, through June 30, 1988, shows the effect of the compression phase-in for the 1985-86 school year, but not for

the remaining years in which the agreement was in effect. Appendix B, Article B-1, Salary Guide Placement, states, in relevant part:

> B. Credit for prior experience.
>
> 1. Upon initial employment, employees will be placed on the salary guide in accordance with the provisions of N.J.S.A. 18A:29-9.
>
> [Exhibit R-2.]

The collective bargaining agreement for July 1, 1988, through June 30, 1991, makes no reference to the compression schedule, however, it also gives no indication as to how the steps on the salary guide relate to prior public school teaching experience. Appendix B, Article B-1, Salary Guide Placement, still refers to *N.J.S.A.* 18A:29-9 as the basis for the initial placement of newly hired teachers on the salary guide (P-6).

DISCUSSION OF LAW AND CONCLUSIONS

Petitioner argues that the Board had to follow the collective bargaining agreement for July 1, 1988, through June 30, 1991, and place Wurster on step 10 of the salary guide because this agreement, as opposed to the prior one, does not specifically refer to the compression schedule. This argument is without merit. The agreement in effect at the time Wurster was hired has no provision which directly correlates prior experience to a teacher's initial placement on the guide. In fact, it specifically defers to the Board's statutory discretion, pursuant to *N.J.S.A.* 18A:29-9, to negotiate the initial point on the guide with the teacher at the time of hiring. I **CONCLUDE** that it was not a breach of this discretion nor a violation of the collective bargaining agreement for the Board to continue its implementation of the compression phase-in during the effective period of the new agreement.

I **FIND** that, in accord with the compression schedule, Wurster was given credit for his 3 years of military service when he was hired in 1990-91. If this were not the case he would have been placed on step 6 initially, along with any others who came to the District with 6 to 8 years of prior public school teaching experience.

Pursuant to *N.J.S.A.* 18A:29-11, the Board is required to give Wurster credit for his 3 years of military service as if it were 3 years of prior public school teaching experience. It is not, however, required to treat those 3 years any differently than it treats any other prior public teaching experience. *Cape May County Vo-Tech v. Cape May County,* 211 *N.J. Super.* 383, 387 (App. Div. 1986). I **FIND** that Wurster was placed on the same initial step on the salary guide in 1990-91 as the District would have placed any other newly-hired teacher in 1990-91 with 10 years of experience. Consequently, I **CONCLUDE** that he was given proper credit by the Board for his military service as required by *N.J.S.A.* 18A:29-11.

Accordingly, I **CONCLUDE** that petitioner is entitled to no relief in this matter, and it is **ORDERED** that his verified petition is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 3, 1996
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

For Petitioner:

Theodore M. Wurster

Jacinta Kay

For Respondent:

Robert Raiford

Raymond A. Cassetta

Exhibits

For Petitioner:

P-1 Teacher of Science certificate

P-2 Letter, dated July 23, 1990

P-3 Résumé of Wurster

P-4 Application for Professional Position

P-5 Employment Contract

P-6 Agreement, July 1, 1988, to June 30, 1991

P-7 Proposed Seniority List

P-8 Form DD214

P-9 Memorandum, dated June 16, 1994

P-10 Letter, dated September 11, 1994

P-11 Letter, dated October 25, 1994

P-12 Memorandum, dated October 27, 1994, with attached 1985-86 Salary Guide

For Respondent:

R-1 Raiford's Interview Notes

R-2 Agreement, July 1, 1985, to June 30, 1988

R-3 Compression Schedule (Salary Guide Placement)

OAL DKT. NO. EDU 7967-95
AGENCY DKT. NO. 227-6/95

THEODORE WURSTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner essentially recasts and reiterates arguments presented before the Administrative Law Judge (ALJ) in his written summation again contending, *inter alia*, that he was denied credit for three years of military service in 1990 and, thus, seeks back pay and a salary adjustment. He maintains that there was no indication of a compression schedule in the collective bargaining agreement in effect when petitioner was hired or that somehow his initial placement on the salary guide was covered by a compression. (Petitioner's Exceptions at pp. 2-3) He further contends that pursuant to *Board of Education of Neptune v. Neptune Township Education Association,* 144 *N.J.* 16 (1966), and *N.J.S.A.* 18A:29-4.1, the compression which occurred in 1985 could be of no import five years later, when petitioner was hired, as the salary guide in question could have a term of no more than three years. He then emphasizes that pursuant to *N.J.S.A.* 18A:29-11, the Board is mandated to credit him for his military service. (Petitioner's Exceptions at p. 5) Lastly, he explains that Mr. Raiford, either by oversight or

the appropriate correction on the seniority list. (*Id.* at p. 9) In that these arguments were already raised before the ALJ, they are not set forth more fully herein.

In its reply, the Board asserts that the ALJ's initial decision was proper and should be affirmed. (Board's Reply at p. 1) The Board avers that the testimony with regard to the compressed salary guide is credible and supported by the evidence. It further notes that it acted within its authority and to grant the relief sought by petitioner would create an inequitable situation within the school system. (*Id.* at pp. 1-2)

Upon review, the Commissioner affirms the initial decision of the ALJ that petitioner was given proper credit by the Board for his military service as required by *N.J.S.A.* 18A:29-11 when he began his employ with the Board. The Commissioner is satisfied that the ALJ fully considered the arguments raised in petitioner's exceptions. He finds no cause to disturb such findings, based on a review of the record herein, and concurs that the Board acted in conformance with its authority when initially placing petitioner on the salary guide, pursuant to *N.J.S.A.* 18A:29-9 and to the agreement in effect when petitioner was hired.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 21, 1997
Date of Mailing, January 21, 1997

30-97

30-97

LORETTA COLANTONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, guidance counselor who was riffed, asserted tenure and seniority entitlement to guidance position contracted out by the Board to Morris Union Jointure Commission (MUJC).

ALJ concluded that the Board acted within its discretion when it eliminated petitioner's counseling position due to financial constraints and, later, for reasons of economy, contracted with MUJC to offer guidance services. ALJ found the Board could contract out the guidance services for its special education students in the District but not the services for its nonhandicapped students. Board was not legally obligated to "recreate" a position in the District for petitioner. Thus, the ALJ concluded that petitioner was not entitled to have the portion of the guidance function related to handicapped students restored to her.

Commissioner adopted in part, reversed in part the ALJ's initial decision. Commissioner concurred with the ALJ that the Board acted properly in contracting with MUJC and that petitioner would be recalled if the Board decided to employ a counselor for additional guidance needs. Commissioner, however, reversed the initial decision to the extent that it holds the enabling statute, *N.J.S.A.* 18A:46-24 *et seq.*, to preclude a jointure commission from offering services to nonhandicapped students. There is nothing in this statute that would act to preclude such commission from expanding the scope of its services to include nonhandicapped pupils where the contracting districts find such expansion to be in the best interest of efficient delivery of services. However, should the need for additional guidance services arise and should the Board decide to employ a counselor, the Board would be obligated to recall petitioner from the preferred eligibility list.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3304-96
AGENCY DKT. NO. 61-2/96

LORETTA COLANTONI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,
Respondent.

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

Lance J. Kalik, Esq., for respondent (Riker, Danzig, Scherer, Hyland & Peretti, attorneys)

Record Closed: September 26, 1996 Decided: October 18, 1996

BEFORE **EDITH KLINGER**, ALJ:

On February 13, 1996, petitioner, Loretta Colantoni, filed a Verified Petition with the Bureau of Controversies and Disputes, Department of Education, alleging that her tenure and seniority rights were violated when respondent, Long Hill Township (District)

Board of Education (Board), abolished her position as guidance counselor, transferred her to a classroom position within the scope of her teaching certificate, and later contracted with the Morris Union Jointure Commission to provide guidance services rather than recreating the guidance position in the district. On March 4, 1996, respondent filed its answer and, on March 18, 1996, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

During a telephone conference held with the parties on May 2, 1996, it was determined that the material facts could be stipulated and the matter resolved by summary decision. The record closed on September 26, 1996, when the final submission was received from the parties.

The following facts are as stated by petitioner in her certification in support of her cross-motion for summary decision and are undisputed by respondent.

She was employed by the Long Hill Township Board of Education as follows:

Year	Subject Area and Grade
1973-74	Full Time Teacher of Math (Grades 7 and 8)
1974-75	Half Time Teacher of Math (Grades 7 and 8) and Half Time Guidance Counselor (Grades 5-8)
1975-76	Full Time Guidance Counselor (Grades 5-8)
1976-77	3/4 Time Guidance Counselor (Grades 5-8) 1/4 Time Special Services
1977-78	3/4 Time Guidance (Grades 5-8) 1/4 Time Special Services
1978-79	Half Time Guidance (Grades 5-8) and Half Time Teacher of Social Studies (Grades 7 and 8)
1979-80	Full Time Teacher of Social Studies (Grades 7 and 8)
1980-81	Full Time Teacher of Social Studies (Grades 7 and 8)

1981-82	Full Time Teacher of Math (Grades 7 and 8)
1982-83	Full Time Teacher of Math (Grades 7 and 8)
1983-84	Full Time Teacher of Math (Grades 7 and 8)
1984-85	Full Time Teacher of Math (Grades 7 and 8)
1985-86	Full Time Teacher of Math (Grades 7 and 8)
1986-87	Full Time Teacher of Math (Grades 7 and 8)
1987-88	4/5 Time Teacher of Math (Grades 7 and 8)
	1/5 Time Teacher of English (Grades 7 and 8)
1988-89	2/5 Time Teacher of Math (Grades 7 and 8)
	1/5 Time Teacher of Social Studies
	2/5 Time Teacher of Reading (Grades 7 and 8)
1989-90	4/5 Time Teacher of Math (Grades 7 and 8)
	1/5 Time Teacher of Social Studies
1990-91	Full Time Guidance Counselor (Grades 5-8)
1991-92	Full Time Guidance Counselor (Grades 5-8)
1992-93	Full Time Guidance Counselor (Grades 5-8)
1993-94	4/5 Time Guidance Counselor (Grades 5-8)
	1/5 Time Teacher of Math (Grade 7)
1994-95	Half Time Teacher of Math (Grade 7)
	1/6 Time Teacher of Health (Grade 7)
	1/6 Time Teacher of Math (Grade 7)
	1/3 Time Teacher of Social Studies (Grade 7)
1995-96	Half Time Teacher of Social Studies (Grade 7)
	1/6 Time Teacher of Health (Grade 7)
	1/6 Time Teacher of Math (Grade 7)
	1/6 Time Teacher of Literature (Grade 7)

At all relevant times, Colantoni was certified as a teacher with endorsements in English, mathematics, social studies, and science (Grades 7 through 9), an Elementary Teacher (Grades 7 and 8), as well as a student personnel services endorsement. She also holds certain supervisory certifications which are irrelevant to the present matter.

Petitioner has achieved tenure in the district under her instructional certificate and under her educational services certificate in the area of student personnel services.

The Board submitted the affidavit of Edward F. Izbicki, Sr. in support of its cross-motion for summary decision. Izbicki has been the Board Secretary, Business Administrator for the Board since September 18, 1995.

He stated that there has been no full-time or part-time guidance position for grades five through eight in the district since the close of the 1993-94 school year when it was eliminated for budgetary reasons.

It subsequently appeared that part-time guidance services were necessary and, on November 27, 1995, the Board passed a resolution to contract with the Morris Union Jointure Commission (MUJC) to provide guidance services for sixteen hours a week to both classified and non-classified students. Jean Molendyke, the employee of the MUJC providing the guidance services, is fully certified and qualified to do so.

The initial contract between the Board and the MUJC ran from November 28, 1995 through June 30, 1996. The contract is to be renewed for the 1996-97 school year.

At the time Colantoni's position was abolished, she was placed on a preferred list to be placed back into the guidance position if it is ever recreated in the district. She argues that the district was legally unable to contract out the position and the position had to be recreated in the district and given to her.

Colantoni has not suffered any loss of income because of the abolition of her position and her lateral transfer.

DISCUSSION OF LAW AND CONCLUSIONS

When the guidance position was abolished in 1994, it was not the subject of an appeal by Colantoni and no authority has been found which states that the district is

legally required to maintain such a position. Consequently, it will be assumed that the position could have been abolished and the abolition was for reasons of economy.

A person holding the position of guidance counselor may be transferred, without loss of salary, to a classroom teaching position without the individual's consent pursuant to a reduction in force or abolition of the guidance position. *Childs v. Union Township Board of Education* (N.J. App. Div., July 19, 1982, A-3603-80T1) (unreported), p. 2.

Further, it is within the discretion of the Board to eliminate such a position to meet financial constraints while continuing to provide the services related to the abolished position, even if it alters the "full-time status of a tenured employee." *Impey v. Board of Education of the Borough of Shrewsbury*, 142 *N.J.* 388, 399 (1995). I, therefore, **CONCLUDE** that the Board could contract out the services formerly provided by Colantoni.

The next question to be addressed is whether the Board could contract out the guidance services for non-handicapped as well as handicapped students to the MUJC. The statute creating jointure commissions is contained in *Chapter* 46 of *Title* 18A, *N.J.S.A.*, entitled "Special Schools and Classes," which deals with special facilities and special education programs. A review of the Jointure Commission Statute, *N.J.S.A.* 18A:46-24 *et seq.*, shows that two or more boards of education may form a joint commission, such as the MUJC, to carry out jointly "the duties imposed upon them in regard to the education and training of handicapped pupils." *N.J.S.A.* 18A:46-25. (Emphasis added.)

In *Impey, supra,* the joint body providing services was an Educational Services Commission (ESC), authorized in *N.J.S.A.* 18A:6-51 *et seq.*. This type of agency is established jointly by boards of education to carry on "programs of educational research and development" and provide "to public schools such educational and administrative services as may be authorized pursuant to rules of the State Board of

Education." An ESC may provide services to the handicapped but is not limited by statute to this role as is a jointure commission. *N.J.A.C.* 6:28-7.1.

Based upon *Impey* and the statutes creating ESCs and jointure commissions, I **CONCLUDE** that the Board could contract out the guidance services for its special education students to the MUJC but not the services for its non-handicapped pupils. There is nothing in the record to indicate that the Board participates in an ESC but, if it did, all of its guidance services could have been contracted out to such an agency.

A reduction in force, if done for reasons of economy, is within the discretion of the Board. *Impey, supra,* at 398. Therefore, the Board could abolish the guidance position to meet financial constraints and contract out the services for special needs students to the MUJC. As a result, I **CONCLUDE** that Colantoni is not entitled to have the portion of the guidance function related to handicapped students restored to her.

This raises several questions: what fraction of the sixteen hours a week of guidance services which are now contracted out to the MUJC is attributable to non-handicapped students; and will the Board decide to service these pupils if not through the MUJC?. The Board might reestablish a part-time guidance position for the non-handicapped students in the District. If so, I **CONCLUDE** that Colantoni would be entitled to it. On the other hand, the Board might decide that there is insufficient need and it is not economically reasonable to provide guidance services to non-handicapped students. Alternatively, the Board might find that it is better to have one provider and bring the guidance services for all students back to the District, in which case I **CONCLUDE** that Colantoni would also be entitled to the position.

These alternatives, and perhaps others, are all within the managerial discretion of the Board and, I **CONCLUDE**, the appropriate one must be chosen by it based upon budgetary considerations and the need for the services.

Accordingly, I **CONCLUDE** that the Board is under no obligation to maintain a guidance position in the District if it is not economical to do so and Colantoni has lost no income because of her transfer to a classroom teaching position. Consequently, I **CONCLUDE** that she is entitled to no relief in this matter unless the Board exercises its managerial discretion to recreate a guidance position in the District.

It is therefore **ORDERED** that summary decision is hereby **GRANTED** to respondent and the appeal of Loretta Colantoni is **DISMISSED WITH PREJUDICE**.

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

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

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

October 18, 1996
DATE

EDITH KLINGER, ALJ

October 23, 1996
DATE

Receipt Acknowledged:
D. M. Ardanowski/p
DEPARTMENT OF EDUCATION

OCT 24 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 3304-96
AGENCY DKT. NO. 61-2/96

LORETTA COLANTONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were timely filed by both petitioner and the Board. Replies were also timely filed by petitioner, pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner objects to the Administrative Law Judge's (ALJ) failure, in light of her findings and conclusions, to direct the Board in the initial decision "***to take any action to correct its illegal subcontracting of guidance work." (Petitioner's Exceptions at p. 2) Consequently, petitioner urges the Commissioner "***to affirmatively direct the Board to employ [her] as its Guidance Counselor in any position which includes both non-handicapped and handicapped guidance services.***" (*Id.*)

Petitioner underscores that the statutes do not permit the Board's position, as it is currently configured, to be subcontracted to a jointure commission. As such, petitioner maintains

that the initial decision "effectively found [her] allegations to be substantiated***," notwithstanding that the ALJ dismisses the petition. (*Id.* at pp. 2- 3) Petitioner further contends,

> ***While it is true that the Board could subsequently change or abolish the position if it chose, it is not the role of a decision-maker to present the respondent with a list of options to correct its illegal action instead of deciding the case on the facts that currently exist.
> (*Id.* at p. 3)

Thus, petitioner asks that the Commissioner order "***the Board to cease the illegal subcontracting of the single position it has created***" and to either employ her in that position or abolish same in favor of some alternative which comports with the law. (*Id.* at p. 4)

The Board's sole exception taken to the initial decision concerns the ALJ's legal conclusion that services to nonhandicapped students are precluded by *N.J.S.A.* 18A:46-24 *et seq.* In this regard, the Board incorporates by reference its brief filed at the OAL in opposition to petitioner's Motion for Summary Decision and in Support of Respondent's Cross-Motion for Summary Decision. Therein, the Board contends, *inter alia*, that the pertinent statute contains no language limiting the jointure commissions to providing services exclusively to handicapped students. (Board's Brief at p. 13) The Board adds that its "conclusion is supported by the fact that since its existence, the MUJC [Morris Union Jointure Commission] has provided a myriad of services to non-handicapped students.***" (*Id.* at p. 14) Listing those "other" services to nonhandicapped students, the Board argues that a contrary ruling "***could have a drastic effect upon jointure commissions, as well as the local districts that rely upon them for assistance with these worthwhile and important services." (*Id.* at pp. 15, 16) Thus, the Board urges the Commissioner to reverse the ALJ's restrictive reading of *N.J.S.A.* 18A:46-24 *et seq.* and find,

instead, that it is entitled to contract all of its guidance services to the MUJC. (Board's Exceptions at p. 2)

In reply to the Board's argument concerning the delivery of services by the MUJC to nonhandicapped students, petitioner incorporates by reference her Brief in Support of Motion for Summary Judgment, essentially contending that *N.J.S.A.* 18A:46-24 *et seq.* does not authorize the provision of such services and "the Board has thus subverted the intended purposes of a jointure commission.***" (Petitioner's Brief at pp. 6-8)

Upon careful and independent review, the Commissioner determines to adopt in part, and reverse in part, the recommended decision of the ALJ. Initially, the Commissioner concurs with the ALJ that the Board acted within its discretion when it eliminated petitioner's counseling position due to financial constraints, *see N.J.S.A.* 18A:28-9, and later, for reasons of economy, contracted with the MUJC to offer guidance services to the students in its District.[1] Contrary to petitioner's position, for the reasons set forth in the initial decision, the Board was not legally obligated to "recreate" a position in its District and to give it to her. (Initial Decision at p. 4) Notwithstanding this conclusion, should the need for additional guidance services arise, and should the Board decide to *employ* a counselor to meet that need, the Board will be obligated to recall petitioner from the preferred eligibility list in accordance with the standards established by *N.J.A.C.* 6:3-5.1.

[1] The Board notes that the position of guidance counselor for grades 5-8 for the 1994-95 school year was eliminated because of budgetary constraints. The Board further provides that there was no full-time or part-time guidance position for grades 5-8 in the District for the 1994-95 school year. Accordingly, petitioner was assigned a full-time teaching position. In the 1995-96 school year, in response to public requests to reinstate the guidance position, but still faced with budgetary constraints, the Board effectuated the agreement with the MUJC. (Izbicki Certification at p. 2, as referenced in the Board's Brief at p. 4)

However, the Commissioner reverses the initial decision of the ALJ to the extent that it holds the enabling statute, *N.J.S.A.* 18A:46-24 *et seq.*, to preclude a jointure commission from offering services to nonhandicapped students. While the primary purpose of a jointure commission is to assist boards of education in carrying out their common duties with respect to the education and training of handicapped pupils, nothing in this statute would act to preclude such commission from expanding the scope of its services to include nonhandicapped pupils where the contracting districts find such expansion to be in the best interest of efficient delivery of services. Under the circumstances herein, for example, nullification of the Board's agreement with the MUJC would certainly contravene sound fiscal and educational policy.

Accordingly, the initial decision of the ALJ is adopted in part, and reversed in part, for the reasons set forth above, and the Petition of Appeal is hereby dismissed. [2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] Subsequent to issuance of the initial decision, as well as receipt of exception and reply arguments, the Board requested, by letter dated November 27, 1996, to supplement the record in order to respond to the questions raised by the ALJ in the initial decision. Those questions concerned the percentage of time which the contracted guidance counselor at the MUJC served nonhandicapped students, so as to ascertain the need, if any, for the Board to establish a guidance position in its District to serve nonhandicapped pupils. In view of the outcome herein, the Commissioner finds it unnecessary to reach to the Board's request, or to petitioner's objections, to supplementing the record with such information.

January 23, 1997
Date of Mailing, January 23, 1997

30-97

EDU #3304-96
C # 30-97
SB # 19-97

LORETTA COLANTONI, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION ON MOTION
SHIP OF LONG HILL, MORRIS COUNTY, :

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, January 23, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Riker, Danzig, Scherer, Hyland & Perretti (Lance Kalik, Esq., of Counsel)

Upon review of the papers filed, the State Board of Education grants petitioner's motion to supplement the record on appeal with the certification of Dr. James A. Durante, Superintendent of the Long Hill Township School District. N.J.A.C. 6:2-1.9.

June 4, 1997

Date of mailing JUN 06 1997

30-97

EDU #3304-96
C # 30-97
SB # 19-97

LORETTA COLANTONI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 23, 1997

Decision on motion by the State Board of Education, June 4, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Riker, Danzig, Scherer, Hyland & Perretti (Lance Kalik, Esq., of Counsel)

This matter was initiated in February 1996 on behalf of Loretta Colantoni (hereinafter "petitioner"), a tenured teaching staff member employed by the Long Hill Township Board of Education (hereinafter "Board"). Petitioner alleged that the Board had violated her tenure and seniority rights when it eliminated her position as a guidance counselor and subsequently subcontracted with the Morris Union Jointure Commission ("Jointure Commission") to provide guidance services to non-handicapped students. Petitioner sought reassignment to a guidance counselor position.

JANUARY 6, 1999

In April 1996, the Long Hill Township Education Association filed an unfair practice charge against the Board with the Public Employment Relations Commission ("PERC") based on the same allegations as are involved herein. In June 1996, the Board sought to consolidate the instant case with the PERC matter. The Administrative Law Judge ("ALJ") denied the Board's request.

On October 18, 1996, the ALJ issued an initial decision in this matter. Although finding that petitioner was not entitled to any relief, the ALJ concluded that the Board could not properly subcontract with a jointure commission to provide guidance services to non-handicapped students.

On January 23, 1997, the Commissioner adopted that part of the ALJ's decision which found that petitioner was not entitled to relief. However, the Commissioner rejected the ALJ's determination that the Board could not subcontract with the Jointure Commission to provide guidance services to non-handicapped students.

Petitioner filed an appeal to the State Board from the Commissioner's decision.

On October 29, 1998, the Board filed the instant motion seeking dismissal of the appeal. The Board contends that the matter is moot since petitioner had retired from her employment with the district effective January 1, 1998.

In response, petitioner argues that the State Board should decide the appeal. Petitioner maintains that the central issue raised herein–i.e., whether the terms of the enabling statutes that authorize the establishment of jointure commissions, N.J.S.A. 18A:46-24 et seq., permit the Board to contract with a jointure commission for the provision of services to non-handicapped students–is both an issue of public concern and one that is likely to reoccur. Petitioner also contends that the State Board should

resolve the issue because PERC had effectively deferred action on the unfair practice charge pending the outcome of this appeal and that it is our agency's interpretation of N.J.S.A. 18A:46-24 et seq. that will be controlling in the PERC matter.

After careful consideration of the arguments made by counsel, including those in the Board's reply to petitioner's answer to its motion to dismiss, we deny the Board's motion. Resolution of the issue involved herein will have far-reaching implications for New Jersey's system of public education and, therefore, the public interest dictates that the State Board decide it. E.g., Galloway Township Board of Educ. v. Galloway Township Educ. Ass'n, 78 N.J. 25, 46-47 (1978).

In order to decide the merits of this matter as expeditiously as possible, we direct the Board to supplement the record on appeal within ten days of the date of this decision with the agreements and resolutions which had been submitted to the Commissioner for approval pursuant to N.J.S.A. 18A:46-24 et seq. to establish the Morris Union Jointure Commission. N.J.A.C. 6:2-1.9.

January 6, 1999

Date of mailing JAN 08 1999

30-97

EDU #3304-96
C # 30-97
SB # 19-97

LORETTA COLANTONI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 23, 1997

Decision on motion by the State Board of Education, June 4, 1997

Decision on motion by the State Board of Education, January 6, 1999

For the Petitioner-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Riker, Danzig, Scherer, Hyland & Perretti (Lance Kalik, Esq., of Counsel)

This matter was initiated in February 1996 on behalf of Loretta Colantoni (hereinafter "petitioner"), a tenured teaching staff member employed by the Long Hill Township Board of Education (hereinafter "Board"). Petitioner alleged that the Board had violated her tenure and seniority rights when, after it had eliminated her position as a guidance counselor, it had subcontracted with the Morris-Union Jointure Commission ("Jointure Commission") to provide guidance services to its students, including non-handicapped students. Although petitioner had been employed by the Board under

MARCH 3, 1999

her instructional certificate without loss of pay following the elimination of her position as a guidance counselor, she sought reassignment to a guidance counselor position.

On October 18, 1996, an Administrative Law Judge ("ALJ") issued an initial decision in this matter. Although finding that petitioner was not entitled to any relief at that point,[1] the ALJ concluded that the Board could not properly subcontract with a jointure commission to provide guidance services to non-handicapped students.

On January 23, 1997, the Commissioner adopted that part of the ALJ's decision which found that petitioner was not entitled to relief. However, the Commissioner rejected the ALJ's determination that N.J.S.A. 18A:46-24 et seq. precluded the Board from subcontracting with the Jointure Commission to provide guidance services to non-handicapped students. Rather, the Commissioner concluded that:

> While the primary purpose of a jointure commission is to assist boards of education in carrying out their common duties with respect to the education and training of handicapped pupils, nothing in this statute would act to preclude such commission from expanding the scope of its services to include nonhandicapped pupils where the contracting districts find such expansion to be in the best interest of efficient delivery of services.

Commissioner's decision, slip op. at 12.

Petitioner filed an appeal to the State Board from the Commissioner's decision.

On October 29, 1998, the Board moved for dismissal of the appeal, contending that the matter was moot since petitioner had retired from her employment with the district effective January 1, 1998.

---

[1] The ALJ observed that there were several alternatives available to the Board if it chose to provide guidance services and that the Board was under no obligation to maintain a guidance counselor position. Hence, the ALJ concluded that petitioner would be entitled to relief only if the Board chose to recreate a guidance counselor position.

In our decision of January 6, 1999, we denied the Board's motion. In doing so, we found that resolution of the issue raised by this appeal would have far-reaching implications for New Jersey's system of public education. Consequently, we concluded that the public interest dictated that we decide the statutory question that had been raised in this case notwithstanding the fact that the individual petitioner involved would not be afforded any relief as a result of our decision.[2]

In order to decide the issue as expeditiously as possible, we directed the Board to supplement the record on appeal with the agreements and resolutions which had been submitted to the Commissioner for approval pursuant to N.J.S.A. 18A:46-24 et seq. to establish the Morris-Union Jointure Commission.

After reviewing the Board's submission, as well as the briefs filed by the parties, we find, as the ALJ correctly concluded, that the Board could not contract with a jointure commission established pursuant to N.J.S.A. 18A:46-24 for the provision of guidance services to non-handicapped students.

The establishment of jointure commissions is authorized by N.J.S.A. 18A:46-24 et seq., which also prescribes their powers. Those statutory provisions are included in Chapter 46 of the education statutes, which specifically provides for "Classes and Facilities for Handicapped Children." N.J.S.A. 18A:46-14 enumerates the various ways in which special education facilities and programs required under Chapter 46 must be provided. N.J.S.A. 18A:46-14(d) specifically authorizes the provision of such facilities

[2] In April 1996, the Long Hill Township Education Association had filed an unfair practice charge against the Board with the Public Employment Relations Commission ("PERC") based on the same allegations as are involved herein. In urging the State Board not to dismiss her appeal as moot, petitioner contended that the State Board should resolve the issue because PERC had effectively deferred action on the unfair practice charge pending the outcome of this appeal and that it is our agency's interpretation of N.J.S.A. 18A:46-24 et seq. that will be controlling in the PERC matter.

and programs through a jointure commission program. The establishment of jointure commissions is authorized by N.J.S.A. 18A:46-25, which provides that:

> When two or more boards of education determine to carry out jointly by agreement the duties imposed upon them in regard to the education and training of handicapped pupils the said boards may, in accordance with rules and regulations of the state board, and with the approval of the commissioner by adoption of similar resolutions establish a jointure commission for the purpose of providing such services....

N.J.S.A. 18A:46-26 delineates the powers of a jointure commission. These include the authority to: a) provide and maintain necessary facilities, b) take necessary action for the proper conduct of the educational program for "such children" referred to it by its member boards, c) employ staff, d) accept pupils from other school districts, and e) apportion costs of the program. In addition, N.J.S.A. 18A:46-26 provides that:

> Within the limited responsibilities of this chapter and except as otherwise provided, the commission shall have and may exercise all powers of a board of education in carrying out the purpose of this chapter.

The language of the applicable statutes is clear and unambiguous. As the Commissioner has previously recognized, jointure commissions were created only for the purpose of educating and training handicapped students. Stuermer v. Board of Education of the Special Services School District of Bergen County, 1978 SLD 628, 631. In conferring the power on jointure commissions to take such action as may be necessary for the proper conduct of the educational program for "such children" as are referred to them, N.J.S.A. 18A:46-26, the Legislature provided jointure commissions with the authority to provide education and training only to handicapped students. This limitation is reinforced by the Legislature's grant to jointure commissions of all powers of boards of education "[w]ithin the limited responsibilities of this chapter" and "in carrying

out the purpose of this chapter." N.J.S.A. 18A:46-26. As previously indicated, the only purpose of Chapter 46 is to provide for special educational services for handicapped children. See, e.g., N.J.S.A. 18A:46-2.

Quite simply, there is nothing in the statutory language to provide the authority for the provision of services to non-handicapped students by a jointure commission. See Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Education, 79 N.J. 574 (1979). That being the case, the Board could not properly provide guidance services to its non-handicapped students by contracting with the Morris-Union Jointure Commission for those services.

This conclusion is reinforced by review of the application for the establishment of the Morris-Union Jointure Commission, which the State Board of Education approved on June 3, 1987 on the recommendation of the Commissioner of Education. The application shows clearly that the Morris-Union Jointure Commission was established under the statutory framework in order for the member boards to provide special education services and programs through a cooperative arrangement. In this respect, we reject the Board's suggestion that Article II of the Jointure Commission's constitution expanded this purpose to include the provision of services to all students of the member and subcontracting districts.

In that petitioner did not suffer any economic loss as a result of the Board's action and has retired from her employment in the district, the relief afforded by our decision is limited to this declaration.

March 3, 1999

Date of mailing MAR 05 1999

(SB) 30-97

SB #30-97

IN THE MATTER OF AN ADJUSTMENT TO :
THE SPENDING GROWTH LIMITATION :
REQUEST OF THE BOARD OF EDUCATION :
OF THE TOWNSHIP OF BERKELEY, OCEAN :
COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 24, 1997

For the Petitioner-Appellant, Robert D. Budesa, Esq.

This matter involves an appeal from a determination made by the Commissioner of Education on March 24, 1997 to approve only $461,789 of a $906,789 request by the Board of Education of the Township of Berkeley (hereinafter "Board") under N.J.S.A. 18A:7F-5(d) for an increase in the district's spending growth limitation for the 1997-98 school year.

The matter was initially placed in abeyance at the Board's request, and, by letter dated May 29, 1997, the Board requested to withdraw its appeal on the basis of an agreement it had arrived at with the Township Council with respect to its education budget for 1997-98.

After reviewing the Board's request, we approve withdrawal of the appeal since the documentation reflects a budget that is within the spending growth limitation

7/2/97

established by the Commissioner's March 24 determination. However, in that the agreement between the Board and the Township Council would also settle any dispute concerning the Township Council's determination pursuant to N.J.S.A. 18A:22-37 of the amount necessary to provide a thorough and efficient system of schools in the district, we refer the proposed settlement to the Commissioner for approval as required by N.J.A.C. 6:24-7.3.

July 2, 1997

Date of mailing JUL 08 1997

31-97

CLARISSA C. KOCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9501-95
AGENCY DKT. NO. 271-7/95

CLARISSA C. KOCH,
Petitioner,
v.
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Andrew B. Brown, Esq., for respondent,
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: December 6, 1996 Decided: December 6, 1996

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law on August 23, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Dec. 6, 1996
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/3/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1996
DATE

Barbara A Harner
OFFICE OF ADMINISTRATIVE LAW

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DEC 3 11 07 AM '96

OAL DKT. NO. 9501-95
AGENCY DKT. NO. 271-7/95

STIPULATION OF SETTLEMENT

CLARISSA C. KOCH,
Petitioner,
v.
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1,
Respondent.

The parties agree to resolve the above matter as follows:

1. The Board shall increase Ms. Koch's 1996-97 base salary by the amount of $6,660, to a total of $80,230, retroactive to September 1, 1996.

2. Upon approval by the Office of Administrative Law, the New Jersey Commissioner of Education, and the Board of Education, Ms. Koch shall receive the retroactive money in a lump sum less deductions for the period between September 1, 1996 and the date of the final approval above. Her subsequent checks for the remainder of the 1996-97 school year shall reflect the new rate.

3. Ms. Koch shall withdraw the pending matter.

4. In future school years, Ms. Koch's salary shall be established by the appropriate school district, which Petitioner represents as having full knowledge of this matter.

5. Except as set forth herein, in the event that Union County Regional High School District No. 1 is in existence beyond June 30, 1997, the parties agree that Koch's salary base for the 1997-98 school year will be $76,070.

6. The parties shall execute mutual releases which shall include a non-admission clause.

7. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

DATED: December 6, 1996

Wayne J. Oppito, Esq.
Attorney for Petitioner

Clarissa C. Koch, Petitioner

Andrew B. Brown, Esq.
(Schwartz, Simon, Edelstein, Celso & Kessler)
Attorney for Respondent

OAL DKT. NO. EDU 9501-95

CLARISSA C. KOCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

January 23, 1997
Date of Mailing, January 23, 1997

32-97

EDU #11369-95
C # 32-97
SB # 17-97

AKBAR ZADRAN,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY, : DECISION ON MOTIONS

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, January 23, 1997

For the Petitioner-Appellant, Rutgers University Constitutional Litigation Clinic (Eric Neisser, Esq., of Counsel)

For the Respondent-Respondent, Gaccione, Pomaco & Beck (Frank Pomaco, Esq., of Counsel)

Upon review of the papers filed, the State Board of Education grants petitioner's motion to admit Penny M. Venetis, Esq. pro hac vice so as to permit her to represent the petitioner before the State Board with respect to the current matter. In addition, we grant petitioner's motion to supplement the record on appeal. N.J.A.C. 6:2-1.9. Accordingly, we reestablish the briefing schedule and direct that petitioner submit a brief in support of his appeal within twenty days from the date of this decision. The Board's answer brief is due within twenty days after service of petitioner's brief.

May 7, 1997

Date of mailing MAY 09 1997

32-97

AKBAR ZADRAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent sought continued enrollment in the Belleville School District for his four children. Board sought payment of tuition, alleging the children were not domiciled in Belleville.

ALJ found that although part of the condominium complex where petitioner lived was located in Belleville, petitioner's unit was mainly located in Newark and petitioner's property taxes (paid by the landlord) were paid to the City of Newark. Thus, the ALJ concluded that the children were domiciled in Newark and were ineligible to attend free public school in Belleville. ALJ ordered the children transferred to the Newark public school district as soon as reasonably possible, directing petitioner to pay the sum of $35,466 to the Board for tuition charges accruing since September 1995 school year when petition was filed, not from February 1993 when the family moved to the condominium.

Commissioner adopted findings and determination in initial decision as his own.

January 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11369-95
AGENCY DKT. NO. 340-8/95

AKBAR ZADRAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE,
Respondent.

Akbar Zadran, *pro se*

Frank Pomaco, Esq., for respondent,
(Gaccione, Pomaco & Beck, attorneys)

Record Closed: November 25, 1996 Decided: December 6, 1996

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

Statement of the Case

This is an appeal brought on behalf of four students seeking continued enrollment in the Belleville school district. Respondent Belleville Board of Education ("Board") has counterclaimed seeking payment of tuition. Basically, the dispute involves whether petitioner's children are domiciled in Belleville within the meaning of *N.J.S.A.* 18A:38-1(a). Akbar Zadran and his family reside in a condominium complex located on the border between the Township of Belleville and the City of Newark. Petitioner contends that his domicile is Belleville and, therefore, that his children are

entitled to attend school in the Belleville district free of charge. The Board maintains that the particular dwelling unit occupied by the Zadran family is situated in Newark and, consequently, that the children are ineligible for free public education in Belleville.

For the reasons that follow, the children's domicile is determined to be in Newark and the parents must reimburse the district for tuition costs since September 1995.

Procedural History

On August 29, 1995, Mr. Zadran filed a verified petition with the Commissioner of Education alleging that his children were eligible to attend the Belleville public schools. The Board filed its answer on September 25, 1995. In accordance with *N.J.S.A.* 18A:38-1(b), the children were allowed to remain in school, on condition that the parents would be liable for payment of tuition in the event that it was ultimately determined that the children are not domiciled in Belleville.

Subsequently, on October 5, 1995, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on November 25, 1996. Witnesses and exhibits are listed in the appendix.

Findings of Fact

All of the material facts necessary for disposition of this case are undisputed. I **FIND:**

Akbar Zadran's four children, ages eighteen, sixteen, eleven and nine, have been enrolled in the Belleville school district for several years. Previously, Mr. Zadran, together with his wife and children, had lived at a different address in Belleville. In or about February 1993, the family moved to a larger and more comfortable apartment which is part of a complex known as Convent Court Condominiums. Mr. Zadran

honestly thought that the new apartment was still within the geographical confines of Belleville. He had told the broker who found the apartment for him that he wanted to live in Belleville. Moreover, the apartment has a Belleville mailing address and a Belleville telephone exchange. A written lease describes the premises as "2 Honnis Street, Belleville, NJ Apt. A-17."

Ray and Cathy Veniero, the owners who subleased the premises to Mr. Zadran, led him to believe that the apartment was located in Belleville. Nonetheless, there were circumstances that might have put an alert tenant on notice that something was wrong. Rent for Apartment A-17 was considerably less than the rent for comparable living space available in the Township of Belleville. At the hearing, Mr. Zadran produced an advertising brochure by the real estate developer which claims that the condominium is located in "Bright Beautiful Belleville!" However, Mr. Zadran could not possibly have relied on this statement, since he was unaware of the brochure at the time that he entered into the lease.

It turns out that only six of the twenty-four dwelling units in the Convent Court Condominium complex are physically located in Belleville and the remaining eighteen are located in Newark. Tax maps depict the condominium complex as straddling the Belleville and Newark boundary line, with the bulk of the footage on the Newark side. Apartment Unit A-17 in particular is located mainly in Newark. A survey conducted by professional land surveyors for the owner reveals that "the total area of Unit A-17 is 1,103 square feet" and that only "101 square feet or nine percent of said area lies within the Township of Belleville." Although Mr. Zadran testified that his living room is "half in Newark and half in Belleville," he admits that the two bedrooms are completely in Newark. Correspondence from the respective municipalities shows that Unit A-17 "is assessed fully by the City of Newark" and that its owner "does not pay taxes to Belleville." Of course, Mr. Zadran had no way of knowing that situation when he entered into the lease, because property taxes are paid directly by the landlord. On Newark tax records, the address of the condominium complex is designated as "33-43 Monteith Avenue." Montieth Avenue is the extension of Honnis Street into Newark.

Much of the remaining evidence concerns factors that are less crucial in ascertaining eligibility for school attendance. Mr. Zadran receives utility bills sent to the Belleville address because that is the mailing address which he provided to the utility companies. However, postal zones do not necessarily coincide with municipal boundaries. Front and rear entrances to Building A are in Belleville. Tenants have access to a storage room located in Belleville. Since the tenants do not have assigned parking spaces, they may park their cars on either the Newark or Belleville side of the parking lot. The entrance to the parking lot is on North 7th Street, which is in Belleville.

Testimony regarding police and fire services is ambiguous. On one occasion last March, Zadran reported the theft of a radio from his car to the Belleville police and they responded. Mr. Zadran cannot say whether the Newark police would have also responded, since he did not contact them. On another occasion in July 1995, Mr. Zadran tried to tell the Belleville police about a shooting which had occurred on the street in front of the complex, but the dispatcher told him to notify the Newark police. After a jurisdictional dispute between the two departments, the Newark police eventually took responsibility for the investigation. A neighbor once called the Belleville fire department about a hallway fire, but her apartment unit is in the Belleville portion of the building. It is unclear from the record whether garbage collection and sewer service is provided by the condominium management or by one or the other of the municipalities. Similarly, it is uncertain where Mr. Zadran would be allowed to vote, since he is not registered in either community.

When assistant superintendent Joseph Ciccone learned that the apartment occupied by the Zadran family was taxed by the City of Newark, he sent a letter, dated August 10, 1995, notifying the parents that, "your children will be transferred out of the district of Belleville for the beginning of the 1995-96 school year." According to Dr. Ciccone's testimony, he "decided to allow the Zadran children to finish out the [1994-95] school year." In addition, Dr. Ciccone's letter offered that, "If you are able to relocate within the Township of Belleville in a bona fide residency, [the children] will be allowed to return." Thus, Mr. Zadran was clearly on notice prior to the commencement

of the 1995-96 school year of the Board's contention that his family did not genuinely reside in Belleville. Insofar as the record reflects, the last lease renewal expired on February 28, 1995, so that family was free to move without incurring liability for additional rent.

Proofs establish that tuition costs for a child attending the elementary grades in the Belleville district was $5,565 for the 1995-96 school year and $1,763 for the current year through the date of the hearing. Tuition costs for a student in high school was $7,923 for 1995-96 and $2,482 for the current school year. Since the Zadrans have two children at each level, total tuition amounts to $35,466.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the children are domiciled in the City of Newark and are ineligible to attend free public school in Belleville.

N.J.S.A. 18A:38-1(a) declares that public schools shall be free to anyone over five and under twenty years of age "who is domiciled within the school district." Recently, the Legislature amended the law to strengthen a school district's authority to remove students not legally domiciled within the district. *L.* 1993, *c.* 380. Most significantly, the amendment places an affirmative obligation on a parent or guardian to challenge a school board's determination that a child is not entitled to attend school in a particular district. If the evidence does not support the claim of the parent or guardian, the Commissioner "shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district." *N.J.S.A.* 18A:38-1(b)(2).

School law decisions addressing the issue of a family living at or near the dividing line between two adjoining districts have given decisive consideration to the precise geographic location of the home and the identity of the municipality to which

taxes are paid. Illustratively, in *Laufer v. Scotch Plains-Fanwood Reg. Schs.*, 1970 *S.L.D.* 424, 425 (Comm'r Dec. 4, 1970), a house was "built on land within the district boundary lines of Plainfield, although a contiguous part of the same property is within the physical boundary lines of Scotch Plains." While all of the house and most of the surrounding land were assessed by Plainfield, all police, fire and other municipal services were provided by Scotch Plains. Arguing that it is a common practice for municipalities to provide municipal services in borderline areas, Scotch Plains insisted that such practice "does not change the character of the property's location or confer rights to school attendance for children living thereon." 1970 *S.L.D.* at 426. Upholding Scotch Plains' view, the Commissioner declared that "petitioners' true permanent home is entirely situate on land in Plainfield" and the fact that a piece of land in a neighboring town is part of the same parcel "is of no importance in a determination of where petitioners' children are domiciled." (at 427).

Even stronger support for the Board's position comes from *Duckett v. Shaw*, 1978 *S.L.D.* 411 (Comm'r April 24, 1978). In that case, petitioners occupied a residence "located in the geographical boundaries of both the Village of South Orange and the City of Orange." (at 411). Their house fronted on a road in the City of Orange, however, "the boundaries of the property cross[ed] two distinct school districts." (at 412). Taxes were split between both municipalities, although the City of Orange received the larger share. Both parents had voted for many years in South Orange elections, participated in various community activities in South Orange and attended church in South Orange. Sanitation and other municipal services were furnished by South Orange and the house had a South Orange mailing address. Again heavily influenced by geographic location and tax receipts, the Commissioner ruled that outcome was governed by *Laufer* and that the proper domicile was the City of Orange, where most of the property taxes went.

Here too, nearly all of the Zadran's living space, including the children's sleeping quarters, are physically located in Newark and every penny of tax money goes to Newark. As long as school finance in New Jersey is so dependent on property taxes, it would be inequitable to impose the financial burden of educating the Zadran children

on the citizens of Belleville while the citizens of Newark enjoy the benefit of tax revenues derived from their living arrangements. Incidental items, such as where the nearest post office happens to be or which local police or fire department is summoned to answer an emergency call, should not be the deciding factor.

Despite the clear legal authority in Belleville's favor, Mr. Zadran urges that it would be unfair to exclude his children from Belleville schools because he is the innocent victim of an unfortunate misunderstanding. But the Board is equally if not more blameless, and Mr. Zadran's apparent good faith does not alter the geographic realities of the situation. Whatever remedies the family may possess against persons who may have misrepresented the facts to him, his purity of intent cannot not justify admitting his children to a school district in which they do not live.

Read literally, the statute seems to suggest that the Zadrans are liable for tuition from the date on which they moved to their current apartment, even though they had no knowledge of any problem until the Board notified them of their true domicile in August 1995. Nonetheless, in appropriate circumstances, the Appellate Division has equitably estopped a school district from obtaining reimbursement of past tuition when school officials failed to act quickly enough. *See Fort Lee Bd. of Educ. v. Kintos*, No. A-4944-93T5 (N.J. App. Div. Oct. 13, 1995), where a school board was barred from recovering full tuition payments because it waited two and one-half years after having reason to believe that the parents did not reside in the district. *See also, Laufer,* 1970 *S.L.D.* at 127, in which the Commissioner directed that any tuition recovery "should be made retroactive to September 1970, since notice of transfer was afforded petitioner in July 1970 and was sufficient to allow time for the move." As noted above, Dr. Ciccone notified Mr. Zadran that his children would be allowed to finish out the 1994-95 school year, but that residency in Belleville must be established prior to commencement of the 1995-96 school year. Under these special circumstances, where the Zadrans did not intentionally violate the school laws, the Board's recovery should be limited to tuition charges accruing since September 1995.

Order

It is **ORDERED** that the four Zadran children be transferred to the Newark public school district as soon as reasonably possible.

And further **ORDERED** that Akbar Zadran and his wife pay the sum of $35,466 to the Belleville Board of Education.

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

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

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

Dec. 6, 1996
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

12/10/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Dr. Joseph Ciccone, assistant superintendent of schools, Belleville School District

2. Akbar Zadran

3. Agmal Zadran

List of Exhibits

No.		Description
P-1		Brochure entitled "Convent Court Condominiums," undated
R-1		Copy of letter to Mr. Lally from Joseph Ciccone, Ed.D., dated June 15, 1995
R-2		Copy of letter to Mr. Zadran from Joseph Ciccone, Ed.D., dated August 10, 1995
R-3	(a)	Copy of letter to Michael Lally from Nicholas J. Palma, Esq., dated July 13, 1995
	(b)	Copy of letter to Nicholas B. Palma, Esq. from George R. Pronesti, P.L.S., dated July 5, 1995
R-4		Copy of letter to Joseph Ciccone from Rosmarie Sicoli, dated November 19, 1996

R-5	Copy of letter to Joseph Ciccone, Ed.D. from Thomas Salzano, dated November 19, 1996
R-6	Copy of portion of tax map of the Township of Belleville, undated (attached to R-5)
R-7	Copy of a portion of a map showing the boundary between the City of Newark and the Township of Belleville prepared for the Belleville Planning Board, dated August 10, 1978
R-8	Copy of a certification from the Tax Assessor of the City of Newark, dated November 19, 1996
R-9	Copy of lease between Mohammed-Akbar-Zadran & family and Ray & Cathy Veniero, dated February 22, 1993
R-10	Copy of lease renewal between Ray & Cathy Veniero and Akbar Zadran & Family, dated November 30, 1993
R-11	Copy of site plan submission to the Belleville Planning Board, undated (attached to R-5)
R-12	Copy of computation of tuition, dated November 20, 1996

OAL DKT. NO. EDU 11369-95
AGENCY DKT. NO. 340-8/95

AKBAR ZADRAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner's children are not domiciled in respondent's District and, therefore, are not entitled to a free public education in that District.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 18A:38-1b(2), the Commissioner directs that petitioner remit to the Board tuition in the amount of $35,466.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is herein noted that the Board raised no objection to the determination that recovery of tuition should be limited to charges accruing since September 1995.

January 23, 1997
Date of Mailing, January 23, 1997

32-97

EDU #11369-95
C # 32-97
SB # 17-97

AKBAR ZADRAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 23, 1997

Decision on motions by the State Board of Education, May 7, 1997

For the Petitioner-Appellant, Rutgers University Constitutional Litigation Clinic (Eric Neisser, Esq., of Counsel, and Penny M. Venetis, Esq., pro hac vice)

For the Respondent-Respondent, Gaccione, Pomaco & Beck (Frank Pomaco, Esq., of Counsel)

Akbar Zadran (hereinafter "petitioner") and his family reside in a condominium complex which is located on the border between Belleville and Newark. Maps depict the complex as straddling the Belleville/Newark boundary line, with the bulk of the complex situated on the Newark side. Petitioner's unit sits directly on the boundary line, although the majority of his unit is located in Newark. Petitioner's landlord pays property taxes entirely to Newark for his unit.

On August 10, 1995, after petitioner's children had been attending public school in Belleville for two years, the assistant superintendent of that district, upon ascertaining that the unit occupied by petitioner's family was taxed by Newark, sent a letter to

April 1, 1998

petitioner advising him that his children could not attend public school in Belleville for the 1995-96 school year unless they relocated within the district.

On August 29, 1995, petitioner filed a petition with the Commissioner of Education, alleging that his domicile was in Belleville and that his children were therefore entitled to a free public education in that district pursuant to N.J.S.A. 18A:38-1(a). The Board of Education of the Township of Belleville (hereinafter "Board") filed a counter-petition seeking tuition from petitioner for the period of his children's attendance in the district. The Board contended that petitioner was domiciled in Newark and, consequently, that his children were ineligible for a free public education in Belleville.

On December 6, 1996, an Administrative Law Judge ("ALJ") agreed with the Board, concluding that petitioner's children were not eligible to attend public school in Belleville free of charge. The ALJ concluded that "it would be inequitable to impose the financial burden of educating the Zadran children on the citizens of Belleville while the citizens of Newark enjoy the benefit of tax revenues derived from their living arrangements." Initial Decision, slip op. at 6-7. However, under the circumstances, the ALJ concluded that the Board's recovery should be limited to tuition charges accruing since September 1995. Finding that petitioner was clearly on notice prior to the 1995-96 school year of the Board's contention that his family was not domiciled in Belleville, the ALJ recommended that the Commissioner of Education direct petitioner to reimburse the Board for tuition costs for his four children for the 1995-96 school year and for 1996-97 through the date of the hearing in the total amount of $35,466.

On January 23, 1997, the Commissioner adopted the findings and conclusions of the ALJ and, noting that the Board had not objected to the ALJ's recommendation that recovery of tuition should be limited to charges accruing since September 1995, directed petitioner to remit tuition to the Board in the amount of $35,466.

Petitioner filed the instant appeal to the State Board.

On May 7, 1997, we granted petitioner's motion to supplement the record on appeal pursuant to N.J.A.C. 6:2-1.9. We also granted petitioner's motion to admit Penny M. Venetis, Esq. pro hac vice so as to permit her to represent the petitioner before the State Board with respect to the current matter.

After a careful review of the record as supplemented on appeal, we reverse that portion of the Commissioner's decision which directed petitioner to reimburse the Board for tuition charges accruing since September 1995.

This case presents us with an unusual situation in which a single condominium unit is physically situated in two school districts. As previously indicated, Belleville had accepted petitioner's children into its public schools until it discovered that petitioner's landlord was paying property taxes on his unit to Newark. We note, however, that the payment of property taxes is not, in itself, dispositive of domicile. See, e.g., N.J.S.A. 54:4-25 ["When the line between taxing districts divides a tract of land, each part shall be assessed in the taxing district where located, unless the governing body of one of the taxing districts shall by resolution request that the entire tract be assessed by the adjoining taxing district in which a portion of the tract is located." (Emphasis added.)]

As found by the ALJ, petitioner honestly believed that his unit was located in Belleville. The ALJ related that petitioner "had told the broker who found the apartment

for him that he wanted to live in Belleville. Moreover, the apartment has a Belleville mailing address and a Belleville telephone exchange. A written lease describes the premises as "2 Honnis Street, Belleville, NJ Apt. A-17." Initial Decision, slip op. at 3. Under these circumstances, it was not unreasonable for petitioner–whose unit was situated partially in Belleville–to believe that he was domiciled in Belleville. Indeed, when petitioner attempted to enroll his son in a high school in Newark in February 1997, the acting principal refused such enrollment on the grounds that petitioner had a Belleville address. Affidavit of Petitioner, Exhibit B. Nor is there any indication in the record that petitioner acted with fraudulent intent to mislead the Board into permitting his children to attend public school in Belleville.

While a claimant's perception of domicile cannot override legal and geographical realities, we conclude that it would be inequitable under the particular facts in the record before us to assess tuition against petitioner for the period of his children's attendance in the Belleville public schools.[1] See State, Dept. of Envir. Protection v. Stavola, 103 N.J. 425, 436 n.2 (1986) (any administrative agency in determining how best to effectuate public policy is limited by applying principles of fundamental fairness); H.M. and L.M. v. Board of Education of the Township of Freehold, decided by the State Board of Education, April 2, 1997. Accordingly, we reverse that portion of the Commissioner's decision which directed petitioner to reimburse the Board for tuition charges accruing since September 1995. Cf. Whasun Lee v. Board of Education of the

[1] We note that if petitioner had enrolled his children in Newark during the pendency of his appeal to the Commissioner and had ultimately prevailed on his contention that he was domiciled in Belleville since his unit was located partially in that district, he may have been responsible under the terms of N.J.S.A. 18A:38-1 for tuition payments to Newark for the period of his children's "improper" attendance in that district.

Township of Holmdel, Docket #A-653-95T5 (App. Div. 1996); Board of Education of the Borough of Fort Lee v. Kintos, Docket #A-4944-93T5 (App. Div. 1995).[2]

Attorney exceptions are noted.

April 1, 1998

Date of mailing APR 0 3 1998

[2] The counsel for petitioner advised us in a letter dated September 30, 1997 that petitioner and his family have relocated to another condominium unit in the complex, which, purportedly, is located entirely in Belleville.

33-97

IN THE MATTER OF THE TENURE :

HEARING OF ANTHONY PEARSON, :

SCHOOL DISTRICT OF THE TOWNSHIP : COMMISSIONER OF EDUCATION

OF IRVINGTON, ESSEX COUNTY. : DECISION

:

SYNOPSIS

Board certified tenure charges of unbecoming conduct, excessive absenteeism, incapacity and other just cause against custodian based on his attendance record during the 1990-91 through 1995-96 school years.

ALJ concluded that respondent was chronically and excessively absent during the years in question, that such constituted unbecoming conduct, incapacity and just cause for discipline, and that such absenteeism warranted his dismissal from his position as a tenured custodian. (*Passaic v. Viani; Jersey City v. Pellecchio*) ALJ ordered respondent removed from his position as a tenured custodian.

Commissioner adopted initial decision and ordered respondent dismissed from his position as of the date of his decision.

January 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3564-96

AGENCY DKT. NO. 70-2/95

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,

Petitioner,

v.

ANTHONY PEARSON,

Respondent.

Denise P. Coleman, Esq., for petitioner

(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Anthony Pearson, respondent, *pro se*

Record Closed: October 22, 1996 Decided: December 6, 1996

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

The Superintendent of Schools of the Board of Education of the Township of Irvington (Board or petitioner) executed tenure charges against Anthony Pearson

(Pearson or respondent), a tenured custodian employed by petitioner, on January 24, 1996. At a meeting held on February 21, 1996, the Board certified the charges to the Commissioner of the State Department of Education (DOE) and suspended respondent without pay, effective February 22, 1996. Pearson filed a response to the tenure charges on March 15, 1996. The DOE transmitted the matter to the Office of Administrative Law on March 29, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Petitioner filed a motion for summary decision on July 8, 1996. Respondent did not file a reply. I issued an order denying the motion on September 20, 1996.

A hearing was conducted on October 4, 1996. Pearson requested that he be permitted to present oral argument at the close of the hearing, and counsel for the Board requested that she be permitted to file a post-hearing written submission. Respondent presented oral argument. A deadline was established for the filing of post-hearing submissions by both parties. Pearson did not file a post-hearing submission. The Board filed a brief on October 22, 1996, on which date the record was closed.

NATURE OF THE CASE

The Board charged respondent with unbecoming conduct, excessive absenteeism, incapacity, and other just cause for dismissal based on respondent's attendance record during the 1990-91 through 1995-96 school years. Respondent does not dispute the attendance records relied on by the Board but presented evidence regarding the reasons for some of his absences, as well as communications with Board personnel. The issues, broadly, are whether the Board has proven, by a preponderance of the credible evidence, the charges and, if so, what discipline, if any, should be imposed.

STIPULATIONS

The parties stipulated that Pearson applied for unemployment compensation benefits on March 31, 1996, that he received unemployment benefits of $646 every two weeks, and that he obtained employment with Chelsea Caterers in Newark, New Jersey, on September 25, 1996, working eight hours daily, at an hourly rate of reimbursement of $5.45.

FINDINGS OF FACT

Based upon a review of the entire record, I **FIND** the following to be facts.

Pearson commenced employment with respondent on December 18, 1989 as a custodian. The Board suspended him on February 22, 1996. As of that date, he was tenured as a custodian.

During the period of his employment, Pearson was assigned to Irvington High School (High School). Custodians at the High School are responsible for general maintenance of the school's facilities, including the performance of cleaning, sweeping, and mopping tasks in classrooms, stairwells, and hallways.

Respondent was assigned to the basement area of the High School. At the time of his suspension, respondent also was expected to work a total of ten hours weekly in the cafeteria. He was a 12-month employee. There are 11 classrooms in the basement area, as well as several stairwells and bathrooms. Classes are scheduled between 8:00 a.m. and 3:10 p.m. All classrooms have to be cleaned by 8:00 a.m.

Respondent was employed during the day shift, from 6:00 a.m. until 3:00 p.m. During the years in question, a total of ten custodians were assigned to the High School during the day shift. Respondent was responsible for the general maintenance

of classrooms, hallways, and rest rooms, as well as for removing garbage from the cafeteria.

Respondent was supervised by Frank Roth (Roth) and Donald Lozito (Lozito). Roth is currently the Assistant Supervisor for Buildings and Grounds and was previously Head Custodian at the High School, a position which he held from September 1, 1981 until May 23, 1991, at which time he assumed his current position. His current duties include supervision of maintenance and custodial personnel, all aspects pertinent to maintenance of cleanliness in the Board's schools, and responsibility for employees' time records. Over the years, he has had both direct and overall supervisory authority pertinent to Pearson.

Lozito has been the Head Custodian at the High School since May of 1995. He previously was employed by the Board as the Assistant Head Custodian at the High School, reporting to Roth. In his current position, Lozito supervises custodians and generally "keeps the building running" (Lozito's direct testimony). During the course of his employment, he has had both direct and general supervisory authority over Pearson.

The Board is on a July 1 through June 30 fiscal year. Pearson was entitled to 12 personal leave days annually; 3 personal business days; 1 funeral day; 10 vacation days; and 5 death-in-family days. Respondent's attendance records for fiscal years 1990-91, 1991-92, 1992-93, 1993-94, 1994-95, and 1995-96 are as stated in Exhibits P-1, P-2, P-3, P-4, P-5, and P-6, respectively.

A workers compensation day is utilized if an employee is injured while on duty. In such a situation, the employee is required to go to the office of the Board's nurse, who evaluates the situation. The nurse may refer the individual to the physician on duty for the Board, Dr. George Melendick (Melendick). The employee cannot return to

work unless authorized by Melendick. Employees are paid their salary during days absent designated as workers compensation days.

Personal business days are carried over into the next year as personal illness days. An overused day is a day upon which an employee is absent and has exhausted his/her time but called in. An unexcused day is a day upon which an employee is absent and failed to notify petitioner of the absence.

The Board's Employee Assistance Program (EAP) offers six free counseling sessions, "per problem," to employees at no cost to them (Roth's direct testimony). Requests for leaves of absence must be in writing and are granted or denied at the Board level. Counseling may be offered, for example, because of the death of a family member of an employee. Counseling services are provided by the University of Medicine and Dentistry of New Jersey. If an employee participates in the EAP, his/her supervisors are notified as a prerequisite to approved time off in advance of the employee's participation.

A request for a leave of absence must be presented to the Board in writing, with any necessary documentation, for example, medical documentation. Such requests are reviewed by respondent's Director of Personnel, who then forwards them to a Board committee. Requests for leaves are only granted by a vote of the Board. These procedures have been followed by petitioner since at least 1982.

By memorandum dated March 9, 1990, Roth communicated with Pearson pertinent to respondent's attendance record. Roth noted that Pearson had reported to work tardy on February 9, February 28, and March 9, 1990 and that such tardiness would not be tolerated. Roth further advised that Pearson was required to thereafter report to Lozito or Roth, upon respondent's arrival at work every morning, until further notice, and reminded Pearson that he was still in a probationary period and that

tardiness could result in termination. At the time, Pearson was still serving in a probationary employment status.

By memorandum dated March 16, 1990, Edwin Klemm, the then Superintendent of Buildings and Grounds, advised Pearson that respondent's probationary period was extended for 30 days, commencing March 16, 1990 through April 16, 1990, because of excessive tardiness.

Pearson was absent a total of 38 days during the 1990-91 fiscal year. He exhausted all of his personal illness days and two of his personal business days. Respondent was also absent unexcused on five and one-half days and was absent three and one-half days designated as overused days. Respondent was also tardy on two occasions, the equivalent of one absent day. The absences included a day designated as a funeral day on May 31, 1991; and as death-in-the-family days on December 13, 14, and 17, 1990 and June 3 and 4, 1991. Respondent's absences during that year also included two personal days, three vacation days, and six days designated as workers compensation days.

Pearson never advised Roth nor Lozito during the year in question that any absences were related to the death of his mother. The death-in-the-family days taken in December 1990 were related to the death of Pearson's father. Respondent's mother died during the latter part of the fiscal year, at which time Pearson had already exhausted his accumulated time.

Pearson was absent a total of 29 days during fiscal year 1991-92. Of these, 13 were designated as personal illness days; 1, a jury duty/court day; 3, overused days; and 10, vacation days. He was tardy a total of one day. Respondent exhausted his sick days and two of his three personal illness days.

Pearson was absent a total of 74 days during the 1992-93 fiscal year. One of those days was designated as a personal business day; 1, November 25, 1992, a death-in-the-family day; 12, personal illness days; 1, tardy; 15.5, overused days; 10, vacation days; 26, workers compensation days; and 5.5, unexcused absences. He utilized all his personal illness and vacation days. Twenty of the days on which petitioner was absent occurred on Mondays, Fridays, or a day following or prior to a holiday. During the year, Roth told Pearson that respondent was entitled to the services of the EAP, urging respondent to take advantage of the program.

Lozito communicated with Pearson regarding respondent's attendance record by memorandum dated September 11, 1992, referencing prior conversations among respondent, Roth and Lozito regarding chronic absenteeism and a pattern of absences on Mondays and Fridays. Lozito also referenced the fact that absences affected respondent's colleagues, who had to be reassigned from their own duties to perform respondent's assignments. Lozito concluded by cautioning: "Before this situation gets totally out of hand, please look at yourself" (Exh. P-6).

Pearson was counseled for insubordination pertinent to an incident occurring on September 11, 1992. The pertinent attendance record indicates that Pearson left work without approval on September 11, 1992, which date was designated as an unexcused day.

By memorandum dated April 5, 1993, Lozito again communicated with respondent regarding the latter's attendance record. Lozito concluded as follows:

> Because of your lack of quality working time, you have become a burden to the custodial staff at the High School. When someone has to pick up on your work, another area of the building suffers. Please look at what you are doing and get your act together.
>
> [Exh. P-11.]

A semi-annual evaluation of Pearson, performed on or about May 12, 1993, rated Pearson's attendance as "WELL BELOW AVERAGE" (Exh. P-12, p.1). Narrative comments indicated that as of the date of the evaluation, Pearson had been absent a total of 28 days, including 10 overused days and 4 unexcused absences, a situation which, the evaluation noted, ". . . borders on unsatisfactory. It also makes his work inconsistent. 28 times during the course of the year another man had to do his work." (*Id.* at p.2.) Pearson received a copy of the evaluation.

Respondent was absent a total of 76 days during the 1993-94 fiscal year. Three were personal business days; 3, death-in-the-family days; 12, personal illness days; 2, jury/court days; 1, a tardy day; 44.5, overused days; 10, vacation days; and 1.5, unexcused absences. Respondent was scheduled to appear in Superior Court of New Jersey on April 14, 1994, pertinent to a custody matter. He was absent from work on that day, which absence was designated as a jury/court day.

Lozito sent Roth a memorandum dated September 9, 1993, regarding Pearson's chronic absenteeism, noting that since July 22, 1993, Pearson had a total of eight days absence and that absenteeism had been an on-going problem. The days absent included September 9, 1993, which was the first day that custodians were to be assigned duties in the High School cafeteria. Lozito noted the adverse impact on other custodians because of Pearson's absenteeism, concluding by requesting that respondent be transferred to another school if Pearson ". . . does not want to be part of this team" (Exh. P-13).

By memorandum dated September 13, 1993, Roth sent Pearson a copy of Lozito's September 9, 1993 memorandum, reiterating concerns regarding Pearson's excessive absenteeism. Pearson was placed on 60 days' probation. Roth concluded as follows:

> Last year, you were referred to EAP for counseling. If you are having problems, I suggest that you go to EAP.
>
> Be advised that you are now on probation for 60 days. If your attendance does not improve, further action will be taken.
>
> [Exh. P-14.]

Roth again communicated with Pearson by memorandum dated November 10, 1993, regarding absenteeism. Roth advised Pearson that respondent had no additional days left for absences; that respondent would lose pay each time he was subsequently absent; that he would not be eligible for overtime for the next 60 days; that his probation for absenteeism was extended for another 60 days; and if there were no improvement in his attendance, Roth would request that the Board authorize a suspension without pay.

Respondent did not report to work on December 10, 1993. Respondent was, at the time, experiencing family problems, and he went to stay with a sister in Connecticut. He returned to Board offices to obtain a paycheck. Respondent did not request a leave of absence in January nor February 1994, and he never spoke to Roth regarding any such requests. Respondent was absent, designated as taken overused days, on January 18, 19, 20, 21, 24, 25, 26, 27, 28, and 31, 1994 as well as February 1, 2, 3, 4, 7, 8, 9, 10, 11, 15, 16, 17, 18, 21, 22, 23, 24, and 25, 1994. He also was designated as taking overused days on March 9, 10, 11, 1994. Although respondent returned to New Jersey in February 1994, he did not report back to work until subsequent to March 11, 1994. Respondent was paid for April 11, 12, 13, and 17, 1995, but not for April 18 through April 27, 1995.

Lozito communicated with Roth, regarding Pearson's overall attendance record, by memorandum dated January 21, 1994, requesting that action be taken. Subsequently, the Assistant Board Secretary, Roger Monel, by memorandum dated February 3, 1994, to Frank Aliello (Aliello), the then Supervisor of Buildings and Grounds, requested that respondent be terminated for absence from duty without

notice for more than four days. Aliello noted that Pearson had not called in since January 18, 1994, at which time respondent had told Aliello's secretary that he (Pearson) was leaving a hospital, on crutches, and would be providing medical documentation, but that he did not do so. Aliello also noted that Board personnel had tried to contact Pearson, but that they did not have a current phone number for him.

The Board thereafter adopted a resolution, on February 23, 1994, withholding Pearson's employment and adjusted salary increments for the 1994-95 school year, freezing his salary for that school year at the 1993-94 school year rate. The Board's secretary advised Pearson of this action by letter dated February 24, 1994.

While carrying scissors in the High School on April 7, 1994, respondent was pushed, apparently by a student, and thereafter went to the nurse's office. Because respondent complained that his head hurt, Melendick gave Pearson a form authorizing an examination by a neurologist. However, Pearson never went to the neurologist authorized. Melendick authorized a return to work for respondent subsequent to April 17, 1995, and when Pearson did not return, respondent was designated as having taken overused days on April 18, 19, 20, 21, 24, 25, 26, and 27, 1995.

Lozito again communicated with Monel regarding Pearson's absences by memorandum dated June 7, 1994, noting that Pearson had been absent for a total of seven days since April 1, 1994; that Pearson had designated overused days on April 4 and April 5, 1994, before and after a holiday weekend; and that Pearson did not appear, as scheduled, to work overtime on June 4, 1994. Lozito concluded by requesting assistance.

Pearson was absent a total of 42.5 days during the 1994-95 fiscal year. Of those days, 2.5 were personal business days; 13, personal illness days; 3, tardy days; 13, overused days; 10, vacation days; and 4, workers compensation days.

Michael G. Steele (Steele), petitioner's Business Administrator, communicated with respondent by memorandum dated August 15, 1994, regarding Pearson's attendance record. Steele advised Pearson that he (Steele) was recommending to the Superintendent of Schools that respondent be placed on 60 days' probation, effective September 1, 1994, and that if respondent's attitude and attendance did not improve, Steele would recommend termination. Pearson was, in fact, placed on probation.

Lozito communicated with Steele by memorandum dated January 31, 1995, noting that Pearson had, as of that date, been absent nine days on either Mondays or Fridays. Lozito requested that Pearson again be removed from the overtime list. Lozito thereafter communicated with Pearson, by memorandum dated January 31, 1995, regarding the number and pattern of respondent's absences.

Lozito also communicated with Pearson by memorandum dated May 30, 1995, forwarding a prior memorandum setting forth Pearson's salary and advising respondent that Lozito would be requesting that respondent be removed from the overtime list. As of the date of the memorandum, Pearson had no sick days, no personal days, and no accrued days left.

Pearson was absent a total of 34 days during the 1995-96 fiscal year. Of these, .5 was a personal business day; 11.5, personal illness days; 11, pertinent to Board action suspending respondent; .5, tardy day; 5.5, overused days; 15, vacation days; and 1.5, unexcused absence days.

Lozito communicated with Pearson regarding respondent's absenteeism by memorandum dated August 30, 1995, noting that as of that date, respondent had been absent 8 days and that on August 1, 1995, Pearson had left, never returned, nor called, after leaving for lunch. Respondent was designated as having one-half an unexcused absence day for that date. Lozito concluded by noting that he had requested that Pearson's file be reviewed and stronger disciplinary action be taken.

Respondent was suspended effective March 15, 1996 because of tenure charges executed by the Board against him. The charges were served by Roth on Pearson, who was "very upset" (Lozito's direct testimony). Respondent thereafter went to Lozito's office, taking a copy of the tenure charges. Several weeks later, Lozito asked Roth to return facility keys. Pearson never did so. Subsequently, an Assistant Head Custodian told Lozito that respondent had referenced prior "post office" events, *i.e.,* murders committed by disgruntled employees. A police complaint was filed regarding the incident. At the time, respondent was escorted from the High School by building security personnel.

In addition to various memoranda sent to respondent, and disciplinary actions taken against him, Roth and Lozito communicated with Pearson verbally on a regular basis regarding respondent's absenteeism, advising him to improve his attendance record. Pearson never advised Roth that he (respondent) was experiencing any personal problems. Roth's general practice, if a subordinate's work seemed to be suffering, is to refer that individual to the EAP, even if the employee does not discuss the matter with Roth. Roth never received communications nor information from EAP personnel authorizing any absences by respondent, and Pearson never submitted documentation of approved absences because of participation in the EAP. Pearson never told Roth that his (respondent's) attendance record was related to any personal problems. Pearson never requested a leave of absence. Respondent's general practice, during the years in question, was to state that he was "sick," whenever he called regarding absences, even if he anticipated taking days off because of personal business requirements (Respondent's redirect testimony).

Custodial staff are required to advise department personnel, prior to the dates in question, of any absences. During 1991, Roth sent a memorandum to all custodians, which memorandum was also posted in department offices, regarding the procedures required pertinent to absences and phone numbers to be called if a custodian would be

absent. Custodians are required to report absences to the Superintendent of Buildings and Grounds until 7:00 a.m. If an employee does not do so, it is assumed that he/she will not be present that day. Respondent periodically followed the procedures in question.

During the years in question, the schedules of High School custodians were routinely modified because of Pearson's absences. This situation resulted in areas of the building being improperly maintained, posing safety hazards to students and staff. As a result of respondent's absences, some custodial tasks in the High School were not performed. For example, spills and debris on floors and stairs were not always removed.

Frequently, a substantial portion of Lozito's entire day's efforts focused on insuring that respondent's tasks were performed. Lozito usually ascertained, at the beginning of the morning shift, whether or not Pearson was present, and if respondent were not, Lozito readjusted the other custodians' schedules. At one time or another, all areas of the High School were affected by Pearson's absences. Because custodial work in the High School is performed between 6:00 and 8:00 a.m., respondent's failures to report absences prior to the dates in question presented difficulties to Lozito in rescheduling Pearson's tasks.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A-6.9 (Supp. 1996). Every janitor of a school district shall, unless appointed for a fixed term, hold his/her office, position, or employment under tenure and shall not be dismissed, suspended, or reduced in compensation, except as the result of a reduction of the number of janitors in the district, or except for neglect, misbehavior, or other

offense, pursuant to the manner prescribed in the applicable statutory provisions. *N.J.S.A.* 18A:17-3.

No individual shall be dismissed if he/she is under tenure of office, position, or employment in a public school system, except for inefficiency, incapacity, unbecoming conduct, or "other just cause." Such action can only be taken after a hearing held pursuant to applicable statutory provisions, subsequent to written charges of the cause of complaint. *N.J.S.A.* 18A:6-10.

Excessive absenteeism may substitute grounds for the removal or suspension of a tenured employee. *Passaic Bd. of Ed. v. Viani*, 92 *N.J.A.R. 2d.* (EDU) 76 (*Viani*). Such absenteeism has been found to constitute incapacity, unbecoming conduct, and other just cause for dismissal. *State-Operated School District of Jersey City v. Pellecchio, 92 N.J.A.R. 2d.* (EDU) 269 (*Pellecchio*). Chronic or excessive absenteeism may warrant removal even when the absences are the result of legitimate medical or health reasons. *Pellecchio, supra.*

The point at which absenteeism is deemed to be chronic falls within the prerogative and discretionary authority of the local board of education, subject to review pursuant to the Commissioner's general authority to hear and determine controversies and disputes arising under the school laws. *Ibid.* A custodian is not held to the same attendance requirements as a teacher. *Viani, supra.* Notwithstanding, a school janitor holds a position of trust and responsibility requiring high standards of dependability and morality. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170. In *In the Matter of the Tenure Hearing of Ingram*, 94 *N.J.A.R. 2d.* (EDU) 581 (*Ingram*), Ingram, a tenured custodian, was charged, in part, with excessive absenteeism. He had been absent a total of 72.5 school days during an approximate three-year period. Finding that the charges, which were proven, justified termination, the presiding administrative law judge, whose decision was subsequently adopted by the Commissioner, noted that:

> High absenteeism has previously been deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse ... This being the case the burden shifts to the tenured employee to show that performance was unaffected by continued absences, notwithstanding the legitimacy of excuse. . . .
>
> [*Ingram* at 582 (citations omitted).]

The nature of any warnings given to an employee, as well as any corrective action taken by a local board of education, and the reasons for any absences, are relevant to the questions of whether discipline, and the nature of any discipline, should be imposed. *Viani, supra. School Dist. of the City of Bridgeton v. McMahan*, 1984 *S.L.D.* 208. In addition as referenced in *Ingram, supra.*, the extent of harm absences of a custodial employee have had on the provision of a thorough and efficient education is relevant. *Viani, supra.*

It is clear that petitioner has proven the tenure charges. I am also persuaded that termination is an appropriate discipline.

Over the six years in question, Pearson has been, on average, absent an average of 48 days annually, an amount clearly excessive. Problems in this respect developed while he was on a probationary status as an employee with the Board and continued until his suspension. As the Board argues, his attendance record, in addition, also exhibited a pattern of days absent on weekends and in proximity to holidays, as well as tardiness. The substantial number of overused and not excused days also argues for termination.

Respondent's supervisors sent him numerous memoranda regarding his absenteeism, with cautions that a continuation of such could result in discipline, including termination. In addition, he received a poor evaluation regarding his attendance record. Roth and Lozito also spoke to Pearson individually and Roth, in addition, suggested that Pearson take advantage of counseling services offered

through the EAP. Despite these efforts, as well as the Board's decision to withhold an increment, the pattern of absenteeism continued.

The record also clearly demonstrates that Pearson's absences have had a direct adverse impact on the cleanliness and safety of the High School, resulting in some custodial tasks not being performed on a regular basis. In addition, the schedule of other custodians had to be constantly modified because of Pearson's absences.

Pearson's testimony regarding alleged medical and family problems which, he claimed, resulted in at least some of the absences, was not supported in the record. In addition, he never communicated the nature of any alleged reasons for absences to supervisory staff nor requested a leave of absence. The Board did, however, pay respondent for certain days on which he was absent which were treated as workers compensation days. Notwithstanding, whatever the reasons for any absences, it is clear that the absences were excessive, that Pearson had ample opportunity to reform his previous attendance record but did not do so, and that his absences had a negative impact on the High School. I am therefore persuaded that termination is appropriate.

CONCLUSIONS

I CONCLUDE that respondent was chronically and excessively absent during the years in questions, that such constituted unbecoming conduct, incapacity, and just cause for discipline, and that such absenteeism warrants his dismissal from his position as a tenured custodian.

ORDER

It is hereby **ORDERED** that respondent be removed from his position as a tenured custodian with petitioner.

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

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

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

December 6, 1996
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

12/10/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 10 1996
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Witnesses

For petitioner:

Belinda Smiley

Frank Roth

Donald Lozito

For Respondent:

Anthony Pearson

Exhibits in Evidence

P-1 7/90 -- 6/91 Attendance Record

P-2 7/91 -- 6/92 Attendance Record

P-3 7/92 -- 6/93 Attendance Record

P-4 7/93 -- 6/94 Attendance Record

P-5 7/94 -- 6/95 Attendance Record

P-6 7/95 -- 6/96 Attendance Record

P-7 Memorandum dated March 9, 1990

P-8 Memorandum dated March 16, 1990

P-9 Memorandum dated September 11, 1992 from Lozito

P-10 Memorandum dated September 11, 1992 from Blocker

P-11 Memorandum dated April 5, 1993

P-12 Evaluation dated May 12, 1993

P-13 Memorandum dated September 9, 1993

P-14 Memorandum dated September 13, 1993

P-15 Memorandum dated November 20, 1993

P-16 Memorandum dated January 21, 1994

P-17 Memorandum dated February 3, 1994

P-18 Resolution dated February 23, 1994

P-19 Letter dated February 24, 1994

P-20 Memorandum dated June 7, 1994

P-21 Letter dated August 15, 1994

P-22 Memorandum dated January 31, 1995 regarding continuous poor attendance

P-23 Memorandum dated January 31, 1995 regarding patterned absenteeism

P-24 Memorandum dated May 30, 1995

P-25 Memorandum dated August 20, 1995

R-1 Notice to Appear and Summons dated March 21, 1994

OAL DKT. NO. EDU 3564-96
AGENCY DKT. NO. 70-2/95

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY PEARSON,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF IRVINGTON, ESSEX COUNTY.	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the Board has proved its charges against respondent which, based upon his attendance record during the 1990-91 through 1995-96 school years, warrant his termination from employment, pursuant to *N.J.S.A.* 18A:6-10 and 11. See *Passaic Bd. of Ed. v. Viani*, *supra*, and *State-operated School District of Jersey City v. Pellecchio, supra.*

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and orders that respondent be dismissed from his position as tenured custodian as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 23, 1997
Date of Mailing, January 23, 1997

34-97

34-97

PATRICIA YOST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, AND DR. TIMOTHY BRENAN, EUGENE VASILE AND BETTY LOU BIONDE,	:	DECISION
RESPONDENTS.	:	
	:	

JANUARY 27, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5844-96
AGENCY DKT. NO. 120-4/96

PATRICIA YOST,

Petitioner,

v.

PARSIPPANY-TROY HILLS TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY, NEW JERSEY; DR. TIMOTHY BRENAN, EUGENE VASILE and BETTY LOU BIONDE,

Respondents.

William H.Claxton, Esq., for petitioner

Marie-Laurence Fabian, Esq., for respondent
(Dillon, Bitar & Luther, attorneys)

Record Closed: December 3, 1996 Decided: December 5, 1996

BEFORE: **MARIA MANCINI LAFIANDRA,** ALJ;

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on June 12, 1996 for a hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to-15 and *N.J.S.A.* 52:14F-1 to 13. The parties informed the Administrative Law Judge (ALJ) that they had agreed to settle this matter. The parties have prepared the attached Stipulation of Settlement setting forth the terms of the settlement, which the ALJ received on November 25, 1996.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached Stipulation of Settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

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

12/5/96
DATE

Marcia M LaFiandra
MARIA MANCINI LAFIANDRA, ALJ

Receipt Acknowledged:

Dec. 11, 1996
DATE

D N Centanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 11 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into this 4th day of October, 1996 by and between the Parsippany-Troy Hills Board of Education (the "Board") and Patricia Yost.

WHEREAS, on April 1, 1996 Ms. Yost filed a petition with the Commissioner of Education against the Board and Timothy Brennan, Eugene Vasile and Betty Lou Bionde alleging breach of contract and seeking reinstatement and back pay; and

WHEREAS, the Board filed an answer on behalf of itself and Timothy Brennan, Eugene Vasile and Betty Lou Bionde, denying such allegation and denying her right to relief; and

WHEREAS, both parties wish to avoid the additional expense and delay inherent in the litigation of this matter;

NOW THEREFORE:

The undersigned agree that this matter shall be amicably settled upon the following terms and conditions:

1. For and in consideration of the sum of TWO THOUSAND AND SEVEN HUNDRED DOLLARS ($2,700.00) to be paid by the Board, Ms. Yost agrees to withdraw the petition filed with the Commissioner of Education and to release the Board, Timothy Brennan, Eugene Vasile and Betty Lou Bionde from any and all claims arising from or attributable to the termination of her employment as a SKIP aide, even if she is presently unaware of the existence of such a claim.

2. Ms. Yost acknowledges and agrees that the aforesaid payment does not in any way constitute an admission by the Board of any wrongdoing relative to the termination of her employment.

3. As a condition of the agreement, Ms. Yost represents that she has not and will not in any manner publicize the terms of this agreement, including to former and present employees of the Board other than to indicate that the matter has been resolved and the charges withdrawn.

Dated: 10/04/96

Patricia Yost
Patricia Yost

Dated: _____

PARSIPPANY-TROY HILLS
BOARD OF EDUCATION

By: _____
David Shaffer,
President

H:\CLIENTS\MISC\AGREE.AG\PTHBOE.006

WILLIAM H. CLAXTON, ESQ.
10 Park Place, Suite 305
Morristown, New Jersey 07960
(201) 292-7500
Attorney for Petitioner

Petitioner

PATRICIA YOST

vs.

Respondent

PARSIPPANY-TROY HILLS TWP. BD OF EDUCATION (MORRIS COUNTY NJ), DR. TIMOTHY BRENNAN, EUGENE VASILE AND BETTY LOU BIONDE

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET #EDUDA 05844-96N
AGENCY REF. # 120-4/96

Administrative Action

STIPULATION OF DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed by and between the respective parties hereto, that the same be and is hereby dismissed without costs in favor of or against either party, with prejudice.

DATED: October 4, 1996.

BY: William H Claxton
WILLIAM H. CLAXTON, ESQ.
Attorney for Petitioner

BY: M.L. Fabian
MARIE-LAURENCE FABIAN, ESQ.
Attorney for Respondents

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OAL DKT. NO. EDU 5844-96

PATRICIA YOST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, AND DR. TIMOTHY BRENAN, EUGENE VASILE AND BETTY LOU BIONDE,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JANUARY 27, 1997

DATE OF MAILING JANUARY 27, 1997

35-97

35-97

DAVID B. FORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 27, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9641-96

AGENCY DKT. NO. 361-8/96

DAVID B. FORD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,

Respondent.

Patricia L. Ratner, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: November 6, 1996 Decided: December 4, 1996

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 25, 1996, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On November 6, 1996, the parties executed and submitted the attached Stipulation of Dismissal with Prejudice indicating that the parties had amicably resolved this matter and which is incorporated herein by reference.

I have reviewed the record and I **FIND**:

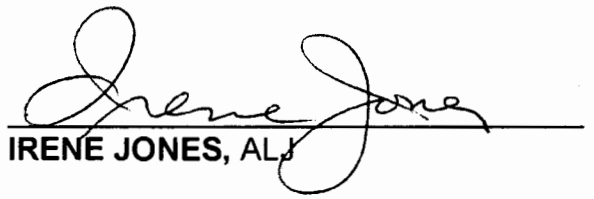
1. The parties have voluntarily agreed to resolve this matter as evidenced by the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that this stipulation meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

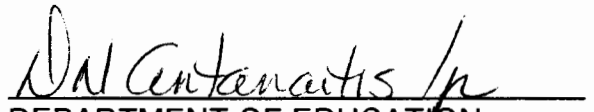
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five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

12/4/96
DATE


IRENE JONES, ALJ

Receipt Acknowledged

Dec. 11, 1996
DATE


DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 11 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

md

WILLS, O'NEILL & MELLK
10 Nassau Street
Princeton, New Jersey 08542
(609) 924-0700
Attorneys for Plaintiffs

DAVID B. FORD	:	STATE OF NEW JERSEY
	:	DEPARTMENT OF EDUCATION
Petitioner	:	
	:	
vs.	:	Agency Docket No. 361-8/96
	:	
FLORHAM PARK	:	
BOARD OF EDUCATION	:	
	:	
Respondent	:	**Stipulation of Dismissal With Prejudice**
	:	

The matter in difference in the above-entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed, with prejudice, and without costs against either party.

Dated: October 21, 1996

FOGARTY & HARA

By: _____
Stephen R. Fogarty, Esq.
Attorney for Respondent

WILLS, O'NEILL & MELLK

By: Patricia L. Ratner
Patricia L. Ratner, Esquire
Attorney for Petitioner

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P O BOX 614
PRINCETON, NJ 08542

PLR:jw\pleadings6\ford\dismissal.stp

OAL DKT. NO. EDU 9641-96
AGENCY DKT. NO. 361-8/96

DAVID B. FORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL), incorporating a "Stipulation of Dismissal" based on the parties' having "amicably adjusted" their differences, have been reviewed.

Upon such review, the Commissioner finds no basis on which he can ascertain the terms of the resolution reached by the parties in this matter, notwithstanding that the specific terms of any settlement must be spread on the record, pursuant to *N.J.A.C.* 1:1-19.1, so that the Commissioner may review them prior to making a final decision on the recommendation of the Administrative Law Judge.

Accordingly, the initial decision of the OAL is remanded for supplementation of the record consistent with *N.J.A.C.* 1:1-19.1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 27, 1997
DATE OF MAILING JANUARY 27, 1997

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DAVID B. FORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

AUGUST 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1592-97
(EDU 9641-96- Remanded)

DAVID B. FORD,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,
Respondent

Arnold Mellk, Esq., for petitioner
(Wills, O'Neill & Mellk, attorneys)

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: May 29, 1997 Decided: June 26, 1997

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 6, 1997 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1

to -15 and *N.J.S.A.* 52:14F-1 to -13. The parties agreed to settle the matter and stipulation of settlement was signed by the parties and filed in the OAL on May 29, 1997. The stipulation of settlement is attached hereto and made a part hereof.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/26/97
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

7/2/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8 1997
DATE

Barbara A Hennel
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW
OFFICE OF ADM
MAY 30 11 50

FOGARTY & HARA, ESQS.
23 Highland Cross
Rutherford, New Jersey 07070
(201) 935-0440
Attorneys for Respondent,
Board of Education of the Borough
of Florham Park, Morris County

RECEIVED
APR 28 1997
O'NEILL & MELLK

STIPULATION OF SETTLEMENT IN THE MATTER OF DAVID B. FORD v. BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DKT. NO. 9641-96 AGENCY REF. NO. 361-8/96 STIPULATION OF SETTLEMENT

WHEREAS, a Verified Petition was filed with the Commissioner of Education on behalf of David B. Ford (hereinafter referred to as "Ford") on August 6, 1996 seeking reimbursement for two (2) days pay, or $633.00, which respondent, Board of Education of the Borough of Florham Park (hereinafter referred to as the "Board"), withheld from Ford's paycheck following his arrest on June 19, 1996; and

WHEREAS, Ford alleged that the Board wrongfully withheld payment for June 20 and June 21, 1996, the last two (2) days of the 1995-1996 school year since he was arrested but not indicted in prohibition of N.J.S.A. 18A:6-8.3; and

WHEREAS, the Board filed its Answer to the Verified Petition on September 13, 1996 and, while admitting that it withheld two (2) days pay from the Ford's paycheck, denied that it was wrongful or that the Board had an obligation to pay him since the bail conditions imposed upon Ford by the Superior Court prevented his return to employment as a teacher; and

WHEREAS, Ford was subsequently indicted on August 27, 1996 by the Morris County Grand Jury on twenty-six (26) counts, including two (2) counts of aggravated sexual assault, twelve (12) counts of sexual assault, and twelve (12) counts of sexual assault, and twelve (12) counts of endangering the welfare of a child; and

WHEREAS, Ford does not challenge his suspension by the Board without pay as of September 1, 1996 during the pendency of his criminal indictment; and

WHEREAS, the Board would incur substantial financial costs by litigating this matter which would significantly exceed the $633.00 sum which is in dispute; and

WHEREAS, the Board has determined that it is in the best interest of the Florham Park Public Schools to pay Ford the amount of $633.00, which represents his pay for June 20 and June 21, 1996; and

WHEREAS, the Stipulation of Settlement is expressly limited to the issue of reimbursement to Ford for two (2) days pay prior to his indictment and does not in any way prejudice the Board's right to prefer tenure charges against Ford and/or

to declare forfeiture of his position following adjudication of the pending criminal matter;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and the mutual promises and covenants of the parties set forth below, the parties hereby agree as follows:

1. The Board agrees to pay Ford the sum of $633.00 which represents his pay for June 20 and June 21, 1996.

2. Ford agrees to withdraw, with prejudice, his Verified Petition in the above-captioned matter bearing O.A.L. Docket No. 9641-96 and Agency Dkt. No. 361-8/96, subject to the approval of this Stipulation of Settlement by the Office of Administrative Law and the Commissioner of Education.

3. It is expressly acknowledged by the parties that this Stipulation of Settlement is without prejudice to the Board's right to prefer tenure charges against Ford and/or declare forfeiture of his position, if appropriate, following adjudication of the pending criminal matter.

4. This settlement is subject to ratification by the Board and is without prejudice to either party if the terms are not agreed upon. The form of the Board's resolution is attached hereto as Exhibit A.

5. The parties acknowledge that this Stipulation of Settlement shall be submitted to the Office of Administrative law and the Commissioner of Education for review and approval, and that the terms of this Stipulation of Settlement are expressly made subject to and contingent upon such review and

approval. In the event that either agency disapproves and/or rejects any of the terms contained herein, this Stipulation of Settlement shall be null and void and the parties shall return to the same positions which they held prior to this Stipulation of Settlement.

6. The parties recognize that each has been represented by legal counsel or a representative of his or its own choosing and that they sign this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

7. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

8. All terms of this Stipulation of Settlement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

3d

WITNESS:

BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK

DAVID CLOVER
Board Secretary/Business Administrator

Dated: 5-13-97

RITA KLIMKOWSKI
Board President

Dated:

WITNESS:

PATRICIA L. RATNER, ESQ.

Dated: 4/30/97

DAVID B. FORD

Dated:

RESOLUTION

BE IT RESOLVED by the Board of Education of the Borough of Florham Park that the terms, stipulations and conditions as established in the Stipulation of Settlement between the Board of Education and David B. Ford which is annexed to this Resolution, are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Settlement Agreement, and any other documents necessary to effect said Settlement Agreement.

CERTIFICATION

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dr. David Clover
Board Secretary/Business Administrator

Dated:

ROLL CALL VOTE:

AYES:
NAYS:

EXTRACT FROM THE MINUTES OF A MEETING
OF THE
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK
MORRIS COUNTY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Borough of Florham Park, in the County of Morris, New Jersey, convened in an Executive Session as part of a Regular Meeting held on Tuesday, September 24,1996, in the Briarwood School Conference Room of the Briarwood School, Briarwood Road, Florham Park, New Jersey.

The following Members of the Board of Education were present:
Rita Klimkowski, President, Jack Crane, Vice President, Trustees Stephen Brodsky, Donald Kamowski, Dale Pardo, and Chris Ryan

The following Member of the Board of Education was absent:
Maryann Core

The minutes of the Executive Session indicate that Dr. Ferrone presented information on "The Ford Appeal regarding withholding two days' pay". It was at that time that the Board unanimously agreed to release two days' pay going back to June, 1996, when Mr. Ford was instructed to remain off school premises.

I. David G. M. Clover, Board Secretary/Business Administrator of the Borough of Florham Park, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the Minutes of the Meeting of said District duly called and held on September 24, 1996 has been compared by me with the original Minutes as officially recorded in the Official Minute Book of said Borough of Florham Park Board of Education and is a true, complete copy thereof and of the whole said original Minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 20th day of May, 1997.

David G. M. Clover
Board Secretary/Business Administrator

(AFFIX SEAL)

Exhibit A
3h

OAL DKT. NO. EDU 1592-97
AGENCY DKT. NO. 361-8/96

DAVID B. FORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 15, 1997
DATE OF MAILING AUGUST 15, 1997

(SB) 35-97

EDU #8330-96
DHPB # 139-97
SB # 35-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF V.E.K. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, March 24, 1997

For the Petitioner-Appellant, Virginia E. Kovalak, pro se

For the Respondent-Respondent, Nancy Kaplen, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

On March 24, 1997, the Deputy Commissioner of Education issued a decision in which he upheld the disqualification of V.E.K. (hereinafter "appellant") from school employment as the result of a conviction for a disqualifying offense under N.J.S.A. 18A:6-7.1. The Commissioner found that appellant had failed to affirmatively demonstrate her rehabilitation by clear and convincing evidence.

On April 9, 1997, appellant, acting pro se, filed a notice of appeal with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of her appeal was due on April 29, 1997, 20 days after the appeal was filed. Appellant, however, failed to file a brief by that date. By letter dated May 5, 1997, the counsel for the State Board notified appellant that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of her failure

7/2/97

to perfect the appeal. Appellant has still failed to file a brief in support of her appeal, more than two months after the deadline for such filing and nearly two months since she was given notice of her failure to file. Nor has appellant responded to that notice, offered any explanation for her failure to file or requested an extension of time for such filing.

Consequently, while we are mindful of appellant's pro se status, under the circumstances we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

July 2, 1997

Date of mailing JUL 08 1997

36-97

JOSEPH DEL GROSSO AND THE NEWARK TEACHERS UNION,

PETITIONERS,

V.

STATE-OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY, AND TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning President of Teachers Union and the Union alleged the Board improperly failed to make pension contribution with respect to a salary increase given to employees in the 1994-95 school year.

ALJ concluded the Commissioner of Education had no jurisdiction to determine the issue of whether the "differential adjustment" payments constituted "creditable salary" pursuant to the Teachers' Pension and Annuity Fund (TPAF) Law. Moreover, the ALJ concluded that TPAF is an independent agency whose determinations are not subject to the review of the Commissioner of Education. Thus, no relief was available to petitioners in this forum. Petition was dismissed.

Commissioner adopted findings and determination in the initial decision as his own.

JANUARY 27, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7570-96

AGENCY DKT. NO. 478-12/95

JOSEPH DEL GROSSO AND NEWARK TEACHERS UNION,

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY AND TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND,

Respondents.

Eugene C. Liss, Esq., for petitioners

Donna Ramsay-Wilcox, Esq., for respondent Newark School District (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Celestine B. Ross, Deputy Attorney General, for respondent Teachers' Pension and Annuity Fund (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: November 1, 1996 Decided: December 9, 1996

BEFORE **EDITH KLINGER**, ALJ:

On December 21, 1995, petitioners filed a petition with the Commissioner of Education seeking resolution of the following disputes pursuant to the school laws, *N.J.S.A.* 18A:

1. Can the State-Operated School District of Newark (District) designate an increase in teachers' salaries for the 1994-95 school year as a "differential adjustment" without deducting contributions to the Teachers' Pension and Annuity Fund (TPAF)?
2. Can the TPAF refuse to credit the differential adjustment payments for pension purposes?

On July 22, 1996, the Commissioner of the Department of Education transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

This petition raises the following threshold questions:

1. Is the question of whether the "differential adjustment" constitutes compensation for pension purposes one which arises under the school laws and, therefore, within the jurisdiction of the Commissioner of Education?
2. Does the Commissioner of Education have jurisdiction over the refusal of the TPAF to credit the "differential adjustment" payment as compensation for pension purposes?
3. Does the Commissioner of Education have jurisdiction to grant any relief against the TPAF, that is, is the TPAF a proper party to this appeal?

DISCUSSION OF LAW AND CONCLUSIONS

This matter is governed by the provisions of the "Teachers' Pension and Annuity Fund Law," *N.J.S.A.* 18A:66-1 *et seq.*, and the regulations promulgated thereunder. The implementation of this statute and the corresponding regulations is within the jurisdiction of the TPAF. *See Siri v. Board of Trustees of the Teachers' Pension and*

Annuity Fund, 262 *N.J. Super.* 147 (App. Div. 1993); *Farrah v. TPAF,* 93 *N.J.A.R.* 2d (TYP) 69 (1993). The TPAF is part of the New Jersey Department of the Treasury and not the New Jersey Department of Education.

N.J.S.A. 18A:66-2d defines compensation for pension purposes in the following manner:

> "Compensation" means the contractual salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extra curricular duties beyond the regular school day or the regular school year.

N.J.A.C. 17:3-4.1 is the regulation which deals with a pension fund member's "creditable salary," that which is subject to pension and group life insurance contributions. It distinguishes between the base or contractual salary, which is subject to contributions, and the forms of extra compensation, set forth in detail, which are not.

An unfavorable determination by the TPAF in this regard may be appealed pursuant to *N.J.A.C.* 17:3-1.7, and the matter transmitted by the TPAF, not the Commissioner of Education, to the Office of Administrative Law for hearing as a contested case, *N.J.A.C.* 17:1-5.1. A final decision on the appeal is issued by the TPAF, not the Commissioner. The final agency determination by the TPAF is reviewed by the Appellate Division of the Superior Court, not the Commissioner of Education.

Based upon the statutory and regulatory scheme, the threshold questions raised by this appeal must all be answered in the negative.

I **CONCLUDE** that the Commissioner of Education has no jurisdiction to determine the issue of whether the "differential adjustment" payments constitute "creditable salary" pursuant to the Teachers' Pension and Annuity Fund Law.

I **CONCLUDE** that TPAF is an independent agency whose determinations are not subject to the review of the Commissioner of Education and, consequently, it is not a proper party to this appeal.

Accordingly, I **CONCLUDE** that the Commissioner of Education is unable to grant petitioners any relief. Since the present matter was transmitted by the Department of Education, not the TPAF, I **CONCLUDE** that no relief is available to petitioners in this forum. The Office of Administrative Law has no greater jurisdiction over the subject matter of a contested case than the agency which transmitted it.

It is, therefore, **ORDERED** that petitioners' Complaint before the Commissioner of Education is hereby **DISMISSED**.

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

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

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

December 9, 1996
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

Dec. 11, 1996
DATE

D. N. Contanzutis/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 11 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 7570-96
AGENCY DKT. NO. 478-12/95

JOSEPH DEL GROSSO AND THE NEWARK TEACHERS UNION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY, AND TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the conclusions of the Administrative Law Judge that this matter is governed by provisions of the Teachers' Pension and Annuity Fund (TPAF) Law, *N.J.S.A.* 18A:66-1, reviewable by the TPAF, not the Commissioner of Education.

Accordingly, the Commissioner adopts the initial decision of the OAL for the reasons expressed therein and dismisses the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 27, 1997
DATE OF MAILING JANUARY 28, 1997

37-97

37-97

IN THE MATTER OF THE TENURE	:	
HEARING OF CLARENCE DIGGS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ORANGE, ESSEX COUNTY.	:	
	:	

JANUARY 27, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL/WITHDRAWAL
OAL DKT. NO EDU 6578-95,
AGENCY DKT. NO. 177/5-95

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,
Petitioner,
v.
CLARENCE DIGGS,
Respondent.

Connie B. McGhee, Esq. for petitioner

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

Record Closed: November 15, 1996 Decided: December 11, 1996

BEFORE **ARNOLD SAMUELS**, ALJ:

On May 19, 1995, the petitioner, Board of Education of the City of Orange Township, Essex County, filed a Certificate of Determination and Written Charges against the respondent, Clarence Diggs, pursuant to *N.J.S.A.* 18A:6-10 and *N.J.A.C.* 6:24-5.1 *et seq.*, seeking to dismiss him from his tenured position, for alleged unbecoming conduct, incapacity and other good cause (absenteeism). The petitioner filed an answer with the Commissioner of Education on May 30, 1995.

On June 23, 1995, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on September

18, 1995, and a prehearing order was entered, scheduling hearing dates, providing for discovery and dealing with other procedural matters to precede the hearing.

A hearing was held on March 26, 1996. At that time, counsel did not dispute the incapacity charge, and the respondent's record of absenteeism was uncontested. It was additionally indicated by counsel that the respondent had applied for a disability pension and would not, in any event, return to work. The record was held open pending receipt of advice from counsel of the total number of school days and the total number of absences for each year in question. The information was not received.

However, by letter dated May 8, 1996, respondent's attorney advised that the Teacher's Pension and Annuity Fund had confirmed the granting of a disability pension to the respondent, retroactive to October 1, 1995. In a later letter, dated May 23, 1996, counsel further stated that "in light of the fact that Mr. Diggs has no claim to back salary since he was unable to work throughout these proceedings and since he has now been found totally and permanently disabled, I do believe these charges are moot and no longer require processing. I await the board's position."

On June 11, 1996, the board's attorney advised, by telephone, that the issues were resolved and the case would be withdrawn. She stated that a letter would follow the telephone message.

No letter of confirmation was received. In response to a further inquiry, several months later, the respondent's attorney stated that he could not withdraw the charges because he did not file them, and that his last communication with the board's attorney concluded with an indication that she would be withdrawing the charges.

As of the date of this decision, no communication has been received from the attorney for the Board of Education, who was sent copies of all of the previously mentioned correspondence.

Based on the foregoing, and in view of the telephone message from the board's attorney, her assurances given to respondent's attorney, and her lack of any further communication by letter or otherwise, it is **CONCLUDED** that good cause has been shown for withdrawal and dismissal of this matter, because it is moot and because the Board of Education no longer is interested in prosecuting the charges. Respondent has effectively resigned his position.

It is therefore **ORDERED** that withdrawal and dismissal of this contested case, with prejudice, be approved, subject to approval by the Commissioner of Education.

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

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

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

December 11, 1996
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

12/13/96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

njf

OAL DKT. NO. EDU 6578-95
AGENCY DKT. NO. 177-5/95

IN THE MATTER OF THE TENURE	:	
HEARING OF CLARENCE DIGGS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ORANGE, ESSEX COUNTY.	:	
	:	

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

The Commissioner approves the withdrawal and dismissal of the instant matter and herein reminds the Board of its obligation, pursuant to *N.J.A.C.* 6:11-3.5, to cooperate with the State Board of Examiners in any action that body may decide to take with regard to this matter.

Accordingly, with the above clarification, the initial decision dismissing the above tenure charges is affirmed and the matter shall be forwarded to the State Board of Examiners for consideration.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 27, 1997
DATE OF MAILING JANUARY 28, 1997

38-97

38-97 SEC

IN THE MATTER OF FRANK PANNUCCI,	:	
BRICK TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, OCEAN COUNTY.	:	DECISION
	:	

JANUARY 28, 1997

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C08-96**
FRANK PANNUCCI,	:	
Brick Township Board of Education,	:	**DECISION**
Ocean County	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on April 4, 1996, by Joseph Sangiovanni. The complaint alleges that respondent participated in negotiation sessions with the Brick Township Education Association (BTEA), the local bargaining unit of the New Jersey Education Association (NJEA). It also alleges that he voted on the collective bargaining agreement in violation of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., specifically N.J.S.A. 18A:12-24(c) and (f).

Respondent filed his answer with the School Ethics Commission on July 3, 1996. He then filed a supplemental affidavit by letter dated July 15, 1996, and a supplemental answer by letter dated July 17, 1996. Therein, he admitted voting on the collective bargaining agreement on November 3, 1994, but denied that his actions violated the Act. Respondent denied participating in any negotiation sessions with the BTEA subsequent to May 21, 1991.

Both complainant and respondent appeared before the Commission on July 23, 1996. At its September meeting, the Commission found probable cause to credit the allegation that Mr. Pannucci voted on the collective bargaining agreement in violation of the Act. It dismissed the allegation that Mr. Pannucci participated in negotiation sessions with the BTEA because there was insufficient evidence that respondent participated in negotiations at any date subsequent to the date on which the Commission rendered its opinion that such participation would violate the Act. The Commission notified the parties of the decision and invited Mr. Pannucci to file a written statement setting forth why he should not be found in violation of the School Ethics Act for voting on the collective bargaining agreement. The Commission received his written statement on October 31, 1996.

The issue now before the Commission is whether respondent violated N.J.S.A. 18A:12-24(c) or (f) by voting on the collective bargaining agreement in November 1994.

FACTS

The following material facts are undisputed. In November 1994, respondent was a member of the Brick Township Board of Education. He was elected to his third consecutive term in April 1996. Respondent is a teacher in East Orange and was so in November 1994. As such, he was and is a member of the NJEA. The BTEA is a local bargaining unit of the NJEA. When the collective bargaining agreement with the BTEA was brought before the Brick Township board for a vote, respondent voted on the contract.

On May 26, 1994, the Commission issued Advisory Opinion A10-93. In that opinion, the Commission set forth that a school board member would violate the Act if he participated in negotiations on a collective bargaining agreement with the local bargaining unit of a statewide union in which the board member or a member of his immediate family member was a member. On June 23, 1994, the Commission issued A10-93(b) and A07-94. In this opinion, the Commission set forth that the Act prohibits a school board member from voting on a collective bargaining agreement for a local bargaining unit of a statewide union when the school board member or his immediate family member belongs to the statewide union. The Commission released the opinions to the public on those dates. The Commission, noting that its opinions were a first interpretation of a new law and would change past practices, stated that the opinions should apply prospectively.

By letter dated August 16, 1994, the Brick Township board received advice from its attorney setting forth the Commission's opinions in A10-93, A10-93(b) and A07-94. The board attorney advised the board as follows:

> Our reading of the aforesaid statute and advisory opinions is that a Board member, who is a member of the same State wide union as the union in which the Board is involved with in labor negotiations, cannot vote after the date of the advisory opinion of June 23, 1994, irrespective of whether the labor negotiations began before the June date and continued thereafter.

However, the board attorney went on to note that that the opinions of the Commission are "purely advisory in nature, and as such are not binding upon any Board member or the Board itself." He went on to give his own opinion that the Advisory Opinion was "overreaching" and the findings "excessively broad". Last, the attorney sets forth:

> Please be advised that if an individual Board member notwithstanding our opinion herein, decides to vote on the teachers' labor contract, there are no known sanctions that can be applied to the contract, there are no known sanctions that can be applied to the Board member if it is his opinion to vote based upon his and his union's interpretation of the advisory opinions. Further, we know of no known mechanism whereby a member's vote is not to be recorded.

Respondent testified that he relied on the board attorney's analysis of the Advisory Opinions and sought additional clarification as to whether he should vote or abstain on November 3, 1994. He testified that he received no clear answer leaving him with the impression that he could do what he felt was correct. Respondent testified that he chose to cast his vote, which he felt he was required to do as a board member. However, respondent did not testify that the board attorney ever advised respondent to vote on the collective bargaining agreement.

ANALYSIS

Respondent sets forth several reasons that the School Ethics Commission should not find that he violated the Act and should not have found probable cause. The issues that he raised will be addressed in turn.

I. The Commission Considered All Material Facts

First the respondent argues that the Commission did not consider all of the material facts in the case, specifically those facts that indicate that respondent relied on the competent advice of counsel. Respondent sets forth that one acting in the position of a fiduciary can rely upon advice of a competent counsel citing Van der Veer v. Ames, 6 N.J. Super. 143 (App. Div. 1950). He further argues that respondent's actions were within the scope of his authority, in good faith and within the purview of an ordinary prudent man taking the advice of competent counsel.

The Commission has reviewed the full opinion of counsel and finds it significant for what it does and does not say. First, the opinion says in no uncertain terms that counsel's reading of the opinion is that "**a board member, who is a member of the same State wide union as the union in which the Board is involved with in labor negotiations, cannot vote after the date of the advisory opinion of June 23, 1994, irrespective of whether the labor negotiations began before the June date and continued after.**" The attorney goes on to express his disagreement with the Commission's opinion and his belief that it is not binding on board members. Then he ultimately leaves it to the board member and his union to decide whether to vote. However, there is no ambiguity in the meaning of the Commission's opinion. Because this is the only portion of the attorney's opinion that is not ambiguous, the Commission concludes that respondent was aware of the Commission decision that he would be in violation of the School Ethics Act if he voted on the collective bargaining agreement.

The counsel to the board goes on to indicate that there are "no known sanctions" that can be applied to a board member who decides to vote on the labor contract "notwithstanding our opinion herein". This sentence indicates that counsel's opinion is that the board member should not vote, but if he does vote, despite the opinion, no sanctions will result. Thus, the Commission concludes that the board member did not rely on the advice of counsel when he decided to vote for the Act. The board attorney

ultimately left the decision to respondent's judgment and that of his union. Respondent chose to vote despite the Commission's opinion that doing so would violate the Act. Respondent's reliance on the attorney's advice that no sanctions could be applied to board member who votes on the contract is very different from reliance on advice telling him that it is permissible to vote. At no time did the attorney advise that it is permissible for respondent to vote. Respondent only testified that he was confused and left to his own devices. Given the clear wording of the attorney's reading of the advisory opinion, and respondent's testimony that indicated that the attorney would not advise him that he could vote, the most prudent course of action would have been to abstain from voting. Respondent chose not to do so.

II. The Commission's Advisory Opinions Do Not Extend the Statutory Prohibition Set Forth in N.J.S.A. 18A:6-8.4.

Respondent next argues that the Commission has no power to extend statutory prohibitions. His argument is that since N.J.S.A. 18A:6-8.4 allows a person employed by a board of education to serve as a board member in a district other than that which employs him, the Commission's Advisory Opinion A10-93(b) and A07-94 effectively sets a statutory prohibition on conduct the legislature did not intend to prohibit. The Commission finds this argument to be without merit.

The Commission's advisory opinions do not impede upon the statutory right of school board employees to serve as board members in other districts. Clearly, respondent has served in both capacities for three consecutive terms and nothing that the Commission does will render him disqualified from serving. Further, he is not being charged with having such a substantial conflict that he cannot continue to serve in both. Rather, the Commission is stating, as it has in other situations, that where respondent has a conflict of interest, he cannot vote on a matter. The Legislature empowered the Commission to enforce the standards of conduct and guide members as to the standards that the legislature set forth in the School Ethics Act. Thus, respondent's argument that a prohibition such as that set forth in Advisory Opinion A10-93(b) and A07-94 would have been included in N.J.S.A. 18A:6-8.4 is illogical. The School Ethics Act sets forth prohibited conduct by school board members and administrators. The advisory opinion is the Commission's interpretation of certain provisions of the Act. It would be inappropriate for the legislature to limit the voting of board members in a section of Title 18A entitled "Employees; Qualifications; Discrimination; Prohibitions; Leave to Serve in Legislature." Again, the Commission's decision does not disqualify a teacher from becoming a board member, nor does it prevent a board member from becoming a teacher.

III. The Commission's Interpretation of N.J.S.A. 18A:12-24(c) and (f) is Neither Arbitrary Nor Capricious.

Next, respondent argues that the Commission's interpretation of N.J.S.A. 18A:12-24(c) and (f) is arbitrary and capricious. He sets forth that the Commission interprets those subsections based on speculation, rather than facts and empirical data. The

Commission disagrees that a finding of a violation of subsection (c) must be based on an actual finding that the board member's salary will be increased by his vote. The law requires no such proof. However, the Commission agrees that a finding of a violation of subsection (f) should be based on evidence that the member used his public office or information that he acquired from that office to secure financial gain for himself. The distinction is clear from the wording of the two provisions.

Subsection (c) sets forth that:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might **reasonably be expected** to impair his objectivity or independence of judgment. (Emphasis added).

Subsection (f), on the other hand, sets forth that:

> No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his or office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated.

Thus, subsection (f) does not have wording that indicates as in (c) that the board member might reasonably be expected to use his office or information to secure financial gain. Rather, the school official must have actually used his office or information derived from it to secure financial gain. To find a violation of (c), the Commission need only show that one would reasonably expect that an indirect personal or financial involvement would impair his objectivity or independence of judgment. Furthermore, one must read all subsections of section 24 in conjunction with the legislature's findings and declarations. The declarations provide that board members and administrators must avoid conduct which is in violation of the public trust or "which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(b).

In the present case, the Commission finds that there is insufficient evidence to show that respondent used his public office or any information derived from it to secure financial gain for himself in violation of subsection (f). Therefore, it now dismisses that charge. The Commission previously ruled that there was no probable cause to credit the allegations that respondent sat in on closed session discussions or participated in negotiations where he could have access to such information. However, the Commission finds that respondent had an indirect financial involvement in the outcome of collective bargaining between the local bargaining unit and the board. The Commission reasons that respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the

justifiable impression among the public that the public trust is being violated when respondent votes on the collective bargaining agreement when he is a member of the same statewide general union as the local bargaining unit.

IV. The Commission's Decision Does Not Infringe Upon Respondent's First Amendment Rights.

Respondent further argues that the Commission's decision raises serious first amendment issues as to his freedom of association. The Commission finds this argument to be baseless. The Commission does not ever require the respondent or others similarly situated to choose being a teacher over being a board member. The respondent is free to associate with both groups within the standards set forth in the School Ethics Act as interpreted by the Commission.

V. Respondent Has Not Proved the Affirmative Defense that the Complaint is Untimely or Barred by Laches.

Respondent next sets forth his belief that the complaint is untimely and barred by laches. The Commission finds that there is no statutory time limitation set forth in the School Ethics Act or the Commission's regulations. Further, respondent has failed to cite facts and supporting cases to prove the affirmative defense of laches.

First, the School Ethics Act does not set a statute of limitations for filing ethics complaints. The Legislature could have set the same 90-day limit for ethics complaints as it did for petitions before the Commissioner, but it chose not to do so. In ethics matters, it often takes time to flesh out relationships to determine whether a conflict exists. Setting a 90-day time limit would only increase frivolous complaints by forcing potential claimants to file before they had all of the facts in order to avoid being time-barred. A time bar does not serve the legislative purpose to ensure that members of the public have faith in their elected officials. Thus, the Commission finds that there is no time bar on filing an ethics complaint, except that it must be a reasonable amount of time that does not result in prejudice to respondent.

In the present case, the respondent has not been prejudiced by the filing of the complaint well over a year after the vote occurred. There were no witnesses that the respondent was unable to call due to the length of time that had passed. There were no documents that he could not retrieve because they had been purged or otherwise destroyed. Furthermore, the respondent has testified that he does not believe that he did anything wrong and thus he is very likely to vote on a collective bargaining agreement again. The issue raised in the complaint is one that needs to be resolved and is likely to arise again. Thus, the Commission does not find that the within complaint is barred by untimeliness.

The affirmative defense of laches is based on the length of delay in bringing a claim, the reasons for delay, and the changing conditions of either or both parties during

the delay. Lavin v. Hackensack Board of Education, 90 N.J. 145, 152 (1982). The length of the delay alone or in conjunction with the other elements may result in laches. Id. Whether or not it is inequitable to allow a claim to be enforced will generally turn on whether an adverse party has been harmed by the delay. Id. at 153; N.J. Dept. of Environmental Protection and Energy v. Dopp, 268 N.J. Super. 165, 176 (App. Div. 1993).

In the present case, Mr. Sangiovanni testified that he did not become aware that Mr. Pannucci improperly voted on the collective bargaining agreement until February 1995 although the vote occurred in November 1994. At that time, he began his candidacy for a seat on the Brick board of education for the first time. His knowledge was acquired through Mr. Mueller who was then seeking to have the contract nullified. Mr. Mueller did not prosecute his petition in the Office of Administrative Law and it was subsequently dismissed. Mr. Sangiovanni filed the within complaint on April 4, 1996.

The Commission finds that the length of time it took Mr. Sangiovanni to file the within complaint did not result in laches. The filing of the complaint was less than a year and a half after the conduct occurred and a year and two months after the complainant states that he became aware of the possible violation of the Act. The Commission finds that it was reasonable for Mr. Sangiovanni not to have filed sooner in light of his knowledge that someone was already challenging the contract at issue in the present case, although the petition was not before the School Ethics Commission. More importantly, the Commission finds that the delay did not harm Mr. Pannucci in any way by denying him access to any evidence that he could have used to defend himself against Mr. Sangiovanni's allegations. For the foregoing reasons, the Commission finds that respondent has failed to prove that he can invoke the affirmative defense of laches to bar the present complaint.

VI. The Commission's Interpretation of the School Ethics Act Does Not Attempt to Supersede the Will of the Electorate.

As set forth in "II" above, the School Ethics Act as interpreted by the Commission does not in any way prevent teachers or any other members of a national school union from serving on a school board. It only sets a limit on their ability to vote on matters that the Commission has deemed them to have a conflict. The decision has not prevented and will never prevent the continuing participation of members of national school union members to participate on school boards. Thus, the Commission finds this argument to be meritless.

CONCLUSION

For all the foregoing reasons, the Commission finds that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. Because respondent received inadequate advice from counsel as to whether he should vote and the Commission had only recently issued the advisory opinion setting forth that his voting on the contract would violate the Act, the Commission recommends a lower penalty than it normally would for the violation. It recommends a penalty of censure because a censure does not force respondent to miss any board meetings, but yet it is a public disciplinary action so that other board members and the public are notified of the violation. For the foregoing reasons, the Commission recommends that the Commissioner impose a penalty of censure.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini 4/13

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C08-96

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the arguments raised by parties in testimony; and

Whereas, the Commission found probable cause to credit the allegations in the complaint, found that there are no material facts in dispute, and therefore invited respondent's written statement in response; and

Whereas, the Commission has reviewed respondent's written statement and now concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Frank Pannucci has violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner impose a penalty of censure and adopts the proposed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 26, 1996

Lisa James-Beavers
Executive Director

[c0896/c:lisa/decisions]

AGENCY DKT. NO. 574-12/96

IN THE MATTER OF FRANK PANNUCCI,	:	
BRICK TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, OCEAN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed.

The parties submitted timely comments with respect to the Commission's recommended penalty.* Complainant Joseph Sangiovanni's comments regarding the Commission's recommended penalty contend that, under the circumstances of this matter, such recommendation is too lenient. Respondent's comments urge that the Commissioner should reconsider the Commission's decision and find the recommended penalty unwarranted.

After his review of the full record in this matter, and with due consideration to the arguments advanced by the parties with respect to the sanction to be imposed, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter.

IT IS HEREBY ORDERED that Frank Pannucci be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that respondent's counsel requested and was granted an extension of time within which to file comments to the Commission's decision.

JANUARY 28, 1997
DATE OF MAILING JANUARY 29, 1997

38-97

SEC #C8-96
C # 38-97SEC
SB # 16-97

IN THE MATTER OF FRANK PANNUCCI, :
BOARD OF EDUCATION OF BRICK :
TOWNSHIP, OCEAN COUNTY. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the School Ethics Commission, November 26, 1996

Decided by the Commissioner of Education, January 28, 1997

For the Complainant-Cross/Appellant, Martin J. Anton, Esq.

For the Respondent-Appellant, Jay C. Sendzik, Esq.

For the Respondent, Geraldine Callahan, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the amicus curiae New Jersey School Boards Association, Michael F. Kaelber, Esq.

The State Board of Education grants the motion for leave to appear as amicus curiae filed in this matter by the New Jersey School Boards Association pursuant to N.J.A.C. 6:2-2.1. The School Boards Association is directed to submit its brief within ten days of the date of this decision.

June 4, 1997

Date of mailing JUN 06 1997

38-97

SEC #C8-96
C #38-97SEC
SB #16-97

IN THE MATTER OF FRANK PANNUCCI, :

BOARD OF EDUCATION OF BRICK : STATE BOARD OF EDUCATION

TOWNSHIP, OCEAN COUNTY. : DECISION ON MOTION

Decided by the School Ethics Commission, November 26, 1996

Decided by the Commissioner of Education, January 28, 1997

Decision on motion by the State Board of Education, June 4, 1997

For the Complainant-Cross/Appellant, Martin J. Anton, Esq.

For the Respondent-Appellant, Jay C. Sendzik, Esq.

For the Respondent School Ethics Commission, John Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the amicus curiae New Jersey School Boards Association, Michael F. Kaelber, Esq.

For the amicus curiae New Jersey Education Association, Zazzali, Zazzali, Fagella & Nowak (Kathleen Naprstek, Esq., of Counsel)

The State Board of Education grants the motion for leave to appear as amicus curiae filed in this matter by the New Jersey Education Association pursuant to N.J.A.C. 6:2-2.1.

January 6, 1999

Date of mailing JAN 08 1999

38-97

SEC #C8-96
C #38-97SEC
SB #16-97

IN THE MATTER OF FRANK PANNUCCI, :

BOARD OF EDUCATION OF BRICK : STATE BOARD OF EDUCATION

TOWNSHIP, OCEAN COUNTY. : DECISION

Decided by the School Ethics Commission, November 26, 1996

Decided by the Commissioner of Education, January 28, 1997

Decision on motion by the State Board of Education, June 4, 1997

For the Complainant-Cross/Appellant, Martin J. Anton, Esq.

For the Respondent-Appellant, Jay C. Sendzik, Esq.

For the Respondent School Ethics Commission, Geraldine Callahan, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the amicus curiae New Jersey School Boards Association, Michael F. Kaelber, Esq.

For the amicus curiae New Jersey Education Association, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of counsel)

This is an appeal by respondent Frank Pannucci from a determination by the School Ethics Commission that he violated N.J.S.A. 18A:12-24(c) of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., by voting on the collective negotiations agreement adopted by the Brick Township Board of Education ("Board" or "Brick Township Board") on November 3, 1994. A cross-appeal was thereafter filed by Joseph Sangiovanni, the individual who initiated the proceedings before the School Ethics Commission which

Mar. 1, 2000

resulted in that determination, from the sanction imposed on Mr. Pannucci by the Commissioner of Education.

Mr. Pannucci, who is employed as a teacher in East Orange, has been a member of the Brick Township Board since 1990, with the exception of the period between April 1995 and April 1996.

Mr. Sangiovanni's complaint alleged that Mr. Pannucci, in violation of the School Ethics Act, had participated in negotiation sessions between the Board and the Brick Township Education Association after May 1994, at which time the School Ethics Commission had issued an advisory opinion on the subject, and that he had voted on the collective negotiations agreement between the Board and the teachers' union.

Mr. Pannucci denied that he had participated in any negotiations after May 1994. He admitted, however, that he had voted on the collective negotiations agreement.

Both Mr. Sangiovanni and Mr. Pannucci appeared before the School Ethics Commission on July 23, 1996, at which time the Commission determined that there was probable cause to credit the allegations in the complaint and to transmit the matter to the Office of Administrative Law ("OAL") for hearing.

However, in a written decision dated September 24, 1996, the Commission dismissed all of the allegations in the complaint except that Mr. Pannucci had violated the Ethics Act by voting on a collective negotiations agreement. Then, finding that there were no material facts in dispute, the Commission determined to give respondent the opportunity to submit his position to the Commission in writing instead of transmitting the case to OAL for hearing.

After written submissions from both the complainant and the respondent, and based on the undisputed facts, the Ethics Commission found that Mr. Pannucci had violated the School Ethics Act when he voted on the agreement in November 1994. In so concluding, the Commission relied on its advisory opinion of June 23, 1994 and reasoned that "respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the justifiable impression among the public that the public trust is being violated when respondent votes on the collective bargaining agreement when he is a member of the same statewide general union as the local bargaining unit." Commission's Decision, slip op. at 5-6.

The Commission, however, recommended to the Commissioner that because Mr. Pannucci had received inadequate advice from counsel and because the advisory opinion on the subject had been issued recently when he voted on the agreement, the appropriate penalty would be a censure.

The Commissioner agreed and directed that Mr. Pannucci "be censured as a school official found to have violated the School Ethics Act." Commissioner's Decision, slip op. at 10.

Mr. Pannucci appealed to the State Board of Education from the Ethics Commission's finding that he had violated the Ethics Act by voting on the agreement and from the Commissioner's imposition of a penalty on the basis of that finding.

Mr. Sangiovanni cross-appealed, seeking the imposition of a more severe penalty.

In addition, the New Jersey School Boards Association ("NJSBA") and the New Jersey Education Association ("NJEA") are participating in the matter as amicus curiae.

Mr. Pannucci argues that a fair and reasonable reading of N.J.S.A. 18A:12-24(c) does not support the Ethics Commission's finding that, solely by virtue of his membership in the New Jersey Education Association, he had violated the School Ethics Act by voting on the agreement between the Brick Township Board and the Brick Township Education Association. He contends that such conclusion was not intended by the Legislature and effectively legislates qualifications for membership on a district board of education beyond those in statute. Mr. Pannucci further contends that the Commission's conclusion unnecessarily infringes upon his First Amendment right to freedom of association and that it supercedes the will of the voters, who knew of his employment as a teacher in East Orange when they re-elected him to the Brick Township Board.

In response, Mr. Sangiovanni contends that Mr. Pannucci's status as a union member "might reasonably be expected to impair his objectivity or independence." Hence, he argues, the Ethics Commission did not need any factual findings to support its conclusion that by voting on the agreement, Mr. Pannucci had violated N.J.S.A. 18A:12-24(c). In addition, by his cross-appeal, Mr. Sangiovanni urges the State Board to increase the penalty which the Commissioner had imposed in this case. In this respect, he argues that an increased penalty is warranted because Mr. Pannucci still does not recognize the "impropriety of his actions." Brief in support of cross-appeal, at 5.

In a brief on behalf of the Ethics Commission, a deputy attorney general argues that Mr. Sangiovanni has no standing to appeal either the Ethics Commission's determination finding a violation of the Ethics Act or the Commissioner's determination of the appropriate penalty because, as a complainant, his role was "informational" once the Ethics Commission initiated its investigation and issued its probable cause determination. In a separate brief on behalf of both the Ethics Commission and the Commissioner, the Deputy argues for affirmance of the penalty recommended by the Commission and imposed by the Commissioner.

The NJSBA challenges the entirety of two advisory opinions issued by the Ethics Commission. These opinions concluded that the School Ethics Act automatically precludes participation by board members in a variety of activities on the basis of union affiliation and/or representation. Among those advisory opinions is the June 23, 1994 opinion that provided the foundation for the Commission's determination in the matter now before us.

The NJSBA argues that both advisory opinions, as well as the determination now on appeal, go beyond the legislative intent of the School Ethics Act and have a significant negative impact on the operations of district boards of education. It further argues that the Commission's determination in this case impermissibly infringes on the constitutional rights of the members of district boards.

Like the NJSBA, the NJEA contends that both advisory opinions are incorrect as a matter of law and that, consequently, the Ethics Commission's determination in this case should be reversed.

Initially, we agree with the Deputy Attorney General representing the Ethics Commission that Mr. Sangiovanni does not have standing to appeal to the State Board from the determinations rendered in this matter by the Ethics Commission and the Commissioner. Examination of the controlling statutes reveals that the role of a complainant was designed to provide the vehicle by which allegations against a school official would be brought to the School Ethics Commission, but that these statutes do not confer on the individual who files the complaint the right to prosecute the matter.

N.J.S.A. 18A:12-29(a) provides that "[a]ny person, including a member of the commission, may file a complaint alleging a violation...by submitting it, on a form prescribed by the commission, to the commission." The statute further provides that no complaint shall be accepted by the Ethics Commission unless it has been signed under oath by the complainant. N.J.S.A. 18A:12-29(b) requires that upon receipt of a complaint, the Commission must serve a copy of the complaint on each school official named in it and provide such official with the "opportunity to submit a written statement under oath."

At that point, the Commission is charged with the responsibility of deciding by majority vote whether "probable cause exists to credit the allegations in the complaint." N.J.S.A. 18A:12-29(b). If the Commission decides that probable cause does not exist, it must dismiss the complaint and notify the complainant and any school official named in the complaint. The statute expressly provides that such dismissal constitutes "final agency action." Id. In addition, N.J.S.A. 18A:12-29(e) confers on the Commission the authority to impose a fine not to exceed $500 on the complainant if it determines that the complaint was frivolous.

In contrast, in those cases in which the Ethics Commission finds that there is probable cause, it must refer the matter for a hearing to be conducted in accordance with the requirements of the Administrative Procedure Act. N.J.S.A. 18A:12-29(b). Upon completion of the hearing, the Commission must decide by majority vote whether the conduct complained of constitutes a violation of the Ethics Act. N.J.S.A. 18A:12-29(c). If the Commission finds such violation, it must recommend a sanction to the Commissioner of Education, who then acts on the Commission's recommendation. Id. Any appeal from the Commission's determination of a violation or the Commissioner's decision regarding the sanction is to the State Board of Education. N.J.S.A. 18A:12-29(d).

Consistent with N.J.S.A. 18A:12-29(d) and the statutory framework governing appeals to the State Board, see N.J.S.A. 18A:6-27 through 6-29, the State Board's regulations delineate that "any party aggrieved by a decision...or by the School Ethics Commission finding a violation of the School Ethics Act may appeal to the State Board of Education." As set forth in N.J.A.C. 6:3-9.2, a complainant is the person bringing a complaint of an alleged violation of the School Ethics Act. Quite simply, given the role of a complainant as defined in the statute and implementing regulations, regardless of whether the proceedings result in a finding of a violation and the imposition of a penalty, a complainant is not an "aggrieved party" by virtue of his status as a complainant. In re Lazarus, 81 N.J. Super. 132 (App. Div. 1963).

However, we recognize that neither the statute nor regulations automatically preclude standing. Although we are mindful of the distinctions between judicial power and the quasi-judicial authority exercised in administrative proceedings, City of

Hackensack v. Winner, 82 N.J. 1, 28-29 (1980), we find that the assessment of whether an individual complainant has standing to pursue an administrative appeal in this context is most appropriately resolved under the principles expressed by the judicial opinions on the subject.

Even under the liberal approach taken by the New Jersey courts, standing is generally confined to situations where the individual concerned with the subject matter of the litigation evidences a sufficient stake in the outcome and real adverseness. New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 68 (1980); Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y., 58 N.J. 98, 107 (1971). At the same time, the courts have recognized that lack of standing to invoke the power of judicial review may confer a conclusive character on administrative action to the possible great detriment of the public. Elizabeth Federal Savings & Loan Ass'n v. Howell, 24 N.J. 488 (1957). They have further recognized that a narrow approach to standing may lose sight of the overriding need of the system to make sure that someone shall in fact be able to secure review of administrative action. Id. Hence, where a substantial public interest is involved, a slight interest may be sufficient to give standing to invoke judicial review. New Jersey State Chamber of Commerce, supra; Elizabeth Federal Savings and Loan, supra.

We stress that the complainant in this case is not attempting to appeal the Ethics Commission's determination that there was not probable cause to support his allegations relating to negotiations. As previously stated, the statute provides that such determinations constitute the final agency decision in the matter, so that review would

presumably be obtainable through the Superior Court. Rather, the complainant is participating in this matter as a respondent/cross-appellant.

While the complaint indicates that the complainant is a resident of Brick, there is no expression that he possesses any interest in this matter other than as a member of the public. In this respect, the complainant has not shown how he has been affected adversely and in any degree greater than the public generally by the Commissioner's determination that a censure was sufficient sanction. Moreover, it is not the function of the Ethics Commission or the Commissioner in this context to adjudicate the rights of complainants vis-à-vis school officials. In re Lazarus, supra.

Again, the function of a complainant is to bring acts by school officials which may indicate a violation of the School Ethics Act to the attention of the Ethics Commission so as to protect the public's confidence. See N.J.S.A. 18A:12-22. It is the Commission, not the complainant, which is charged in this context with acting as the guardian of the public interest.

We therefore hold that complainant in this case does not have standing to seek review on appeal by the State Board of Education of the determinations of either the Ethics Commission or the Commissioner. Nor does he have the right to participate in Mr. Pannucci's appeal as a party respondent.

We turn now to the substance of Mr. Pannucci's appeal. After review of the matter, we reverse the Ethics Commission's determination that Mr. Pannucci violated the School Ethics Act by voting on the collective negotiations agreement involved.

Prior to enactment of the Ethics Act, conduct such as involved here was controlled by N.J.S.A. 18A:12-2. It was well established under that statute that Mr.

Pannucci's conduct in voting on the contract while a member of the same statewide employee association as that with which the local in Brick was affiliated was not prohibited. See Salerno v. Board of Education of the Township of Old Bridge, decided by the Commissioner of Education, April 23, 1984, Larsen v. Woodbridge Bd. Of Ed., decided by the Commissioner of Education, March 18, 1985. However, this does not automatically result in the conclusion that respondent's conduct did not violate the Ethics Act.

In its decision, the Ethics Commission found that respondent had violated N.J.S.A. 18A:12-24(c). That statute provides in pertinent part that:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The Commission found that respondent had an "indirect financial involvement in the outcome of collective bargaining between the local bargaining unit and the board."[1] Commission's Decision, slip op. at 5. In reaching this conclusion, the Commission reasoned that:

> respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the

[1] We note that N.J.S.A. 18A:12-24(c) was subsequently amended to eliminate the prohibition on school officials acting in instances in which such official or a member of his immediate family has a direct or indirect personal involvement that night reasonably be expected to impair his objectivity. Instead, the statute now provides in this respect that:

> No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

This change, however, has no bearing on the instant matter.

> impression among the public that the public trust is being violated when respondent votes on the collective bargaining agreement when he is a member of the same statewide general union as the local bargaining unit.

Id. at 5-6.

This reasoning is more fully explicated in the advisory opinion issued by the Commission on June 23, 1994 pursuant to N.J.S.A. 18A:12-31.[2] It is this advisory opinion, along with the opinion issued on May 26, 1994, that provides the underpinnings for the Commission's decision in the instant case.[3]

The May 26, 1994 opinion, A10-93, addressed questions relating to negotiations rather than to voting on the resultant agreement. This opinion concluded that a board member could not participate directly in negotiations if the member or a member of his immediate family belonged to the same statewide general union. Relying on this opinion, the Commission's June 23, 1994 advisory opinion, A10-93(b) and AO7-94, concluded that a board member could not vote on a negotiated contract if the board member or a member of his immediate family was a member of the same statewide general union "that has negotiated the contract with the school board." In that opinion, the Ethics Commission found that:

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[2] N.J.S.A. 18A:12-31 provides the authority under which the Ethics Commission may issue advisory opinions. The statute provides in pertinent part that:

> A school official may request and obtain from the Commission an advisory opinion as to whether any proposed activity or conduct would in its opinion constitute violation a violation of the provisions of this act. Advisory opinions shall not be made public, except when the commission, by a vote of at least sia members, directs that the opinion be made public. Public advisory opinions shall not disclose the name of the school official.

[3] We note that these opinions resulted from requests by an attorney representing several district boards, rather than from a request by a school official. See DeSimone v. New Jersey School Ethics Commission, decided by the State Board of Education, December 7, 1994.

> it is likely that the public could perceive that the member's independence of judgment is impaired if he or she votes on such a contract, even though the board member or his family member is not subject to the specific contract before the board. It is reasonable for the public to perceive that voting for one's fellow union members to receive a contractual award or service, etc., could be publicly perceived to create a conflict for a school board member. Likewise, if a school official's spouse were a member of the union, the same conflict would arise since the board member has an indirect involvement with that union. Lastly, the board member's business organization has an involvement that could prejudice the board member's independence of judgment.

A10-93(b) and AO7-94 (June 23, 1994), at 2.

The Commission rejected the view that the distinction between the fact that a vote on an agreement takes place in public while negotiations are private makes a difference. In this respect the Commission reasoned that by voting to increase the pay rate for members of one bargaining unit, a board member could be influencing the rate of payment to all union members, thereby benefiting himself or his spouse. Id. Accordingly, the advisory opinion barred not only union members from voting on a collective bargaining agreement, but also barred non-members and their spouses from voting if either of them was represented by that union through their employment, i.e., an agency shop situation. Id.

We stress that our jurisdiction in this matter is over the Ethics Commission's final decision of November 26, 1996 and the Commissioner of Education's decision of January 28, 1997 regarding the appropriate sanction. Accordingly, we are concerned with the Commission's advisory opinions only to the extent that the Commission's final decision relies upon or incorporates them. DeSimone v. New Jersey School Ethics Commission, remanded to the School Ehics Commission by the State Board of

Education, October 5, 1994, and decided by the State Board, December 7, 1994. Our decision in this matter therefore addresses only the question involved in the Commission's June 23, 1994 opinion, i.e., whether a board member is precluded from voting on a collective negotiations agreement if he or his spouse are either members of the same statewide union representing the bargaining unit whose contract is before that board member or are non-members represented by the union through employment within the scope of another bargaining unit in a different school district.

After careful review, we reject the view that status as a member of another local union within the same statewide union should, on a per se basis, preclude a board member from voting on a collective negotiations agreement in the district where he or she is a member of the district board of education. Quite simply, any connection between a vote by a member of a district board on a collective negotiations agreement applicable to an employee negotiations unit in that district and the salary structure of a whole class of employees on a statewide basis is far too attenuated to justify mechanically barring all board members with ties to a statewide union from voting. Similarly, it is not reasonable to assume that an individual who belongs to or is represented by a local affiliate of a statewide union would necessarily be influenced by that status when voting on a contract applicable to an employee unit represented by a different local affiliate of that statewide union.

The unreasonableness of such a blanket disqualification is even more dramatic if applied to a board member whose spouse is represented by a different local affiliate and who is employed in an entirely different job classification than the one to which the contract at issue would apply. The School Ethics Act does not demand such a result.

It was previously well settled that the only blanket prohibition to board service was that a professional employee could not serve on the board which employed him. N.J.S.A. 18A:6-8.4; Schulman v. O'Reilly-Lando, 226 N.J. Super. 626 (App. Div. 1988). Nothing in the legislative history of the School Ethics Act indicates that the Legislature intended to limit the service of board members purely on the basis of the status of such member and his immediate family with respect to a statewide employee association. Accordingly, there is nothing in the legislative history to provide a factual underpinning for the overly broad interpretation which the Ethics Commission has adopted. Nor are there any factual findings in the record of this matter to support such an interpretation.

In sum, we hold that N.J.S.A. 18A:12-24(c) does not automatically prohibit a board member from voting on a collective negotiations agreement solely on the basis of his status or that of his immediate family with respect to membership or representation by a different local affiliate of the same statewide association with whom the agreement is made. In that there is nothing in the record that suggests that the particular circumstances of Mr. Pannucci's involvement with such local affiliate has or appears to have compromised his objectivity or independence of judgment, we reverse the Ethics Commission's finding that he violated N.J.S.A. 18A:12-24(c) and the Commissioner's imposition of a sanction on the basis of that finding.

Attorney exceptions are noted.

Maud Dahme, Donald C. Addison, Jr., Jean D. Alexander, Dr. Ronald K. Butcher, Thomas P. McGough, and Robert A. Woodruff join in the opinion of the majority.

March 1, 2000

Date of mailing MAR 03 2000

Daniel J.P. Moroney dissenting:

Up to Page 9, Paragraph 4 starting "We turn now to the substance of Mr. Pannucci's appeal..." I have no problem with the Legal Committee's Report [henceforth LCR] on SB #16-97.

The substance of this case is an appeal from a determination by the Ethics Commissioner [henceforth EC] that a Brick Township School Board member, Mr. Pannucci, violated the School Ethics Act [henceforth SEA] by voting on the Collective Bargaining Negotiations Agreement [henceforth CBNA].

The LCR's reference to N.J.S.A. 18:12-2 is essentially irrelevant and prejudicial in that it has been superceded by the SEA. But even so in the cited Salerno v. Old Bridge decided under that old standard of "substantial and material" Commissioner Cooperman in his decision for the Board members "noted with approval the treatment herein describing safeguards to be observed by a member of the board of education who has close relatives in the employ of the board to avoid even the appearance of a conflict of interest" which in that case was evidenced by abstaining from voting. The operative phrase therein is to "avoid even the appearance of a conflict of interest."

June 23, 1994 EC issued opinions A10-93b and A07-94. Those opinions stated that under the SEA [N.J.S.A. 18A:12-24c] a school board member is prohibited from voting on a CBNA for a local bargaining unit of a statewide union when a school board member or his immediate family member belongs to the state-wide union – opinion to be applied prospectively including labor negotiations begun before that date and continued thereafter.

By letter of August 16, 1994, the Brick Township Board received advice from its attorney setting forth the EC's opinions in A10-93, A10-93b and A07-94 as follows: "Our reading of the aforesaid statute and opinions is that a board member, who is a member of the same statewide union as the union in which the Board is involved with in labor negotiations, cannot vote after the date of the advisory opinion of June 3, 1994 irrespective of whether the legal negotiations began before the June date and continued thereafter." The attorney goes on to express his disagreement with the EC's opinion but ultimately gives no specific direction and leaves it up to the board member and his union to decide whether the board member should vote. The EC decision stated that "because that quote was the only portion of the attorney's opinion that was unambiguous the EC concluded that the board member was aware of the EC decision that he would be in violation of the SEA if he voted on the CBNA.

Given the clear wording of the attorney's reading of the advisory opinion, and respondents testimony that indicated that the attorney would not advise him that he could vote, the most prudent course of action would have been to abstain from voting. Respondent chose not to do so.

Furthermore one must read all subsections of Section 24 in conjunction with the Legislator's findings and declarations. The declarations provide that board members and administrators must avoid conduct which is in violation of the public trust or "which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22a.

The EC found that the respondent had an indirect financial involvement in the outcome of the collective bargaining between the local bargaining unit and the board.

The EC reasons that respondent's statewide general union looks to salary and benefits statewide to determine what salary to seek for its members. The comparison of salaries creates the justifiable impression among the public that the public trust has been violated when respondent votes on the CBNA when he is a member of the same statewide general union as the local bargaining unit.

In conducting a balancing test here it is noteworthy that the appellant seeks to participate on behalf of the [local] board and the public and vote on the CBNA with the local bargaining unit of the same statewide union in which he holds membership. On the other side of the balance is the EC and the [Ethics] Act which show a state interest in fostering and maintaining the "respect and confidence of the people" in the operations of government. N.J.S.A. 18A:12-22a. Our lawmakers have found and declared that this requires school officials not only to avoid conduct in violation of the public trust but also that conduct "which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22a.

The LCR avers, without foundation, that the EC decision is a blanket prohibition to board service. Clearly it does not in any way prevent teachers or any other members of a national school union from serving on a school board. It only sets a limit on their ability to vote on matters that the EC has deemed them to have a conflict. That decision has not prevented and will never prevent the continuing participation of national school union members from participating on school boards. The EC decision does not amount to a per se finding that being a teacher and school board member are incompatible. Appellant was found to have a limited conflict of interest under N.J.S.A. 18A:12-24c.

The decision did not preclude appellant from participating on other board business and was not "overly broad."

The EC rightfully found that respondent violated N.J.S.A. 18A:12-24c of the SEA. Because respondent received inadequate advice from counsel as to whether he should vote and the EC had only recently issued the advisory opinion setting forth that his voting on the contract would violate the Act, the EC recommended a lower penalty than it would for the violation. It recommended a penalty of censure because a censure does not force respondent to miss any board meetings, but yet it is a public disciplinary action so that other board members and the public are notified of the violation.

For the reasons contained herein, I would move that the finding of the EC that the respondent violated N.J.S.A. 18A:12-24c and the Commissioner of Education's imposition of a sanction based on that finding be affirmed and the matter be returned to the Legal Committee for preparation of a formal decision.

Anne S. Dillman and Samuel J. Podietz join in the dissent.

March 1, 2000

Date of mailing MAR 03 2000

39-97

39-97 SEC

IN THE MATTER OF EDWARD GORE,	:	
HAMILTON TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MERCER COUNTY.	:	DECISION
	:	

JANUARY 30, 1997

	)	Before the School
	)	Ethics Commission
	)	
IN THE MATTER OF	)	Docket No. C10-96
	)	
EDWARD GORE	)	Decision

PROCEDURAL HISTORY

On May 3, 1996, Kathleen Lord, President of the Hamilton Township School Secretaries Association, and Constance K. Petro, President of the Hamilton Township Educational Support Staff (Complainants), filed this complaint against Edward Gore (Respondent), a member of the Hamilton Township Board of Education (Board), alleging that respondent used his position as a Board member to secure the home addresses of district employees and send them an intimidating campaign letter. Respondent filed an answer on May 28, 1996. The Commission considered the complaint at its July 23, 1996 meeting, at which time complainants and respondent appeared and addressed the Commission. Anthony M. Armenti, Director of Secondary Education of the Hamilton Township School District, also appeared at the request of the Commission to answer questions from the Commission.

At its September 24, 1996 meeting, the Commission issued a written Decision on Probable Cause, finding that there was probable cause to credit the allegations in the complaint that respondent's actions had violated N.J.S.A. 18A:12-24(b). The Commission also concluded that there were no material facts in dispute. Respondent was given until October 25, 1996 to submit his position in writing to the Commission. Respondent filed a legal memorandum with the Commission on October 23, 1996.

FACTS

In their complaint, complainants allege that respondent used his position as a Board member to secure the home addresses of district employees and that he used this information to send district employees who resided in Hamilton Township an intimidating letter advising them that their jobs could be in jeopardy if they did not vote for the candidates respondent was endorsing. Complainants allege that these actions violate the Act.

Respondent is a member of the Board and was a member in April, 1996. Respondent admitted that, subsequent to a Board meeting, he asked Mr. Armenti for the home addresses of district employees who had been hired since July, 1995. Respondent stated that, using the addresses he had received from Mr. Armenti, he mailed the letter in question, dated April 12, 1996, to those recent appointees who resided in Hamilton Township. The contents of the letter is undisputed. The letter begins by congratulating the employee on his or her recent appointment. The letter then advises the recipient that Board member Violet Harrison was ". . . the lone vote against your appointment" and that she is seeking re-election to the Board. The letter further states, "[t]o be frank, if Ms. Harrison and her two political allies are elected on April 16, 1996, the possibility exists that your re-appointment will be in jeopardy." The letter encourages the recipient to vote for Janice Williams, "who enthusiastically supported your appointment" and her "teammates" Ron Tola and Loren Moffatt. While not on Board letterhead, the letter is signed "Edward Gore, Hamilton School Board Vice President." An asterisk appears at the bottom of the letter, which states, "Paid for entirely by Ed Gore."

ANALYSIS

Respondent argues that his actions in securing the home addresses of district employees and sending the campaign letter do not violate the Act. First, respondent argues that the home addresses of district employees are public information pursuant to the Right-to-Know Law, N.J.S.A. 47:1A-1, et seq. and, he thus was entitled to the information as a citizen. According to respondent, the fact that he is a Board member is irrelevant. Respondent also argues that he is entitled to the home addresses of district employees under the common law right-to-know doctrine. Secondly, respondent argues that he has a right under the United States Constitution to engage in political speech and the Commission cannot infringe upon his first amendment rights by imposing a sanction in this case. For the following reasons, the Commission finds respondent's defense to be without merit and finds that his actions do constitute a violation of N.J.S.A. 18A:12-24(b).

N.J.S.A. 18A:12-24(b) provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

Respondent was provided with the home addresses of district employees because he is a board member. He asked a district employee for the addresses after a Board meeting. Mr. Armenti, the employee of whom the request was made, advised the Commission that he gave respondent the information because respondent was a Board member, which made respondent Mr. Armenti's employer. No inquiry was made as to why respondent needed the information.

As respondent stated, and as the Commission's investigation revealed, this was not a unique request, as other Board members in the past had requested and received district

employees' home addresses. What is different about this case, however, is that respondent used the addresses for non-Board business. Thus, respondent was not requesting the information for official Board business. Rather, he was using it for his own personal purposes. Respondent wanted the addresses so he could target recently appointed district employees who resided in Hamilton Township and send them a campaign letter. Contrary to respondent's assertions, the letter did not merely inform the recipient of what occurred at a Board meeting. The letter forthrightly suggested that if he or she did not vote for "Williams, Tola & Moffatt" his or her job could be in jeopardy. Such a letter in no way can be characterized as Board business.

Furthermore, the letter begins by congratulating the individual on the recent appointment as a district employee and is signed by respondent as Board Vice President. Even though it is not on Board letterhead, the initial congratulatory paragraph certainly sounds authoritative, especially when coupled with the use of respondent's official title under his name. This letter was not sent to all district employees or all voters in Hamilton Township. Respondent targeted a very discreet group of individuals, drafted the letter and used his title in a manner apparently calculated to alarm those individuals. Indeed, this tactic worked, as a number of recipients of the letter were concerned enough to contact complainants who ultimately filed the complaint. The fact that respondent included the "Paid for by Ed Gore" language does not cure the situation. Respondent by virtue of the fact that he is a Board member, received the home addresses of recently hired district employees, who could be viewed as vulnerable, and then targeted those who resided in the district and sent them what initially sounded like a letter addressing Board business for the purpose of advancing the political campaign of others. The actions violate N.J.S.A. 18A:12-24(b).

Respondent argues that the home addresses of all school district employees are public records because state and local entities are required to receive and maintain school employee addresses. Therefore, respondent argues that since the addresses are public records, he cannot be said to have used his position as Board member to get the addresses. The Commission disagrees.

N.J.S.A. 47:1A-2 provides:

> Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, all records which are required by law to be made, maintained or kept on file by any board, agency, department, commission or official of the State or of any political sub-division thereof or by any official acting for or on behalf thereof . . . shall, for the purposes of this act, be deemed to be public records. Every citizen of this State, . . . shall have the right to inspect such records.

Pursuant to the above provision, information required to be maintained is not public information if an executive order of the Governor provides to the contrary. On November 15, 1974, Governor Brendan Byrne signed Executive Order No. 11 which provides in the relevant part:

> 2. Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, an instrumentality of government shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties, personnel or pension records of an individual, except that the following shall be public:

> a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation from government service and the reason therefore; and the amount and type of pension he is receiving;
>
> b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public position, but in no event shall detailed medical or psychological information be released.

Executive Order No. 11 still is in effect. Pursuant to this Executive Order, home addresses of public employees are not public information. While respondent may have been allowed to receive the home addresses of district employees for official Board business, he was not permitted to use his position as a Board member to secure and use the addresses for private purposes.

Respondent also argues that he has a right to the information under the common law right to know doctrine. The Commission again disagrees. As the New Jersey Supreme Court explained in South Jersey Pub. v. N.J. Expressway, 124 N.J. 478, 487 (1991):

> Under the common law, the threshold condition for access to public records is that a citizen establish an interest in the subject matter of the material he or she is seeking. Irval Realty, Inc. v. Board of Pub. Util. Comm'rs, 61 N.J. 366, 372, 294 A.2d 425 (1972). The interest does not have to be purely personal, but rather '[a]s one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem, even though his individual interest may [be] slight.' Ibid. For example, a newspaper's interest in ' keep[ing] a watchful eye on the workings of public agencies' is sufficient to accord standing under the common

> law, Red Bank Register v. Board of Educ., 206 N.J.Super. 1, 9, 501 A2d, 985 (App. Div. 1985) (quoting Nixon v. Warner Communications, Inc. 435 U.S. 589, 598 98 S.Ct. 1306, 1312, 55 L.Ed. 2d 570, 579-80 (1978).

Additionally, assuming arguendo that respondent has standing and employee addresses are public records under the common law doctrine, the right to inspection is not absolute. A balancing test is used wherein the public right to know is weighed against the individual's right to privacy. Loigman v. Kimmelman, 102 N.J. 98, 112 (1986).

In this case, respondent sought the home addresses of recently appointed district employees so that he could target those employees who resided in the district and send them a campaign letter advising them that their jobs would be in jeopardy if they did not vote a certain way. This is not the type of interest that would confer standing on respondent to receive otherwise confidential information. Moreover, it is not the type of interest where respondent's right to know would outweigh the employee's right to privacy.

Respondent also argues that the Commission cannot legally impose a sanction on him because to do so would interfere with respondent's constitutional right to engage in political speech. Respondent relies on Pickering v. Board of Education, 391 U.S. 563 (1968) and Perez v. Cucci et al., 725 F. Supp. 209 (D.C.N.J. 1989), aff'd 898 F.2d, 139 (3rd Cir. 1990) in support of his arguments. While these cases certainly support the general constitutional right of a public official to express his opinion on political issues, they do not support respondent's actions here. In Pickering, a teacher was dismissed for sending a letter critical of the Board of Education's policy to a newspaper. In Perez, a police officer was demoted for supporting the candidacy of a defeated mayoral candidate. In those cases, the courts concluded that it was unconstitutional

to use the individual's political positions as the basis for demoting or dismissing them. In this case, respondent received information not available to the general public, targeted vulnerable district employees and sent a campaign letter to them. Finding that respondent violated the Act under these circumstances, does not infringe upon respondent's right to free speech. Respondent certainly is free to express his opinions on political matters, he simply cannot do what he did in this instance.

CONCLUSION

For the above reasons, the Commission find that respondent violated N.J.S.A. 18A:12-24(b), when, as a Board member, he secured the home addresses of district employees and used that information to single out recently appointed district employees and send a letter under the signature of Board Vice President, that advised them that their jobs could be jeopardized if they did not vote a certain way. Certainly, those individuals were the most vulnerable as they did not have the job security that tenure imparts. The letter played on this vulnerability by starting out in such a way as to lead the recipient to believe that it involved Board business by congratulating them on their appointment and by ending with the signature "Edward Gore, Hamilton School Board Vice President." These actions violate N.J.S.A. 18A:12-24(b).

The Commission recommends that respondent be censured for his violation of N.J.S.A. 18A:12-24(b). The Commission views this as a serious violation of the Act. Respondent used his position as a Board member to receive information he would not otherwise be entitled to receive and used that information for his own personal, political purposes. Moreover,

respondent targeted a group of individuals who were not secure in their jobs and sent what sounded like an authoritative letter advising them how to vote. While the letter was not in Board letterhead, it began in a manner that made it sound like it initially was addressing Board business and was sent under signature of respondent's official title. The Act is intended to instill public confidence in the conduct of members of local boards of education. N.J.S.A. 18A:12-22(a). Respondent's use of his official position in the manner he used it here serves to seriously undermine public confidence and the Commission believes censure is warranted. Respondent argues that he should not be penalized because the statements in the letter are true. The Commission is not persuaded that this should serve to ameliorate the penalty. Regardless of whether the statements were true, it is respondent's use of his position to get information and send this letter that concerns the Commission.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

DATED: 11/26/96

State of New Jersey

DEPARTMENT OF EDUCATION
SCHOOL ETHICS COMMISSION
CN 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

LEO KLAGHOLZ
Commissioner

Resolution Adopting Decision -- C10-96

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the testimony given and documents submitted in support thereof; and

Whereas, on September 24, 1996, the Commission found that probable cause exists to credit the allegations in the complaint; and

Whereas, the Commission determined that no material facts were in dispute and offered the parties the opportunity to submit written statements on the Commission's findings and the applicable law; and

Whereas, after careful analysis of the legal arguments submitted, the Commission concludes that Mr. Gore's conduct violated the School Ethics Act; and

Whereas, the Commission orally adopted the proposed decision of its staff setting forth the reasons for its findings at its meeting of November 24, 1996, but did not adopt a resolution;

Now Therefore Be It Resolved that the Commission finds that Edward Gore violated the School Ethics Act and recommends that the Commissioner of Education impose a penalty of censure and adopts the attached decision as its decision in this matter;

Paul C. Garbarini, Chairman

I hereby certify that this Resolution memorializes the Commission's oral adoption of the within decision at its November 24, 1996, meeting.

Lisa James-Beavers
Executive Director

IN THE MATTER OF EDWARD GORE,	:	
HAMILTON TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MERCER COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. Comments were timely filed by complainants and by respondent.

In her comments, Complainant Constance K. Petro urges that the Commissioner either accept the penalty of the Commission or impose a stronger penalty in that Mr. Gore's use of personal addresses of school employees was totally unethical. (Complainant Petro's Comments at p. 1) Complainant Kathleen Lord also seeks that Mr. Gore receive the recommended penalty or a more severe penalty contending he misused and abused his position as Board vice president for political gain. (Complainant Lord's Comments at p. 1)

Respondent Gore avers that the Commission erroneously concluded that he "targeted" recipients for his letter and that he drafted the letter and used his position in a manner calculated to cause its recipients alarm. (Respondent Gore's Comments at pp. 1-2) Mr. Gore further asserts the Commission erred in not finding that the addresses of school employees were common law records which were subject to disclosure. He avers that complainants had no right nor expectation of privacy as to their addresses since that information was publicly available in telephone books in county voting lists. Further, because complainants are public employees,

Mr. Gore argues that they surrendered their rights of confidentiality under the Right to Know Act. Additionally, he contends he should not be denied his rights to access to public records simply because he is a member of the Board of Education. In sum, Mr. Gore emphasizes that the Commissioner must not permit the School Ethics Commission to trod upon his First Amendment rights of political speech and references a legal memorandum setting forth arguments to support this contention. (Comments at p. 4) In that these arguments were raised and fully considered by the Commission in reaching its determination, they are not set forth in detail herein.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter, in view of the Commission's determination that a violation of the School Ethics Act occurred* which is sufficiently serious to warrant the imposition of censure as it is defined at *N.J.A.C.* 6:3-9.19(c)1.

Accordingly, IT IS HEREBY ORDERED that Edward Gore be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The determination of the Commission as to violation of the Act is not reviewable by the Commissioner herein, pursuant to *N.J.S.A.* 18A:12-29(c). Therefore, this decision is limited to a review of the recommended penalty and its implementation.

39-97

SEC #C10-96
C # 39-97SEC
SB # 9-97

IN THE MATTER OF EDWARD GORE, :
HAMILTON TOWNSHIP BOARD OF :
EDUCATION. :

STATE BOARD OF EDUCATION

DECISION

Decided by the School Ethics Commission, November 26, 1996

Decided by the Commissioner of Education, January 30, 1997

For the Complainants-Respondents, Geraldine Callahan, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Destribats, Campbell, DeSantis, Magee & O'Donnell (Dennis DeSantis, Esq., of Counsel)

This appeal arises from a complaint filed with the School Ethics Commission alleging that Edward Gore had used his position as a member of the Hamilton Township Board of Education to secure home addresses of district employees for the purpose of sending those employees an intimidating letter advising them that their jobs could be in jeopardy if they did not vote for the board candidates Mr. Gore had endorsed.

By decision of November 26, 1996, the School Ethics Commission found that Mr. Gore's actions violated N.J.S.A. 18A:12-24(b).[1] It recommended that the Commissioner of Education sanction Mr. Gore for this violation by censuring him.

[1] N.J.S.A. 18A:12-24(b) provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

6/4/97

By decision of January 30, 1997, the Commissioner determined that censure was the appropriate sanction for such violation.

Mr. Gore has appealed both the Ethics Commission's determination that he violated the School Ethics Act and the sanction imposed on him by the Commissioner of Education. He argues, as he did before the Ethics Commission and the Commissioner, that he did not use his position as a board member to secure the addresses because they were public records. He further contends that it was improper to penalize him for sending the letter at issue since he was exercising his right to free speech.

Based on our review of this matter, and for the reasons expressed by the Ethics Commission in its decision, we affirm the Ethics Commission's determination that Mr. Gore violated N.J.S.A. 18A:12-24(b). We fully concur with the Ethics Commission that although it may have been appropriate for him to obtain employees' addresses for purposes related to board business, in this instance Mr. Gore obtained the information solely for his own political purposes. We find that the inappropriateness of his conduct is amply demonstrated by the fact that the letter was constructed so as to convey the initial impression that it related to official board business and was designed for and sent out to a selected group of district employees over Mr. Gore's signature as vice-president of the Hamilton Township Board of Education.

We also affirm the Commissioner's determination that the appropriate sanction in this case is a censure as delineated by N.J.A.C. 6:3-9.19(c)(1). In this, we join with the Ethics Commission in rejecting Mr. Gore's claim that a sanction cannot be imposed on him because he was exercising his right to free speech. Quite simply, he is not

being sanctioned for the exercise of such rights. Rather, the sanction is for using his position as a member of a district board of education to obtain the home addresses of vulnerable employees in order to send them a targeted letter to solicit votes for the candidates he supported.

Review of Mr. Gore's submissions in this appeal indicates to us that he has not yet acknowledged the impropriety of his conduct or comprehended its seriousness. It is critical that members of district boards of education recognize the importance of maintaining public confidence in them. Central to this is the ability and desire to conform their conduct to the standards set forth in the School Ethics Act. There is no question that Mr. Gore failed to do so in this instance and that the imposition of a sanction is necessary in order to impress upon him the seriousness of this failure. Therefore, we fully concur with the Ethics Commission's recommendation and the Commissioner's determination directing that Mr. Gore be censured.

June 4, 1997

Date of mailing JUN 06 1997

(SB) 39-97

DHPL #136-97
SB # 39-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.C. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, March 21, 1997

For the Petitioner-Appellant, J.C., pro se

J.C. (hereinafter "petitioner"), who was employed as a teacher's aide for the Sawtelle Learning Center, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted of possession of a controlled dangerous substance–cocaine–following an arrest in May 1992. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated March 21, 1997, the Deputy Commissioner of Education upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear and convincing evidence of his rehabilitation as required by N.J.S.A. 18A:6-7.1.

[1] We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

7/2/97

Petitioner filed the instant appeal to the State Board of Education, along with a motion to supplement the record pursuant to N.J.A.C. 6:2-1.9 with two letters confirming his completion of drug rehabilitation programs.

We grant petitioner's motion to supplement the record on appeal and, after a careful review of the record, including the additional documents submitted by petitioner, reverse the decision of the Deputy Commissioner. We find that petitioner has demonstrated clear and convincing evidence of his rehabilitation.

N.J.S.A. 18A:6-7.1 provides, in pertinent part:

> e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
>
> 1. The nature and responsibility of the position which the convicted individual would hold;
> 2. The nature and seriousness of the offense;
> 3. The circumstances under which the offense occurred;
> 4. The date of the offense;
> 5. The age of the individual when the offense was committed;
> 6. Whether the offense was an isolated or repeated incident;
> 7. Any social conditions which may have contributed to the offense;
> 8. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

A former supervisor of petitioner praises him as "an excellent worker, prompt and reliable, and well liked by my customers." The supplemental materials provided by petitioner indicate that he attended and successfully completed an outpatient alcohol and drug treatment program at Mountainside Hospital between June and November 1993. He also subsequently completed a residential rehabilitation program at the Adult Rehabilitation Center of the Salvation Army in the summer of 1994. That 90-day program included "individual counseling, group therapy, substance abuse education, twelve step programs, chapel services and work therapy." The record also includes letters of recommendation from long-time acquaintances of petitioner, including a police officer, two attorneys and his high school English teacher.

Petitioner explains that at the time of his arrest, he had just dropped out of college and was "struggling to find direction and purpose in my life." He subsequently re-enrolled in college, married and had a child. In July 1996, petitioner took the National Teacher's Exam, scoring 182 out of a possible 200. The record also indicates that petitioner was 21-years-old at the time of his arrest in 1992, and that he subsequently graduated from Ramapo College of New Jersey in 1995 with a bachelor of arts degree in Literature. There have been no further arrests.

Under the circumstances, we find that further penalization of this individual is neither a just result nor warranted under the terms of the statute. Given the uncontradicted evidence in the record, including the recommendation of petitioner's supervisor and his successful completion of drug and alcohol rehabilitation programs, we conclude that he has demonstrated clear and convincing evidence of his rehabilitation pursuant to N.J.S.A. 18A:6-7.1(e). We stress, in addition, that petitioner

was disqualified from employment as a teacher's aide, a position in which he would be under the direct supervision of a classroom teacher.

Accordingly, we reverse the decision of the Deputy Commissioner disqualifying petitioner from service in the schools of New Jersey as a teacher's aide.

July 2, 1997

Date of mailing JUL 08 1997

40-97

40-97 SEC

IN THE MATTER OF MATILDA TOUW, :

WEST MILFORD BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

PASSAIC COUNTY. : DECISION

:

January 29, 1997

IN THE MATTER	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
OF	:	
	:	Docket No.: C16-96
MATILDA TOUW,	:	
West Milford Board of Education	:	DECISION
Passaic County	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 28, 1996, by Mark Connolly, a member of the West Milford Board of Education. The complaint alleges, in pertinent part, that Matilda Touw, also a member of the West Milford Board of Education, moved the resolution and voted to reappoint her son as an Assistant Head Custodian in violation of the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Mrs. Touw filed her answer with the School Ethics Commission on July 8, 1996, admitting to making a motion to approve many agenda items, including the reappointment of her son, and voting in favor of all of the items. She denies that any of her actions violated the School Ethics Act.

The Commission notified the parties that the Commission would hold a probable cause hearing on October 22, 1996. Mrs. Touw appeared before the Commission and testified at that time that she was not aware that she could not vote for her son since he was emancipated and thus, not an immediate family member. She also testified that, on the evening of the meeting in question, she received advice from board counsel not to vote and was prepared to abstain. However, no board member moved to have item ten, the reappointment of her son, removed from the consent agenda for a separate vote. She did not realize that item ten was the resolution to approve her son's reappointment.

In its public meeting on October 22, 1996, the Commission found probable cause to credit the allegations in the complaint that Mrs. Touw violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by voting for her son's reappointment. The Commission determined that there were no facts in dispute that required a hearing at the Office of Administrative Law. Therefore, by letter of October 24, 1996, the Commission advised Mrs. Touw of the decision and gave her until November 15, 1996, to provide a written statement. Therein, she was to set forth whether she agrees with the facts in the letter and why those facts do not constitute a violation of the School Ethics Act. She was also invited to provide comments as to the appropriate penalty if the Commission found her to have violated the Act.

Mrs. Touw submitted her written statement on November 14, 1996. The Commission considered her statement in rendering this decision on November 26, 1996.

FACTS

The Commission finds the following facts to be undisputed:

1. Matilda Touw has served as a board member in the West Milford School District since April 1992.

2. She has served as Chair of the Budget and Finance Committee for the past two and one-half years.

3. Mrs. Touw's son, who does not reside with her, has served as a custodian in the district for seven years, being hired on a year to year basis.

4. At the April 30, 1996, meeting of the West Milford school board, Mr. Connolly had a copy of the April 25, 1996, issue of *School Board Notes*, a publication of the New Jersey School Boards Association (NJSBA). He provided it to Mr. Rothschild, the former attorney for the board.

5. Mr. Rothschild brought the publication to the attention of Mrs. Touw by calling her to the back of the room. There he advised her that she should not vote for her son's reappointment as a custodian.

6. On the front page of the issue of *School Board Notes* was an article summarizing a Commission decision. It stated that the Commissioner had adopted a the Commission's recommendation to suspend a board member for one month for casting a vote to reappoint his business partner as transportation director and casting a vote to reappoint teachers, including his emancipated daughter.

7. Mrs. Touw then requested an executive session to discuss the matter. After considerable discussion and in order to facilitate getting on with the meeting, she agreed to abstain on the vote, but said that she wanted to check the board attorney's advice with the NJSBA..

8. Mr. Rothschild was later dismissed as board attorney.

9. Mrs. Touw has voted for her son's re-employment in the past without adverse consequences. This fact was discussed during the executive session.

10. When the board returned to the regular meeting at approximately 11:30 p.m., Mrs. Touw, as Chair of the Budget and Finance Committee, moved to approve the items on the agenda that were brought by her committee: 1-10, 13-16, 18-20, 22-23, and 25-31. Item 10 was the resolution to approve the list of custodians, including her son.

11. The motion to approve the items passed by an 8-0 vote. Neither the board attorney nor any board member requested that the board vote on Item 10 separately or that Mrs. Touw abstain.

12. On May 28, 1996, Mr. Connolly filed this complaint with the School Ethics Commission.

Mrs. Touw would like for the Commission to consider additional facts that she presented to the Commission regarding Mr. Connolly's motive for filing the complaint. The Commission finds that the other facts presented are not material to the present case since they would only impact upon credibility determinations. Where, as here, there are no facts in dispute, facts that go to the credibility of a party are not relevant. The issue before the Commission is whether Mrs. Touw's conduct at the April 30, 1996, meeting violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. Mr. Connolly's reasons for filing are not relevant to this inquiry.

ANALYSIS

In her written statement, Mrs. Touw submits that she should not be found to have violated the Act because she understood that she could vote on his reappointment. She emphasizes that her son has not lived with her for over 17 years and thus, he does not fall within the definition of immediate family member. She adds that she does not benefit in any way from his salary. She states that no one has ever questioned her conduct since she began serving on the board in 1992. While the Commission understands that she may have had some confusion about the law, it also understands that based on the board attorney's advice, she was aware that she should not vote. Thus, she should have moved to have item ten considered separately and then moved the rest of her agenda. The attorney's failure to call it to her attention in the public meeting does not absolve her of her duty to take precautions to avoid all conflicts of interest.

N.J.S.A. 18A:12-24(c) of the School Ethics Act provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The Commission agrees that Mrs. Touw's son is not an "immediate family member" as defined in N.J.S.A. 18A:12-23 of the School Ethics Act. However, as set forth in the Commission's prior decision referred to in *School Board Notes*, In the Matter of Salvatore Buono, C16-94, a school official is prohibited not only from voting on matters in which her immediate family member has a financial or personal involvement. The statute is clear that a school official cannot act in her official capacity in any matter in which **she** has a direct or indirect financial or personal involvement. The Commission

concludes that Mrs. Touw had a personal involvement with her son's employment such that she should have abstained from voting when the matter came before the board. Again, she had the ultimate responsibility to have the item considered separately from the other agenda items. The executive session prior to the vote, although it did not immediately precede the vote, should have heightened her sensitivity to the fact that the matter was coming up for a vote. Her failure to exclude the item from her motion and abstain from voting on it violated section 24(c) of the Act.

CONCLUSION

For all the foregoing reasons, the Commission concludes that Mrs. Touw violated N.J.S.A. 18A:12-24(c) of the School Ethics Act and recommends that the Commissioner impose the lowest penalty of reprimand. In making the recommendation, the Commission has considered the fact that the son was employed as a custodian before Mrs. Touw became a board member, the fact that her vote was not a critical vote in his reappointment since the resolution passed unanimously, and the fact the item was considered with 25 other items at the same time. In addition, the Commission notes that Mr. Connolly brought the conflict to the board's attention early in the meeting, yet remained silent when he could have brought it to Mrs. Touw's attention, and chose to file a complaint after the fact. For the reasons set forth above, these facts do not absolve Mrs. Touw, but they do mitigate the penalty.

The board may wish to reconsider its procedure of voting on a large number of items by consent. It is confusing to the public and can easily result in board members voting on matters on which they should abstain, as happened here. Although it may slow the meeting, the board members and the public will have a greater understanding after the meeting about the action taken by the board if items are considered separately. The Commission makes this suggestion in order to aid the board in avoiding similar problems in the future.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C16-96

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the testimony of the respondent; and

Whereas, the Commission found probable cause to credit the allegations in the complaint and invited respondent's written statement in response; and

Whereas, the Commission has reviewed respondent's written statement and now concludes that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby finds that Matilda Touw has violated the School Ethics Act and recommends that the Commissioner impose a penalty of reprimand and adopts the proposed decision referenced as its decision in this matter.

Paul C. Garbarini, Chairman

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 26, 1996.

Lisa James-Beavers
Executive Director

[c1696dec/c:lisa/decisions]

AGENCY DKT. NO. 567-11/96

IN THE MATTER OF MATILDA TOUW,	:	
WEST MILFORD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed.

Timely comments were filed by complainant. No comments were filed by Mrs. Touw.

Complainant submits that the determination of the Commission was a reasonable one and asks that the Commissioner take into consideration, when determining the appropriate penalty, an article in the local newspaper, wherein Mrs. Touw was quoted as stating that she considered the Commission's decision "***a complete joke." Complainant further submitted a copy of said newspaper article.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter, in view of the Commission's determination that a violation of the School Ethics Act occurred as set forth in its decision.*

* The determination of the Commission as to violation of the Act is not reviewable by the Commissioner herein, pursuant to *N.J.S.A.* 18A:12-29(c). Therefore, this decision is limited to a review of the recommended penalty and its implementation.

Accordingly, IT IS HEREBY ORDERED that Matilda Touw be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

January 29, 1997
Date of Mailing, January 29, 1997

42-97

42-97

JANINE BARNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher alleged the Board violated *N.J.S.A.* 18A:37-2.1 for failure to initiate expulsion proceedings against student, R.S., who assaulted her.

ALJ found that *N.J.S.A.* 18A:37-2.1, as amended, effective June 1995, prior to the alleged assault, no longer requires that the offending student be expelled. Therefore, the ALJ concluded that the Board complied with the statute - it conducted disciplinary proceedings and imposed the sanction of a five-day suspension on R.S. To subject him to an additional sanction would violate his rights of due process. Thus, petitioner was not entitled to any relief involving any action by the Board with respect to R.S. Summary judgment was granted to the Board; petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

JANUARY 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 1754-96

AGENCY DKT. NO. 448-11/95

JANINE BARNA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,

Respondent.

James M. Weinberg, Esq., for petitioner (Weinberg & Weinberg, attorneys)

Joseph R. Morano, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: November 29, 1996 Decided: December 12, 1996

BEFORE **EDITH KLINGER**, ALJ:

On November 20, 1995, petitioner Janine Barna filed a Verified Petition with the Bureau of Controversies and Disputes, Department of Education, seeking sanctions against respondent Board of Education of Irvington (Board) for allegedly failing to enforce the provisions of *N.J.S.A.* 18A:37-2.1. On February 7, 1996, respondent filed its answer and, on February 20, 1996, the Department of Education transmitted the

matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On November 1, 1996, the Board filed a motion for summary decision on the grounds that *N.J.S.A.* 18A:37-2.1 does not apply to the facts in this matter, that the controversy is moot and that the Commissioner of Education does not have the jurisdiction to award the relief sought by petitioner. No responsive papers were received from petitioner.

THE RELEVANT STATUTES

N.J.S.A. 18A:37-2.1, as amended effective June 22, 1995, states:

> Any pupil who commits an assault, as defined pursuant to N.J.S. 2C:12-1, upon a teacher, administrator, board member or other employee of a board of education, acting in the performance of his duties and in a situation where his authority to so act is apparent, . . . not involving the use of a weapon or firearm, shall be immediately suspended from school consistent with procedural due process pending suspension or expulsion proceedings before the local board of education. Said proceedings shall take place no later than 30 calendar days following the day on which the pupil is suspended. The decision of the board shall be made within five days after the close of the hearing. Any appeal of the board's decision shall be made to the Commissioner of Education within 90 days of the board's decision.

N.J.S.A. 2C:12-1 provides, in relevant part:

> a. Simple assault. A person is guilty of assault if he:
>
> (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
>
> (2) Negligently causes bodily injury to another with a deadly weapon; or
>
> (3) Attempts by physical menace to put another in fear of imminent serious bodily injury.
>
> . . . .

> b. Aggravated assault. A person is guilty of aggravated assault if he:
>
> (5) Commits a simple assault as defined in subsection a. (1), (2), or (3) of this section upon: . . .
>
> (d) Any school board member or school administrator, teacher or other employee of a school board while clearly identifiable as being engaged in the performance of his duties or because of his status as a member or employee of a school board.

THE UNDISPUTED FACTS

In her petition, Barna alleges that on September 29, 1995, she was assaulted by an eighth-grade student, R.S., age thirteen. The police were called and charges were filed against the boy. The administration suspended R.S. for a period of five days. No attempt was made to expel him from school.

Barna seeks to have the Commissioner of Education investigate the incident and sanction the Board for failure to apply the procedures which she believes to be mandated pursuant to *N.J.S.A.* 18A:37-2.1.

In support of its motion for summary decision, the Board provided the affidavit of Aldo DiTrolio, Esq., the attorney who represented R.S. through the juvenile proceedings in the Superior Court. DiTrolio stated that, on February 7, 1996, R.S. was released on an adjourned disposition pursuant to *N.J.S.A.* 2A:4A-43. He was never found guilty of the assault charges.

THE POSITIONS OF THE PARTIES

N.J.S.A. 18A:37-2.1, as amended, effective June 1995, prior to the alleged assault, no longer requires that the offending student be expelled. After affording a due process hearing, the Board may, if appropriate, impose a suspension instead.

The Board argues that the statute does not apply because R.S. was not found guilty of an assault pursuant to *N.J.S.A.* 2C:12-1. Further, even if it does apply, R.S. was suspended for five days and the statutory requirement was satisfied.

The Board correctly points out that the controversy is moot insofar as the Board has already conducted disciplinary proceedings and imposed its sanction upon R.S. for his part in the incident. To subject him to an additional sanction would violate the student's rights to procedural due process. *See N.J.S.A.* 18A:37-2.1, which states that no expulsion proceedings shall be brought more than thirty days following the day on which the pupil was suspended.

I **CONCLUDE** that the respondent has complied with the provisions of the above statutes and is required to take no further action with respect to R.S. I further **CONCLUDE** that it cannot take any further action with respect to R.S. without violating his rights to procedural due process. I, therefore, **CONCLUDE** that Barna is entitled to no relief involving any action by the Board with respect to R.S.

Petitioner alleges that the Commissioner should investigate the Board for its procedures which "repeatedly defy state statutes." Her allegation is based upon the fact that the present appeal is the second brought by her pursuant to *N.J.S.A.* 18A:37-2.1. The Initial Decision of Administrative Law Judge Ken R. Springer in the first appeal, entitled *Barna v. Irvington Board of Education,* OAL Dkt. No. EDU 2073-95 (Jan. 29, 1996), was adopted by the Commissioner of Education on March 18, 1996. In that appeal, Barna challenged the determination of the Board not to conduct an expulsion proceeding against a classified student, A.M., who allegedly assaulted Barna. In his decision, Judge Springer found that the Board acted properly since it was legally prohibited from expelling A.M. by the provisions of *N.J.A.C.* 6:28-2.8. Consequently, Barna has not demonstrated a repeated instance where the Board has acted contrary to law.

The Board asserts that the Commissioner has no authority to investigate it for one alleged violation of *N.J.S.A.* 18A:37-2.1, and no such authority has been found in the statutes or regulations. The Commissioner cannot impose fines or monetary penalties (*Coulter v. Board of Education of Caldwell-West Caldwell,* 79 *S.L.D.* 295), compensatory or punitive damages *(McLean v. Board of Education of Glenridge*, 1977 *S.L.D.* 311; *North Bergen Federation of Teachers v. Board of Education of North Bergen*, 1975 *S.L.D.* 461), counsel fees (*Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434, 442-43 [1990]), or legal costs (*Lilenfield v. Board of Education of Watchung*, 1977 *S.L.D.* 315).

Based upon the applicable statutes and case law, I **CONCLUDE** that respondent is correct: there is no relief which can be granted to petitioner in this forum. Accordingly, I **CONCLUDE** that respondent is entitled to summary decision in this matter.

ORDER

It is **ORDERED** that respondent's motion for summary decision is hereby **GRANTED**, and the petition of Janine Barna is **DISMISSED WITH PREJUDICE**.

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

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

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

December 2, 1996
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

12/12/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. 1754-96
AGENCY DKT. NO. 448-11/95

JANINE BARNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner determines to affirm the determination of the Administrative Law Judge (ALJ), for the reasons expressed therein, that petitioner is not entitled to the relief she seeks. It is axiomatic that when a local board of education acts within its authority, its decision is entitled to a presumption of correctness and may not be disturbed absent a finding that it was arbitrary, capricious or unreasonable. *Thomas v. Board of Education of Morris Township*, 89 *N.J. Super.* 327 (App. Div. 1965) at 332. Here the Board may, pursuant to *N.J.S.A.* 18A:37-2.1, suspend or expel a student for an alleged assault following a due process hearing, and no showing was made that the Board's decision to suspend, rather than expel, was not properly or rationally taken. Therefore, the granting of summary judgment was appropriate in the instant case.

Accordingly, for the reasons expressed therein, and as further explicated above, the Commissioner affirms the initial decision of the OAL and orders that the within Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 30, 1997
DATE OF MAILING JANUARY 30, 1997

42-97

EDU #1754-96
C # 42-97
SB # 18-97

JANINE BARNA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 30, 1997

For the Petitioner-Appellant, Weinberg & Weinberg (James M. Weinberg, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (James R. Morano, Esq., of Counsel)

Janine Barna (hereinafter "petitioner"), a teaching staff member, alleged that the Board of Education of the Town of Irvington (hereinafter "Board") had violated N.J.S.A. 18A:37-2.1 when it failed to initiate expulsion proceedings against R.S., a student who had assaulted her. On December 12, 1996, an Administrative Law Judge ("ALJ") recommended granting summary judgment to the Board and dismissing the petition. The ALJ concluded that N.J.S.A. 18A:37-2.1, as amended in June 1995, does not require that an offending student be expelled. Therefore, the ALJ found that the Board had complied with the statute when it conducted disciplinary proceedings against R.S.

Nov. 5, 1997

and imposed a five-day suspension. On January 30, 1997, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition.

On February 25, 1997, petitioner's attorney filed a notice of appeal with the State Board "solely to preserve the rights" of petitioner. The State Board granted petitioner's request to place the briefing schedule in abeyance so that she could seek new counsel.

On July 15, 1997, the director of the State Board Appeals Office notified petitioner's counsel that a substitution of attorney was required to be filed by July 31, 1997. Petitioner was sent a copy of that correspondence. When no response was received, petitioner's counsel was advised by letter dated August 22, 1997 that "in the absence of a substitution of attorney, you continue to be the attorney of record" and that his appeal brief was therefore due on September 22, 1997. Petitioner was also sent a copy of the August 22 letter.

Petitioner, however, failed to file her appeal brief by September 22, 1997, and has still failed to file a brief in support of her appeal, more than six weeks after the extended due date. Nor has the petitioner provided any explanation for her failure to file or requested an additional extension.

Consequently, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a).

November 5, 1997

Date of mailing NOV 07 1997

43-97

43-97

BARKER BUS COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY SPECIAL SERVICES COMMISSION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JANUARY 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2390-95
AGENCY DKT. NO. #21-2/95

BARKER BUS COMPANY, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY SPECIAL SERVICES COMMISSION,
Respondent.

James J. Ross, Esq., for petitioner (Wolff & Samson, attorneys)

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: December 12, 1996 Decided: December 12, 1996

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

This matter was transmitted to the Office of Administrative Law on March 6, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

12 DECEMBER 1996
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/16/96
DATE

DNA
DEPARTMENT OF EDUCATION

DEC 18 1996
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

slf

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL
A Professional Corporation
2875 U.S. Highway #1
P.O. Box 7463
North Brunswick, New Jersey 08902
(908) 422-1000
Attorneys for Respondent

	OFFICE OF ADMINISTRATIVE LAW
Petitioner BARKER BUS COMPANY, INC.	
	DOCKET NO. EDU 2390-95
vs.	
Defendant	Civil Action
MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION	STIPULATION OF SETTLEMENT

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. That the parties acknowledge that the Commission is in possession of the sum of $59,893.34 representing disputed funds. From this sum, the Commission shall retain the sum of $36,000.00 and shall deliver to Barker Bus the sum of $23,893.34. The payment of such sums shall be in full satisfaction of all claims outstanding between the parties; and

2. That the parties acknowledge that the aforesaid sums have already been paid to Barker Bus and to the Commission; and

3. That the parties shall exchange releases for all claims arising out of the subject litigation and the prior transportation contracts which existed between the Commission and Barker Bus. The parties acknowledge that such releases have already been exchanged;

BORRUS, GOLDIN
FOLEY, VIGNUOLO,
HYMAN & STAHL
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
2875 US HIGHWAY #1
NORTH BRUNSWICK NJ 08902

and

4. That except as provided herein, the within matter is hereby dismissed with prejudice and without costs to either party.

WOLFF & SAMSON, ESQS.
Attorneys for Petitioner

JAMES J. ROSS, ESQ.

BORRUS, GOLDIN, FOLEY, VIGNUOLO, HYMAN & STAHL, P.C.
Attorneys for Respondent

ANTHONY B. VIGNUOLO, ESQ.

Dated: Dec 4, 1996

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FOLEY, VIGNUOLO,
HYMAN & STAHL
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2875 US HIGHWAY #1
NORTH BRUNSWICK, N.J. 08902

OAL DKT. NO. EDU 2390-95

BARKER BUS COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY SPECIAL SERVICES COMMISSION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

The Commissioner notes, however, that the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in doing so and cautions them and other litigants whose controverted matters have been duly transmitted to OAL against effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

COMMISSIONER OF EDUCATION

JANUARY 30, 1997
DATE OF MAILING JANUARY 30, 1997

44-97

44-97 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF M.T.	:	DECISION
_____	:	

JANUARY 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.: EDU 10828-95
AGENCY DKT. NO. DHP #361

MICHAEL TAYLOR,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Sheldon H. Pincus, Esq., represented petitioner
(Bucceri & Pincus, attorneys)

No appearance for respondent

Record Closed: December 2, 1996 Decided: December 13, 1996

BEFORE **JEFFREY A. GERSON**, ALJ

PROCEDURAL HISTORY

Michael Taylor was hired as a special ed teacher by the Linden School District on November 9, 1992. He was disqualified from his employment after a notice from the Office of Criminal History Review of the Department of Education revealed a North Carolina conviction in 1977 for resisting arrest/assault on an officer. Taylor, acting *pro se* at the time, appealed his disqualification. The Deputy Commissioner of Education, on February 7, 1995, interpreting Taylor's appeal as an attempt to prove rehabilitation, upheld the disqualification and failed to find clear and convincing evidence of Taylor's rehabilitation.

Taylor, now quite ably represented by Mr. Pincus, moved for a Stay of the Deputy Commissioner's determination which was granted.

An appeal to the State Board was filed in which Taylor argued that his conviction did not involve "the use of force which results in bodily injury" as required by *N.J.S.A.* 18A:6-7.1(c)(2). Consequently, Taylor argues his offense was not disqualifying. Taylor's application to remand the matter to the Commissioner of Education for consideration of his legal argument was granted.

On or about November 28, 1995, the Commissioner of Education forwarded this matter to the Office of Administrative Law for determination.

On or about May 17, 1996, Taylor moved for a Summary Decision which was decided by me on June 13, 1996. The Motion for Summary Decision was denied. Taylor then requested an interlocutory review of the denial which, by letter of June 28, 1996, Commissioner Leo Klagholz decided not to grant such review pursuant to his discretion under *N.J.A.C.* 1:1-14.10.

After the adjournment of the September 17, 1996 hearing date, the matter was heard on December 2, 1996.

BACKGROUND

Mr. Taylor's criminal history check revealed an out-of-state conviction in 1977 for resisting arrest/assault on an officer. No supporting documentation was submitted with respect to this conviction and apparently none was available according to Mr. Carabelli, Manager of the Office of Criminal History Review. Taylor never contested the resisting portion of this conviction, but did contest the assault portion. Brought squarely into dispute was *N.J.S.A.* 18A:6-7.1 that provides for the disqualification from employment of a teacher if a criminal history record check reveals a conviction for "a simple assault involving the use of force which results in bodily injury." It was and continues to be Taylor's contention that his conviction did not involve the use of force.

The difficulty arises from the Criminal History Report, which though it indicates a conviction of Mr. Taylor for resisting arrest/assault on an officer, it does not indicate that these were two separate charges. There was, in fact, only one penalty assessed for the conviction. Even if this conviction incorporated an assault on an officer there was still an absence of any indication that injury accompanied the assault. It was this 20-year old conviction which was the focal point of Mr. Taylor's testimony.

Mr. Taylor indicated that at the time of his arrest he was living in North Carolina with his mother and his niece. Sometime between 11:00 and 11:30 p.m. two uniformed police officers came to his door to arrest him on a bad check charge. After gaining entrance to the household, the officers apparently placed Mr. Taylor under arrest and started walking down the stairs outside of his mother's residence. It was at this time that Mr. Taylor, who was not yet handcuffed, took flight. He was recaptured after a short pursuit and was then handcuffed and processed.

Mr. Taylor subsequently did appear in court and, without the assistance of counsel, pled guilty to the charges. He denies using any force whatsoever against the officers and in fact denies resorting to any violence of any type during the course of his approximately 43 years.

N.J.A.C. 2C:12-1(b)5(a) which converts a simple assault on a police officer into an aggravated assault still requires a showing of bodily injury.

Though inherent in a conviction for assault on an officer there would either be the use of physical force or the threat of physical force, according to Taylor's testimony there was neither. The absence of a police report or any other documentation with respect to the incident leaves Taylor's version unrebutted and subject only to a question of credibility.

I found Michael Taylor to be bright and articulate and, except for some lapses that can easily be attributable to a 20-year passage of time, quite forthcoming. The

witnesses that Mr. Taylor presented besides himself, though presented for the purposes of establishing rehabilitation, did assist in bolstering his credibility.

The first witness to testify was **Reverend John S. Andao**, pastor of a church in Elizabeth. He has known Mr. Taylor for approximately four or five years as a member of his parish and as director of the choir. He indicated that Mr. Taylor plays the organ and conducts musical groups with children ages 4 through 12. According to Rev Andao, Taylor was "very, very, good with children". He also found him to be "very honest, kind, and unselfish".

Brenda Boyd, the vice-principal of Linden High School who had been Mr. Taylor's supervisor as a special ed teacher in 1994, indicated that during the time that she supervised Taylor between October 1994 and January 1995 he was "starting to develop into a tremendous asset".

James B. Clark, Jr., the superintendent of the Linden school system, indicated that Taylor's performance was good, and his attendance was excellent. He also said, "He was making his way toward being an excellent teacher".

A reanalysis of the law involved herein is unnecessary for it is well set forth in both Mr. Pincus' brief and in the Deputy Commissioner and Commissioner's opinion.

Factually, I cannot conclude, under the rather unique circumstances of this particular case, that Mr. Taylor's conviction was a manifestation of any type of violence whatsoever. Ordinarily, a conviction for assaulting an officer would, for the most part, stand as extremely compelling evidence of grounds for disqualification. But, North Carolina's characterization of this offense and their inability to produce any documentation that would in any way contradict Mr. Taylor's version of the factual circumstances leads me to conclude that the offense committed by Mr. Taylor was not disqualifying pursuant to the statute.

Since I have concluded that the offense does not disqualify Mr. Taylor from employment, I do not reach the issue of whether he has been rehabilitated. I note,

however, that between 1977 and the 1990s, he had three convictions for either bad checks or credit card fraud. Thus, if this offense had been a basis for disqualification, Mr. Taylor would have been unable to prove rehabilitation. The statutory framework creates this anomaly.

ORDER

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

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

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

Dec 13 96
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

12/16/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 17 1996
DATE

Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 10828-95
AGENCY DKT. NO. DHP 361

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF M.T.	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, and based upon the credibility determinations of the Administrative Law Judge (ALJ) and the absence of any evidence to rebut appellant's account of the arrest underlying his 1977 conviction, the Commissioner concurs with the ALJ's conclusion that the offense in question does not disqualify appellant from employment, pursuant to the standards set forth at *N.J.S.A.* 18A:6-7.1 *et seq.*

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein, and appellant is deemed eligible for school employment in that he has no disqualifying offenses on his criminal record.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JANUARY 30, 1997
DATE OF MAILING JANUARY 30, 1997

(SB) 45-97

DHPBL #210-97
SB # 45-97

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF D.C. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, April 25, 1997

For the Petitioner-Appellant, D.C., pro se

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

July 2, 1997

Date of mailing JUL 09 1997

54-97

54-97

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Somerville Board challenged the Department's determination that it was responsible for the tuition of N.M. for 1994-95 because at the time of the request to determine district of residence, her mother, M.V., was incarcerated in the Somerset County Jail. At all relevant times, M.V. was neither domiciled in, nor a resident of, the Borough of Somerville.

ALJ found that *N.J.A.C.* 6:20-5.4(a)4, relied upon by the Department, does not provide a basis for making petitioner the responsible district based upon M.V.'s temporary incarceration in the Somerset County Jail as a county jail is not a *State* correctional facility and those committed to the county jail are persons who are sentenced to imprisonment for a term of less than one year. Thus, to assess petitioner for tuition costs for the children of all persons passing through the Somerset County Jail, no matter how brief their stay, would not be in keeping with the legislative scheme that the child's home district should be responsible. ALJ concluded a county jail was not an appropriate place for determining a parent or guardian's district of residence. ALJ granted summary decision on behalf of petitioner, relieving it of tuition responsibility. Any monies paid to respondent Board for N.M.'s 1994-95 tuition should be returned.

Commissioner reversed the determination of the ALJ. Although the Commissioner concurred that tuition is based on the domicile of a parent or guardian pursuant to *N.J.S.A.* 18A:38-1, when that person is *chronically transient, i.e.* not homeless but having had a series of short-term residences with no identifiable domicile, the only reasonable interpretation of applicable statute and implementing regulations is to assign responsibility for tuition to the parent or guardian's district of *present residence*, notwithstanding that such residence might be temporary. Thus, the Department correctly determined herein that N.M.'s present district of residence for school funding purposes was Somerville based on M.V.'s residence in Somerset County Jail on the applicable date. Summary judgment was granted respondents; petition was dismissed.

February 5, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 677-96

AGENCY DKT. NO. #481-12/95

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondents.

Michael J. Rogers, Esq., for petitioner (McDonald, Rogers & Rizzolo, attorneys)

George F. Hendricks, Esq., for respondent Board of Education of the City of New Brunswick (Hendricks & Hendricks, attorneys)

John K. Worthington, Deputy Attorney General, for respondent New Jersey State Department of Education (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: September 30, 1996 Decided: November 7, 1996

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on December 26, 1995, when the Board of Education of the Borough of Somerville (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order determining that a county jail is not an appropriate facility for determining a child's district of residence pursuant to N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.4 and therefore relieving the Somerville Board of Education of responsibility for tuition for the child N.M. for the 1994-95 school year. An answer on behalf of respondent Board of Education of the City of New Brunswick (hereinafter Respondent Board) was filed on January 25, 1996. An answer on behalf of respondent New Jersey Department of Education (hereinafter Respondent Department) was filed on February 9, 1996. On February 20, 1996, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F- 1 to -13.

A prehearing conference was conducted on May 2, 1996 by telephone conference call. At that time the parties advised that it was their belief the matter could be decided on cross-motions for summary decision. Thereafter a joint stipulation of facts was filed on June 5, 1996. A letter memorandum on behalf of Respondent Department was received on June 14, 1996. Petitioner's initial letter memorandum was received on June 17, 1996, and a letter on behalf of Respondent Board was received on June 21, 1996. Respondent Department replied by letter memorandum, dated June 27, 1996. Thereafter oral argument was conducted by telephone conference call on August 13, 1996. In response to a request from the undersigned for additional information, Respondent Department sent a letter dated August 15, 1996. Respondent Board sent a letter dated September 13, 1996 and petitioner sent letters dated September 9, 1996 and September 27, 1996. Respondent Department sent a letter dated September 24, 1996, which was received on September 30, 1996, whereupon the record closed.

FINDINGS OF FACT

The parties have entered into the following stipulations of fact:

1. N.M. was a second grade pupil in the Vanderveer Elementary School in the Somerville Public School District in the 1990-91 school year.

2. M.V. is the mother of N.M.

3. On or about March 28, 1991, N.M. was removed from her home by the New Jersey Division of Youth and Family Services (DYFS) and placed with foster parents outside of the Somerville Public School District.

4. Since March 28, 1991, N.M. never re-entered the Somerville Public Schools, nor was she eligible to do so because neither she, her foster parents, nor her mother were residents of the Borough of Somerville.

5. On or about May 11, 1995, N.M. was placed by DYFS in the Youth Consultant Services Facility in New Brunswick, New Jersey.

6. M.V. was incarcerated in the Somerset County Jail from approximately April 1995 until October 6, 1995 for a violation of the law.

7. At all relevant times herein, M.V. was neither domiciled in nor a resident of the Borough of Somerville.

8. The New Jersey Department of Human Services requested that the Department of Education determine the district of residence for N.M. By letter dated June 27, 1995, the Department of Education determined that the district of residence for N.M. was Somerville because, at the time the request came in, M.V. was incarcerated in the Somerset County Jail.

9. The Somerville Public School District was assessed tuition for N.M. for the 1994-95 school year and part of the 1995-96 school year because her mother was incarcerated at the Somerset County Jail as of the date of placement.

10. The issue in this case is whether a county jail is an appropriate facility to determine a child's district of residence under law and the facts presented, and whether the Somerville School District is entitled to reimbursement

from the New Brunswick School District, or from the district where M.V. was last domiciled.

11. Neither M.V. nor her daughter are residents of the City of New Brunswick.

Unfortunately, no other facts appear of record. Facts which are not stipulated must be established by affidavit or certification of someone with personal knowledge. N.J.A.C. 1:1-12.4. Although the undersigned repeatedly asked for additional facts and information, no affidavits or certifications were received. Petitioner did forward a copy of a letter on the stationery Respondent Department, dated July 8, 1996, addressed to David B. Rubin, Esquire, attorney for the Branchburg Board of Education, the authenticity of which Respondent Department has not contested. That letter provides:

> This is in reference to your correspondence dated May 9, 1996 with regards to the Branchburg Board of Education's dispute of the district of residence determination for M.M. [sic, should be N.M.], a child who was placed by DYFS with the Willowglen Academy, Newton, New Jersey in December 1995.
>
> The Department of Human Services has verified that parent M.V. has a history of being chronically transient and has been missing since March of this year. In view of this information and because the residence in Branchburg was not considered fixed or adequate, fiscal responsibility for M.M. [sic, should be N.M.] is removed from the Branchburg Board of Education for the 1996-96 school year.
>
> If you have further questions concerning this matter, please contact this office.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Insurance Company of America, and KRA Insurance Agency, Inc., 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same

as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exits a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, the facts which have been stipulated by the parties are sufficient to address the issue framed in the petition of appeal; i.e., is a county jail an appropriate facility for determining "district of residence" under N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.4. Accordingly, the matter is ripe for summary decision even though the facts as stipulated are insufficient to resolve the issue of ultimate financial responsibility.

18A:7B-12, the statute relevant to a determination in this matter provides in pertinent part:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> a. The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement had occurred.
>
> b. The district of residence for children who are in residential facilities, or who have been placed by State agencies in group homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> c. The district of residence for children whose parent or guardian temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless. For the purpose of this amendatory and supplementary act, "homeless" shall mean an individual who temporarily lacks a fixed, regular and adequate residence.
>
> d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child. . . .

In the present case, N.M. resided with foster parents outside of petitioner's school district commencing with March 1991 until May 11, 1995, when she was placed by DYFS in a group

home in New Brunswick, New Jersey. Pursuant to subparagraph a. of N.J.S.A. 18A:7B-12, while she lived in a foster home, the responsible school district for school funding purposes was the district in which the foster parents resided. Once she was placed in the group home in New Brunswick, however, the responsible district was to be determined as if no such foster placement had occurred. Under subparagraph b. the district of residence for children who have been placed by State agencies in group homes is the "present district of residence of the parent or guardian with whom the child lived prior to his/her . . . most recent placement by a State agency." Respondent Department cites N.J.A.C. 6:20-5.3(a)2, N.J.A.C. 6:20-5.3(b) and N.J.A.C. 6:20-5.4 in support of its determination that petitioner is the responsible school district based upon the "residence" of M.V. in the Somerset County Jail from April 1995 until October 6, 1995. These regulations provide:

N.J.A.C. 6:20-5.3

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

. . .

2. The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-State facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1.

3. The "district of residence" referred to in paragraph two of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence in which the child resided with is or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.

(b) The commissioner shall determine the "present district of residence" or "district of residence" referred to in N.J.S.A. 18A:7B-12(b) based upon the address submitted

by the Department of Corrections or the Department of Human Services on forms prepared by the Department of Education.

. . .

N.J.A.C. 6:20-5.4

(a) The address submitted to the Department of Education for determining the district of residence for school funding purposes for a child described below shall be the address defined below:

1. If the State has custody of the child or if a court or the State has appointed a third party as the custodian of the child, the present address of the parent(s) or guardian(s) with whom the child resided immediately prior to his or her initial admission to a State facility or placement by a State agency shall be submitted.

2. If the child's parents are divorced with joint guardianship, the present address of the individual parent with whom the child resided as of the date required by N.J.A.C. 6:20-5.3(a)1 or 2 shall be submitted.

3. If the child never resided with his or her parent(s) or guardian(s), the address of the facility, group home, or private school shall be submitted.

4. If the child's sole parent or legal guardian resides in a State facility, the address of the State facility wherein the parent or guardian resides shall be submitted.

Respondent Department's decision that Somerville was M.V.'s district of residence on May 11, 1995, is based, at least in part, upon the conclusion summarily recited as fact without reference or attribution in Respondent Department's June 27, 1996 submission that the Legislature intended something different from domicile when it used the word "residence" in N.J.S.A. 18A:7B-12. This is simply an erroneous conclusion. N.J.S.A. 18A:1-1 specifically recites, "Residence means domicile, unless a temporary residence is indicated." The word "present" in the first paragraph of N.J.S.A. 18A:7B-12(b) does not indicate a temporary residence but rather simply distinguishes

the domicile of the parent or guardian at the time of the child's placement as opposed to (perhaps) a different domicile when the child lived with that parent or guardian prior to her most recent admission to a State facility or most recent placement by a State agency.

A statute should be read as a whole and not in separate sections; provisions should be read in such a way as to harmonize the individual sections and to read the entire statute in a way that is most consistent with the overall legislative intent. Fiore v. Consolidated Freightways, 140 N.J. 452, 466 (1995). The evident legislative intent is that, with few exceptions, the right to free public education at the expense of a particular district is dependent upon the domicile of the child's parent or guardian. Any time the word residence appears in the statutes set forth in Title 18A, it means domicile unless temporary residence is specified (See, for example N.J.S.A. 18A:38-1(d).)

Domicile has been defined by case law. An individual may have many residences, if he or she is financially able to do so, but can have only one domicile. Miller v. U.S. Fidel. & Guar. Co., 127 N.J. Super. 37, 42 (App. Div. 1974); Continos v. Parsekian, 68 N.J. Super. 54, 58-59 (App. Div. 1961); DeFiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super. 267 (Law Div. 1961).

> "The domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. . . . Home is the place where a person dwells and which is the center of his domestic, social and civil life. . . . Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence." Matter of Unanue, 255 N.J. Super. 362, 374-5 (Law Div. 1991); See also, In re Jaffe, 74 N.J. 86, 90-91 (1977).

N.J.A.C. 6:20-5.4(a)4, relied upon by Respondent Department, does not provide a basis for making Somerville the responsible district based upon M.V.'s temporary incarceration in the Somerset County Jail. It is true that the regulation specifically references those who reside in a State facility, which is defined at N.J.S.A. 18A:7D-3 and N.J.S.A. 18A:46-18.2 as including correctional facilities. The county jail, however, is not a State correctional facility. Those who

are committed to the common jail of the county are persons who are sentenced to imprisonment for a term of less than one year. N.J.S.A. 2C:43-10. Since the stay in a county jail is by definition relatively brief, the likelihood that the person retains his pre-incarceration domicile is far greater than one who is committed to a State correctional facility. Someone sentenced to life imprisonment would legitimately be said to reside in a State correctional facility. To assess the Somerville School district for tuition costs for the children of all persons passing through the Somerset County Jail, however, no matter how brief their stay, is not in keeping with the legislative scheme that the child's home district should be responsible. For all of the foregoing reasons, I **CONCLUDE** that the county jail is not an appropriate place for determining a parent or guardian's district of residence. Respondent Department's determination that Somerville is the responsible district based upon M.V.'s presence in the Somerset County Jail on May 11, 1995 is therefore **REVERSED.**

Because many of the facts requested of the parties have not been provided, it is not possible to determine, in the context of the within matter, which school district is the child's district of residence for purposes of 1994-95 tuition. If the Division of Youth and Family Services was "acting as guardian" for N.M. when it placed her at the Youth Consultant Services Facility Group Home in New Brunswick on or about May 11, 1995, then pursuant to N.J.S.A. 18A:38-1(e), the Board of Education of the City of New Brunswick may be responsible. N.J.S.A. 18A:38-1(e) provides: "Public schools shall be free to the following persons over five and under 20 years of age: . . . (e) Any person for whom the Division of Youth and Family Services in the Department of Human Services is acting as guardian and who is placed in the district by said bureau." If DYFS was not acting as guardian for the child,* then pursuant to the first paragraph of N.J.S.A. 18A:7B-12(b), if the domicile of M.V., N.M.'s mother, on May 11, 1995 can be determined, then that district is the district responsible for tuition. Pursuant to the second paragraph of N.J.S.A. 18A:7B-12(b), if the domicile of the mother on May 11, 1995 cannot be determined, the district of residence responsible for this tuition is the district in which the child

* Support for Respondent Department's position that this statutory language means legal guardian and not just custodian may be found in the language of N.J.A.C. 6:20-5.4(a)1 which makes the domiciliary district of the child's parent or guardian responsible when the State merely has custody and places the child.

resided prior to her various placements by DYFS, which appears from the stipulation of facts provided herein, to have been Somerville. Somerville may also be the district of residence pursuant to N.J.S.A. 18A:7B-12(c), depending upon when the mother became homeless, or began her "history of being chronically transient" as specified in the July 8, 1996 letter which Respondent Department wrote to attorney David B. Rubin. According to the stipulation of facts herein, N.M. did attend school in Somerville during 1990-91 school year before being removed from her home by DYFS on March 28, 1991. It may be that Somerville was the last "fixed, regular and adequate residence" of the child's mother. If Somerville is the district of residence for 1994-95 tuition, however, it is not based upon the mother's incarceration in the Somerset County Jail on May 11, 1995.*

For all of the foregoing reasons, summary decision on behalf of the Somerville Board of Education relieving it of tuition responsibility based upon the Commissioner of Education's previous determination is hereby **GRANTED.** If petitioner paid any monies to Respondent Board for N.M.'s 1994-95 tuition, those monies should be returned, subject of course, to repayment should the Commissioner of Education subsequently determine that in fact Somerville was the district of residence based upon facts other than those presented in the within matter.

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

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* Note that the determination under appeal here is set forth in a letter dated June 27, 1995 from Respondent Department to petitioner and references only the 1994-95 school year. The "present district of residence" of N.M. for 1995-96 tuition purposes is the district of residence of M.V. as of the last school day prior to October 16, 1995. M. V. was released from jail on October 6, 1995, and her domicile (if any) after that date cannot be determined from the facts in this record.

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

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

Nov. 7, 1996
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 12 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. 677-96
AGENCY DKT. NO. 481-12/95

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent Department of Education's (Department) exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. No exceptions were filed by respondent Board, nor were reply exceptions filed by petitioner.

The Department generally recasts and reiterates arguments previously raised before the Administrative Law Judge (ALJ) that a county jail qualifies as a residence for determining petitioner's "district of residence" pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6:20-5.4. (Department's Exceptions at p. 1) It excepts that for school funding purposes, the district of residence for children who are in residential State facilities, "***shall be the *present district of residence of the parent or guardian* with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency." (emphasis in text) (*Id.* at p. 2) The Department notes that in the present case, N.M.'s mother, M.V., resided in the Somerset County jail when N.M. was placed in the Youth Consultant Facility in New Brunswick. It reiterates its previous argument that statute and applicable regulations, *N.J.A.C.* 6:20-5.3(b) and *N.J.A.C.* 6:20-5.4(a), mandate that if a parent resides in a State facility, including a correctional facility, when placed, the address of the State facility must be utilized in order to

determine the district of residence that is responsible for payment of tuition for the child. (Department's Exceptions at pp. 2-3) The Department disagrees with the ALJ's determination that a State correctional facility constitutes a State facility, but a county jail does not. (*Id.* at p. 3)

The Department next contends that residence for school funding purposes for children placed in State facilities in accordance with *N.J.S.A.* 18A:7B-1 *et seq.* is different from residence or domicile for determining a free public education under *N.J.S.A.* 18A:38-1. It summarizes that *N.J.S.A.* 18A:7B-12 requires that a parent or guardian's *residence, not domicile,* be submitted for school funding purposes and that a county jail can constitute one's present residence. (Department's Exceptions at p. 3)

Upon a careful and independent review, the Commissioner determines to reverse the determination of the ALJ. Although the Commissioner fully concurs that the statutory scheme generally envisions entitlement to attend public school and responsibility for tuition as based on the *domicile* of a parent or guardian pursuant to *N.J.S.A.* 18A:38-1, when responsibility for tuition must be determined where the sole parent or guardian is *chronically transient, i.e.* not homeless[1] but having had a series of short-term residences with no identifiable domicile, the only reasonable interpretation of applicable statute and implementing regulations is to assign responsibility for tuition to the parent or guardian's district of *present residence*, notwithstanding that such residence might be temporary.[2] Under the circumstances herein, the Department correctly determined that N.M.'s present district of residence for school funding purposes was Somerville based on M.V.'s residence in Somerset County Jail on the applicable date.

Accordingly, for the reasons expressed above, the Commissioner reverses the initial decision of the OAL, hereby entering summary judgment in favor of respondents and dismissing the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] Nowhere in the record is it indicated that M.V. was found to be homeless so as to invoke the provisions of *N.J.A.C.* 6:20-5.3(g).

[2] Pursuant to *N.J.S.A.* 18A:38-1(d), an individual is entitled to a free public education in a district if the parent or guardian is residing temporarily therein. Further, *N.J.S.A.* 18A:1-1 allows exception to its definition of residence (ordinarily "domicile") when temporary residence is indicated.

54-97

EDU #677-96
C # 54-97
SB # 23-97

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 5, 1997

For the Petitioner-Appellant, McDonald, Rogers & Rizzolo (Michael J. Rogers, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the City of New Brunswick, Hendricks and Hendricks (George F. Hendricks, Esq., of Counsel)

For the Respondent-Respondent New Jersey State Department of Education, John K. Worthington, Deputy Attorney General (John J. Farmer, Attorney General of New Jersey)

This case centers on a single issue: whether a county jail is a "residence" within the meaning of N.J.S.A. 18A:7B-12 so as to impose financial responsibility on the school district in which the county jail is located for the costs of a placement of a child made by the Division of Youth and Family Services ("DYFS"). Based on the stipulation of the parties to this matter and her analysis of the applicable law, the Administrative

June 5, 2000

Law Judge ("ALJ") concluded that a county jail did not constitute a residence within the meaning of the statute. The Commissioner rejected the ALJ's determination, holding that a county jail could be considered as a present residence for purposes of establishing financial responsibility for such placements.

After careful review of the record and the applicable legal framework, we reverse the Commissioner's decision in this matter.

The facts in this case are straightforward and undisputed. As stipulated by the parties, N.M. was a second-grade pupil in the Somerville School District during the 1990-91 school year. In March 1991, N.M. was removed from her home by DYFS and placed with foster parents outside of the Somerville School District. N.M. has never returned to the Somerville public schools. On or about May 11, 1995, N.M. was placed by DYFS in the Youth Consultant Services Facility in New Brunswick. N.M.'s mother, M.V., was incarcerated in the Somerset County Jail from approximately April 1995 until October 6, 1995. At all times relevant to this matter, M.V. was neither domiciled in nor a resident of Somerville.

Acting upon a request from the Department of Human Services, the Department of Education determined that Somerville was the district of residence for N.M. because, at the time of the request, her mother was incarcerated in the Somerset County Jail. As a result, the Somerville School District was assessed tuition for N.M. for the 1994-95 school year and for a portion of the 1995-96 school year.

In December 1995, the Board of Education of the Borough of Somerville (hereinafter "Somerville Board") filed a petition of appeal with the Commissioner of Education, contending that a county jail was not an appropriate facility for determining a

child's district of residence and that, as a result, the Somerville Board was not responsible for N.M.'s tuition. As set forth above, the ALJ concurred with the Somerville Board that a county jail was not a residence for purposes of establishing financial responsibility for N.M.'s placement, and the Commissioner rejected the ALJ's determination.

N.J.S.A. 18A:7B-12, the statute applicable to this matter, provides in pertinent part that:

> a. The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement had occurred.
>
> b. The district of residence for children who are in residential facilities, or who have been placed by State agencies in group homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> c. The district of residence for children whose parent or guardian temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless. For the purpose of this amendatory and supplementary act, "homeless" shall mean an individual who temporarily lacks a fixed, regular and adequate residence.
>
> d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the

> State, the State shall assume fiscal responsibility for the tuition of the child....

Under N.J.S.A. 18A:7B-12(b), N.M.'s district of residence for purposes of establishing financial responsibility for her placement is "the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency." Hence, it is N.M.'s mother's present district of residence that would establish financial responsibility if that district can be determined.

The regulations adopted by the State Board of Education under authority of the statute provide further guidance in determining M.V.'s "present district of residence." As provided by N.J.A.C. 6:20-5.3:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> . . .
>
> 2. The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-state facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1.
>
> 3. The "district of residence" referred to in paragraph two of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.
>
> (b) The commissioner shall determine the "present district of residence" or "district of residence" referred to in N.J.S.A. 18A:7B-12(b) based upon the address submitted by the Department of Corrections or the Department of Human

> Services on forms prepared by the Department of Education.
>
> . . .

N.J.A.C. 6:20-5.4 further provides:

> (a) The address submitted to the Department of Education for determining the district of residence for school funding purposes for a child described below shall be the address defined below:
>
> 1. If the State has custody of the child or if a court or the State has appointed a third party as the custodian of the child, the present address of the parent(s) or guardian(s) with whom the child resided immediately prior to his or her initial admission to a State facility or placement by a State agency shall be submitted.
>
> 2. If the child's parents are divorced with joint guardianship, the present address of the individual parent with whom the child resided as of the date required by N.J.A.C. 6:20-5.3(a)(1) or (2) shall be submitted.
>
> 3. If the child never resided with his or her parent(s) or guardian(s), the address of the facility, group home, or private school shall be submitted.
>
> 4. If the child's sole parent or legal guardian resides in a State facility, the address of the State facility wherein the parent or guardian resides shall be submitted.

Accordingly, M.V.'s "present district of residence" is to be determined based on her address as of May 11, 1995, the date on which DYFS placed N.M. in the State facility.

There is no dispute that M.V. was incarcerated in the Somerset County Jail from April 1995 until October 1995. This encompasses the date on which N.M.'s placement occurred. Hence, M.V.'s address on the relevant date was the Somerset County Jail. However, the address in this case does not provide M.V.'s present district of residence because, as the ALJ found, N.J.S.A. 18A:1-1 provides that "residence means domicile,

unless a temporary residence is indicated." In that N.J.S.A. 18A:7B-12(b) does not provide any indication that "present residence" is a temporary residence, M.V.'s present residence on the pertinent date must be her domicile.

As set forth in the ALJ's Initial Decision, an individual may have many residences, but can have only one domicile. Miller v. U.S. Fidel. & Guar. Co., 127 N.J. Super. 37, 42 (App. Div. 1974); Continos v. Parsekian, 68 N.J. Super. 54, 58-59 (App. Div. 1961); DeFiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super. 267 (Law Div. 1961).

> The domicile of a person is the place where he has his true, fixed permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving....Home is the place where a person dwells and which is the center of his domestic, social and civil life....Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence.

Matter of Unanue, 255 N.J. Super. 362, 374-5 (Law Div. 1991); See also, In re Jaffe, 74 N.J. 86, 90-91 (1977).

Incarceration in the county jail is for less than one year. N.J.S.A. 2C:43-10. Given that a stay in the county jail is brief by definition, a county jail cannot, as the ALJ correctly concluded, be an individual's domicile. Because a county jail cannot be an individual's domicile, the address of the Somerset County Jail could not provide M.V.'s present district of residence as of May 11, 1995. On this record, the conclusion is unavoidable that M.V.'s present district of residence was unknown. In this respect, we stress that a county jail is not a State facility so that N.J.A.C. 6:20-5.4(a)4 does not apply.

On this record, we conclude that Somerville is not responsible for N.M.'s tuition for 1994-95. Moreover, under the statute, if the parent's district of residence cannot be determined, then the district of residence shall be the district in which the child resided prior to the placement. N.J.S.A. 18A: 7B-12(b). In this case, N.M. was in foster care and, under these circumstances where the parent's district of residence can not be determined, the child's district of residence must be determined as if no foster placement had occurred. N.J.S.A. 18A: 7B-12(a). Although the stipulation by the parties indicates that prior to her placement in foster care, N.M. was attending Somerville public school, the record does not establish that this was the district of residence of either the parent or the child. Hence, we agree with the ALJ that although there is a possibility that Somerville might ultimately be responsible for N.M.'s tuition by further operation of the statute, any such obligation cannot be based on M.V.'s stay in the Somerset County Jail.

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

(SB) 54-97

DHPBL #211-97
SB # 54-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.M.C. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, April 25, 1997

For the Petitioner-Appellant, Robert J. Pompliano, Esq.

On April 25, 1997, the Deputy Commissioner of Education issued a letter decision in which he upheld the disqualification of J.M.C. (hereinafter "appellant") from school employment as a bus driver following a criminal history record review pursuant to N.J.S.A. 18A:39-19.1 The Deputy Commissioner found that appellant had failed to affirmatively demonstrate clear and convincing evidence of his rehabilitation.

On May 27, 1997, appellant filed a notice of appeal with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of his appeal was due on June 16, 1997, 20 days after the appeal was filed. Appellant, however, failed to file a brief by that date. By letter dated June 18, 1997, the counsel for the State Board notified appellant's counsel that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal. Appellant's counsel has still failed to file a brief in support of the appeal, more than seven weeks after the deadline for such filing, or to offer any explanation for his failure to file. Nor has he requested an extension of time.

8/6/97

Consequently, the State Board of Education dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

August 6, 1997

Date of mailing AUG 08 1997

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55-97

MARILYN VICENZINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured school social worker, contended Board's refusal to reemploy her for the 1996-97 school year violated her tenure and seniority rights.

ALJ found that the Board terminated the services of petitioner, who was a member of the basic, or "core" child study team, for purported economic reasons. ALJ concluded that even if the economic reasons were justifiable, the termination of petitioner and the reallocation of at least some of her duties to an outside contractor was violative of *N.J.A.C.* 6:28-3.1(b) and 6:28-5.1(c)1. Therefore, the Board was ordered to either reemploy petitioner to perform such services or alternatively arrange for the provision of such services by properly qualified employees of the Board, with due consideration of the tenure and seniority rights of petitioner.

Commissioner adopted findings and determination in initial decision as his own.

February 5, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 06468-96S

AGENCY DKT. NO. 227-6/96

MARILYN VICENZINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner and Hunter, attorneys)

James W. Broscious, Esq., for respondent (Broscious, Glynn and Gentile, attorneys)

Record Closed: December 3, 1996 Decided: December 19, 1996

BEFORE **JEFF S. MASIN**, ALJ:

Marilyn Vicenzino is a tenured school social worker who was employed by the Bedminster Township Board of Education ("Board") for seven years until June 30, 1996. The Board advised Ms. Vicenzino on March 25, 1996, that it had determined at its March 21, 1996, meeting to terminate her employment for the 1996-97 school year pursuant to a reduction in force ("RIF"). Ms. Vicenzino has appealed that action to the Commissioner of Education. She asserts that the Board acted in violation of her tenure rights, held pursuant to *N.J.S.A.* 18A:28-5, as well as her seniority and re-employment rights, *N.J.S.A.* 18A:28-11 and *N.J.S.A.* 18A:28-12. The

Commissioner transferred the contested case to the Office of Administrative Law ("OAL") pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

When the case was transmitted to the OAL it arrived with a motion filed by counsel for the respondent seeking to dismiss the petitioner's case based on an alleged failure to state a cause for which relief could be granted. On September 16, 1996, associate counsel for the Board advised this judge's secretary that the Board had previously granted Mr. Hunter an extension of time in which to respond to the motion, but that no response had been received and that the Board wished the judge to "immediately move on our motion to dismiss." Thereafter during a prehearing conference held September 25, 1996, counsel for Ms. Vicenzino indicated that he had delayed a response to the motion pending the prehearing conference, in accordance with practice which he had found to be the norm in regard to administrative hearings wherein issues concerning the pending case, including the submission of motions and replies thereto, were generally first addressed at the prehearing conference. The administrative law judge indicated that his review of the motion to dismiss for failure to state a cause of action suggested to him that the application was more appropriately characterized as a motion for summary decision and that he was inclined to allow the petitioner's attorney to file a response to that motion. After further correspondence in which Board Counsel advised that he had indeed assumed that a response would be filed prior to the prehearing and that he wished to press for a determination of the motion in the absence of a response, I advised counsel by letter of October 3, 1996, that I believed that there had been some "misunderstanding or lack of clear communication on the issue" and that I had determined to treat the matter as a motion for summary decision and allow a response and the filing of any cross-motion. Thereafter counsel for petitioner filed a response and cross-motion for summary decision. A telephone oral argument on the motion for summary decision was held on December 3, 1996, on which date the record closed.

CONCLUSION

Based upon an analysis of the positions of the parties and the current state of the statutes, regulations and decisional law on the developing issue of contracting of services by school districts, I **FIND** that the Board of Education has terminated the services of petitioner, who was a

member of the basic, or "core" child study team ("CST") for purported economic reasons, and **I CONCLUDE** that even if the economic reasons are justifiable, the termination of the tenured employee and the reallocation of at least some of her duties to an outside contractor is violative of *N.J.A.C.* 6:28-3.1 (b) and *N.J.A.C.* 6:28-5.1(c)1. Therefore, the Board of Education must either re-employ the petitioner to perform such services or must alternatively arrange for the provision of such services by any properly qualified employees of the Board of Education, with due consideration of the tenure and seniority rights of the petitioner.

FACTUAL BACKGROUND

This case arises from a decision made by the respondent Board of Education in March, 1996. The petitioner had been employed by the Board on a part-time (2/5th) basis as a social worker, assigned to the district's CST. Her job duties were numerous and she was the case manager for fourteen students. The Board determined that two of these students were about to graduate, one had been de-classified and it was anticipated that two others would be moving out of the district. The Board further determined that while it still had to provide for the case management services necessary for the remaining nine students for whom Ms. Vicenzino had served as case manager, these services could be accommodated by designating the CST Director to manage their cases in the 1996/97 school year. As for the approximately fifteen case histories anticipated for expected new referrals to the CST, the Board decided that rather than continue the petitioner's employment it could save a purported $15,000 per school year by eliminating the petitioner's position and contracting out to the Hunterdon County Educational Services Commission ("ESC") at a cost of $300 per social history. The Board would thus save $15,000 out of the $19,380 salary which the petitioner received in 1985/86.

The Board first notified petitioner that it was considering a reduction in force, and after the Board voted in favor of the reduction on March 21, 1996, it advised the petitioner that she was to be terminated. This petition followed.

LEGAL ISSUES

While there appears to be some dispute as to whether the several duties and responsibilities which Ms Vicenzino was required to perform as a member of the CST will in fact all be performed either to a sufficient level or at all if the reduction in force is permitted to stand, the first and indeed the fundamental issue in dispute between the parties is the question of whether a board of education may legally eliminate the position of a tenured employee who is a member of the basic CST and then have the services which that employee has rendered to the Board performed instead by an outside contractor. Petitioner asserts that such action is a violation of applicable regulations and cannot be countenanced. Respondent asserts that a board of education may indeed determine to reduce its staff for legitimate economic reasons and can contract out work of an employee such as Ms. Vicenzino without running afoul of the law.

THE STANDARD FOR SUMMARY DECISION

In *Robin Brill v. The Guardian Life Insurance Company of America, et al.*, 142 *N.J. 520* (1995), the New Jersey Supreme Court elaborated upon the applicable standard for determining if summary decision was proper, amending the traditional standard as announced in *Judson v. Peoples' Bank and Trust Co. of Westfield,* 17 *N.J.* 67, 74-75 (1954) to incorporate the United States Supreme Court's analysis as presented in *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 106 *S.Ct.* 2505, 91 *L. Ed. 2d* 202 (1986) and *Celotex Corp. v. Catrett*, 477 *U.S.* 317, 106 *S. Ct.* 2548, 91 *L.Ed. 2d* 265 (1986). As before, a motion for summary decision may only be granted where there are no genuine disputes of material fact. The determination of the existence of a genuine dispute of material fact is made after a "discriminating search" of the record, consisting as it may of affidavits, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. The *Brill* decision focuses upon the procedure for determining whether a purported dispute of material fact is in fact "genuine." Under the *Brill* standard, the judge is required to engage in the same analytical process in deciding the summary decision motion as is necessary for ruling upon a motion for a directed verdict. The fact finder must be guided by the applicable substantive evidentiary standard of proof, whether

preponderance of the evidence or clear and convincing evidence, which would apply at trial on the merits. *Brill, supra.* In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact by presenting something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious, ..." *Judson, supra.*, at 75 (citations omitted), cited in *Brill, supra.* If a careful review under this standard establishes that no such *genuine* disputes exist as to the material facts of the case, then the uncontradicted facts thus established can be examined in light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment. Where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held. *Brill, supra.*, citing S. Pressler, *Current N.J. Court Rules, R.* 4:40-2, comment (1991). (The comment is to the standard for determining motions for directed verdicts under *Rule* 4:40-1 and judgment notwithstanding the verdict pursuant to *Rule* 4:40-2, which the Court determined to be essentially the same standard which applies to motions for summary judgment decision, in the administrative context, under the *Liberty Lobby-Celotex-Brill* standard.)

ANALYSIS

In seeking summary decision, the Board of Education contends that its authority to abolish positions for reasons of economy is so clear that the case can be decided without an evidentiary hearing. It relies upon its authority as expressed in *N.J.S.A.* 18A:28-9, which provides that

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

The Board argues that, faced with legitimate economic concerns, it was fully within its legal rights when it determined that it should reduce its financial burdens by terminating Ms. Vicenzino, a part-time employee, and should contract out that portion of her work involving

social histories while providing for the performance of her other duties by another board employee. It cites such cases as *Cordano v. Board of Education of the Township of Weehawkin,* 1976 *SLD* 761 and *Hyun v. Board of Education, Borough of Wharton,* 1976 *SLD* 763, as standing for the proposition that its authority under the statute permits it to act as it has in Ms. Vicenzino's case.

In response, petitioner points to the fact that in neither *Cordano* or *Hyun* did the challenged action involve an attempt to affect the positions of members of the basic child study team. Cordano was an industrial arts teacher, Hyun an instrumental music teacher. In each of these cases, the Commissioner agreed that the board was free to act in a manner which effectuated economic savings, so long as it did not run afoul of the concerns recognized in the unpublished decision of the Appellate Division in *Jacqueline Cochrane v. Watchung Hills Regional Board of Education*, A-2327-85T7, (December 22, 1986) as to whether the purported elimination of functions actually occurred. Petitioner argues that in contrast to these cases, in the present matter, the Board's freedom to act is subject to legal constraints not applicable to the employees in *Cordano* and *Hyan.* This is due to the regulatory requirement contained in *N.J.S.A.* 18A:46-5.1 that persons who are performing the functions normally performed by the school social worker, the school psychologist and the learning disability-teacher consultant ("LDTC") must be carried out by persons actually employed by the Board. Ms. Vicenzino's own motion for summary decision relies upon this regulation as dispositive of the case.

The membership of a CST is defined in *N.J.S.A.* 18A:46-5.1,

> Each board of education and State operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker. . . .

and is further specified in *N.J.A.C.* 6:28-3.1(b), which adds the requirement that "For pupils ages three to five, the study team shall include a speech correctionist or speech-language specialist." Additionally, the regulation provides that

> All members of the child study team shall be employees of a district board of education, have an identifiable, apportioned commitment to the local school district and shall be available during the hours pupils are in attendance.

Petitioner asserts that while the decisional law now recognizes that where a school district chooses to maintain its own separate CST (as opposed to participating in a joint, multi-district arrangement without having its own exclusive in-district CST) certain adjunct services of the CST can be completely provided by outside contractors and consultants, and supplementation of the efforts of district employed CST members is also permitted, the board must nevertheless provide basic CST services through its own employees. Thus, as the petitioner understands the law, the CST is composed of three positions, social worker, psychologist and LDTC, each of whom is employed by "a" district, that is, all three members by a single district, as opposed to a split of the three between separate employing districts. Thus, it is illegal for the Board to terminate the team's only social worker, and then divide up the functions which she has previously performed and distribute them to a combination of remaining basic CST members and/or director (not a social worker) who may perform both "social worker" tasks and other "case management" tasks and transfer the "social work" aspect of the position to an outside contractor. She contends that what the Board has attempted to accomplish is nothing more than the transfer of the particular duties of a tenured employee to another individual not employed by a (here meaning "the") board of education, conduct which she asserts has been barred for at least the past 50 years, since the Appellate Division's decision in *Viemeister v. Prospect Park Board of Education*, 5 *N.J. Super.* 215 (App. Div. 1947). The continuation of the substance of the tenured basic CST employee's job by another under the guise of a reduction in force is simply not permissible. That that person may work for "a" school district, such as the ESC, does not lessen the violation.

In support of her contentions, petitioner cites the unpublished decision of the Appellate Division in *Cochran, supra.* There, the Court struck down a board of education's purportedly economic based reduction in force ("RIF") of tenured members of the CST from full time to half time, an action which was taken in conjunction with the awarding of a contract to provide the same services through a third party at purportedly less cost to the board. The State Board of Education, which voided the reduction in force, had concluded that the board had never intended the actual abolition of the positions occupied by the appellants, but had merely reorganized and

transferred their duties to a less expensive provider, or, as characterized by the Commissioner, "had actually intended not to abolish . . . but merely to divide up their duties and distribute part of those duties to the outside contractor in violation of their tenure rights." The court noted that while the board relied upon the broad authorization of *N.J.S.A.* 18A:28-9 as support for its right to implement a reduction in force, it was nevertheless clearly appropriate for the state board of education to review the determination of a local board, acting pursuant to that statute, to determine whether "the position ostensibly abolished has not, in fact, been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights . . ." *Viemeister*, *supra*. The State Board determined that the Watchung Board's action was in fact "not an actual abolishment of positions, but a mere reorganization and transfer of duties to a less expensive provider." *Cochran*, slip opinion at pages 3 and 4. Interestingly, in *Cochran* the court noted that both the commissioner and the administrative law judge who sat on the case

> correctly concluded that the integrity of the reduction in force decision was vitiated by the virtually contemporaneous decision to contract for additional Child Study Team services that the team, as originally constituted, would have otherwise performed. That being the case, the reduction in force decisions were properly voided, the full-time positions reinstated and Petitioners ordered restored to those positions. . . . Slip opinion at page 6.

Petitioner also cites *Elson v. Board of Education of the Hudson County Area Vocational-Technical School,* 96 *N.J.A.R. 2d* (EDU) 229, in support of her claims. There, the Commissioner agreed with and adopted the determination of Administrative Law Judge Diana Sukovich, who held that the tenure rights of a tenured school psychologist, who served as a member of the basic child study team, were violated when the district terminated his services as the result of a reduction in force and subsequently contracted the performance of his previously assigned duties to a private child study team. Judge Sukovich discussed both the *Cochrane* decision and the decision in *Mullin v. Boonton Town Board of Education,* 94 *N.J.A.R. 2d* (EDU) 583. In *Mullin,* three tenured members of a basic child study team (a LDTC, school psychologist and a social worker) were terminated in a RIF effective June 30, 1991. Thereafter, the Board contracted out for CST services, first on an as needed basis and then for four days a month, "to handle the overflow or excess CST work that the CST remaining after the reduction in force could not

handle." In December 1991, the Board hired a .2, or one day a week, CST. Administrative Law Judge Joseph Martone concluded that while in *Cochrane* the conclusion was that the reduction in force of the full time CST to half-time and the contracting out of this half of their former work load amounted to an improper supplanting of the CST and not merely a supplementation of the team's work, in the circumstances present in *Mullin,* the very limited utilization of the outside CST in the summer months and the Fall prior to the hiring of the .2 Team in December amounted to only a supplementation of the work of the remaining Board employed CST, and not a supplanting.

In her *Elson* decision, Judge Sukovich concluded that the facts of the case were "more akin to those considered in *Cochrane,*" and while she acknowledged that supplemental assistance can be obtained through a subcontracting arrangement, she held that "this situation presupposes an existing team with members who are employed by the district. Outside contractors are permitted in limited circumstances and only to supplement services provided by existing team members." *Id.* at 234.

The respondent notes that the *Elson* decision acknowledged the authority of local boards to both reduce the size of the teaching staff and to contract out certain CST services. In regard to this latter point, the judge cited the decision of the Appellate Division in *Impey v. Board of Education of Shrewsbury*, 271 *N.J. Super.* 429 (App. Div. 1994). Subsequently, the Supreme Court reviewed the Impey dispute and its decision is reported at 142 *N.J.* 388 (1995). The Board believes that *Impey* provides strong support for its right to act in this case without interference from the Commissioner. Indeed, based upon its reading of *Impey* the Board contends that the ALJ and the Commissioner decided *Elson* incorrectly.

In *Impey*, the local board abolished the position of speech correctionist and contracted with the county educational services commission for speech corrective services for its pupils. It asserted that the arrangement saved it approximately $12,000 a year. Ms. Impey appealed, and the ALJ, Commissioner and State Board all agreed that the Board had acted within its legal rights. The Appellate Division affirmed the State Board and Commissioner. The Supreme Court granted certification.

In its decision, the Court recognized the "considerable latitude" which local boards possess in determining how to provide "essential educational services." It also acknowledged that both statute and regulation authorize that local boards of education may provide special education services by "'joint facilities . . . provided by agreement between one or more school districts.' *N.J.S.A.* 18A:46-1" and that a local board could "undertake programs 'separately or jointly with one or more boards of education or State agencies [to] provide for basic child study team services.' *N.J.S.A.* 18:46-5.1" *Id.* at 394. Additionally, a board may contract with an ESC for "the provision of examination, classification and speech correction services required by this act." *Id.*

Ms. Impey contended that she was protected by *N.J.A.C.* 6:28-1 and that under that statute the local board was required to use only persons employed by the board as members of the CST. However, the Court noted that the ALJ, Commissioner and State Board had all held that as a speech correctionist, Impey "was not a member of the basic child study team referred to in" that statute. The Supreme Court concurred

> in the Appellate Division's conclusion that the Board was empowered to enter into the contract with the ESC for the provision of educational services. The statutory and regulatory provisions enable an ESC to provide a wide range of educational service to local schools. Those enactments clearly authorize a local board to enter into a contract with an educational services commission to obtain speech correction service for its eligible pupils.
> *Id.* at 395-96.

Judge Sukovich did not have the benefit of the Supreme Court's decision when she issued her initial decision in *Elson.* However, she concluded that while the Appellate Division decision in *Impey* upheld the Board's decision and supported the proposition that certain services can be contracted out, the ability of local boards to contract out the work of child study teams is nevertheless limited.

> There is no such broad authority pertinent to child study teams in general. As discussed, a local board may only contract team evaluation and diagnostic services to supplement existing local district services, not to supplant them.

Under the provisions of the statute which both mandates the maintenance and the composition of CST's, a board of education is not required to employ its own CST, but may provide for CST services in a multi-district arrangement so long as identifiable apportionment of time and responsibilities to the districts involved is provided. However, where a board has provided its own CST, and then seeks to change the arrangements for the provision of such services, examination of the several decisions discussed herein demonstrates that the particular facts of each case have played a significant role in the conclusions reached as to legality of the modifications. Factors which appear to be important may include such matters as whether the termination of the petitioner and the abolition of the petitioner's position eliminated all of the persons in the district filling that position (such as in the *Cochrane* case where the one-half reduction in the petitioner's positions left no in-district CST employees doing any of that one-half of the work associated with the case load, which was then entirely performed by the outside contractor), or whether the district continues to employ a full basic CST even after the RIF (as in *Mullin)*, or whether the abolition is of all positions on the basic team and the contract entered into provides for all CST services to be performed by employees of a board of education operating for a multi-district group, or only of one of the basic positions with the other two positions continuing to be filled by employees of the individual board which abolished the position (as in the present matter), or whether the contract services were with a public entity such as a multi-district cooperative or ESC (as in *Impey*) or with a private group (as in *Elson*), and whether the extent of the work performed by the outside contractor is minimal (*Mullin*) or involves significant amounts of work. In the present matter, the certification of Ms. Vicenzino indicates that she was the sole social worker employed by the district, and it appears that all of the needed social histories which she prepared as a portion of her CST work were contracted out and that none would be performed by a board employee, as the CST-related social histories which the ESC contractor is to perform constitute all of the social histories anticipated for the district's special education needs for the coming year. The contract was awarded to an ESC.

While the law would permit Bedminster to abolish its CST entirely if it entered into a proper multi-district arrangement for such services, on the undisputed facts of this case, which involves the complete abolition of only the social worker position in the district, with the retention of the board employed psychologist and LDTC, an ESC hired as outside contractor, and a significant amount of work assigned to that contractor, the case appears to be very much akin to *Cochrane* and *Elson*. Unless the Supreme Court's decision in *Impey* represents an implied precedent for the termination of the position of one (or two) of the three mandated members of the basic CST and the contracting out of the work associated with only those positions, (which would make the requirement of, and the protections inherent in, *N.J.A.C.* 6:28-1.3 tenuous at best and would authorize the splitting up of the basic team members amongst different employers, quite possibly raising significant practical concerns in regard to management and supervision of the "split" team) there appears to be no case supporting the Bedminster Board's action. *Impey* did not involve a basic team member. The court did not address the validity of *N.J.A.C.* 6:28-1.3(a). While it is quite conceivable that *Impey's* support for legitimate, good faith economic based decisions involving the abolition of positions and the contracting of work with the expectation of savings could be extended to permit such actions in regard to the members of the basic CST, as the regulations now stand, in those instances where a district chooses to maintain its own CST the school social worker, the school psychologist and the LDTC must be employees of the district and cannot be outside contractors.

ORDER

The action of the Bedminster Board of Education violates the regulation and must therefore be overturned. The Board is **HEREBY ORDERED** to reinstate the petitioner to the position of school social worker.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

December 19, 1996
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

December 23, 1996
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 26 1996
Barbara A Harned
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

OAL DKT. NO. EDU 06468-96S
AGENCY DKT. NO. 227-6/96

MARILYN VICENZINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent Board's exceptions and petitioner's reply thereto were timely filed in accordance with the requirements of *N.J.A.C.* 1-1-18.4.

Respondent's exceptions essentially recast and reiterate the arguments presented in the brief in support of its summary decision motion. In that the Commissioner finds that such arguments were fully and fairly considered and addressed by the Administrative Law Judge (ALJ) in his initial decision, they will not be repeated herein.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the ALJ that the Board's termination of petitioner, a tenured member of the "core" child study team, and its reallocation of at least some of her duties to an outside contractor is violative of *N.J.A.C.* 6:28-3.1(b) and *N.J.A.C.* 6:28-5.1(c)l, and, as such, petitioner must be reinstated to her school social worker position.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated by the ALJ therein. The Board is directed to reinstate petitioner to her former position as school social worker with back pay and emoluments, as appropriate, for the 1996-97 school year and thereafter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 5, 1997
Date of Mailing, February 6, 1997

55-97

EDU #6468-96S
C # 55-97
SB # 24-97

MARILYN VICENZINO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 5, 1997

For the Petitioner-Respondent, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, Broscious, Glynn & Gentile (James W. Broscious, Esq., of Counsel)

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

July 2, 1997

Date of mailing JUL 08 1997

56-97

56-97

THOMAS MADARAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

February 5, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3303-96
Agency Dkt. No. 48-2/96

THOMAS MADARAS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WESTFIELD,

Respondent.

Thomas Madaras, *pro se*

Richard J. Kaplow, Esq., for respondent

Record Closed: December 6, 1996 Decided: December 18, 1996

BEFORE **MUMTAZ BARI-BROWN**, ALJ

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on March 18, 1996 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

December 16, 1996
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

December 24, 1996
DATE

D M Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

RICHARD J. KAPLOW, P.A.
A PROFESSIONAL CORPORATION
COUNSELLOR AT LAW
53 ELM STREET
WESTFIELD, NEW JERSEY 07090

RICHARD J. KAPLOW (908) 232-8787 FAX (908) 232-8811

DEC 6 3 42 PM '96

December 4, 1996

Honorable Mumtaz Bari-Brown, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102-3011

Re: Thomas Madaras vs. Board of Education of the Town of Westfield
Agency Docket No. 48-2/96
OAL Docket No. EDUOT 0303-96N

Dear Judge Bari-Brown :

The undersigned represents the Respondent Westfield Board of Education in the above-referenced matter, which is presently scheduled for a telephone Prehearing Conference on December 11, 1996 at 3:30 p.m.

I am pleased to advise that the parties have reached a negotiated settlement agreement regarding the issues in dispute. I have enclosed an original and copy of the signed Stipulation of Settlement for your Honor's consideration and approval.

Based upon the Petitioner's agreement to withdraw the pending Petition of Appeal, I will assume that the scheduled telephone Prehearing Conference will not be necessary, unless I am otherwise advised by the Court.

Respectfully submitted,

Richard J. Kaplow, Esq.

RJK:jg
cc: Thomas Madaras
Board Secretary

3/21/96

RICHARD J. KAPLOW, P.A.
53 ELM STREET
WESTFIELD, NEW JERSEY 07090
(908)232-8787
Attorney for Respondent

THOMAS P. MADARAS,	:	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	AGENCY DOCKET NO. 48-2/96 OAL Dkt. No. EDUOT 03303-96N
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	STIPULATION OF SETTLEMENT
Respondent.	:	

The parties in the above-referenced matter having indicated to the Court that they have reached an amicable resolution of the matters in dispute, and said parties having further indicated the desire to set forth their specific points of agreement in writing, and for good cause shown:

NOW, THEREFORE it is agreed by and between the parties as follows :

1. The parties mutually acknowledge that the intent of the Board in amending Article I, Section 3 of its By-Laws

(Special Meetings), whereby the President of the Board would be notified in the first instance regarding the existence of a request for a special meeting, is intended as a courtesy to the Board President, enabling efficient Board governance and accurate dissemination of information.

2. It is not the intent of the Board that the aforesaid By-Law amendment shall operate to limit or interfere with the ability of a majority of the whole number of members of the Board to call a special meeting. The parties hereby acknowledge that the provisions of N.J.A.C. 6:3-1.2 shall continue to govern the calling of special meetings of the Board.

3. The parties hereby acknowledge that N.J.A.C. 6:3-1.2 requires that the Secretary of the Board of Education call a special meeting upon the presentation of a petition requesting same signed by a majority of the whole number of the members of the Board, notwithstanding the failure of the requesting Board members to comply with the notification procedure set forth in Paragraph 1. The Secretary of the Board, as a courtesy, shall notify the Board President of any such request for a special meeting.

4. Based upon the foregoing mutual acknowledgments, the Petitioner hereby withdraws the pending Petition of Appeal, OAL Dkt. No. EDUOT 03303-96N.

5. A copy of the within Stipulation of Settlement, as well as a legal citation to N.J.A.C. 6:3-1.2, shall be incorporated by reference into the amended version of the By-Laws of the Westfield Board of Education.

Witnessed:

Thomas Madaras, Petitioner
with that changes

Witnessed:

Susan Jacobson, President
Westfield Board of Education

OAL DKT. NO. EDU 3303-96
AGENCY DKT. NO. 48-2/96

THOMAS MADARAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

February 5, 1997
Date of Mailing, February 6, 1997

(SB) 58-97

DHPBL #309-97
SB # 58-97

IN THE MATTER OF THE DISQUALIFI- : STATE BOARD OF EDUCATION

CATION FROM SCHOOL EMPLOYMENT : DECISION

OF P.R., JR. :

Decided by the Assistant Commissioner of Education, June 13, 1997

For the Petitioner-Appellant, P.R., Jr., pro se

The decision of the Assistant Commissioner of Education disqualifying petitioner from school employment as a custodian following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein.

September 3, 1997

Date of mailing SEP 05 1997

60-97

60-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JULIA GARD-ZUZICK,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF PARSIPPANY-TROY HILLS, MORRIS	:	DECISION
COUNTY.	:	
	:	

February 3, 1997

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9732-96
AGENCY DKT. NO. 363-8/96

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY - TROY HILLS SCHOOL DISTRICT,

Petitioner,

v.

JULIA GARD-ZUZICK,

Respondent.

Marie-Laurence Fabian, Esq., for petitioner
(Dillon, Bitar & Luther, attorneys)

Sanford R. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 10, 1996 Decided: December 13, 1996

BEFORE **MARIA MANCINI LAFIANDRA**, ALJ:

STATEMENT OF THE CASE

Julia Gard-Zuzick, a Learning Disabilities Teacher Consultant (LTDC) and member of the Child Study Team (CST) of the Lake Parsippany School, appeals the tenure charges against her by the Board of Education of the Township of Parsippany-Troy Hills School District.

This matter was transmitted to the Office of Administrative Law (OAL) on September 27, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Prior to the matter being set down for hearing, a settlement agreement was entered into by the parties.

The parties have prepared the attached Settlement Agreement setting forth the terms of the settlement which the Administrative Law Judge (ALJ) received on December 10, 1996.

I have reviewed the settlement terms and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec 13 1996
DATE

Maria M La Fiandra
MARIA MANCINI LAFIANDRA, ALJ

Receipt Acknowledged:

12/20/96
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 1996
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jrp

DILLON, BITAR & LUTHER
COUNSELLORS AT LAW

THOMAS J. BITAR
HENRY N. LUTHER, III
BARRY M. JOHNSTON
PETER E. HENRY
ROBERT W. DELVENTHAL
GARTH F. WEBER
WILLIAM F. CAMPBELL, III
MARY A. POWERS
MICHAEL L. RICH
GLENN J. COCCHIOLA
STEVEN B. GREENAPPLE
MARIE-LAURENCE FABIAN
CHARLES V. QUINN
STEVEN F. RITARDI
STEVEN M. BOSACKI
RONNA M. GARELICK*
ELISABETH L'HEUREUX
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WORRALL F. MOUNTAIN
(1909-1992)

SIDNEY G. DILLON
WILLIAM E. BARDUSCH, JR.
DOROTHEA GARBER CRACAS
OF COUNSEL

December 9, 1996

DEC 10 11 04 AM '96

Honorable Maria M. LaFiandra
Office of Administrative Law
185 Washington Street
Newark, NJ 07102-3011

Re: In the Matter of Tenure Charges Against Julia Gard-Zuzick, Parsippany-Troy Hills Board of Education

OAL Docket No. EDUTH 09732-96N
Agency Ref. No. 363-8/96

Dear Judge LaFiandra:

We represent the Parsippany-Troy Hills Board of Education. Enclosed herewith is a copy of a settlement agreement entered into between the parties to the above-referenced matter. As you will see, the settlement was entered into on June 13, 1996.

The tenure charges brought in this matter were for inefficiency and incompetency. Pursuant to the settlement agreement, Ms. Gard-Zuzick applied for a disability pension. The parties agreed that if the application was still pending at the time the Board was required to certify the charges to the Commissioner, the charges would be certified at that time to protect the interests of the Board in the event the disability pension application was denied.

As the application was still pending at that time, the Board certified the charges at its meeting of August 22, 1996. An answer was filed on September 13, 1996. Ms. Gard-Zuzick has been suspended without pay since August 23, 1996.

Also enclosed herewith is a copy of the letter from the Division of Pensions and Benefits dated November 18, 1996

indicating that Ms. Gard-Zuzick's application for an ordinary disability pension was granted. As the application for a pension has been granted, we are submitting the settlement agreement to the court for approval. The applicable terms of the agreement are contained in paragraphs 6 and 7, which provide that Ms. Gard-Zuzick will resign effective January 1, 1997 and the Board will restore two previously withheld increments.

Please let me know if anything further is required in order for the court to review the settlement.

Respectfully submitted,

M. L. Fabian

Marie-Laurence Fabian

cc: Sanford Oxfeld, Esq.
Eugene Vasile

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into this 13th day of June, 1996 by and between the Parsippany-Troy Hills Board of Education ("the Board") and Julia Gard-Zuzick.

WHEREAS, On January 11, 1996 the Board filed tenure charges of inefficiency against Ms. Gard-Zuzick; and

WHEREAS, pursuant to those charges, Ms. Gard-Zuzick had until May 31, 1996 to correct the inefficiencies stated in the charges; and

WHEREAS, the Board has been notified that Ms. Gard-Zuzick has corrected only one of the inefficiencies stated in the tenure charges; and

WHEREAS, Ms. Gard-Zuzick denies that she has been inefficient;

WHEREAS, the Board plans to certify the tenure charges to the Commissioner; and

WHEREAS, both parties wish to avoid the additional expense and delay inherent in the possible litigation of these charges;

NOW THEREFORE:

The undersigned agree that this matter shall be amicably settled upon the following terms and conditions:

1. Ms. Gard-Zuzick shall immediately apply to TPAF for a disability pension to be effective January 1, 1997.

2. The Board will promptly fill out all forms necessary to effectuate the application.

3. While the pension application is pending, the Board will proceed according to the requirements of N.J.A.C. 6:24-5.1(c),

which would require, in this case, the certification of tenure charges no later than August 29, 1996.

4. If the disability pension is granted prior to the August 22, 1996 Board meeting, the charges will not be certified, and Ms. Gard-Zuzick will resign effective January 1, 1997. The Board will grant Ms. Gard-Zuzick a paid medical leave of absence for the period September 1, 1996 through December 31, 1996 at an annual salary of $70,010.00 plus $700 longevity, prorated for the period, and restore her increments as described in paragraphs 6 and 7 of this Agreement.

5. If the pension application is still pending as of the August 22, 1996 Board meeting, the parties understand and agree that the Board will certify the charges to the Commissioner at that time. If the pension application is granted subsequent to the certification of the charges, the parties will submit this settlement to the Commissioner for approval.

6. At such time as the disability pension is granted and Ms. Gard-Zuzick submits her resignation, the Board shall restore her increments for the 1994-95 and 1995-96 school years and send to TPAF an amended certification of final salary indicating her 1994-95 salary as $65,521.00 and her 1995-96 salary as $67,800.00 plus $600 longevity.

7. The parties agree that the amount to be restored for 1994-95 is $2,821.00 and the amount to be restored for 1995-96 is $5,100.00. If the disability pension is granted, the appropriate percentage of the restored amounts will be sent by the Board to

TPAF and the remainder will be paid to Ms. Gard-Zuzick.

8. If the pension is denied, none of the above provisions will apply and the Board will proceed with all aspects of the tenure charges.

Dated: 6/5/96 Julia Gard-Zuzick
Julia Gard-Zuzick

Dated: 6/13/96 PARSIPPANY-TROY HILLS BOARD OF EDUCATION

By: _____
David Shaffer, President

Post-it® Fax Note 7671	Date 11/21/96	pages 1
To Sanford Oxfeld	From Julia Gard-Zuzick	
Co./Dept.	Co.	
Phone #	Phone # 201-966-2901	
Fax # 201-802-1055	Fax #	

CHRISTINE TODD WHITMAN
Governor

New Jersey
OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718

CN-295
Trenton NJ 08625-0295
Location:
50 West State Street
Trenton, New Jersey

BRIAN W. CLYMER
State Treasurer
MARGARET M. MCMAHON
Director

November 18, 1996

Julia Gard-Zuzick
20 Stafford Drive
Madison, NJ 07940

RE: TPAF #351023

Dear Ms. Gard-Zuzick:

The Board of Trustees of the Teachers' Pension and Annuity Fund, at its meeting on November 15, 1996 approved your application for Ordinary Disability retirement effective January 1, 1997, under Option 1. You have the right to change this election to another type of retirement payment provided you file an amended application within 30 days from the date of the Board's approval; otherwise, the retirement will stand as approved and cannot be changed for any other reason whatsoever thereafter.

If you continue to receive a salary beyond the effective date of retirement, no retirement benefits shall be paid for the period where the member received salary and no salary or service credit shall be provided for the service rendered after the approved effective date of retirement. In addition, your employer shall be required to complete an updated Certification of Service and Final Salary.

Your retirement allowance as a disability retirant is subject to adjustment if your earnings from employment after retirement exceed the difference between the pension portion of your retirement allowance and the salary attributable to your former position.

The statute permits the Board of Trustees to require a disability retirant to undergo annual medical examinations to determine if he continues to be totally and permanently disabled and therefore eligible for continued receipt of his disability retirement allowance.

Your claim is being forwarded to our Retirement Bureau and all statistics regarding this account will follow. Your first retirement check cannot be disbursed until a minimum of 30 days has elapsed from the date of Board approval or your effective date, whichever is later. Shortly thereafter, you will receive your initial payment.

Sincerely,

Regina M. Thatcher, Secretary
Board of Trustees
Teachers' Pension and Annuity Fund

jb
c: Parsippany-Troy Hills
Debbie Lane w/File

OAL DKT. NO. EDU 9732-96
AGENCY DKT. NO. 363-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JULIA GARD-ZUZICK,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF PARSIPPANY-TROY HILLS, MORRIS	:	DECISION
COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

February 3, 1997
Date of Mailing, February 3, 1997

(SB) 60-97

DHPBL #313-97
SB # 60-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.W.

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, June 13, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

J.W. (hereinafter "petitioner"), who was employed as a school bus driver for the Hudson County Schools of Technology, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 revealed that she had been convicted of possession of drug paraphernalia in March 1992 following an arrest in February 1992.

In a letter decision dated June 13, 1997, the Assistant Commissioner of Education, Executive Services, upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear and convincing evidence of her rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1.

Petitioner filed the instant appeal to the State Board of Education.

[1] We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

9/3/97

After a careful review of the record, we reverse the decision of the Assistant Commissioner. We find that petitioner's conviction for possession of drug paraphernalia is not a disqualifying offense under N.J.S.A. 18A:39-19.1.

N.J.S.A. 18A:39-19.1 provides, in pertinent part:

> ....A school bus driver shall be disqualified from employment or service if the individual's criminal history record reveals a record of conviction of any of the following crimes and offenses:
>
> a. A crime or offense bearing upon or involving a sexual offense or child molestation or endangering the welfare of children or incompetents, as specified in section 1 of P.L.1986, c.116 (C.18A:6-7.1).
>
> b. A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c.226 C.24:21-1 et seq.).
>
> c. A crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, assault, kidnapping, arson, manslaughter and murder.

The New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1 et seq., defines controlled dangerous substance as "a drug, substance, or immediate precursor in Schedules I through V of article 2 of this act...." The only conviction revealed by petitioner's criminal history review in this case was for possession of drug paraphernalia. N.J.S.A. 2C:36-2.[2] Drug paraphernalia, however, as defined in N.J.S.A. 2C:36-1, are not listed in Schedules I through V of the Controlled Dangerous Substances Act, N.J.S.A. 24:21-5 through N.J.S.A. 24:21-8.1, as a controlled dangerous substance.[3] As a result,

---

[2] N.J.S.A. 2C:36-2 provides:

> It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title. Any person who violates this section is guilty of a disorderly persons offense.

[3] N.J.S.A. 2C:36-1 defines "drug paraphernalia" as:

petitioner's conviction for possession of drug paraphernalia was not a "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act'" so as to constitute a disqualifying offense under subsection (b) of N.J.S.A. 18A:39-19.1. Nor did such conviction involve a sexual offense within subsection (a) of that statute, or the use or threat of force within subsection (c).

Thus, given the clear terms of the statute, we reverse the decision of the Assistant Commissioner disqualifying petitioner from service as a school bus driver. We stress in so doing, however, that while petitioner's conviction for possession of drug paraphernalia is not a disqualifying offense under N.J.S.A. 18A:39-19.1, nothing in our decision herein would require the Hudson County Schools of Technology to reemploy petitioner in her former position.[4]

Ronald K. Butcher abstained.

Donald C. Addison, Jr. and S. David Brandt opposed.

September 3, 1997

Date of mailing SEP 05 1997

> ...all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

[4] We note that, while not necessary for a determination of this case, petitioner has submitted evidence in support of her rehabilitation claim. The director of support services in the Hudson County Schools of Technology commends petitioner as "a productive employee with no indication of current difficulty." A freeholder in Jersey City indicates that petitioner "has performed her duties in a reliable, dependable fashion....She has earned our support and encouragement." Petitioner completed 28 counseling sessions with New Pathways Counseling Services in 1993, and also successfully completed a course in data processing at the Hudson County Area Vocational-Technical Schools in January 1994. There have been no further arrests.

(SB) 60-97

DHPBL #313-97
SB # 60-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF J.W.

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, June 13, 1997

Decided by the State Board of Education, September 3, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Commissioner of Education, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

J.W. (hereinafter "petitioner"), who was employed as a school bus driver for the Hudson County Schools of Technology, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 revealed that she had been convicted of possession of drug paraphernalia in March 1992 following an arrest in February 1992. Petitioner appealed her disqualification to the Commissioner of Education, contending that she was rehabilitated.

The Office of Criminal History Review did not contest petitioner's appeal and, accordingly, the matter was not transmitted to the Office of Administrative Law for hearing. In a letter decision dated June 13, 1997, the Assistant Commissioner of

FEB. 4, 1998

Education, Executive Services, upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear and convincing evidence of her rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1.

Petitioner filed an appeal from that decision to the State Board. In support of her appeal, she argued that her conviction was not for a disqualifying offense and renewed her claim that she had demonstrated rehabilitation.

On September 3, 1997, we reversed the decision of the Assistant Commissioner, concluding that petitioner's conviction for possession of drug paraphernalia was not a "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act'" so as to constitute a disqualifying offense under N.J.S.A. 18A:39-19.1.[2]

In that the Office of Criminal History Review did not respond to petitioner's appeal, our determination was based solely on our review of the language of the statute in light of petitioner's arguments. As expressed in our decision, we reasoned that:

> The New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1 et seq., defines controlled dangerous

---

[1] N.J.S.A. 18A:4-34 authorizes the Commissioner to assign to an assistant commissioner the "hearing and determination of controversies and disputes which may arise under the school laws...."

[2] N.J.S.A. 18A:39-19.1 provides, in pertinent part:

> ....A school bus driver shall be disqualified from employment or service if the individual's criminal history record reveals a record of conviction of any of the following crimes and offenses:
>
> a. A crime or offense bearing upon or involving a sexual offense or child molestation or endangering the welfare of children or incompetents, as specified in section 1 of P.L.1986, c.116 (C.18A:6-7.1).
>
> b. A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," (P.L.1970, c.226 C.24:21-1 et seq.).
>
> c. A crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, assault, kidnapping, arson, manslaughter and murder.

> substance as "a drug, substance, or immediate precursor in Schedules I through V of article 2 of this act...." The only conviction revealed by petitioner's criminal history review in this case was for possession of drug paraphernalia. N.J.S.A. 2C:36-2. Drug paraphernalia, however, as defined in N.J.S.A. 2C:36-1, are not listed in Schedules I through V of the Controlled Dangerous Substances Act, N.J.S.A. 24:21-5 through N.J.S.A. 24:21-8.1, as a controlled dangerous substance.[3] As a result, petitioner's conviction for possession of drug paraphernalia was not a "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act'" so as to constitute a disqualifying offense under subsection (b) of N.J.S.A. 18A:39-19.1. Nor did such conviction involve a sexual offense within subsection (a) of that statute, or the use or threat of force within subsection (c).

State Board's Decision, slip op. at 2-3.

On September 15, 1997, a Deputy Attorney General representing the Commissioner of Education filed a motion on behalf of the Commissioner to participate in this matter for the purpose of seeking reconsideration/clarification of our decision of September 3, 1997. Our review of the Commissioner's submission indicates that he is not seeking to participate as a party litigant, but, rather, because the individual case involves "broad policy issues that go beyond the facts, and affect disqualification cases currently pending before the Commissioner...." Letter brief, at 1-2. See Hasbrouck Heights v. Division of Tax Appeals, 48 N.J. Super. 328 (App. Div. 1958); Public Service Interstate Transportation Co. v. Board of Public Utility Com'rs., 129 N.J.L. 94 (E. & A.

[3] N.J.S.A. 2C:36-1 defines "drug paraphernalia" as:

> ...all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

1942). In this respect, the Commissioner points out that the only issues raised by petitioner when the matter was before him related to rehabilitation. Hence, the Assistant Commissioner who decided this matter on his behalf had not been required to consider questions relating to the proper interpretation of the statute at issue.

In his letter brief, the Commissioner indicates that it has been a long-standing agency practice to disqualify individuals from school employment under N.J.S.A. 18A:39-19.1 and N.J.S.A. 18A:6-7.1 based upon a conviction for possession of drug paraphernalia under N.J.S.A. 2C:36-2.[4] He further indicates that the Office of Criminal History Review and the Commissioner's Office have taken this position based upon a statutory interpretation which focuses on the language of N.J.S.A. 2C:36-2. That statute provides in pertinent part that:

> It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

The Commissioner argues that because the terms of N.J.S.A. 2C:36-2 predicate a conviction on the individual's use or intent to use the paraphernalia with a controlled dangerous substance, "it must be concluded that a conviction pursuant to this statute involves the manufacture, transportation, possession, sale or use of a [controlled dangerous substance]." Letter brief, at 6. (Emphasis added.) Hence, the Commissioner maintains, a conviction for possession of drug paraphernalia is an

[4] We note that N.J.S.A. 18A:6-7.1, which applies to school employees other than bus drivers, includes a provision which is identical to the language of N.J.S.A. 18A:39-19.1(b) disqualifying employees for drug offenses.

offense "involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance'" within the meaning of N.J.S.A. 18A:39-19.1(b).

In response, counsel for petitioner argues that the Commissioner's motion should be denied because it presents an appearance of a conflict. He also reiterates the statutory interpretation he presented when we first considered this appeal.

After careful consideration, we grant the Commissioner's request to participate, and we have reconsidered our original decision in this appeal in light of the arguments he has presented. However, for the reasons that follow, and with the requirements set forth herein, we remand this matter to the Commissioner with the direction that he transmit it to the Office of Administrative Law for initial determination.

Initially, we stress that the legal question that has been raised by this appeal is one of first impression. As a result, the State Board has not been called upon previously to evaluate either the practice which the Office of Criminal History Review has followed when confronted with a criminal record reflecting a conviction for possession of drug paraphernalia under N.J.S.A. 2C:36-2 or the rationale upon which such practice has been based. Furthermore, we have been unable to identify any case in which the Commissioner has reviewed this practice and, on the basis of his review, analyzed and determined the issue now being raised. See New Jersey Department of Education v. Skwarek, decided by the Commissioner of Education, October 25, 1991 [cursory conclusion by ALJ that individual convicted of possession of drug paraphernalia, in combination with other drug offenses, was disqualified from continued "certification" pursuant to N.J.S.A. 18A:6-7.1(b)].

On the surface, the interpretation being articulated by the Commissioner does not appear to be an unreasonable one. However, because such position has not been formally adopted by this agency and because the issue has not been previously litigated, we find that the proper course is to remand this matter to the Commissioner in accordance with the terms of our decision in order to consider all of the relevant legal arguments and circumstances relating thereto. Specifically, in addition to petitioner's arguments, the proceedings on remand should consider the effect, if any, of the Legislature's actions in expressly including drug paraphernalia in N.J.S.A. 2C:35-16.1 and N.J.S.A. 2A:18-61.1.[5]

In addition, we agree with the Commissioner that the issue now being raised is important from a policy perspective. As the Commissioner has presented it to us, the lynchpin of his approach is his interpretation of the word "involving" as it appears in N.J.S.A. 18A:39-19.1. Ordinarily, we would be compelled to give the word "involving" the same meaning when considering whether a conviction was disqualifying under N.J.S.A. 18A:39-19.1(a) and (c) as we do when considering convictions for possession of drug paraphernalia under N.J.S.A. 18A:39-19.1(b). This would appear to bring inchoate crimes such as attempt and conspiracy within the purview of N.J.S.A. 18A:39-19.1 and to require that they also be considered disqualifying offenses. In the absence of express guidance from the Legislature, it is critical that the Commissioner

[5] We note that both N.J.S.A. 2C:35-16.1, which provides for notice to a property owner of drug offenses committed by a tenant on his property, and N.J.S.A. 2A:18-61.1, which authorizes the eviction of a tenant following conviction for a drug offense which occurred on the rental premises, include language which is similar to the drug provisions of N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:39-19.1 except that they expressly include drug paraphernalia.

have the opportunity in the first instance to thoroughly examine any implications that may follow from the statutory interpretation he is proposing.

Accordingly, for the reasons expressed herein, we remand this matter to the Commissioner with direction that the matter be transmitted to the Office of Administrative Law for further proceedings and an initial determination in conformity with our decision herein.[6] We retain jurisdiction and therefore direct the Commissioner to transmit this matter back to us once he has rendered his final decision.

Attorney exceptions are noted.

February 4, 1998

Date of mailing FEB 06 1998

[6] Given the procedural posture of this case, both the petitioner and the Office of Criminal History Review should be party to the proceedings on remand.

61-97

61-97

V.H., on behalf of minor, I.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

PETITIONER,

V.

V.H., on behalf of minor, I.G.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 10, 1997

OAL DKT. NO. EDU 5713-95
AGENCY DKT. NO. 153-4/95

V.H., on behalf of minor, I.G.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

PETITIONER,

V.

V.H., on behalf of minor, I.G.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 10, 1997

DATE OF MAILING FEBRUARY 10, 1997

(SB) 61-97

DHPBL #311-97
SB # 61-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF R.J.B. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Deputy Commissioner of Education, June 13, 1997

For the Petitioner-Appellant, R.J.B., pro se

R.J.B. (hereinafter "petitioner"), who was employed as a school bus driver by the Bayonne Board of Education, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 revealed that he had been convicted of possession of drug paraphernalia in February 1997 following an arrest in May 1996.[1]

In a letter decision dated June 13, 1997, the Assistant Commissioner of Education, Executive Services, upheld the disqualification,[2] concluding that petitioner

[1] We note that petitioner had been charged with possession of a controlled dangerous substance but had subsequently pleaded guilty to a reduced charge of possession of drug paraphernalia. We note, in addition, that petitioner had been convicted of a disqualifying offense, possession of marijuana, following an arrest in June 1983. However, in 1992, the Office of Criminal History Review determined that he had been rehabilitated and approved his school employment. Consequently, the only offense currently before us is for possession of drug paraphernalia in May 1996.

[2] N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

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had failed to demonstrate clear and convincing evidence of his rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1.

Petitioner filed the instant appeal to the State Board of Education.

After a careful review of the record, we reverse the decision of the Assistant Commissioner. We find that petitioner's conviction for possession of drug paraphernalia is not a disqualifying offense under N.J.S.A. 18A:39-19.1. However, we do find that petitioner is disqualified from employment as a school bus driver through September 21, 1997 as a result of the suspension of his driving privileges.

N.J.S.A. 18A:39-19.1 provides, in pertinent part:

> ....A school bus driver shall be disqualified from employment or service if the individual's criminal history record reveals a record of conviction of any of the following crimes and offenses:
>
> a. A crime or offense bearing upon or involving a sexual offense or child molestation or endangering the welfare of children or incompetents, as specified in section 1 of P.L.1986, c.116 (C.18A:6-7.1).
>
> b. A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c.226 C.24:21-1 et seq.).
>
> c. A crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, assault, kidnapping, arson, manslaughter and murder.
>
> A school bus driver shall also be disqualified if the individual's bus driver's license is currently revoked or suspended by the Division of Motor Vehicles in accordance with R.S. 39:3-10.1.

The New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1 et seq., defines controlled dangerous substance as "a drug, substance, or immediate precursor in Schedules I through V of article 2 of this act...." The only conviction before

us in this appeal is for possession of drug paraphernalia. N.J.S.A. 2C:36-2.[3] Drug paraphernalia, however, as defined in N.J.S.A. 2C:36-1, are not listed in Schedules I through V of the Controlled Dangerous Substances Act, N.J.S.A. 24:21-5 through N.J.S.A. 24:21-8.1, as a controlled dangerous substance.[4] As a result, petitioner's conviction for possession of drug paraphernalia was not a "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act'" so as to constitute a disqualifying offense under subsection (b) of N.J.S.A. 18A:39-19.1. Nor did such conviction involve a sexual offense within subsection (a) of that statute, or the use or threat of force within subsection (c).

However, the record reveals that petitioner's driver's licenses are currently suspended as the result of his drug paraphernalia conviction. As previously noted, a school bus driver is disqualified from employment in such capacity if his or her bus driver's license is currently revoked or suspended. N.J.S.A. 18A:39-19.1. Thus, although possession of drug paraphernalia is not a disqualifying offense under the

---

[3] N.J.S.A. 2C:36-2 provides:

> It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title. Any person who violates this section is guilty of a disorderly persons offense.

[4] N.J.S.A. 2C:36-1 defines "drug paraphernalia" as:

> ...all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

statute, petitioner is disqualified from employment as a school bus driver through September 21, 1997, the expiration of that suspension.

In sum, given the clear terms of the statute, we are compelled to reverse the decision of the Assistant Commissioner disqualifying petitioner from service as a school bus driver pursuant to N.J.S.A. 18A:39-19.1 on the basis of his conviction for possession of drug paraphernalia. Nonetheless, we conclude that petitioner is disqualified from such employment through September 21, 1997 as the result of the suspension of his driver's licenses. We stress, in addition, that while petitioner's conviction for possession of drug paraphernalia is not a disqualifying offense under N.J.S.A. 18A:39-19.1, nothing in our decision herein would require the Bayonne Board to reemploy him following the expiration of his current disqualification.[5]

Ronald K. Butcher abstained.

September 3, 1997

Date of mailing SEP 05 1997

[5] We note that, while not necessary for a determination of this case, petitioner has submitted letters in support of his rehabilitation claim. Petitioner's supervisor in Bayonne asserts that his "attendance, punctuality, and overall knowledge towards his position are excellent....[Petitioner's] dedication towards his position has been above the normal standards....All results of testing done since the original incident have proven that [petitioner] has not been involved in any type of drugs." Petitioner's supervisor at a part-time position commends him as "reliable, honest and trusting." Another supervisor in a part-time position praises petitioner as displaying "honest and honorable ethics." Petitioner participated in individual and group substance abuse therapy, and random drug tests administered between June 1996 and March 1997 were negative. He complied with all the conditions of his probation, and there have been no further arrests.

(SB) 61-97

DHPBL #311-97
SB # 61-97

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF R.J.B. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, June 13, 1997

Decided by the State Board of Education, September 3, 1997

For the Petitioner-Appellant, R.J.B., pro se

For the Commissioner of Education, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

R.J.B. (hereinafter "petitioner"), who was employed as a school bus driver by the Bayonne Board of Education, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:39-19.1 revealed that he had been convicted of possession of drug paraphernalia in February 1997 following an arrest in May 1996. Petitioner appealed his disqualification to the Commissioner of Education, contending that he was rehabilitated.

The Office of Criminal History Review did not contest petitioner's appeal and, accordingly, the matter was not transmitted to the Office of Administrative Law for hearing. In a letter decision dated June 13, 1997, the Assistant Commissioner of

FEB. 4, 1998

Education, Executive Services, upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear and convincing evidence of his rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1. Petitioner filed an appeal from that decision to the State Board.

On September 3, 1997, we reversed the decision of the Assistant Commissioner, concluding that petitioner's conviction for possession of drug paraphernalia was not a "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act'" so as to constitute a disqualifying offense under N.J.S.A. 18A:39-19.1.

In that the Office of Criminal History Review did not respond to petitioner's appeal, our determination was based solely on our review of the language of the statute in light of petitioner's arguments. As expressed in our decision, we reasoned that:

> The New Jersey Controlled Dangerous Substances Act, N.J.S.A. 24:21-1 et seq., defines controlled dangerous substance as "a drug, substance, or immediate precursor in Schedules I through V of article 2 of this act...." The only conviction revealed by petitioner's criminal history review in this case was for possession of drug paraphernalia. N.J.S.A. 2C:36-2. Drug paraphernalia, however, as defined in N.J.S.A. 2C:36-1, are not listed in Schedules I through V of the Controlled Dangerous Substances Act, N.J.S.A. 24:21-5 through N.J.S.A. 24:21-8.1, as a controlled dangerous substance.[2] As a result, petitioner's conviction

[1] We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

[2] N.J.S.A. 2C:36-1 defines "drug paraphernalia" as:

> ...all equipment, products and materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging,

> for possession of drug paraphernalia was not a "crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance' as defined in the 'New Jersey Controlled Dangerous Substances Act'" so as to constitute a disqualifying offense under subsection (b) of N.J.S.A. 18A:39-19.1. Nor did such conviction involve a sexual offense within subsection (a) of that statute, or the use or threat of force within subsection (c).

State Board's Decision, slip op. at 2-3.

On September 15, 1997, a Deputy Attorney General representing the Commissioner of Education filed a motion on behalf of the Commissioner to participate in this matter for the purpose of seeking reconsideration/clarification of our decision of September 3, 1997. Our review of the Commissioner's submission indicates that he is not seeking to participate as a party litigant, but, rather, because the individual case involves "broad policy issues that go beyond the facts, and affect disqualification cases currently pending before the Commissioner...." Letter brief, at 1-2. See Hasbrouck Heights v. Division of Tax Appeals, 48 N.J. Super. 328 (App. Div. 1958); Public Service Interstate Transportation Co. v. Board of Public Utility Com'rs., 129 N.J.L. 94 (E. & A. 1942). In this respect, the Commissioner points out that the only issues raised by petitioner when the matter was before him related to rehabilitation. Hence, the Assistant Commissioner who decided this matter on his behalf had not been required to consider questions relating to the proper interpretation of the statute at issue.

In his letter brief, the Commissioner indicates that it has been a long-standing agency practice to disqualify individuals from school employment under N.J.S.A.

> storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

18A:39-19.1 and N.J.S.A. 18A:6-7.1 based upon a conviction for possession of drug paraphernalia under N.J.S.A. 2C:36-2.[3] He further indicates that the Office of Criminal History Review and the Commissioner's Office have taken this position based upon a statutory interpretation which focuses on the language of N.J.S.A. 2C:36-2. That statute provides in pertinent part that:

> It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance or controlled substance analog in violation of the provisions of chapter 35 of this title....

The Commissioner argues that because the terms of N.J.S.A. 2C:36-2 predicate a conviction on the individual's use or intent to use the paraphernalia with a controlled dangerous substance, "it must be concluded that a conviction pursuant to this statute involves the manufacture, transportation, possession, sale or use of a [controlled dangerous substance]." Letter brief, at 6. (Emphasis added.) Hence, the Commissioner maintains, a conviction for possession of drug paraphernalia is an offense "involving the manufacture, transportation, sale, possession, or habitual use of a 'controlled dangerous substance'" within the meaning of N.J.S.A. 18A:39-19.1(b).

After careful consideration, we grant the Commissioner's request to participate, and we have reconsidered our original decision in this appeal in light of the arguments he has presented. However, for the reasons that follow, and with the requirements set

[3] We note that N.J.S.A. 18A:6-7.1, which applies to school employees other than bus drivers, includes a provision which is identical to the language of N.J.S.A. 18A:39-19.1(b) disqualifying employees for drug offenses.

forth herein, we remand this matter to the Commissioner with the direction that he transmit it to the Office of Administrative Law for initial determination.

This case raises the same legal issue as In the Matter of the Disqualification from School Employment of J.W., which we have decided today. As we stressed in our opinion in that appeal, this legal question is one of first impression. As a result, the State Board has not been called upon previously to evaluate either the practice which the Office of Criminal History Review has followed when confronted with a criminal record reflecting a conviction for possession of drug paraphernalia under N.J.S.A. 2C:36-2 or the rationale upon which such practice has been based. Furthermore, we have been unable to identify any case in which the Commissioner has reviewed this practice and, on the basis of his review, analyzed and determined the issue now being raised. See New Jersey Department of Education v. Skwarek, decided by the Commissioner of Education, October 25, 1991 [cursory conclusion by ALJ that individual convicted of possession of drug paraphernalia, in combination with other drug offenses, was disqualified from continued "certification" pursuant to N.J.S.A. 18A:6-7.1(b)].

On the surface, the interpretation being articulated by the Commissioner does not appear to be an unreasonable one. However, because such position has not been formally adopted by this agency and because the issue has not been previously litigated, we find, as we did in J.W., supra, that the proper course is to remand this matter to the Commissioner in accordance with the terms of our decision in order to consider all of the relevant legal arguments and circumstances relating thereto.[4]

[4] We note that in contrast to the petitioner in J.W., who has been represented by counsel during the agency proceedings in her appeal, petitioner in this case has been acting pro se.

Specifically, in addition to petitioner's arguments, the proceedings on remand should consider the effect, if any, of the Legislature's actions in expressly including drug paraphernalia in N.J.S.A. 2C:35-16.1 and N.J.S.A. 2A:18-61.1.[5]

In addition, we agree with the Commissioner that the issue now being raised is important from a policy perspective. As the Commissioner has presented it to us, the lynchpin of his approach is his interpretation of the word "involving" as it appears in N.J.S.A. 18A:39-19.1. Ordinarily, we would be compelled to give the word "involving" the same meaning when considering whether a conviction was disqualifying under N.J.S.A. 18A:39-19.1(a) and (c) as we do when considering convictions for possession of drug paraphernalia under N.J.S.A. 18A:39-19.1(b). This would appear to bring inchoate crimes such as attempt and conspiracy within the purview of N.J.S.A. 18A:39-19.1 and to require that they also be considered disqualifying offenses. In the absence of express guidance from the Legislature, it is critical that the Commissioner have the opportunity in the first instance to thoroughly examine any implications that may follow from the statutory interpretation he is proposing.

Accordingly, for the reasons expressed herein and consistent with our decision today in In the Matter of the Disqualification from School Employment of J.W., we remand this matter to the Commissioner with direction that it be transmitted to the Office of Administrative Law for further proceedings and an initial determination in

[5] We note that both N.J.S.A. 2C:35-16.1, which provides for notice to a property owner of drug offenses committed by a tenant on his property, and N.J.S.A. 2A:18-61.1, which authorizes the eviction of a tenant following conviction for a drug offense which occurred on the rental premises, include language which is similar to the drug provisions of N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:39-19.1 except that they expressly include drug paraphernalia.

conformity with this decision.[6] We retain jurisdiction and therefore direct the Commissioner to transmit this matter back to us once he has rendered his final decision.

February 4, 1998

Date of mailing FEB 06 1998

[6] Given the procedural posture of this case, both the petitioner and the Office of Criminal History Review should be party to the proceedings on remand.

62-97

62-97

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BARNEGAT	:	DECISION
TOWNSHIP, OCEAN COUNTY.	:	
_____	:	

FEBRUARY 11, 1997

OAL DKT. NO. EDU 4706-95
AGENCY DKT. NO. 93-4/95

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 11, 1997

DATE OF MAILING FEBRUARY 11, 1997

(SB) 62-97

SBE #434-01/97
SB # 62-97

IN THE MATTER OF THE ISSUANCE OF :

AN EMERGENCY TEACHING CERTIFI- : STATE BOARD OF EDUCATION

CATE TO CHRISTOPHER ILCONICH. : DECISION ON MOTION

Decided by the State Board of Examiners, January 23, 1997

For the Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent, Nancy Kaplen, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

On July 7, 1997, Christopher Ilconich (hereinafter "respondent") filed a notice of appeal to the State Board of Education. It appeared from the notice that respondent was seeking to appeal a decision issued by the State Board of Examiners on January 23, 1997 denying an application he had made for emergency certification as a teacher of the handicapped. In that respondent's notice appeared to be untimely, we notified him in a letter dated July 9 that this matter was being referred to our Legal Committee and that he could make a submission relating to the untimeliness issue by July 21.

By letter dated July 15, 1997, respondent indicated that this matter had arisen from an order issued by the Board of Examiners to show cause why his Teacher of Elementary School certificate of eligibility should not be revoked or suspended, at which time the Board of Examiners had also taken action to "block" issuance of an emergency certification to him during the pendency of those proceedings. Respondent characterizes this appeal as interlocutory and contends that his notice was filed within the five-day time

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limit imposed by N.J.A.C. 6:2-2.3,[1] arguing that a letter dated June 23, 1997 from Ida Graham, Secretary for the Board of Examiners, constituted the first notice that may be used to assess the timeliness of his appeal. He further contends that the notice was timely because it was filed within five working days after June 27, 1997, the date on which he received Ms. Graham's June 23 letter.

After reviewing the record certified to us on behalf of the State Board of Examiners, we conclude that respondent had sufficient notice of the Board of Examiners' interim action upon receipt of a letter from Ida Graham dated May 12, 1997. By letter of that date, Ms. Graham advised respondent that:

> As noted in our April 28, 1997 reply, upon receipt of your client's request for reconsideration of the State Board of Examiners' previous decision to block issuance of an Emergency Teacher of the Handicapped License, the Board discussed, deliberated and determined at its April 3, 1997 meeting that there were insufficient reasons tendered to the Board in April to alter its earlier decision to block issuance of that license to Mr. Ilconich. The reasons for the January 23, 1997 determination were provided in our letter decision dated February 14, 1997.

Certainly such letter provided respondent with notice of the "action" from which he is now seeking leave to appeal sufficient to permit him to comply with the filing requirements of N.J.A.C. 6:2-2.3.

Moreover, we find that respondent's notice of appeal was not timely even if we accept his contention that June 27, the date on which he received the Board of Examiners'

---

[1] N.J.A.C. 6:2-2.3 provides that:

> Motion for leave to appeal an interlocutory order, decision or action shall be made by filing a motion for leave to appeal to the State Board of Education within five days after the action or service of the interlocutory decision or order. Motion for leave to appeal shall conform to the requirements of N.J.A.C. 6:2-1.18, except that the brief in support of the motion shall also include the merits of the issues sought to be appealed. The respondent's answer shall be filed within 10 days of service of motion.

June 23 correspondence, should be the operative date for assessing the timeliness of his notice. N.J.A.C. 6:2-2.3 requires that a motion for leave to appeal an interlocutory order or decision must be filed "within five days after the action or service of the interlocutory decision or order." Thus, even accepting June 27 as the operative date for assessing the timeliness of the appeal, respondent's notice would have been due on July 2, 1997. As noted, respondent did not file his notice until July 7. N.J.A.C. 6:2-2.3 does not provide five working days for filing a motion for leave to appeal, as respondent urges. Nor do we find the circumstances herein, as presented by respondent, to be such as to warrant relaxation of our rules. N.J.A.C. 6:2-1.19.

Accordingly, we conclude that respondent's notice of motion for leave to appeal an interlocutory decision of the State Board of Examiners was not filed in a timely manner. We stress, however, that an interlocutory ruling may be subject to our review upon appeal from a final decision on the merits of the case. N.J.A.C. 1:1-14.10.

Finally, we note that although respondent sought to challenge a determination of the Board of Examiners to "block issuance" of an emergency certificate to him pending the outcome of proceedings to revoke his certificate of eligibility, see N.J.A.C. 6:11-4.4, an emergency certificate is, in contrast to standard certification, a substandard certificate issued for a period of one year only on application of a public school district. N.J.A.C. 6:11-4.3.

Maud Dahme recused herself from this matter.

September 3, 1997

Date of mailing SEP 05 1997

64-97

64-97 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF C.M.H.	:	DECISION
	:	

FEBRUARY 11, 1997

OAL DKT. NO. EDU 8331-96
AGENCY DKT. NO. DHP 60-96

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF C.M.H.	:	DECISION
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on January 1, 1997, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 11, 1997
DATE OF MAILING FEBRUARY 11, 1997

65-97

65-97

IN THE MATTER OF THE SPECIAL	:	
ELECTION HELD IN THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF WEST ORANGE,	:	DECISION
ESSEX COUNTY.	:	
_____	:	

FEBRUARY 11, 1997

OAL DKT. NO. EDU 12393-95
AGENCY DKT. NO. 464-12/95

IN THE MATTER OF THE SPECIAL	:	
ELECTION HELD IN THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF WEST ORANGE,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 11, 1997
DATE OF MAILING FEBRUARY 11, 1997

(SB) 65-97

SB #65-97

IN THE MATTER OF THE CERTIFICA- :
TION OF THE EDUCATION BUDGET OF :
THE BOARD OF EDUCATION OF THE : STATE BOARD OF EDUCATION
CITY OF ATLANTIC CITY PURSUANT TO : DECISION
N.J.A.C. 18A:22-38, ATLANTIC COUNTY. :

Decided by the Commissioner of Education, June 13, 1997

For the Appellant, Jacobs & Jacobs (Joseph M. Jacobs, Esq., of Counsel) and Michael C. Epps, Esq.

Based upon our review of the record in this matter, with particular attention to the arguments offered by the Atlantic City Board in support of its appeal, we conclude that the Board has failed to establish that it is necessary to restore $350,000 in line item reductions made by the Commissioner to its proposed budget for 1997-98 in order for it to provide a thorough and efficient education to its students. Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, decided by the State Board, July 6, 1994. That being the case, the Commissioner's participation in this matter is not required and, accordingly, we have not addressed whether the submission made on his behalf in this appeal should be considered.

November 5, 1997

Date of mailing NOV 07 1997

66-97

M.J., on behalf of minor child, C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 11, 1997

OAL DKT. NO. EDU 5226-96
AGENCY DKT. NO. 83-3/96

M.J., on behalf of minor child, C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 11, 1997
DATE OF MAILING FEBRUARY 11, 1997

(SB) 66-97

DHPL #276-97
DHPL #325-97
SB # 66-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF D.E.S. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, May 23, 1997

Decision on motion by the Assistant Commissioner of Education, June 19, 1997

For the Petitioner-Appellant, D.E.S., pro se

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

November 5, 1997

Date of mailing NOV 07 1997

69-97

INTERLOCUTORY REVIEW

SUMMARY OF COMMISSIONER'S DECISION

Ruben Gonzalez, Paul J. O'Donohue, Claude Craig, and Steven G. Block v. State-operated School District of the City of Newark, Essex County

Petitioners, employees of the Newark Board prior to takeover, argued they were terminated without notice, contrary to *N.J.S.A.* 18A:7A-44b and c. They sought reinstatement with back pay.

ALJ found that certain nontenured employees are entitled to protection under the takeover statutes and that petitioners were potentially improperly terminated.

Commissioner granted motion for interlocutory review of the ALJ's order and established that there is a distinction between at-will termination of a particular employee pursuant to contract terms and abolishment of his position as part of the State reorganization, with the protections of the takeover statute applying only in the latter case. As recommended by the ALJ, the Commissioner directed matter proceed to further fact-finding.

FEBRUARY 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTIONS

OAL DKT. NOS. EDU 12388, 12390
12391 AND 12394-95
AGENCY DKT. NOS. 444-11/95,
441-11/95, 443-11/95, AND 442-11/95
(CONSOLIDATED CASES)

RUBEN GONZALEZ, PAUL J. O'DONOHUE,
CLAUDE CRAIG, AND STEVEN G. BLOCK,
Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT,
CITY OF NEWARK,
Respondent.

Philip Elberg, Esq., for petitioners (Medvin & Elberg, attorneys)

Derlys Maria Gutierrez, Esq., and **Cherie L. Maxwell**, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

Ruben Gonzalez, Ed.D. (Gonzalez or petitioner), Paul J. O'Donohue (O'Donohue or petitioner), Steven G. Block (Block or petitioner), and Claude Craig

(Craig or petitioner) filed petitions with the State Department of Education (DOE) on November 15, 1995. Petitioners requested relief pertinent to actions taken by the State-Operated School District of the City of Newark (District or respondent). Respondent filed answers on December 6, 1995. The DOE transmitted the matters to the Office of Administrative Law on December 18, 1995 for determination as contested cases pursuant to *N.J.S.A.* 52:14F-1 to -13.

A telephone conference was conducted on March 4, 1996, at which time it was agreed that the matters would be consolidated. An order to that effect was issued on March 7, 1996. Hearings scheduled for October 1996 were subsequently adjourned at the parties' requests.

Respondent filed a motion for summary decision on August 12, 1996. The deadline for the extension of a reply thereto was granted at petitioners' requests. Petitioners filed a reply to the District's motion and a cross-motion for summary decision on October 23, 1996. The deadline for the filing of a response thereto was extended at respondent's request. Respondent filed a response on November 25, 1996. Petitioners did not file a reply to the response to the cross-motion.

NATURE OF THE CASE

On July 11, 1995, the DOE removed the Newark Board of Education (Board) and created a State-Operated School District, pursuant to *N.J.S.A.* 18A:7A-34 *et seq.*, commonly referred to as the "Takeover Statute." Petitioners were employees of the Board prior to the takeover. The District terminated petitioners' employment on August 17, 1995. Petitioners argue that they were terminated without notice, contrary to *N.J.S.A.* 18A:7A-44b and c, and that they therefore should be reinstated, with back pay. Respondent argues that those provisions are not applicable, that petitioners were "at will" employees, both before and after the takeover, and that they were not entitled to notice. The issues, broadly, are whether petitioners were entitled to notice and, if so, what relief should be granted.

FINDINGS OF FACT

Based upon a review of the motion papers, I **FIND** the following to be material facts.

Petitioners were at-will employees of the Board. O'Donohue was appointed by the Board to the position of Director of Purchasing and Warehousing, effective September 1, 1980, and he served in that position until his termination, effective August 17, 1995. His accomplishments during his employment with the Board included automating the district's financial management and procurement system, assuming responsibility for fixed asset management, and utilization of a warehousing system for textbooks.

The position of Director of Purchasing and Warehousing is an unclassified civil service position. O'Donohue did not have tenure in any position he held with the Board. O'Donohue was a central administrative or supervisory employee of the Board.

Craig was employed by the Board effective May 4, 1993. From that date through June 1, 1989, he held various provisional positions under civil service statutes. The Board appointed Craig to the unclassified civil service position of Executive Director of Personnel, effective June 1, 1989. He was terminated from that position, effective August 23, 1991. The Board provisionally appointed Craig to the position of Hearing Officer, effective August 23, 1991. He remained in that provisional civil service appointment until his termination by respondent, effective August 17, 1995. Craig did not have civil service protection. Craig was not tenured in any position with the Board.

In his last position, Craig was employed in the Board's Office of Hearing Grievance. He was the Board's only hearing officer and heard approximately 500 cases annually. Craig never supervised any employees as a Hearing Officer.

Block was appointed by the Board to the position of Executive Director, in the Office of Accountability and Quality Assurance, effective October 31, 1994. His position did not have civil service status, and Block had no tenure in the position with the Board. Block was a central administrative or supervisory employee of the Board.

Block's position related to supporting and augmenting the Board's efforts to implement reform on a program of comprehensive school improvement. His responsibilities included the provision and encouragement of reviews, inspections, evaluations, and analyses utilized by teachers and principals, in-school managers and technical personnel, and essential office staff. His accomplishments included the design and implementation of senior staff review of the quality of reform initiatives, a planning and development effort to bring a school quality review process to the school district, and development and initial implementation of a peer review program designed to provide reviews of the quality of plans by Board personnel prior to implementation.

Gonzalez was appointed by the Board to the position of Executive Superintendent, effective July 1, 1993. He did not have tenure in any position with the Board and did not have civil service status. He was one of five Assistant Executive Superintendents, responsible for one of the five clusters of schools into which the district was divided. Gonzalez's responsibilities involved the supervision of Cluster 4, that part of the City with the largest portion of Hispanic students. From 1979 through 1982, he served as the Board's director of the English as a Second Language Program and Bilingual Education. Gonzalez was a central administrative or supervisory employee of the Board.

The State District Superintendent, Dr. Beverly Hall (Hall), was appointed to her position after the State Board of Education (State Board) removed the Board and created a State-Operated School District. The State assumed control on or about July 11, 1995. At that time, Hall was appointed as Acting Superintendent for up to one year.

On July 13, 1995, Block was called to a meeting with the interim acting State Superintendent. He was asked to provide an undated letter of resignation and was

ensured that the incoming Acting State District Superintendent, Hall, would evaluate his job and performance and would, as a result, determine if he would be terminated, reassigned, or held-over.

On or about July 13, 1995, Gonzalez received a letter, dated July 13, 1995, from Barbara Anderson (Anderson), the then Acting District Superintendent. This letter read as follows:

> As you know, as an 'at-will' employee, you serve at the pleasure of the Acting State District Superintendent. Your employment is, therefore, subject to termination at any time without cause. However, to facilitate any employment actions that may be taken during this transition period, I am requesting letters of resignation from all central office district staff that serve in an 'at-will' capacity in the Newark School District. As we discussed, I would like you to submit that letter of resignation to me by noon tomorrow, July 14, 1995. In the event your resignation is accepted, you will be notified in writing by the Acting State District Superintendent.
>
> Thank you for your anticipated cooperation in an orderly transition to state operation of the Newark School District.
>
> [Exhibit A to Randall Kanter's (Kanter) certification in support of respondent's motion and Exhibit A to petitioners' cross-motion.]

On or about July 13, 1995, O'Donohue, Block and Craig received letters, dated July 13, 1995, from Anderson, similar to the letter sent to Gonzalez.

On or about July 13, 1995, Gonzalez submitted a letter of resignation to Anderson, dated July 13, 1995. This letter read as follows:

> As per your request, I am submitting my resignation as assistant executive superintendent, effective upon acceptance.
>
> [Exh. B to Kanter's certification in support of respondent's motion and Exh. B in support of petitioners' cross-motion.]

On or about July 13, 1995, O'Donohue, Block, and Craig submitted letters of resignation to Anderson similar to that submitted by Gonzalez.

On or about July 17, 1995, petitioners received letters from the Commissioner of the DOE (Commissioner), which were dated July 17, 1995 and which were sent to all employees of the District. The letters stated, in part, that:

> The administrators, teachers, and noninstructional employees of the Newark School District have a very special role to play in turning the district around quickly so that students can sense immediately that their future will be brighter. It is not the intention of the state to replace employees. Displaced administrators will have their tenure rights recognized within the district and those employees who are performing their duties satisfactorily for the students of Newark will remain employed.
>
> Improving the schools in Newark will be an extremely challenging task. I am a firm believer that the first and most important step in pursuing that success is the creation of a partnership among the state, the employees of the Newark School District, parents, and community leaders in the city.
>
> [Exh. E to petitioners' brief in opposition to respondent's motion and in support of petitioners' motion.]

On August 17, 1995, petitioners were informed that their resignations had been accepted. On August 17, 1995, O'Donohue was instructed to report to the Office of the Acting District Superintendent, where he was given a letter informing him that his letter of resignation had been accepted, effective immediately. He was not given any reason for his termination and was not told that his work was deficient in any manner. O'Donohue was required to leave the District that day. On that day, at approximately 11:00 a.m., Block was summoned to the Office of the Acting District Superintendent. Hope Blackburn, the Acting District General Counsel, and Carol Perry, the Acting District Chief of Staff, were present. Hall informed Block that she was accepting his letter of resignation. Hall indicated that Block had to be out of his office by 5 p.m. that day and that he would be entitled to any accrued vacation pay in lieu of days off.

Gonzalez received a letter from Hall, dated August 17, 1995, on or about August 17, 1995. That letter read as follows:

> This is to inform you that your letter of resignation dated July 13, 1995, from the position of Assistant Executive Superintendent has been accepted effective immediately. You are advised that you are entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which you may be entitled within the district. District records indicate that you have no claim to any other position in the district. If you disagree, please advise me in writing no later than August 21, 1995, as to the position to which you claim an entitlement and the basis of that claim.
>
> Accordingly you are directed to vacate your office by the end of business today. You should report to Michael Popovitch to arrange to return all district property you currently possess. Please remove all of your personal belongings from the building.
>
> Be advised that you will be compensated for any unused accumulated vacation time. Thank you for your service to the district.
>
> [Exhibit C to Gonzalez's certification in support of petitioners' cross-motion.]

O'Donohue, Craig, and Block received similar letters on or about August 17, 1995.

DISCUSSION

The Takeover Statute provides that whenever the Commissioner determines, after the issuance of an administrative order, that a local school district has failed to assure a thorough and efficient system of education, the State Board may issue an administrative order removing the local district board of education and creating a State-operated school district. Such school district shall become effective immediately upon issuance of the State Board's order. *N.J.S.A.* 18A:7A-34.

The schools of a State-operated school district shall be conducted by and under supervision of a State District Superintendent of schools, appointed by the State Board upon recommendation of the Commissioner. The State District Superintendent shall perform all duties and possess all powers heretofore and thereafter assigned, in Title 18 of the *New Jersey Statutes*, to central administrative and supervisory staff, instructional and noninstructional, including, but not limited to, the superintendent of

schools, secretary of the board of education, school business administrator, school business manager, and assistants and clerks thereto. *Id.* at §35d (Supp. 1996). The State District Superintendent generally has the power to perform all acts and do all things necessary for the proper conduct, maintenance, and supervision of schools in the district. *Id.* at §e. The State District Superintendent may also make, amend, and repeal district rules, policies, and guidelines for the proper conduct, maintenance, and supervision of the schools in the district. *Id.* at §f.

When a State-operated district is established, collective bargaining agreements entered into by the school district shall remain in force, except as otherwise provided. *N.J.S.A.* 18A:7A-40a. Also except where otherwise provided, all teaching staff members and other employees of a State-operated district shall retain and continue to acquire all rights and privileges acquired pursuant to Title 18A of the *New Jersey Statutes*. *Id.* at §b.

All officers, employees, and consultants, professional and nonprofessional, certified and noncertified, shall be employed or retained, transferred and removed as provided in the Takeover Statute. *Id.* at §42a. The State District Superintendent may appoint, transfer, and remove clerks, pursuant to pertinent civil service and educational statutes. *Id.* at §(1). Subject to the approval of the Commissioner, the State District Superintendent shall appoint and set the salaries of such State assistant superintendents as the superintendent deems necessary and assign their duties and responsibilities. No State assistant superintendent shall acquire tenure, not withstanding any other provision of law. *Id.* at §(2). Also subject to the Commissioner's approval, the State District Superintendent, or his/her designee, shall make all personnel determinations regarding employment, transfer, and removal of all officers, employees, professional and nonprofessional, except that the services of the districts' auditor or auditors, and attorney or attorneys, shall be immediately terminated by creation of a State-operated school district. *Id.* at §(3). The State Superintendent may delegate any of his/her powers and duties. *Id.* at §b.

Except as otherwise provided, any individual serving under tenure or permanent civil service status shall retain all tenure rights and may continue to serve in the district pursuant to applicable statutory provisions. Such individuals shall perform only such duties prescribed or delegated by the State District Superintendent and for which he/she may be appropriately certified. *Id.* at §43.

The Takeover Statute also specifically addresses the employment status of certain categories of employees of the Board. *N.J.S.A.* 18A:7A-44, effective July 11, 1995, provides:

> a. Notwithstanding any other provision of law or contract, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Any individual whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the individual may be entitled by virtue of tenure or seniority within the district. No individual whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.
>
> b. Within one year of the establishment of the State-operated school district, the State district superintendent shall prepare a reorganization of the district's central administrative and supervisory staff and shall evaluate all individuals employed in central administrative and supervisory staff positions. The State district superintendent shall implement the reorganization on the July 1 next following its preparation, unless otherwise directed by the commissioner.
>
> c. Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, other than those positions abolished pursuant to subsection a of this section, shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of *N.J.S.A.*

> 18A:28-6. Individuals hired as State assistant superintendents shall not be hired with tenure and shall not acquire tenure. Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Notwithstanding this limitation, nothing herein shall preclude an individual from asserting upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs. Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.
>
> [*Id.* at §44 (Supp. 1996).]

The Takeover Statute also addresses the evaluation and dismissal of principals. Upon appointment, the State District Superintendent is required to establish an assessment unit to conduct on-site evaluations of each building principal in accordance with criteria established by the Commissioner and to render evaluation reports. A minimum of three evaluations are required for each principal within six months following the reorganization of the central and administrative staff. After the completion of an assessment cycle of not less than twelve months, the State District Superintendent may dismiss any tenured principal for certain specified reasons. A principal may also be dismissed prior to the completion of an assessment cycle if the basis for the dismissal is incapacity or unbecoming conduct. *N.J.S.A.* 18A:7A-45.

Respondent argues that Section 44 of the Takeover Statute only applies to individuals who had tenure prior to the reorganization because the statute was not intended to give at-will employees greater rights than they had prior to a takeover. Petitioners argue to the contrary. I am not persuaded by respondent's analysis.

It is a long-standing principle of statutory construction that the plain and unambiguous terms of a statute are controlling:

> It is elementary that the meaning of a statute must come in the first instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body, which passed it, the sole function of the courts is to enforce it according to its terms.
>
> [*Caminetti v. United States*, 61 *L.Ed.* 442, 455 (1916) (*Caminetti*).]

The standard articulated in *Caminetti* has been adopted in New Jersey. *Greenway Development Co.*, 185 *N.J. Super.* 86 (App. Div. 1982). Although the Legislative intent "ultimately controls," the Legislative will must be interpreted as written, "not according to some supposed unexpressed intention." *Hoffman v. Hock*, 8 *N.J.* 397, 408-409 (1952). *Accord, International Broth. of Elec. Workers v. Gillen*, 174 *N.J. Super.* 326, 329 (App. Div. 1980) (*International Broth.*).

The general rule of statutory interpretation is that the language of the statute itself is the first indicator used. If the statute is by its terms clear and unambiguous on its face, ". . . we need delve no further than the act's literal terms to define the Legislature's intent." *State v. Butler*, 89 *N.J.* 220, 226 (1982). The statutory language should be given its ordinary meaning, ". . . absent specific intent to the contrary." *Renz v. Penn Central Corp.*, 87 *N.J.* 437, 440 (1981). *Accord, International Broth., supra.* The facial meaning of the statutory language in question controls. *International Broth., supra.*

The plain language of Section 44 of the Takeover Statute divides central administrative and supervisory staff into two categories: One consists of those holding the positions of chief school administrator and executive administrators responsible for curriculum, business and finance, and personnel. Those positions shall be abolished immediately upon creation of a State-operated school district, and individuals holding them shall be given 60 days' notice of termination or 60 days' pay. All other positions of central administrative and supervisory staff shall be abolished upon the reorganization of a State-operated school district staff. As discussed hereinabove, the State District Superintendent may hire an individual whose position is abolished, based

upon an evaluation of the individual and staffing needs of the reorganized district staff. Such individual shall be hired with tenure if he/she had tenure in a prior position.

Paragraph c of Section 44 references the treatment of individuals who did not have tenure in prior positions as well as those who did. These provisions evidence a Legislative intent that the pertinent provisions are applicable to at-will employees. In addition, contrary to provisions addressing individuals serving under tenure or permanent civil service status, *N.J.S.A.* 18A:7A-43, as well as those pertinent to the evaluation of building principles, *Id.* at § 45, Section 44, on its face, applies to individuals who had tenure and those who did not prior to a takeover. Such a construction is also supported by the tenor of the Commissioner's letter of July 17 1995, although such is not determinative. The District's analysis is clearly at odds with the clear, unambiguous language of the pertinent statutory provisions. Respondent does not reference any Legislative history which supports its position, and in any event, as discussed, the facial language of the statute controls.

Adoption of respondent's position would also render provisions of Section 44 void. In interpreting a statute, consideration and effect must be given to all of the provisions. However:

> An inference of surplusage in a legislative enactment should not be readily entertained, and no statutory language should, if reasonably available, be found to be inoperative, superfluous or meaningless. A court certainly may not read out express provisions which continue to make sense on pure speculation that the Legislative meant to delete it or by some strained enlargement of an exception. . . . It is to be assumed that each word and phrase in a statute was incorporated by design of the Legislative, and the statute must be construed as a whole, giving effect to each and every portion thereof, in a manner consistent with the general scheme and intent of the whole [citation omitted].
>
> [*State Bd. of Med. Examiners v. Warren Hospital*, 102 *N.J. Super.* 407, 413-414 (Cty. Ct. 1968), *aff'd,* 104 *N.J. Super.* 409 (App. Div. 1969).]

The certification of Kanter, the District's Assistant Superintendent for Human Resources, which was filed in support of respondent's motion, states that O'Donohue,

Block and Gonzalez were central administrative or supervisory employees of the Board. That certification is reflected in the above findings of fact. Kanter does not specifically address Craig's status in that respect, and petitioners argue that he was a member of the central administrative or supervisory staff.

Although the Takeover Statute does not define central administrative and supervisory staff, the great latitude given to the State District Superintendent in selecting personnel who comprise central office staff has been recognized. *Cirasa v. State-Operated School of the District, City of Paterson*, 95 *N.J.A.R. 2d.* (EDU) 141, *aff'd*, (N.J. App. Div., Dkt. No. A-2408-93T2, Jan. 10, 1995). In *Cirasa*, the administrative law judge, whose decision was upheld by the Commissioner, the State Board, and the Appellant Division, noted that:

> *N.J.S.A.* 18A:7A-44 establishes a two-part test for determining which positions fall within its scope: whether the particular position is 'administrative' or 'supervisory'; and, if so, whether the particular position belongs to the 'central office' as opposed to being building-based. Given the blurred lines of responsibility and confused organizational structure typical of a mismanaged local school district, the State District Superintendent is not bound by the outgoing administration's assignment of functions or duties [footnote omitted]. What truly matters is the function which each employee should be performing in an effectively managed school system.
>
> [*Cirasa* at 145-146.]

The fact that individuals may not have had policy-making authority is not determinative. *Id.* at 146. Nor is it determinative that individuals who are considered to be lower or middle-level managerial staff are eligible to join a collective negotiating unit. A crucial factor is whether or not the individuals in question have district-wide responsibilities and are therefore members of 'central' office staff. *Ibid.* In this respect, the fact that individuals may be 'cluster' supervisors assigned to a certain number of school buildings is not determinative. *Ibid.*

Although Craig's exact duties and assignments are not entirely clear, I am persuaded that there are no material facts in dispute regarding his prior employment

and that he falls within that category of employees referenced in Section 44 of the Takeover Statute. As found, Craig was employed in the Board's Office of Hearing Grievances as a hearing officer, was the Board's only hearing officer, and heard approximately 500 cases annually. It is evident that his responsibilities were district-wide, not building-specific. The fact that he did not supervise other individuals is not, as discussed hereinabove, determinative. However, it is not clear if petitioners fall within *N.J.S.A.* 18A:7A-44a or c.

Section 44b requires that a reorganization of a local district's central administrative and supervisory staff be completed within one year of the establishment of a State-operated district. Paragraph c clearly requires that the positions of the categories of employees referenced therein shall be abolished upon such a reorganization. The positions of such individuals, therefore, cannot be abolished until a reorganization has been completed. It is not clear from the motion papers if a reorganization was completed prior to the terminations of petitioners.

A motion for summary decision may be granted if the papers and any discovery, in addition to affidavits, demonstrate that there is no genuine issue regarding any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5.

For the foregoing reasons, I **CONCLUDE** that petitioners held positions of the central administrative and supervisory staff, as referenced in *N.J.S.A.* 18A:7A-44.

It is hereby **ORDERED** that petitioners' and respondent's motions for summary decision be and are hereby **DENIED** and that a hearing be conducted on the questions of whether petitioners fall within *N.J.S.A.* 18:7A-44a or c, whether respondent implemented a reorganization of central administrative and supervisory staff, pursuant to *N.J.S.A.* 18A:7A-44b, and what relief should be granted to petitioners if they ultimately prevail.

This order may be reviewed by the **Commissioner of the Department of Education** either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

January 10, 1997
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

njf

OAL DKT. NO. EDU 12388, EDU 12390, EDU 12391 AND EDU 12394-95
(CONSOLIDATED)
AGENCY DKT. NOS. 441-11/95, 442-11/95, 443-11/95 AND 444-11/95

RUBEN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG, AND STEVEN G. BLOCK,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION ON MOTION
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

This matter has come before the Commissioner by way of Respondent's motion for interlocutory review of the ALJ's order denying the parties' cross motions for summary judgment. Relying on papers filed with the ALJ, respondent State-operated School District ("District") urges the Commissioner to find that, as a matter of law, the protections of *N.J.S.A.* 18A:7A-44 do not apply to nontenured, at-will employees, who should have no greater protection under the "takeover" law than they would be accorded had the District remained under local control, and that, therefore, the ALJ should have summarily dismissed petitioners' appeals. Petitioners did not oppose the District's request for review of the ALJ's order on an interlocutory basis.

Upon consideration, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:7A-44 applies to both tenured and nontenured employees. He clarifies, however, that it applies *only* to those employees *whose positions are abolished upon the establishment, or as a result of the reorganization of,* a State-operated district; it does *not* apply to individual decisions to terminate employment where the underlying position is not abolished. Abolishment of a position and termination of employment are not synonymous and, in the latter circumstance, which is neither expressly addressed nor implicitly encompassed in the special statutory scheme governing establishment and operation of State-operated school districts, the terminated

employee is afforded all the protections to which he or she would ordinarily be entitled by contract, tenure or civil service status, no more and no less.

Because the record herein is insufficient to establish whether petitioners' employment was terminated or their positions abolished and, if the latter, whether by operation of law (*N.J.S.A.* 18A:7A-44a) or district reorganization (*N.J.S.A.* 18A:7A-44c), it remains necessary for this matter to proceed to further fact-finding as recommended by the ALJ. The Commissioner stresses, however, that should such fact-finding reveal that petitioners' positions were not abolished pursuant to these "takeover" statutes but, rather, that their individual employment was terminated by the lawful discretionary action of the State superintendent, as at-will employees they would be entitled to no relief in the instant proceedings.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 11, 1997

(SB) 69-97

DHPBL #406-97
SB # 69-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF C.M.P. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, August 8, 1997

For the Petitioner-Appellant, C.M.P., pro se

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

November 5, 1997

Date of mailing NOV 07 1997

70-97

IN THE MATTER OF THE TENURE :
HEARING OF LEONARD J. MARANO, :
BOARD OF EDUCATION OF THE :
BOROUGH OF LINCOLN PARK, :
MORRIS COUNTY. :

LEONARD J. MARANO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE :
BOROUGH OF LINCOLN PARK, DECISION
MORRIS COUNTY, :
RESPONDENT. :

LEONARD J. MARANO, :
PETITIONER, :
V.
BOARD OF EDUCATION OF THE :
BOROUGH OF LINCOLN PARK,
MORRIS COUNTY, :
RESPONDENT. :
:

SYNOPSIS

In consolidated matter, Board certified tenure charges against School Business Administrator Marano for allegedly obtaining District funds under false pretenses; Marano appealed withholding of his increment; and Marano alleged Board acted without statutory authority in abolishing position of school business administrator.

ALJ found consolidated matter to be moot by virtue of the criminal action and forfeiture of Marano's position by order of the Superior Court. ALJ concluded Marano forfeited his position as business administrator and his right to public employment. Moreover, ALJ found that Marano was not entitled to any further payment after the 121st day of the certification of tenure charges due to the fact that the delays in this case were caused by, or attributable to, Marano and concerns regarding the criminal matter which was pending against him. ALJ ordered that the Board's motion for summary decision denying back pay to Marano for the period of time from October 1994 through April 3, 1995 be granted.

Commissioner affirmed in part/reversed in part the initial decision of the ALJ. The Commissioner initially concurred that the within matters, including the tenure charges, were rendered moot as a result of the criminal matter and Marano's subsequent forfeiture of his position. In this regard, Commissioner found without merit Marano's contention that there was no nexus between the criminal charges to which he pled guilty and his position in the District. Commissioner determined that, pursuant to the parties' agreement, Marano had an entitlement to salary beginning on December 15, 1994, when the hearing in this matter was rescheduled. Such salary entitlement terminated on March 16, 1995, when Marano's attorney requested that the matter be placed on inactive status. The Commissioner specifically noted, contrary to the conclusion of the ALJ, that the record contained no indication that Marano requested any postponement or inactive status during this period. Thus, the Commissioner ordered the within Petitions of Appeal be dismissed and that the Board compensate Marano in accordance with this decision.

FEBRUARY 13, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION

IN THE MATTER OF THE TENURE HEARING OF LEONARD J. MARANO, BOARD OF EDUCATION OF THE BOARD OF LINCOLN PARK, MORRIS COUNTY.

OAL DKT. NO. EDU 12098-93
AGENCY REF. NO. 406-12/93

LEONARD J. MARANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 8695-94
AGENCY REF. NO. 353-8/94

LEONARD J. MARANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,
Respondent.

OAL DKT. NO. EDU 2040-95
AGENCY REF. NO. 477-12/94

Paul E. Griggs, Esq., for Leonard J. Marano

Anthony P. Sciarrillo, Esq., for Board of Education of the Borough of Lincoln Park

Record Closed: September 30, 1996 Decided: November 6, 1996

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

PROCEDURAL HISTORY

These cases originally arose by way of tenure charges filed against Leonard J. Marano which were certified to and transmitted to the Commissioner of Education in December 1993. After that case had been transmitted for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 to the Office of Administrative Law (OAL) two other matters were filed in which Marano was the petitioner rather than the respondent. For these reasons Marano and Board of Education will be used rather than petitioner and respondent because the parties' positions change depending upon which of the consolidated cases is being discussed.

The matter was originally set down for hearing dates, however, after a number of conferences with the parties it was determined that the parties wished the matter to be placed on the inactive list because of a potential impending criminal indictment with respect to Marano. In the interim an order was signed placing the matter on the inactive list at the request of Marano for a period of four months. (C-1, ev.).

The order was signed in June 1994 and it stated that respondent waived his salary entitlement set forth in *N.J.S.A.* 18A:6-14 during the period commencing on the date of the order and until the matter was rescheduled for hearing.

At that time a question arose as to payment of Marano between the 121st calendar day after the certification of tenure charges and the period of time when the matter was placed on the inactive list. During all points relevant to this and the related cases Marano has been suspended. With respect to that issue a motion was filed by the Board of Education to set up an escrow account for any moneys which would have been due pursuant to the statute up until the January 1, 1994 order placing the matter on the inactive list. The Board of Education requested to set up an escrow account rather than to pay Leonard J. Marano the moneys which, by statutory, were due to him. The Board of Education's motion was denied. (C-2). Although the motion was denied

it dealt only with the period from the 121st day after which he had been suspended through June 1, 1994.

The related matters in this case were filed by Marano subsequent to the tenure charges. One matter was a petition questioning the withholding of a salary increment (EDU 8695-94) and the most recent of which contested the abolition of the position of school business administrator (EDU 2040-95). Although the original matter was resurrected from the inactive list, hearing dates in this matter have continually been adjourned at the request of the parties because of the federal indictment and the case which was being pursued in federal court on criminal charges.

Subsequent to disposition on the criminal charges a motion was brought in the Superior Court of New Jersey before the Honorable Reginald Stanton, A.J.S.C. requesting an order determining that Marano had forfeited his offices as business administrator/board secretary of the Board of Education of the Lincoln Park school district and any other public position held by him under the government of this State of any of its administrative or political subdivisions. An order was entered by the Superior Court on September 20, 1996 and it is deemed to have taken effect on November 2, 1995.

Of the original issues earmarked for summary decision only two remain for determination at this time and are dispositive of all three matters. The first was whether or not there was a forfeiture of Marano's positions. That has been answered by the Superior Court order and therefore is now moot in this proceeding. It is clear that by virtue of the order (C-3) Marano has in fact forfeited all rights to employment as detailed in the order.

The second issue is whether or not Marano is entitled to payment for the time of his suspension. Marano seeks payment for the period of October 14, 1994 through April 3, 1995. It is submitted by Counsel for Marano that the federal indictment and the

continued joint requests for adjournment did not affect Marano's entitlement under the statute.

LEGAL DISCUSSION

In order to determine whether or not Marano should be paid for any period of time after the 121st day of his suspension has already been addressed by way of the order indicating that payment was required between the 121st day after certification of charges up until June 1, 1994 at which time he waived payment of his salary and the matter was placed on the inactive list.

The next question becomes whether or not from October 1994 on any entitlement to salary is contemplated by *N.J.S.A.* 18A:6-14. That statutes states in pertinent part that upon certification of any charge to the Commissioner, the Board may suspend a person against whom such charges is made without pay however when a decision is not made on the charge by the Commissioner within 121 calendar days after certification of the charges, **excluding all delays which are granted at the request of such person,** then the full salary (except for said 121 days of such person) shall be paid beginning on the 121st day until such determination is made.

The history of this case makes it clear that while the matter was on the inactive list for a period of approximately four months each and every hearing date or event date whether by way of conference, in person or by telephone, adjournments were granted based upon requests of Marano in order to dispose of his criminal matter. While these requests were consented to it does not make any change in the fact that the delays were granted at the request of or caused by Marano. Even if there were some question about the timing of any of the subsequent hearing days which were removed and replaced based upon representations by Marano's attorney and largely timed by the events in the criminal case it should be clear that the very first adjournment which lead to the period of inactivity during which it is clear that Marano

waived all entitlement to salary was at Marano's request. Each and every event and delay stemmed from that original request. On the original hearing dates this tribunal was prepared to go forward and determine the tenure charges. It was Marano who requested that that not occur due to the pending criminal matter. As a result the delays in this case are attributable to Marano and therefore, notwithstanding the reactivation of the case, any delays which occurred afterwards are attributable both by direct request and inferentially by the initial request which changed the timing of the entire matter, to Marano. As a result, other than the salary question already dealt with between the 121st day from the suspension to June 1, 1994, Marano is not entitled to receive salary benefits pursuant to *N.J.S.A.* 18A:6-14.

CONCLUSION

As a result of the criminal matter and the forfeiture of his position the underlying cases are **FOUND** to be moot.

I further **CONCLUDE** that based upon the order Leonard Marano has in fact forfeited his position as business administrator and his right to public employment.

Additionally, I **FIND** that Leonard Marano is not entitled to any further payment after the 121st day of the certification of tenure charges due to the fact that the delays in this case were caused by Marano and concerns regarding the criminal matter which was pending against him and to which he had pled guilty and has now been sentenced.

ORDER

It is hereby **ORDERED** that the Lincoln Park Board of Education's motion for summary decision denying back pay to Leonard J. Marano for the period of time from October 1994 on while suspended by and hereby is **GRANTED.**

I further **FIND** that all three matters in this case are moot by virtue of the criminal action and the subsequent forfeiture order of the Superior Court. Therefore it is hereby **ORDERED** that the petitions in these cases be and hereby are **DISMISSED.**

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

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

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

11/6/96
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

11-13-96
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 18 1996
DATE

OFFICE OF ADMINISTRATIVE LAW

am(FV)mxl

APPENDIX

Witnesses

For petitioner:

None

For respondent:

None

Evidence

C-1 Consent order

C-2 Order denying motion

C-3 Order dated September 20, 1996 by the Honorable Reginald Stanton

OAL DKT. NOS. EDU 12098-93,
EDU 8695-94 and EDU 2040-95 (CONSOLIDATED)
AGENCY DKT. NOS. 406-12/93,
353-8/94 and 477-12/94 (CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF LEONARD J. MARANO, BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY.	:	
LEONARD J. MARANO, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
LEONARD J. MARANO, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Marano and replies thereto of the Board were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Marano's exceptions initially argue that the Administrative Law Judge (ALJ) erred in concluding that the delays in this matter are attributable to him thereby precluding his claim for salary reimbursement during the pendency of this matter. He maintains that the only document present in the record which confirms his consent to the placing of the tenure matter on inactive status is the Consent Order, dated June 15, 1994, which placed such matter on inactive status for a period not to exceed four months. Marano contends that the record is totally devoid of any other facts which would substantiate the ALJ's conclusion that subsequent delays in these proceedings were attributable to him.

Marano next argues that, pursuant to *N.J.S.A.* 18A:6-10 *et seq.*, he must be granted a hearing to determine whether he is entitled to be paid for the initial 120 days he was placed on suspension. In this connection, he asserts that the crime to which he pled guilty was tax evasion and, other than some ambiguous language set forth in his federal plea agreement with respect to "abuse of trust," "***there is not one scintilla of evidence to support the Board's position that the crime to which [he] pled guilty to (sic) touched his position as School Business Administrator, and therefore [that] the forfeiture is depositive (sic) of the tenure charge. (Marano's Exceptions at p. 2) Marano presents specific quoted portions of the transcript of his plea before the Honorable Judge Ackerman which, he argues, establish that there is no nexus between the tax evasion charges and his position or, for that matter, the tenure charges. Marano, therefore, asserts that his claim to salary entitlement for the initial 120-day period of his suspension is not a moot issue as concluded by the ALJ and he urges that this matter be remanded for a plenary hearing.

In response, with respect to the ALJ's attributing the delays in the adjudication of this matter to Marano, the Board contends that "[it] is unclear why, at this late date, Mr. Marano

continues to dispute his request for placement of this matter on inactive status." (Board's Reply Exceptions at p. 1) It asserts that the request for inactive status, which occurred on the eve of the commencement of the proceedings of the tenure matter, was clearly initiated by Marano with the clear intent of placing this matter on inactive status pending the outcome of the criminal charges. The Board urges that the language of the Consent Order of June 15, 1994 memorializing the parties' agreement to delay proceedings, which specifies a delay "not to exceed 4 months," was simply "utilized for the purpose of placing on the calendar a follow-up conference with respect to the status of the criminal matter." (*Id.* at p. 2) It asserts that it is undisputed that this delay in the proceedings is solely attributable to Marano.

With regard to the mootness of the tenure charges, the Board argues that Marano "continues to ignore the language of his plea agreement and the transcript of the sentencing before the Honorable Harold Ackerman of the Federal District Court. Both of these documents prove a nexus between the actions of Mr. Marano and his convictions of tax evasions." (*Id.* at p. 3) The Board urges that Marano quotes only selected portions of the transcripts in order to provide the Commissioner with "an incomplete and tainted view of the proceeding." (*Id.*) It requests the Commissioner to review the entire transcripts of both the plea agreement and sentencing to clearly understand what actually transpired on those occasions.

Upon an independent and comprehensive review of the entire record in this matter and the exceptions advanced by the parties, the Commissioner agrees with the conclusion of the ALJ that the within cases, including the tenure charges, have been rendered moot as a result of the criminal matter and the subsequent forfeiture of Marano's position. The Commissioner finds Marano's argument that he is entitled to a hearing on the tenure charges to establish his claim to payment for the 120 days of his initial suspension because there is no nexus between the crime to

which he pled guilty in federal court and his position as School Business Administrator in the District, without merit. The Commissioner concludes that a reasoned reading of the full context of the transcript of Marano's criminal plea on November 2, 1995 and that of his sentencing on June 18, 1996 before the Honorable Harold A. Ackerman of Federal District Court, establishes that there is a readily apparent nexus between the crimes to which Marano pled guilty and his position in the District. The Commissioner finds equally meritless Marano's assertion that the language in his federal plea agreement with respect to "abuse of trust" is ambiguous. Rather, in light of the record before him and the clear language of the federal sentencing guidelines detailing the applicability of this term in matters of this type, the Commissioner determines that the resultant conclusion is unmistakable. In this connection, the Commissioner notes that it is undisputed that Marano's plea agreement contains a stipulation wherein he agrees that a 2 level enhancement to his penalty in the tax evasion matters for "abuse of position of trust" is appropriate. It is further noted that such enhancement is made pursuant to U.S. Sentencing Guidelines (U.S.S.G.) Section 3B1.3 which provides

> If the defendant abused a position of public or private trust *** in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.***
> (Guidelines Manual dated November 1, 1994, at 232)

Moreover, the applicability of this provision is clarified in 1. of the Commentary to this Section which specifies

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. *For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense* (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more

> difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors. (emphasis added) (*Id.*)

In that Marano expressly acknowledges and agrees that his criminal conduct constituted an abuse of a position of trust, and given the specificity of the applicability of this penalty enhancement, the Commissioner finds Marano's contention that there is no nexus between his criminal conduct and his position in the District incomprehensible. Consequently, the Commissioner resolves that Marano can claim no entitlement to compensation for the initial 120-day term of his suspension.

As to whether Marano has any entitlement to salary for the period October 14, 1994 through April 3, 1995 pursuant to *N.J.S.A.* 18A:6-14, the Commissioner cannot agree that the record substantiates the conclusion of the ALJ that Marano is not entitled to receive any salary benefits for this period. Initially, in this regard, the Commissioner observes that 2. of the parties' Consent Order dated June 14, 1994 specifies

> The salary entitlement of Respondent as set forth in *N.J.S.A.* 18A:6-14 is hereby waived during the period commencing on the date of this ORDER *to and until the matter is rescheduled for a hearing.* (emphasis added)
> (Consent Order dated June 15, 1994 at p. 2)

The Commissioner further notes that the record before him substantiates that on December 13, 1994, counsel for Marano wrote to the ALJ requesting that this case be activated and hearing dates scheduled, which was accomplished by Notice of Plenary Hearing from the OAL, dated December 15, 199[4], wherein the parties were advised that this matter was rescheduled for hearing on April 3, 4, 5, 6, 7, 10, and 11, 1995. Notwithstanding the Board's argument in the record of this matter that the actual intent of the Consent Order executed by the

parties was that Marano was waiving his entitlement to salary until the hearing "commenced," the clear, unambiguous language of the consent agreement belies such an interpretation. As such, the Commissioner concludes that pursuant to the parties' agreement, Marano's entitlement to salary began on December 15, 1994, when the hearing in this matter was rescheduled. The Commissioner further concludes that such salary entitlement ceased on March 16, 1995 when, according to the certification of Marano's counsel in his June 12, 1995 motion papers

> On March 16, 1995, a telephone conference was held with the court and the parties[']' respective counsel at which time Respondent's counsel requested the hearing originally scheduled to begin on April 3, 1995 be adjourned and that the matter be again placed on inactive status on that date.***
> (Certification of Paul E. Griggs dated March 22, 1995 at p. 2)

As such, the Commissioner determines that Marano is entitled to salary payment for the period of December 15, 1994 through March 15, 1995.[1] [2]

Accordingly, the recommended decision of the OAL is affirmed in part and reversed in part as detailed herein. The within Petitions of Appeal are hereby dismissed and the Board is ordered to compensate Marano in accordance with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that the record contains no indication that Marano requested any postponement or inactive status during the period December 15, 1994 through March 15, 1995.

[2] Marano was indicted on March 22, 1995, at which time the Board, pursuant to *N.J.S.A.* 18A:6-8.3, would have been entitled to suspend him without pay.

70-97

EDU #12098-93, #8695-94 and #2040-95 (consolidated)
C # 70-97
SB # 22-97

IN THE MATTER OF THE TENURE HEARING OF LEONARD J. MARANO, BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

AND

LEONARD J. MARANO,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

RESPONDENT-APPELLANT,

AND

LEONARD J. MARANO,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 13. 1997

For the Petitioner/Respondent-Appellant, Anthony P. Sciarrillo, Esq.

For the Respondent/Petitioner-Respondent, Paul E. Griggs, Esq.

JUNE 7, 2000

This consolidated matter involves tenure charges certified in December 1993 against Leonard J. Marano (hereinafter "Marano"), who had been employed by the Board of Education of the Borough of Lincoln Park (hereinafter "Board" or "Lincoln Park Board") as its Business Administrator/Board Secretary since October 1982. Those charges alleged that Marano had misappropriated funds from the district. On November 2, 1995, Marano pled guilty in U.S. District Court to two counts of tax evasion. Thereafter, by an order of the Superior Court dated September 20, 1996, Marano was deemed to have forfeited his position with the Board as of November 2, 1995.

On February 13, 1997, the Commissioner of Education adopted the conclusion of the Administrative Law Judge that the tenure charges against Marano had been rendered moot as a result of the disposition of the criminal charges against him and the resultant forfeiture of his position. The Commissioner, however, rejected the ALJ's determination that the Board was not obligated to pay Marano his salary for the period after December 15, 1994, when the tenure matter had been removed from the inactive list and rescheduled for hearing at the request of Marano's attorney. The Commissioner concluded, however, that Marano's entitlement to pay during the period of his suspension ended on March 16, 1995, when his attorney requested that the matter be adjourned and placed again on the inactive list. See N.J.S.A. 18A:6-14.[1]

[1] N.J.S.A. 18A:6-14 provides, in pertinent part, that:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the

The Lincoln Park Board appealed that determination to the State Board, claiming that it should not be responsible for the payment of any additional salary to Marano. Thus, the appeal before us is limited to the issue of whether the Commissioner properly determined that the Board was required to pay Marano his salary for the period from December 15, 1994 through March 15, 1995.

After reviewing the record in this matter, we affirm the decision of the Commissioner as clarified herein.

Initially, we agree with the Commissioner that Marano did not waive his claim to salary for the controverted period by virtue of a Consent Order signed by the ALJ on June 15, 1994. By the express terms of that Order, the Board and Marano agreed to place this matter "on inactive status for a period not to exceed four (4) months" and, "during this said inactive period," Marano agreed "to forgo any legal right he has pursuant to N.J.S.A. 18A:6-14 to receive his full salary." The Order directed that Marano's entitlement to salary was waived "until the matter is rescheduled for a hearing." On December 15, 1994, the case was rescheduled for hearing on April 3, 4, 5, 6, 7, 10 and 11, 1995. The fact that the matter was adjourned once again at Marano's request in March 1995 does not alter his entitlement to salary under N.J.S.A. 18A:6-14 for this limited period.

> charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal....

We reject the Board's contention that this result is altered by the fact that it took action in September 1994 to eliminate the position of Business Administrator/Board Secretary, or, in the alternative, that this matter should be remanded for further proceedings on Marano's petition challenging the action by the Board to abolish his position during the pendency of the tenure proceedings. As determined by the Commissioner, the tenure charges against Marano were rendered moot by the subsequent forfeiture of his position. In addition, we find that Marano's challenge to the abolishment of his position has been rendered moot by virtue of the fact that no further relief could be afforded him if his petition challenging such action were to be reinstated. If he ultimately were to prevail on that claim, he would not be entitled to any compensation beyond the amount awarded herein. Nor, given the forfeiture of his employment, would he be entitled to placement on a preferred eligibility list for possible future employment. Under these circumstances, we reject the view that the Board can avoid its obligations under N.J.S.A. 18A:6-14 by now raising as an affirmative defense the contention that it had acted properly to eliminate Marano's position pursuant to N.J.S.A. 18A:28-9 during the pendency of the tenure charges.

Therefore, as clarified herein, we affirm the Commissioner's determination that the Board was responsible for the payment of Marano's salary for the period from December 15, 1994 through March 15, 1995.

Attorney exceptions are noted.

June 7, 2000

Date of mailing JUN 09 2000

70-97

EDU #12098-93, #8695-94 and #2040-95 (consolidated)
C # 70-97
SB # 22-97

IN THE MATTER OF THE TENURE HEARING OF LEONARD J. MARANO, BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

AND

LEONARD J. MARANO,

RESPONDENT/PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

PETITIONER/RESPONDENT-APPELLANT,

AND

LEONARD J. MARANO,

RESPONDENT/PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

PETITIONER/RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 13, 1997

Decided by the State Board of Education, June 7, 2000

Remanded by the Appellate Division, March 28, 2002

For the Petitioner/Respondent-Appellant, Lindabury, McCormick & Estabrook (Anthony P. Sciarrillo, Esq., of Counsel)

For the Respondent/Petitioner-Respondent, Paul E. Griggs, Esq.

This matter is before us pursuant to a remand by the Appellate Division. The case involves tenure charges certified in December 1993 against Leonard J. Marano (hereinafter "Marano"), who had been employed by the Board of Education of the Borough of Lincoln Park (hereinafter "Board" or "Lincoln Park Board") as its Business Administrator/Board Secretary since October 1982. Those charges alleged that Marano had misappropriated funds from the district. On November 2, 1995, Marano pled guilty in U.S. District Court to two counts of tax evasion. Thereafter, by an order of the Superior Court dated September 20, 1996, Marano was deemed to have forfeited his position with the Board as of November 2, 1995.

On February 13, 1997, the Commissioner of Education adopted the conclusion of the Administrative Law Judge ("ALJ") that the tenure charges against Marano had been rendered moot as a result of the disposition of the criminal charges against him and the resultant forfeiture of his position. The Commissioner, however, rejected the ALJ's determination that the Board was not obligated to pay Marano his salary for the period after December 15, 1994, when the tenure matter had been removed from the inactive list and rescheduled for hearing at the request of Marano's attorney. In this respect, the Commissioner found that the record before him substantiated that on December 13, 1994, counsel for Marano had written to the ALJ requesting that the case be activated

and hearing dates scheduled and that this had been accomplished by a Notice of Plenary Hearing dated December 15, 1994 from the Office of Administrative Law rescheduling the matter for hearing on April 3, 4, 5, 6, 7, 10, and 11, 1995. Commissioner's Decision, slip op. at 12. The Commissioner concluded, however, that Marano's entitlement to pay during the period of his suspension ended on March 16, 1995, when his attorney requested that the matter be adjourned and placed again on the inactive list.

The Lincoln Park Board appealed that determination to the State Board, claiming that it should not be responsible for the payment of any additional salary to Marano. Thus, the appeal before the State Board was limited to the issue of whether the Commissioner had properly determined that N.J.S.A. 18A:6-14 required the Board to pay Marano his salary for the period from December 15, 1994 through March 15, 1995.

On June 7, 2000, the State Board affirmed the decision of the Commissioner with clarification. The Lincoln Park Board appealed to the Appellate Division from our determination.

On March 28, 2002, the Appellate Division reversed our decision. In doing so, the Court found that N.J.S.A. 18A:6-14, which provides that salary payments to an individual who is suspended pending the determination of tenure charges must be resumed if the Commissioner has not made his determination within 120 days following certification of the charges, was clearly intended to protect the employee from the negative effect of unavoidable or intentional delay in the resolution of the charges. The Court stressed that the statute expressly excludes all delays which are granted at the request of the employee and, viewing the entirety of the circumstances, found that it

was apparent from the record that Marano had no desire to proceed with the "appeal from his disciplinary dismissal" until the federal criminal charges against him were resolved.

The Court concluded that the Commissioner and the State Board had violated the legislative policy of the statute that an employee who is the subject of tenure charges cannot benefit from delay occasioned by his own requests and that this was particularly true in this case given "the ultimate result of both the criminal charges and the disciplinary appeal." Slip op. at 13. In so concluding, the Court found that "[c]learly, the delay in meeting the one-hundred-and-twenty-day time requirement specified in N.J.S.A. 18A:6-14 was an accommodation to Morano [sic], not Lincoln Park." Id.

On this basis, the Court reversed our decision and remanded the matter to the State Board for "adoption of an amended final administrative decision adopting the recommendation of the ALJ that Morano's [sic] request for salary entitlement under N.J.S.A. 18A:6-14 is denied." Id. To the extent that adoption of such a decision is required to effectuate the Court's determination that Marano was not entitled to the salary payments he sought pursuant to N.J.S.A. 18A:6-14, and given the comprehensive system of appeals in place in this agency, Laba v. Newark Board of Education, 23 N.J. 364 (1957); In re Masiello, 25 N.J. 590 (1958), the appropriate course is to remand this matter to the Commissioner for implementation of the Court's remand. Accordingly, we remand the matter to the Commissioner.

May 1, 2002

Date of mailing MAY 03 2002

74-97

74-97

BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MICHAEL AND MARIE VANNI,	:	DECISION
RESPONDENTS.	:	

FEBRUARY 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12118-95
AGENCY DKT. NO. 423-10/95

BELLEVILLE BOARD OF EDUCATION,
Petitioner,
v.
MICHAEL and MARIE VANNI,
Respondents.

Frank Pomaco, Esq., for petitioner
(Gaccione, Pomaco & Beck, attorneys)

Samuel J. McNulty, Esq., for respondents,
(Hueston, McNulty & Mueller, attorneys)

Record Closed: December 23, 1996 Decided: January 2, 1997

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law on November 27, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Jan. 2, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Jan. 3, 1997
DATE

D. M. Centanni Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 6 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

DEC 23 11 48 AM '96

GACCIONE, POMACO & BECK
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, NJ 07109
(201) 759-2807

Attorneys for

BELLEVILLE BOARD OF EDUCATION Petitioner, vs. MICHAEL VANNI and MARIA VANNI Respondent.	OAL DOCKET NO.: EDU 12118-95 **STIPULATION OF SETTLEMENT**

The parties agree to settle this case on the following terms and conditions:

1. Mr. & Mrs. Vanni shall pay to the Belleville Board of Education a lump sum of $2,000.00, which sum shall be payable in installments as follows:

a. $500.00 within ten (10) days of the execution of this Settlement Agreement;

b. $200.00 per month for six months, the first installment of which shall be due thirty (30) days after the date of execution of the Settlement Agreement, with the other payments every thirty (30) days thereafter;

c. $300.00 final payment, which shall be due thirty (30) days after the final $200.00 installment.

2. The Vannis shall not reside at the condominium at 2 Honiss Street, Unit 13A, while their daughter is in attendance at the Belleville Public Schools. The Vannis shall reside at 341 Franklin Avenue in Belleville, New Jersey or in another legitimate Belleville residence, proof of which shall be submitted to the Board in the event the Vannis move from their current domicile at 341 Franklin Avenue, Belleville, New Jersey.

DATED: 12/18/96

FRANK POMACO, ESQ.
For Petitioner Belleville
Board of Education

DATED: 12/18/96

RALPH MAZZUCCA
President of the Belleville
Board of Education

DATED: 12/16/96

SAMUEL J. McNULTY, ESQ.
For Michael Vanni and
Maria Vanni

OAL DKT. NO. EDU 12118-95
AGENCY DKT. NO. 423-10/95

BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY, PETITIONER, V. MICHAEL AND MARIE VANNI, RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

The Commissioner notes, however, that the terms of the settlement appear to have commenced effectuation prior to the Commissioner's approval. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them and other litigants whose controverted matters have been duly transmitted to OAL against beginning effectuation of any settlement prior to its submission to, and approval by, the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.

COMMISSIONER OF EDUCATION

FEBRUARY 18, 1997
DATE OF MAILING FEBRUARY 18, 1997

75-97

J.A., on behalf of her minor niece, T.C., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning aunt alleged that her minor niece, T.C., was wrongfully denied admission to respondent's school district in violation of *N.J.S.A.* 18A:38-1.

ALJ determined that T.C. was not living with petitioner solely for the purpose of attending a South Orange school. Petitioner demonstrated that T.C.'s mother was not capable of care or support because of family and economic hardship. ALJ ordered that the Board provide a free public education to T.C. pursuant to N.J.S.A. 18A:38-1b(1) as of the date of application for admission.

Commissioner adopted as his final decision the initial decision granting petitioner's appeal to set aside the Board's decision to disenroll her niece. Commissioner ordered the Board to admit T.C. into its public school system, free of charge, so long as there is no change in petitioner's circumstances that would alter T.C.'s entitlement. Commissioner dismissed Board's counterclaim.

February 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3562-96
Agency Dkt. No. 54-2/96

J.A., on behalf of her minor niece, T.C.
Petitioner,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE and MAPLEWOOD, NEW JERSEY,
Respondent.

Ellen M. Boylan, Esq., for petitioner
(Education Law Center, David Sciarra, Executive Director, attorneys)

Glenn R. Moran, Esq., for respondent
(Leary, Bride, Tinker and Moran, attorneys)

Record Closed: November 18, 1996 Decided: January 2, 1997

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner contests the respondent Board of Education action of February 8, 1996 (Exhibit J-2), under *N.J.S.A.* 18A:38-1, denying admission of T.C., her niece, to its public schools on the grounds that the evidence presented to respondent Board of Education does not support the validity of the claim that T.C. is entitled to a free education in respondent's school district. Upon notice of the filing, as required by the statute, Jacqueline L. Cusack, Ed.D., Assistant Superintendent, Educational Planning,

Policy and Special Projects, by her letter of February 20, 1996, (Exhibit R-1) notified petitioner that her niece, T.C. would be permitted to attend High Columbia School during the pendency of the proceedings.

The matter was transmitted by the Department of Education to the Office of Administrative Law as a contested matter pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14B-1 to 13.

MATTERS PRESENTED

The matter was heard on November 1, 1996. Counsel were granted leave to submit post hearing briefs. Upon receipt the record was closed.

Petitioner, J.A., whose occupation is as a county social worker, testified. T.C., now 17, her niece, is the daughter of J.A.'s sister, Delphine. T.C.'s father was killed in 1988 during a holdup.

As an infant Delphine suffered a severe adverse reaction to penicillin. She has always been child like and is probably mentally retarded. Although Delphine has never been able to work, J.A. could not convince her mother to apply for SSI (Supplemental Security Income) on behalf of Delphine. Delphine, who now has a five year old child, and T.C. lived with J.A.'s and Delphine's mother in her house in Elizabeth, until she died in 1993. Without the mother, Delphine, who was then over 300 lbs., and the two children were living in one room. T.C. had to sleep on the floor until she appealed to an uncle to let her stay with him and his teenage son in an efficiency apartment equipped with bunk beds. The uncle expected to be find larger quarters and also took in a brother and his 15 year old son. T.C. was then sharing a sleeping area with two teenage boys.

Petitioner was very concerned about T.C.'s living condition but was reluctant to take on that responsibility when she had two children of her own and the custody of a

nephew, K.G. When her daughter began college at Howard University she asked her mother to let T.C. live in her room in the house petitioner then owned in Berkeley Heights. T.C. moved in and, after affidavits were filed on her behalf, she enrolled in the Governor Livingston Regional High School, Berkeley Heights, (Exhibit J-3) along with K.G. The two children remained in school in Berkeley Heights until petitioner sold her house there and purchased her present home in South Orange.

On February 4, 1996, she registered T.C. (Exhibits R-2, R-3) and K.G. for school in the South Orange and Maplewood School District. Separate affidavits of residency were submitted on behalf of T.C. (Exhibits J-1) and K.G. (Exhibit J-5). Attached to that submitted for K.G. were letters of guardianship, petitioner's U.S. Individual Tax Return, Form 1040, listing K.G. as a dependent for tax purposes and a card indicating he was included in her medical insurance plan.

K.G. was accepted for admission. (Exhibit J-5).

Petitioner did not seek guardianship for T.C. as she did K.G. Reasons for not doing so included that T.C. still had a mother, whereas K.G. had lost both parents. Also, by the time, T.C. came to live with her she was close to adulthood and will be 18 on April 1, 1997. She did not include her as a dependent on her income tax return because the only way T.C. can go on to college, which she wants to do, is by scholarship and she did not want to have her income count against her for scholarships based on need.

Two affidavits were submitted on behalf of T.C., petitioner's and Delphine's which petitioner filled in for her to sign before a notary public (Exhibit J-1). Also attached is petitioner's handwritten letter further amplifying the affidavits.

As noted in that letter, T. C. is without health coverage. Recently, she experienced a gynocological problem while at school and the nurse told her that she needed a medical checkup. Without medical coverage, petitioner cannot help T.C. and

has advised her to contact Planned Parenthood which may provide her medical examination for free.

T. C. is a good student with a "B" average. Petitioner would like her to attend one of the predominantly black colleges which are generally in the South, but T.C. hopes to attend Montclair State which is within five miles so that she can commute from petitioner's home.

Her sister, Delphine, who lives with her uncle in Keyport, New Jersey, can only care for the five year old with the help of her uncle and his live-in companion. Mostly Delphine spends her time watching soap operas.

The affidavits which were submitted on behalf of T.C. were not accompanied by any independent documentation. Introduced into evidence was Exhibit J-3 a Student Transfer Card completed by Governor Livingston Regional High School, Berkeley Heights, New Jersey, when T. C. moved with her aunt to South Orange.

DISCUSSION

N.J.S.A. 18A:38-1 identifies persons of school age who are entitled to a free public education and the school districts which are to provide it.

Principally, as provided for in subsection a, the school district wherein an eligible student is domiciled is responsible to provide that pupil a free public education.

Subsection b(1) provides that a child domiciled in another district, who lives in the home of another person who is domiciled within a school district, is entitled to a free public education from that district upon a showing that three circumstances exist:

1. the domicillary of the school district is supporting the child gratis including all obligations relative to school with the intention to continue to so support the child beyond the school term;

2. the child's parent or guardian is not capable of supporting or providing care for the child because of family or economic hardship; and

3. the child is not being kept in the home "solely for the purpose of receiving a free public education within the district."

The resident must also:

1. submit a sworn statement that the resident is a domiciliary of that school district, is supporting the child gratis and will assume all personal obligations of the child relative to school requirements gratuitously for a period beyond the school term;

2. file the sworn statement of the child's parent or guardian that the parent or guardian is not capable of supporting or providing care for the child through a family or economic hardship, and

3. provide "documentation to support the validity of the sworn statements."

The statute provides that upon review and consideration of the matters submitted "[i]f in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child."

Respondent asserts that petitioner's failure to provide sufficient documentation "made it impossible for the Board. . . to find that an economic or family hardship exists to permit [T.C.]'s admission as an 'affidavit pupil.'" Post Hearing Brief on behalf of Board of Education of Maplewood/South Orange, page 3.

Initially, it is noted that under *N.J.S.A.* 18A:38-1b(1), even if the board of education finds that the evidence presented does not support the validity of the claim, such board is not compelled to deny admission rather "the board may deny admission to the child.".[1]

[1] Absent clear legislative intent to the contrary, generally the word "shall" is construed to be mandatory and the word "may" permissive or directory. *Franklin Estates v. Tp. of Edison*, 142 *N.J. Super.* 179, 184 (App. Div. 1976), *aff'd*, 73 *N.J.* 462 (1977).

In view of the requirement that the board of education is to determine whether separate evidence supports the validity of the claim, there is the question whether the Office of Administrative Law is thereby constrained to make that same determination before it can accept the validity of the claims or is it to arrive at findings of fact in accordance with its general statutory tenets pursuant to the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to 15, particularly *N.J.S.A.* 52:14B-10?

Although a statutory scheme may require the application of different rules in an administrative proceedings,[2] the statutory language here places no such requirement upon the Office of Administrative Law.

As the Commissioner of Education observed of *N.J.S.A.* 18A:38-1 in *Gunderson v. City of Brigantine Board of Education*, 95 *N.J.A.R.* 2d (Department of Education 1994) 39, 42, *aff'd State Bd. of Education*, 95 *N.J.A.R.* 2d 132 (Department of Education 1995):

> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the non-parent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, do to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all it children. *Sabella v. Lacey tp.*, 204 *N.J. Super.* 55, 60 (App. Div. 1985); *Restaurant Enterprises, inc. v. Sussex Mutual Ins. Co.*, 52 *N.J.* 73, 77 (1968)

To hold a resident such as this petitioner, to limited methods of proof, not ordinarily required in administrative law hearings before the Office of Administative Law, would unduly circumscribe efforts to ensure that a child is properly enrolled in public school.

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[2] *In the Division of Gaming Enforcement v. Merlino and Leonetti*, 8 *N.J.A.R.* 126 (Casino Control 1985), *aff'd*, 216 *N.J. Super.* 579, 524 A.2d 821 (App. Div. 1987), it was ruled that because of specific language in the Casino Control Act, the residuum rule, *N.J.A.C.* 1:1-15.5(b) did not apply to proceedings under that Act..

In order for petitioner to prevail, she must prove the presence of the three statutory circumstances by a preponderance of the credible evidence.[3] *See Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962); *Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478 (App. Div. 1989). In order to determine whether the petitioner has met that burden, as the Administrative Law Judge, I must determine the credibility of the witnesses. *Hornauer v. Division of Alcoholic Beverages Control*, 40 *Super.* 501 (App. Div. 1956).

Having considered all matters presented, I **FIND** that petitioner successfully sustained that burden.

Although petitioner has raised her own children who are now adults, she has taken on the responsibility of other children. Her nephew, who was orphaned, is under her legal guardianship.

When T.C. first asked to live with her, petitioner, who was deeply concerned with T.C.'s living arrangements, was reluctant to take her in. It was her own daughter, a student who attends Howard University, who prevailed upon her mother to let T.C. use her room. It also appears that T.C. will likely attend a local college to which she can commute from petitioner's South Orange home.

Petitioner convincingly described her sister's situation and long financial dependence upon others' largesse by which she survives.

Once petitioner's mother died, T.C. was without a real home until petitioner took her in. The circumstances leading up to T.C. coming to live with her aunt clearly demonstrate that T.C.'s mother is not capable of care or support because of family and economic hardship. Other than that provided by petitioner, T.C. has no support.

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[3] The term "evidence" appeared in *N.J.S.A.* 18A:38-1 before the 1993 amendment which, *inter alia*. empowered a board to deny admission if the evidence did not support the claim. It, therefore, appears that "evidence" as used in the statute retains its ordinary meaning and is not limited to the affidavits and "documentation" required by the statute to be submitted to the board.

With regard to the statutory requirement that it be shown that the child is not with the resident "solely for the purpose of receiving a free public education within the district," respondent does not contest that. Moreover, T.C.'s move to South Orange was because petitioner sold her house in Berkeley Heights to purchase her present home.

It has been clearly shown that T.C. is not living with petitioner solely for the purpose of attending a South Orange school.

In its post hearing brief, respondent requests that, in the event the Administrative Law Judge were to find for petitioner, he determine that respondent properly found, under the statute, that the documentation was insufficient and to conclude that T.C.'s status as an affidavit pupil be established at the time of this initial decision and not as of the application.

Regardless of the procedural requirements before the respondent Board of Education under the statute, upon the facts, as they existed at the time of application, show that T.C. was entitled to a free public education at Columbia High School, South Orange.

Respondent's request is denied.

In view of the disposition in this matter, the constitutional and other issues raised by petitioner are not addressed.

ORDER

It is **ORDERED** that respondent, Board of Education of the South Orange Maplewood School District shall provide a free public education to T.C. pursuant to *N.J.S.A.* 18A:38-1b(1) as of the date of application for admission.

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

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

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

January 2, 1997
DATE

Sebastian Gaeta Jr.
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

Jan. 7, 1997
DATE

D M Cantanates Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:
J.A.

For Respondent
Jacqueline L. Cusack, Ed.D.

Exhibits:

Joint

J-1 Affidavits of J.A. and Delphine, mother of T.C.

J-2 Letter of Jacqueline L. Cusack, Ed.D., School District of South Orange and Maplewood to J.A., dated February 8, 1996.

J-3 Student Transfer Card prepared by Governor Livingston Regional High School, Berkeley Heights, New Jersey.

J-4 Form 1040 U.S. Individual Tax Return 1994 for J.A.

J-5 Affidavits, Form 1040, Letters of Guardianship, Insurance Card, written Note, February 8, 1996 Letter of Acceptance, Affidavit Summary regarding the Application for Admission on behalf of K.G.

For Petitioner

P-1 Enrollment of Affidavit Pupil Information Sheet.

P-2 Instruction sheet for Registering a Student in the South Orange/Maplewood School District.

For Respondent

R-1 Letter of Dr. Cusack to J.A. dated February 20, 1996.

R-2 Registration Form for T.C.

R-3 File Summary (with attachments).

Submissions by Counsel

Trial Brief on behalf of Petitioner

Prehearing Brief on behalf on Respondent

Posthearing Brief on behalf of Petitioner

Post Hearing Brief on behalf of Respondent.

OAL DKT. NO. EDU 3562-96
AGENCY DKT. NO. 54-2/96

J.A., on behalf of her minor niece, T.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exception arguments were filed by both parties, and reply arguments were filed by the Board, in accordance with *N.J.A.C.* 1:1-18.4. To the extent these submissions merely reiterate those arguments advanced before the OAL, they are only briefly summarized herein.

Petitioner first contends that T.C. should not have been treated by the Board as an affidavit student under *N.J.S.A.* 18A:38-1b, but, rather, should have been found domiciled in the District in accordance with *N.J.S.A.* 18A:38-1a. Petitioner asserts that while the ALJ's findings are consistent with this conclusion, he did not rule on her claim that T.C. was entitled to admission in respondent's District under *N.J.S.A.* 18A:38-1a. The Board, in reply, maintains the position that T.C. should not be declared a domiciliary of the District, asserting, *inter alia*, that to

do so "would countermand the efforts of the Legislature to combat the ever increasing attendance at district schools of children who are not legally entitled to same." (Board's Reply at p. 9)

Petitioner next asserts that the Board's notice denying T.C. admission as an affidavit student violated her due process rights, in that said notice provided no reason for the Board's denial.[1] Petitioner affirms that, under the principles of *Goss v. Lopez*, 419 *U.S.* 565 (1975) and *R.R. v. Board of Education of Shore Regional H.S.*, 109 *N.J. Super.* 337 (Ch. Div. 1970),

> ***a notice denying admission to school on residency grounds must, at a minimum, contain a statement detailing the reasons for denial. A blanket statement that the requirements of the statute have not been met does not satisfy due process. Petitioner was entitled to a statement which specified precisely how her application was defective.*** (Petitioner's Exceptions at p. 6)

The Board counters, however, that its notice denying petitioner the request for admission of T.C. comported with all requisite due process standards, and that the enabling statute imposes no obligation to explain the factual basis for its denial, or to provide specific information on the manner of filing a petition of appeal. (Board's Reply at pp. 10, 11)

Finally, petitioner maintains that the Board's policy of denying admission in every case where the affidavit student lacks independent documentation to support his/her required sworn statement is arbitrary and capricious. Instead, petitioner claims that the Legislature clearly intended for such documentation to be provided *if* it exists. "The Legislature did not intend that in the absence of documentation, the school board simply refuse to exercise its judgment about

[1] Petitioner avers, "The letter simply states that '[h]aving reviewed the affidavits, the administration has determined that the requirements of *N.J.S.A.* 18A:38-1 have not been satisfied.' Respondent failed to specify in what regard the statute had not been met and left petitioner guessing as to how her application was defective." (Petitioner's Exceptions at p. 5) Petitioner further contends that the Board improperly failed to provide her with the address for filing a Petition of Appeal to contest its decision.

the truthfulness of the claim of family and economic hardship.***" (Petitioner's Exceptions at p. 8) In the Board's view, the enabling statute does not create an irrebuttable presumption of nonresidency, but, rather, outlines the requirements which must be met in order to establish a student's entitlement to a free public education in the district. Here, the Board maintains, petitioner was denied the benefit of a free public education "***not because of some irrebuttable statutory presumption, but rather, because the requirements of *N.J.S.A.* 18A:38-1 were clearly not met." (Board's Exceptions at pp. 13, 14)

The Board's initial exception is that no competent evidence was offered as to the physical and/or mental condition of T.C.'s mother. Notwithstanding the ALJ's findings in this regard, the Board maintains that J.A. failed to provide either evidentiary or documentary support for the claimed hardship and, therefore, has not sustained her burden of proof. (Id. at p. 3)

The Board next contends that the ALJ's reliance upon *Gunderson, supra*, was unwarranted, inasmuch as *Gunderson* is clearly distinguishable. T.C.'s mother, the Board comments, "***has never been declared or diagnosed as mentally incompetent or having any other condition precluding her ability to care for T.C. ***" and, unlike the situation in *Gunderson*, has participated in the affidavit process by providing a sworn statement. (Board's exceptions at p. 4) Moreover, the Board asserts that "***there is a difference between supporting documents which are not obtainable and those that are never sought." (*Id.*) Thus, the Board argues that the ALJ has "***essentially eliminate[ed] from the statute the requirement that a petitioner provide *** supporting documentation ***." (*Id.*)

The Board further excepts to the ALJ's reliance upon the current relationship between petitioner and T.C. to support petitioner's claim. That T.C. resided with petitioner

before petitioner moved to South Orange and, therefore, similarly "utilize[d]" the Berkeley Heights school system is a "past abuse of the affidavit pupil status [which] should not be found as support for a current abuse." (Board's Exceptions at p. 5) Moreover, the Board points out that

> Contrary to the ALJ's finding that T.C. did not have a "real home" with [her mother], we learned through the petitioner's own testimony that a significant factor in T.C.'s decision to leave her uncle's apartment where she resided with [her mother] was her inability to get along with her uncle's live-in companion. Personal preference and personality differences should not be elevated to the level of "family" hardship. (*Id.* Exceptions at p. 6)

Finally, the Board finds erroneous the ALJ's conclusion that the facts, as they existed at the time of the application, show that T.C. was entitled to a free public education. (Board's Exceptions at p. 6) Here, the Board affirms, "[t]here is no reference within [the ALJ's] decision to the proofs submitted by way of affidavit to the Board of Education which could, standing alone, have supported petitioner's claim and burden of proof before the Board *** as required by *N.J.S.A.* 18A:38-1b." (Board's Exceptions at p. 7) Moreover, according to the Board, the ALJ cites only to evidence adduced by petitioner's testimony to buttress his conclusion that T.C. is entitled to affidavit pupil status, notwithstanding his observation that the evidence which is required to meet petitioner's burden "***is not limited to the affidavits and 'documentation' required by the statute to be submitted by the board." (Initial Decision at p. 7, note 3, as referenced in Board's Exceptions at p. 7)

Upon careful and independent review, the Commissioner concurs with the credibility determinations, findings and conclusions of the ALJ. The Commissioner further agrees that the ALJ's factual findings, under the circumstances of this case, may be considered to have satisfied the statutory purpose for requiring documentation to support the claim that family

or economic hardship exists, sufficient to permit T.C. to be admitted into the Board's District as an affidavit pupil. See *Gunderson, supra.* Thus, the Commissioner, finding it noteworthy that the Board fails to claim that T.C. is living with petitioner for the sole purpose of attending school in the District, (Initial Decision at p. 8) accepts the ALJ's conclusion that petitioner has satisfied the requirements of *N.J.S.A.* 18A:38-1b(1), thereby establishing T.C.'s eligibility to attend school in respondent's District. As to the Board's policy of denying an application, like petitioner's, for failure to provide documentation to support her claims, however, the Commissioner declines to find that such policy is necessarily arbitrary, capricious or unreasonable, given the statutory requirement that sworn statements be accompanied by documentation to support their validity, and the statutory mechanism for ensuring subsequent due process before the Commissioner with no loss of educational opportunity in the interim.

Further, the Commissioner rejects petitioner's claim that T.C. should be determined domiciled in the District, pursuant to *N.J.S.A.* 18A:38-1a. Petitioner has advanced no compelling argument which would convince the Commissioner to abandon the long-standing rule that the domicile of a child follows that of the parent or legal guardian who has control over her. *Mansfield Twp. v. State Bd. of Education*, 101 *N.J.L.* 474, 479, 480. In that petitioner is not T.C.'s legal guardian and T.C.'s mother has not terminated her parental rights (Petitioner's Exceptions at p. 3), and inasmuch as the law does not permit an unemancipated minor to choose her domicile (*Mansfield* at 478), the Commissioner declines, under these circumstances, to declare T.C. a domiciliary of the Board's District, pursuant to *N.J.S.A.* 18A:38-1a.

Additionally, the Commissioner finds petitioner's reliance upon *Goss, supra,* and *R.R, supra,* to advance her position that T.C. was entitled to a statement specifying the

deficiencies in her application to be misplaced. These cases involved the school districts' power to impose pupil discipline in the form of suspension or expulsion, and examined the process which is due a pupil prior to removing her from school. The Courts therein recognized that those students, by virtue of their *legitimate* claims of entitlement to a public education, possessed a property interest subject to due process protections. *Goss* at 574; *R.R.* at 346, 347. Interests which give rise to due process protections are those which are created, and their dimensions defined, "***by an independent source such as state statutes or rules entitling the citizens to certain benefits." *Goss* at 572, 573 , citing *Board of Regents v. Roth,* 408 *U.S.* 564, 577 (1972).

While there is no doubt that T.C. possesses the right to a free public education and, indeed, is required to attend school between the ages of six and 16,[2] "the independent source," found at *N.J.S.A.* 18A:38-1, clearly links T.C.'s entitlement to her domicile status, or, in the alternative, to her residence, under specific conditions, with a person who is domiciled in the district. Thus, the question herein *is not*, as in *Goss, supra,* and *R.R., supra,* whether the district infringed upon a student's legitimate claim to an education, *but whether the student's claim to a free education in the Board's District is, in fact, legitimate.* Moreover, to protect a petitioner who *might have* a legitimate claim, the Legislature has provided that, once the board's decision is appealed to the Commissioner of Education, a student must be admitted to school during the pendency of the hearing. Consequently, the Commissioner finds no cause to invoke the principles of *Goss* and *R.R.* in this matter so as to obligate the Board to provide a statement detailing the reasons for its denial of an application for admission. Neither does the Commissioner find support in the language of the statute for such a proposition.

[2] *N.J.S.A.* 18A:38-25.

Accordingly, the initial decision of the OAL granting petitioner's appeal to set aside the Board's decision to disenroll her niece is adopted as the final decision in this matter. The Board is hereby ordered to admit T.C. into its public school system, free of charge, so long as there is no change in petitioner's circumstances that would alter T.C.'s entitlement. The counterclaim by the Board is dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

February 19, 1997
Date of Mailing, February 19, 1997

75-97

EDU #3562-96
C # 75-97
SB # 28-97

J.A., on behalf of her minor niece, T.C.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT-CROSS/APPELLANT.	:	

Decided by the Commissioner of Education, February 19, 1997

For the Petitioner-Appellant, Education Law Center (Ellen M. Boylan, Esq., of Counsel)

For the Respondent-Cross/Appellant, Leary, Bride, Tinker & Moran (Glenn R. Moran, Esq., of Counsel)

J.A. (hereinafter "petitioner") filed a petition with the Commissioner of Education alleging that the Board of Education of the South Orange-Maplewood School District (hereinafter "Board") had improperly denied her niece, T.C., who was living with her in South Orange, a free public education in the district under N.J.S.A. 18A:38-1(b).[1] The

[1] N.J.S.A. 18A:38-1 provides, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
> a. Any person who is domiciled within the school district;
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting

8/6/97

Board filed a counterclaim seeking tuition for the period of T.C.'s attendance in the district.

On January 2, 1997, following a hearing, the Administrative Law Judge ("ALJ") concluded that petitioner had sustained her burden of demonstrating T.C.'s entitlement to attend public school in the district free of charge. The ALJ found that petitioner had demonstrated that T.C.'s mother was not capable of supporting her or providing care due to a family and economic hardship.

On February 19, 1997, the Commissioner adopted the credibility determinations, findings and conclusions of the ALJ and directed the Board to provide T.C. with a free public education. Citing Gunderson v. Board of Education of the City of Brigantine, decided by the Commissioner of Education, 95 N.J.A.R.2d (EDU) 39, aff'd by the State Board of Education, 95 N.J.A.R.2d (EDU) 132, the Commissioner concluded that "the ALJ's factual findings, under the circumstances of this case, may be considered to have satisfied the statutory purpose for requiring documentation to support the claim that family or economic hardship exists, sufficient to permit T.C. to be admitted into the Board's District as an affidavit pupil." Commissioner's Decision, slip op. at 15-16.

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or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements....If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner.

The Commissioner, however, declined to find the Board's alleged policy of denying any application under N.J.S.A. 18A:38-1(b) that was not accompanied by supporting documentation to be arbitrary, capricious or unreasonable. The Commissioner observed that the statute expressly required sworn statements to be accompanied by documentation to support their validity. He noted, in addition, that the statute ensured subsequent due process before the Commissioner with no loss of educational opportunity in the interim. The Commissioner also rejected petitioner's contention that she had been entitled to a statement from the Board detailing the reasons for its denial of her application.

Despite the Commissioner's determination that her niece was entitled to a free public education in South Orange-Maplewood, petitioner filed the instant appeal to the State Board. Petitioner again contends that the Board's notice letter denying her application for T.C.'s admission to the district failed to satisfy the minimum requirements of due process and that the Board's alleged policy of denying admission under N.J.S.A. 18A:38-1(b) to any student lacking documentation to support the sworn statements required by the statute was arbitrary and capricious.

The Board cross-appealed from the Commissioner's decision, arguing that petitioner had failed to establish T.C.'s entitlement to a free public education in the district.

After a careful review of the record before us,[2] we affirm the Commissioner's decision as modified herein.

[2] We note that the parties did not provide us with a transcript of the hearing held in the Office of Administrative Law in this matter.

For the reasons expressed by the ALJ and Commissioner, we find that petitioner has demonstrated T.C.'s entitlement to a free public education in South Orange-Maplewood. Under the particular circumstances herein, we agree that petitioner has sustained her burden under the standard set forth in N.J.S.A. 18A:38-1(b). We also agree that the Board was not required to provide petitioner with a statement of reasons for the denial of her application or to provide specific details about the appeals procedure in its notice letter, except to advise petitioner that she had the right to contest the Board's decision with the Commissioner of Education within 21 days.

However, we modify the Commissioner's decision to the extent that it might be read to permit a district board to mechanically deny any application for admission under N.J.S.A. 18A:38-1(b) which is not accompanied by documentation to support the sworn statements submitted with the application. As the Commissioner observed in Gunderson, supra, at 42:

> ...the parental affidavit provision [in N.J.S.A. 18A:38-1(b)] is [not] meant to act as a bar to a child who, do [sic] to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children.

Similarly, a lack of documentation in support of the sworn statements required by N.J.S.A. 18A:38-1(b) may not necessarily bar a child from admission in a case in which documentation cannot be produced due to the particular circumstances of the situation. Hence, a district board policy that automatically bars admission solely on the basis of a lack of documentation, without permitting consideration of those circumstances, would

be arbitrary and capricious. However, given the outcome of this case and the fact that we are unable to determine on the basis of the record before us, which does not include transcripts, whether the South Orange-Maplewood Board actually had such a policy, we decline to determine that question in the context of this appeal.

Accordingly, as modified herein, we affirm the decision of the Commissioner.

August 6, 1997

Date of mailing AUG 0 8 1997

(SB) 75-97

DHPL #411-97
SB # 75-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF L.A.W. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, August 8, 1997

For the Petitioner-Appellant, Reed & Scholl (Robert B. Reed, Esq., of Counsel)

L.A.W. (hereinafter "petitioner"), who was employed as a school health office aide by the Hunterdon County Educational Services Commission, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that she had been found guilty of Endangering the Welfare of Children, a disqualifying offense under the statute, following an arrest in Pennsylvania in April 1993. Petitioner sought to overturn her disqualification on the basis of rehabilitation. She also argued that N.J.S.A. 2A:168A-3 of the Rehabilitated Convicted Offenders Act prohibited the Department from disqualifying her from school employment since she had been issued a Certificate of Good Conduct in 1996 by the Probation Department of Hunterdon County.

In a letter decision dated August 8, 1997, the Assistant Commissioner of Education, Executive Services, upheld the disqualification,[1] concluding that, while

[1] We note that N.J.S.A. 18A:4-33 authorizes the Commissioner to "designate an assistant commissioner as deputy commissioner with full power to act in his place and stead during any absence or inability of the

JAN. 7, 1998

petitioner was progressing towards rehabilitation, she had failed to demonstrate clear and convincing evidence of her rehabilitation as required by N.J.S.A. 18A:6-7.1. The Assistant Commissioner also rejected petitioner's contention regarding her Certificate of Good Conduct, noting that "the within matter is solely within the purview of the Commissioner of Education and education law and, therefore, any finding with respect to L.A.W. arising under the criminal law statutes, is irrelevant to the instant determination." Assistant Commissioner's Decision, slip op. at 2, n.2.

Petitioner filed the instant appeal to the State Board.

After a careful review of the record, we remand this matter to the Commissioner for further proceedings in accordance with our determination herein.

Initially, we reject petitioner's contention that N.J.S.A. 2A:168A-3 of the Rehabilitated Convicted Offenders Act prohibits the Department from disqualifying her from school employment on the basis of her conviction. That statute provides that:

> The presentation to a licensing authority of evidence of a pardon or of the expungement of a criminal conviction, pursuant to N.J.S. 2A:164-28, or of a certificate of the Federal or State Parole Board, or of the Chief Probation Officer of a United States District Court or a county who has supervised the applicant's probation, that the applicant has achieved a degree of rehabilitation indicating that his engaging in the proposed employment would not be incompatible with the welfare of society shall preclude a licensing authority from disqualifying or discriminating against the applicant.

This is not a case in which action was being taken by a licensing authority. Rather, the Office of Criminal History Review, as affirmed by the Commissioner,

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commissioner and at such other times as the commissioner may designate." Such authority expressly includes assignment by the Commissioner of the "hearing and determination of controversies and disputes which may arise under the school laws...." N.J.S.A. 18A:4-34.

disqualified petitioner from employment in the State's schools as a health office aide on the basis of a conviction listed in N.J.S.A. 18A:6-7.1 as grounds for disqualification from school employment. We note, in addition, that the Certificate of Good Conduct refers only generally to petitioner's proposed employment as a licensed practical nurse, and not specifically to her service as a school health office aide. Consequently, we conclude that N.J.S.A. 2A:168A-3 does not bar petitioner's disqualification from school employment under N.J.S.A. 18A:6-7.1.

Turning to the issue of rehabilitation, we find that petitioner has shown significant evidence of her rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1(e). The Superintendent of the Hunterdon County Educational Services Commission, in which petitioner had been employed prior to her disqualification, indicates that the assistant superintendent to whom petitioner reported "was very complimentary of [petitioner's] work and enthusiasm for the organization." Several other letters attest to petitioner's fine work and reliability in her position as a home health care companion. The record also reveals that petitioner was granted sole legal custody of her children in March 1995 by the Chancery Division of Superior Court, and that she received a degree in practical nursing from the Somerset County Technical Institute in January 1996. In July 1996, the Probation Department of Hunterdon County issued the Certificate of Good Conduct asserting that petitioner "has achieved a degree of rehabilitation, indicating that her engaging in the proposed employment as a licensed practical nurse would not be incompatible with the welfare of society...." Petitioner was granted a practical nurse license by the New Jersey Board of Nursing in November 1996, and, in April 1997, she

was accepted into the Practical Nurse Associate Degree Option in the nursing program at Raritan Valley Community College. There have been no further arrests.

In determining whether petitioner has established her rehabilitation, we are required to consider the factors set forth in N.J.S.A. 18A:6-7.1(e), including "the nature and seriousness of the offense," N.J.S.A. 18A:6-7.1(e)(2). In this case, the criminal history review revealed that petitioner had been found guilty of Endangering the Welfare of Children. Although petitioner states without contradiction[2] that her conviction arose from an incident in which she had left her two young children at home in the care of a friend who had then left them alone, the record before us raises questions concerning the facts underlying that conviction. In a letter denying petitioner's request to expunge her conviction, the District Attorney of Mifflin County, Pennsylvania stated that while he was "impressed with [petitioner's] apparent change in lifestyle," his review of "the file and the photos" led him to believe that this was "too serious of a case to be expunged from her record." On the record before us, we are unable to reconcile to our satisfaction the District Attorney's statement with the explanation offered by the petitioner. In that context, we also question whether petitioner's explanation that she had innocently left her children in the care of a friend would lead to petitioner's conviction for Endangering the Welfare of Children after the friend left them alone. Given such concerns, we are unable to conclude at this time that petitioner has affirmatively demonstrated her rehabilitation by clear and convincing evidence.

[2] We note that the Office of Criminal History Review did not participate in the proceedings before the Commissioner.

However, under these circumstances, and in view of the fact that petitioner has shown significant evidence of rehabilitation, we do not dismiss her petition. Rather, we remand this matter to the Commissioner for further proceedings for the limited purpose of clarifying the specific nature and seriousness of petitioner's offense, and for a resultant determination under the standard set forth in N.J.S.A. 18A:6-7.1(e) as to whether petitioner has affirmatively demonstrated her rehabilitation by clear and convincing evidence.

Given our determination herein, we find it unnecessary to address whether the answer brief filed on behalf of the Commissioner, the decision-maker below, who is not a party to this matter, see In the Matter of the Disqualification from School Employment of Earl Davis, decided by the State Board of Education, June 7, 1995, slip op. at 2, n.2, should be considered in this instance. See Hasbrouck Heights v. Division of Tax Appeals, 48 N.J. Super. 328 (App. Div. 1958); Public Service Interstate Transportation Co. v. Board of Public Utility Com'rs., 129 N.J.L. 94 (E. & A. 1942). See also Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Co. et al., 514 U.S. 122, 115 S.Ct. 1278, 131 L.Ed.2d 160 (1995). We have therefore not considered the Commissioner's submission in determining this matter.

We do not retain jurisdiction.

Maud Dahme abstained.

January 7, 1998

Date of mailing JAN 09 1998

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76-97R

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCIS SABO, ALBERT G.	:	COMMISSIONER OF EDUCATION
WAGNER YOUTH CORRECTIONAL	:	DECISION ON REMAND
FACILITY, STATE OF NEW JERSEY.	:	
_____	:	

February 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6163-96
AGENCY REF. NO. 185-5/95
(EDU 8587-95 ON REMAND)

IN THE MATTER OF
THE TENURE HEARING OF
FRANCIS SABO,
ALBERT C. WAGNER YOUTH
CORRECTIONAL CENTER.

Judith Lieberman, Deputy Attorney General, for petitioner (Peter Verniero, Attorney General of New Jersey, attorney)

Sharra E. Greer, Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: January 6, 1997 Decided: January 6, 1997

BEFORE BRUCE. R. CAMPBELL, ALJ:

Tenure charges were filed against Francis Sabo, a teacher employed by the Albert C. Wagner Youth Correctional Center.

The matter was transmitted to the Office of Administrative Law on September 20, 1995 for a hearing pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The judge then assigned approved a settlement on April 30, 1996. The Commissioner of Education remanded for failure to meet the standards expressed in *In re Cardonick*, 1990 *S.L.D.* 842, 846. Thereafter, the matter was assigned to me.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

Thus recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. I f the Commissioner does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14b-10.

6 JANUARY 1997
Date

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Jan. 7, 1997
Date

Del Ventanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 1997
Date

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

	)	HONORABLE BRUCE CAMPBELL OAL DKT. NO. EDU 6163-96
IN THE MATTER OF THE TENURE HEARING OF FRANCIS SABO, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY	)	
	)	SETTLEMENT AGREEMENT

WHEREAS the parties agree to settle this matter, noting that the public policy of New Jersey strongly encourages settlement;

THE REASONS FOR ENTERING INTO THIS AGREEMENT ARE AS FOLLOWS:

(a) The costs of continuing to prosecute the tenure claims against the Respondent are expected to be substantial;

(b) The charges against Respondent can be divided into two categories, sleeping and breaches of security. The full facts of this matter are contained in the record which will be transmitted to the Commissioner of Education with this agreement. Respondent's apparent sleeping was caused by heart problems and resulting low blood pressure. Respondent has undergone triple bypass surgery since the institution of these charges and no longer suffers from this health problem. In addition, Respondent has agreed not to seek re-employment with the Department of Corrections. Prison security is unique and much stricter than that in other education settings. The Department's concerns with security only apply to the prison setting and not to traditional education settings. Therefore, the parties concur that this agreement comports with the public policy of New Jersey.

(c) The charges did not involve allegations of abuse of students, or any claims alleging moral turpitude or affecting the public trust; and

(d) Respondent and the Department have reached a mutually acceptable agreement concerning back salary as set forth below and Respondent agrees to waive attorneys fees.

1. Petitioning Department of Corrections shall withdraw the tenure charges against Respondent Sabo (Respondent).

2. Respondent's personnel file shall reflect that the tenure charges filed against him were withdrawn by the Department under a Settlement Agreement.

3. Respondent shall retire from his employment as a teacher with the Department of Corrections and he agrees not to seek renewal of active employment with that Agency.

4. The parties agree that this Settlement Agreement resolves all issues in controversy between them and that all such claims and counterclaims which may have arisen from such issues are mutually waived.

5. The Department of Corrections will pay Respondent $5,849.10 back pay for the period beginning December 11, 1995 and ending after the first half of the January 26, 1996 work day. In addition, the Department of Corrections agrees to compensate respondent for unused accumulated vacation and sick days.

6. The respondent will not receive any counsel fees, costs or any other monetary relief as a result of this settlement.

7. Between April 10, 1996 and June 17, 1996 , Respondent agrees to be placed on an approved leave of absence without pay. Respondent agrees to be placed on an approved leave of absence with pay from June 18, 1996 through December 1, 1996. From December 1, 1996 until the date of the Commissioner's decision or the effective date of Respondent's retirement, whichever is earlier, Respondent agrees to be placed on an approved leave of absence without pay.

8. The Department agrees to pay Respondent for the period June 18, 1996 though September 9, 1996 during the first State pay period subsequent to the signing of the agreement by the parties and the issuing of the initial decision approving the agreement by the Administrative Law Judge.

9. The Department agrees to pay the remainder of Respondent's salary for the period June 18, 1996 to December 1, 1996 less mitigation after: 1) Respondent provides all documentation of mitigation for the period, and 2) the decision of the Commissioner or the effective date of Respondent's retirement, whichever is earlier.

10. The parties agree to waive the filing of exceptions to the initial decision which would recommend the approval of the settlement agreement as a complete and final disposition of the matter.

11. The Respondent is aware that pursuant to N.J.A.C. 6:11-3.6(a)(1), the Commissioner of Education shall forward this settlement agreement to the State Board of Examiners for determination of possible revocation or suspension of Respondent's certificate. The State Board of Examiners may make new factual findings and issue an order to show cause and a statement of charges upon which revocation or suspension may be considered.

12. Nothing contained within this Agreement shall be considered as precedent in other existing or future cases by the Department of Corrections.

13. The Department of Corrections agrees to submit a letter to the State Health Benefits Commission to suggest that respondent be compensated for insurance premiums paid by him between December 11, 1995 and the first half of January 26, 1996. However, the Department of Corrections has no authority or control over the ultimate decision of the State Health Benefits Commission.

14. The Department of Corrections will permit respondent to return to the Albert C. Wagner Youth Correctional Facility so that he may retrieve his personal belongings. Respondent must first provide at least 24 hours notice of his intent to enter the Facility and must do so during a regular day and during regular work hours. Respondent will be accompanied by an escort when he enters the Facility and retrieves his belongings.

15. The parties acknowledge that this Settlement Agreement may not be consummated until approval by the Commissioner of Education. Any disapproval by the Commissioner of Education shall not interfere with the rights of either party to pursue this matter further.

16. The Department of Corrections will respond to inquiries about the Respondent from prospective employers, other than the New Jersey Department of Corrections, by indicating only that respondent is retired and by stating the position he held, how long he held it and the salary he was paid.

1/2/97
Date

Francis L Sabo Jr
FRANCIS L. SABO JR.

1/6/97
Date

Sharon E. Grier, Attorney For Respondent

1/6/97
Date

Thomas D. Sawey
THOMAS D. SAWEY
ADMINISTRATOR, EMPLOYEE RELATIONS

CERTIFICATION

I, FRANCIS h. SABO JR., being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that the Administrative Law Judge and my representative questioned my understanding and my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this agreement voluntarily.

11-6-97
Date

Francis Sabo Jr.

OAL DKT. NO. EDU 6163-96 (EDU 8587-95 ON REMAND)
AGENCY DKT. NO. 185-5/95

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCIS SABO, ALBERT G.	:	COMMISSIONER OF EDUCATION
WAGNER YOUTH CORRECTIONAL	:	DECISION ON REMAND
FACILITY, STATE OF NEW JERSEY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

February 19, 1997
Date of Mailing, February 19, 1997

77-97

77-97

CLAUDETTE JEFFRIES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured clerical worker, challenged the Board's reassignment of her to a position having a decreased salary.

ALJ denied the Board's motion to dismiss the petition for lack of jurisdiction, but concluded that the petition had to be dismissed for untimeliness as petitioner filed 105 days following receipt of notice of reassignment, not 90 days as required by *N.J.A.C.* 6:24-1.2(c).

Commissioner adopted findings and determination in initial decision. Petition was dismissed as untimely.

February 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ORDER OF DISMISSAL

OAL DKT. NO. EDU 1905-96
AGENCY DKT. NO. 38-1/96

CLAUDETTE JEFFRIES,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Eldridge Hawkins, Esq., for petitioner

Melvin C. Randall, Esq., for respondent
(Love & Randall, attorneys)

Record Closed: December 17, 1996 Decided: January 2, 1997

BEFORE **RICHARD McGILL,** ALJ:

This matter involves a petition by Claudette Jeffries (petitioner) in which she alleges that she was subjected to unfair and abusive treatment by her supervisor, Velma Jones, and improperly reassigned by the Board of Education of the City of East Orange (respondent) from the position of Group IV Clerk to Group III Secretary with a decrease in salary. Respondent now moves for dismissal of the petition for lack of jurisdiction and for failure to file the petition in a timely manner.

PROCEDURAL HISTORY

The petition in this matter was filed with the Commissioner of Education on January 31, 1996 pursuant to the Commissioner's authority to hear and determine controversies under the school laws pursuant to *N.J.S.A.* 18A:6-9. Acting as a *pro se* litigant, petitioner did not cite any statute or regulation allegedly violated by respondent. The matter was transmitted to the Office of Administrative Law on February 29, 1996 for determination as a contested case.

Eldridge Hawkins, Esq. entered an appearance on behalf of petitioner. During a prehearing conference on September 16, 1996, Counsellor Hawkins advised that petitioner has filed a petition in Superior Court alleging a violation of the Conscientious Employee Protection (Whistle-blower) Act, *N.J.S.A.* 34:19-1 to -8, based upon the same set of facts. The parties agreed at that time that petitioner's supervisor, Velma Jones, is not a party to this proceeding.

Respondent filed its motion to dismiss the petition in this matter on November 27, 1996. Petitioner did not respond to the motion.

MOTION TO DISMISS

Respondent first moves to dismiss the petition for lack of jurisdiction. The Commissioner of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. Here, petitioner has not specifically alleged, either in the petition or in response to the motion, that respondent violated any of the statutes or regulations comprising the school laws. Petitioner mentions only one statute, the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 to -8, which is the subject of a proceeding in Superior Court. However, the Conscientious Employee Protection Act is not part of the school laws.

Nonetheless, the factual assertions in the petition indicate that petitioner has been an employee of respondent for eighteen years evidently in secretarial or clerical positions. In

October 1995, respondent reassigned petitioner to a different position with a reduction in salary. These allegations imply that respondent may have violated petitioner's tenure rights secured by *N.J.S.A.* 18A:17-2. Under the circumstances, I **CONCLUDE** that the motion to dismiss the petition for lack of jurisdiction must be denied.

To initiate a contested case before the Commissioner of Education, the petitioner must file the petition no later than the 90th day from the date of receipt of notice of a final order, ruling or other action by the district board of education, which is the subject of the requested contested case hearing. *N.J.A.C.* 6:24-1.2(c). Here, the petition relates to a series of incidents dating back to January 1994. With respect to the most recent incident, the petition indicates that respondent finalized the determination to reassign petitioner at a meeting on October 17, 1995 and that petitioner was in fact reassigned on October 18, 1995. Thus, petitioner was on notice of respondent's action on October 18, 1995. Further, it is undisputed that the petition in this matter was filed on January 31, 1996. These dates indicate that the petition was filed on the 105th day following receipt of notice of the reassignment. It follows that the petition was filed in an untimely manner relative to the most recent incident as well as all prior incidents. Under the circumstances, I **CONCLUDE** that the petition in this matter must be dismissed.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

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

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

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

Jan. 2, 1997
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

Jan. 7, 1997
DATE

Val Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

OAL DKT. NO. EDU 1905-96
AGENCY DKT. NO. 38-1/96

CLAUDETTE JEFFRIES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that the Petition of Appeal was filed out of time and that no relaxation or waiver of *N.J.A.C.* 6:24-1.2(c) is warranted in this instance.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 19, 1997
Date of Mailing, February 19, 1997

78-97

LOUISE V. O'DONNELL,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY, HANOVER TOWNSHIP EDUCATION ASSOCIATION AND NEW JERSEY EDUCATION ASSOCIATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured teaching staff member, claimed entitlement to credit for her six years of service as a part-time supplemental teacher.

ALJ dismissed the matter for failure to state a claim arising under school laws, for lack of subject matter jurisdiction over the interpretation and enforcement of contractual provisions and for untimeliness.

Commissioner adopted findings and determination in the initial decision as his own.

February 19, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9878-94

AGENCY DKT. NO. 343-8/94

LOUISE V. O'DONNELL,

Petitioner,

v.

HANOVER TOWNSHIP BOARD OF EDUCATION, HANOVER TOWNSHIP EDUCATION ASSOCIATION and NEW JERSEY EDUCATION ASSOCIATION,

Respondents.

Noel C. Crowley, Esq., for petitioner
(Crowley & Crowley, attorneys)

Andrew B. Brown, Esq., for respondent Hanover Township Board of Education
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Robert A. Fagella, Esq., for respondents Hanover Township Education Association and New Jersey Education Association
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: November 19, 1996 Decided: January 3, 1997

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

Statement of the Case

This is a suit by a full-time teacher who did not receive credit on the salary guide for prior part-time employment in the district. Petitioner Louise V. O'Donnell had served for six years as a part-time supplemental teacher in the Hanover school district. When she became a full-time classroom teacher in 1984, she was placed at Step 4 of the salary guide. She now contends that her acceptance of this initial placement on the salary guide was wrongfully induced by fraudulent statements made by the former superintendent of schools. Nearly a decade later, in or about 1993, the Hanover Township Board of Education ("Board") gave credit to several other teachers for their prior service as supplemental teachers in the district. In 1994 Ms. O'Donnell brought the present appeal to the Commissioner of Education ("Commissioner"), claiming that the Board's denial of salary credit for her prior service constitutes a "continuing violation" and violates her constitutional right to equal protection and due process of law.. She is seeking additional credit on the salary guide from 1993 onward. Additionally, she joined her local and state collective-negotiating representatives, alleging that they beached their duty of fair representation.

Presently the matter comes before the Office of Administrative Law ("OAL") on respondents' motions to dismiss and for summary decision. The Board contends that petition must be dismissed because it fails to state a claim arising under the school laws, because it was filed out-of-time, and because the Commissioner lacks subject matter jurisdiction. Similarly, the Hanover Township Education Association and the New Jersey Education Association ("HTEA" and "NJEA" or, collectively, "Association") move to dismiss the petition for lack of jurisdiction and failure to state a claim for which relief may be granted. For the reasons which follow, the respondents' motions to dismiss the petition will be granted.

OAL DKT. NO. EDU 9878-94

Order

It is **ORDERED** that Ms. O'Donnell's petition against the Board, the HTEA and the NJEA is dismissed.

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

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

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

Jan. 3, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Jan. 3, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 9878-94
AGENCY DKT. NO. 343-8/94

LOUISE V. O'DONNELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY, HANOVER TOWNSHIP EDUCATION ASSOCIATION AND NEW JERSEY EDUCATION ASSOCIATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the initial decision was mailed to the parties on January 10, 1997, and the exceptions were filed on January 29, 1997.* Accordingly, neither the exceptions nor replies thereto are considered herein.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is properly dismissed for failure to state a claim arising under school laws, for lack of subject matter jurisdiction and for untimeliness, pursuant to respondents' motions. Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and this matter is hereby dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

February 19, 1997
Date of Mailing, February 19, 1997

* Even assuming, *arguendo*, that counsel for petitioner is correct in asserting that the initial decision was mailed to his office on January 14, 1997, exceptions were nonetheless filed outside the 13-day time frame provided by regulation.

78-97

EDU #9878-94
C # 78-97
SB # 29-97

LOUISE V. O'DONNELL,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY, HANOVER TOWNSHIP EDUCATION ASSOCIATION AND NEW JERSEY EDUCATION ASSOCIATION,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, February 19, 1997

For the Petitioner-Appellant, Crowley & Crowley (Noel C. Crowley, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Hanover, Schwartz, Simon, Edelstein, Celso & Kessler (Andrew B. Brown, Esq., of Counsel)

For the Respondents-Respondents Hanover Township Education Association and New Jersey Education Association, Zazzali, Zazzali, Fagella & Nowak (Robert A. Fagella, Esq., of Counsel)

The decision of the Commissioner of Education dismissing the petition filed in this matter is affirmed substantially for the reasons expressed therein. In so doing, we reject the contention of petitioner's counsel that the Commissioner had "refused to recognize the true nature of [petitioner's] claim." Brief in support of appeal, at 7. Counsel for petitioner maintains that the claim herein "is based solely and exclusively

8/6/97

respecting the allowance of credit of supplemental teaching experience in the assignment of salary grades," Id. at 8, and that petitioner's claim "has nothing to do with the events surrounding [her] hiring in 1984." Id. at 9.

However, a review of the petition of appeal filed with the Commissioner reveals that petitioner made express allegations relating back to her initial placement on the salary guide in 1984. Petitioner claimed therein that she had been fraudulently induced to accept her initial placement in reliance upon "intentionally false statements" made to her by the former superintendent of schools that it was the Board's policy and practice not to give credit for supplemental teaching experience upon conversion to full-time employment. She further alleged that at the time of this purported misrepresentation, another supplemental teacher in the district had been granted full credit for all of her supplemental teaching experience when she was converted to full-time employment.

Consequently, we find it disingenuous for petitioner's counsel to now argue that it is "absurd" to consider her claim as involving a loss of salary resulting from improper initial placement on the salary guide. Id. at 8.

August 6, 1997

Date of mailing AUG 0 8 1997

80-97

80-97

MUIRFIELD CONSTRUCTION COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND HERMAN H. BRAUN, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning construction company alleged the Board awarded a nonresponsive bid containing material defects to respondent bidding company for plumbing contract.

ALJ concluded that the bid did materially deviate from the specifications set forth by respondent contracting agency and was untimely, based on the record before him. Moreover, the ALJ concluded that the Board was without the power to accept respondent's invalid bid; however, this conclusion did not necessarily result in petitioner's being awarded the contract. Rather, the ALJ concluded that the proper remedy was to return the matter to the Board to consider petitioner's bid and its other options consonant with the restrictions and purposes of the Public Schools Contracts Law. Petitioner's Motion for Summary Decision was granted.

Prior to the issuance of this decision, parties proposed a settlement, wherein the Board agreed to pay petitioner a sum of money to release its claim. The Commissioner declined approval of said settlement as violating sound public policy and subverting state bidding laws. Thus, the Commissioner rendered a final determination on the merits and affirmed the findings and conclusions of the ALJ that this matter should be returned to the Board to consider petitioner's bid and its other options consonant with the Public Schools Contracts Law, N.J.S.A. 18A:18A-1 to -59.

February 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11336-96

AGENCY DKT. 517-11/96

MUIRFIELD CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY AND HERMAN H. BRAUN, INC.,

Respondents.

Robert Hedinger, Esq., appearing for petitioner
(Hedinger & Lawless, attorneys)

Eric Bernstein, Esq., appearing for respondent Englewood Board of Education
(Weiner Lesniak, attorneys)

No appearance on behalf of respondent Herman H. Braun, Inc.

Record Closed: December 4, 1996 Decided: January 7, 1997

BEFORE **MARGARET M. HAYDEN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Muirfield Construction, Co., Inc., (petitioner or Muirfield) filed a petition on November 1, 1996 with the Commissioner of Education (Department) after having filed an Order to Show Cause in Superior Court - Law Division which was denied with directions to proceed before the Department. Muirfield sought emergent relief staying the awarding of the plumbing contract by the Board of Education of the City of Englewood (Board) to respondent Herman H. Braun, Inc. (Braun) on the grounds that Braun's bid was materially defective. The Department subsequently transmitted the matter to the Office of Administrative Law (OAL) on November 7, 1996 for determination as a contested case pursuant to *N.J.A.C.* 52:14F-1 to -13. The OAL scheduled an emergency hearing on November 12, 1996 at which time the Board and Muirfield appeared and agreed that Muirfield would turn the petition for emergent relief into a summary decision motion and the Board would refrain from entering into a contract with Braun pending a swift resolution of the motion. Muirfield and the Board filed additional briefs with the last one received on December 4, 1996. On December 23, 1996, Muirfield sent a newly decided Appellate Division case to this tribunal without additional legal argument. Respondent Braun did not appear at the hearing and has submitted no papers.

FINDINGS OF FACT

Based upon the undisputed evidence presented in the affidavits and supporting documents, I **FIND** the following **FACTS.**

On August 4, 1996, the Board advertised for bids on construction project No. 109275, entitled "Quarles Elementary School Expansion" (hereinafter referred to as the "Project"). The bid package solicited bids for various aspects of the construction, including plumbing, HVAC and combined mechanical and electrical work. The bids were opened on September 10, 1996 and Muirfield was the low bidder. Subsequently, however, Muirfield withdrew its bid due to an alleged error on its part.

As a result of Muirfield's withdrawal of its original bid, the Board readvertised for bids on the project on September 25, 1996. The specifications, identical to the originals, provided that the bids were to be opened on Tuesday, October 8, 1996 at 10:00 a.m. at the Board's offices located in the Administration Building at 12 Tenafly Road, Englewood, New Jersey. In the specifications, the Board reserved the right to "waive immaterial informalities, or to accept any proposal which, in the opinion of the Board of Education will be in the best interest of the school district." The Notice also provided that bids could be either mailed to Nilkanth Patel, the Board Secretary-Business Administrator, or hand-delivered to the Board's office. The notice stated "No bid will be considered, regardless of the postmark, unless it is in the hands of the Secretary-Business Administrator prior to the time set for the opening of the bids."

The bid package included detailed "Instructions to Bidders" ("ITB") which also stated that the late bids would not be accepted. For example, at ITB, Article 6, bidders were advised:

> A Proposal will be declared invalid if it is not deposited at the designated location prior to the time and date established for receipt of Bids in the Advertisement for Bids. No oral Bids, or Bids submitted by any method other than the proper form set forth in Article 5, will be accepted or considered by the Owner.

The scope of the Project was to expand and renovate the Donald A. Quarles Elementary School in Englewood. The Board had prepared the plans and specifications in order to afford it the option of accepting certain "alternates" which either increased or decreased the scope of work. Of particular import here was Alternate No. 8, which proposed deletion of "classroom building E" from the base bid. There was substantial plumbing work included within classroom building E. The Bid Form for plumbing specifically listed Alternate No. 8 and instructed the bidders to identify the monetary "deduct" from their bid for this alternate.

Thus, under Section 01100, Alternates, bidders were advised at paragraph IB3 as follows:

> All Alternates described in this Section are required to be reflected in the bid submitted on the Bid Form for the Work; however, do not submit alternates other than those described in this Section.

Paragraph IC1 specified exactly how each bidder was to handle the alternative bids compared to the base bid:

> Each bidder shall submit on the Bid Form, all Alternate Bids stated herein, as the Alternates related to their specific Contract. Alternate Bids shall state the difference in price as "addictions to" or "deductions from" the Base Bid unless otherwise noted, for the substitution, omission, or addition of the alternate materials, items or construction from that shown and specified. If the Alternate does not require a change in the Base Bid, state "No Change" on the Bid Form. (Emphasis added.)

Although bids were normally opened in the front office of the Administration Building, on October 8, 1996, the morning of the bid opening, a meeting in the front office necessitated the Board's moving the bid opening to the library, located on the second floor. No signs were posted to indicate the change of location. In addition, no one was assigned to be at the front entrance in order to direct any other bidders to the new location.

The move took place at about 9:55 a.m. and by the time the group reached the library and were ready to open the bids, the time was approximately 10:02 a.m. Prior to the opening of the bids, another bidder arrived at approximately 10:08 a.m. who identified himself as a representative of Herman H. Braun, Inc. and walked up to the Board Secretary and handed him a sealed envelope. The representative offered no reason for his lateness. The Secretary did not ask the bidder the reason for his lateness but assumed that the bidder was late because he did not know where to go

upon entering the building and may have been held up looking for someone who could direct him.

Having accepted the late bid, the Secretary opened the bids. There were only two bidders on the plumbing aspect of the project, Muirfield and Braun. Braun had the lower base bid of $131,100 and Muirfield's base bid was $153,313. Braun's bid made no deduct for Alternative No. 8 but indicated that Alternate No. 8 was "not applicable." Muirfield deducted $50,000 from its bid based on the scope of the work deleted in Alternative No. 8.

Following the receipt of bids, Muirfield's president contacted the Board and protested the award to Braun. On October 9, 1996, Muirfield, through its counsel, sent the Board a formal protest letter. On October 15, 1996, the Board advised Braun that Englewood had resolved to award the plumbing contract, which did not include Alternative No. 8 as part of the project, to Braun. On October 17, 1996, when Muirfield contacted the Board Secretary to ascertain whether Englewood intended to reject the Braun bid as nonresponsive, the Secretary stated that the Board had already resolved to award the contract to Braun. The Board has not entered into a contract with Braun pending the resolution of this motion.

POSITIONS OF THE PARTIES

Petitioner

As there are no material facts at issue, Muirfield is entitled to a Summary Decision in its favor. Petitioner's position is that Braun's bid was materially defective and hence invalid for two reasons. First, the failure of Braun to follow the instructions to provide all the required alternatives bids, specifically Alternative No. 8, rendered the bid non-responsive and invalid. The failure to follow the instructions is a material defect which gave Braun an unfair advantage and provided an opportunity for favortism. Additionally, the acceptance of Braun's bid at 10:08 a.m. after the published

time of 10:00 a.m. when no valid reason was proffered was a material defect also rendering the bid invalid. Both material defects undermine the purpose of the public bidding statutes in general and the education public bidding statute in particular. Braun's invalid bid may not be accepted by the Board. Therefore the Muirfield's bid, which was the second lowest bid and conformed to the specifications completely, is the lowest responsible bid and Muirfield must be awarded the contract.

Englewood Board of Education

The Board is entitled to Summary Decision in its favor.[1] The Board argues that neither of the alleged defects are material defects which render a bid invalid. The Board did not select Alternative 8 as part of the scope of the work so no harm was done. The Board assumed that Braun's response "not applicable" meant that the alternative of eliminating classroom building E would not alter Braun's base bid and so the bid was responsive to the bid specifications. Additionally, allowing the bid to be opened ten minutes late was reasonable based on the Secretary's assumption that the lateness was caused by the change of rooms. Moreover, the bid announcement specifically stated that the Board reserved the right to "waive immaterial informalities". Both of these alleged defects were mere immaterial informalities that the Board has the right to waive.

LEGAL DISCUSSION AND CONCLUSION

Administrative summary decisions are governed by *N.J.A.C.* 1:1-12.5(b), which reads:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged

[1]The Board argued in its brief that the case was ripe for summary decision in its favor but need a hearing to flesh out more facts before deciding Petitioner's Summary Decison Motion. During a phone conversation with counsel for the Board, counsel for Muirfield and the undersigned, counsel for the Board agreed that the matter was ready for summary decision.

> and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The standards enunciated in *N.J.A.C.* 1:1-12.5(b) are similar to those for a summary judgment motion found in *R.* 4:46-2 Consequently, the cases interpreting *R.* 4:46-2 are binding.

The first task of the judge in a summary decision motion is to determine whether there is a genuine issue of a material fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 73 (1954). Summary decision is designed to allow the judge to quickly and inexpensively dispose of any case which does not present any genuine issue of material fact requiring disposition at a hearing. *Id.* at 74. A summary decision motion requires the motion judge to consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 540 (1995).

Here, the facts material to the matter to be decided are not disputed by the parties. Both parties agree and I **CONCLUDE** that the matter is ripe for summary decision. Thus my task is to analyze the facts in light of the applicable to law see which party prevails as a matter of law.

Pursuant to the public school contracts law, *N.J.S.A.* 18A:18A-1 to -59 (Act) contracts or agreements for the performance of work to be paid out of school funds generally are required to be made only after public advertisement for bids and the bidding has taken place. *N.J.S.A.* 18A:18A-4. Advertisements for bids are generally required to be published in the newspaper sufficiently in advance of the date fixed for

receiving bids but no less than ten days prior to the date. The advertisement must designate the manner of submitting and receiving bids and the time and place at which they will be received. *N.J.S.A.* 18A:18A-21. Bids must conform to specifications: "No bid shall be accepted which does not conform to the specifications furnished therefore." *N.J.S.A.* 18A:18A-22. The contract must be awarded to the lowest responsible bidder. *N.J.S.A.* 18A:18A-37.

Legal principals established under other public bidding statutes are applicable to the public school contracts law because the purpose of all bidding statutes is "to secure competition and 'guard against favoritism, improvidence, extravagance and corruption,' in order to benefit the taxpayers and not the bidders." *In re Honeywell Info. Sys., Inc.*, 145 *N.J. Super.* 187, 200-01 (App. Div. 1976), *certif. denied,* 73 *N.J.* 53 (1977) (quoting *Township of Hillside v. Sternin,* 25 *N.J.* 317, 322 (1957)). Therefore, public bidding statutes must be construed with sole reference to the public good and rigidly adhered to by the courts. *Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp.* 283 *N.J. Super.* 223, 230 (App. Div. 1995).

The law is clear that "where a party does not materially respond to the bid specifications he cannot be classified as a bidder at all, since the specifications are mandatory and jurisdictional." *George Harms Constr. Co., Inc. v. Borough of Lincoln Park,* 161 *N.J. Super.* 367, 374 (Law Div. 1978). The conditions and specifications of an invitation to bid must apply equally to all prospective bidders; the individual bidder cannot decide to follow or to ignore these conditions, thereby able to "estimate his bid on a basis different from that afforded to other contenders." *Hillside, supra,* 25 *N.J.* at 322-23 (citations omitted).

Legally acceptable bids cannot materially deviate from the specifications set forth by the contracting agency. *Meadowbrook Carting Co., Inc. v. Borough of Island Heights,* 138 *N.J.* 307, 314 (1994). While minor or inconsequential discrepancies and technical omissions can be waived, material conditions contained in bidding specifications cannot be waived. *Terminal Const. Corp. v. Atlantic County Sewerage*

Auth., 67 *N.J.* 403, 411 (1975). New Jersey Courts have developed a two-prong test for determining if a deviation is material: (1) does waiver of such defect deprive the purchaser of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements, and (2) does it adversely affect the competitive bidding process by placing a bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. *Meadowbrook Carting, supra,* 138 *N.J.* at 315; *Township of River Vale v. R.J. Longo Const. Co, Inc.,* 127 *N.J. Super.* 207, 216 (Law Div. 1974).

The failure to bid on all terms necessarily creates an inequality in the bidding and an opportunity for favoritism. *Meadowbrook Carting, supra,* 138 *N.J.* at 324-25. Moreover, the omission of a cost item has been held *per se* material "even if it is unlikely that it could have affected the relative positions of the bidders" because it undermines the common standard of competition. *In re On-Line Games Contract, supra,* 279 *N.J. Super.* at 601-02.

In *L. Pucillo & Sons, Inc. v. Mayor and Council of the Borough of New Milford,* 73 *N.J.* 349 (1977), where the municipality requested bid proposals for garbage collection for a duration of one, two, three and five years, the firm awarded the contract failed to submit a bid for the five year alternate. The Court found the failure to submit a bid for each alternate a material defect even though the contract was awarded for a three year duration, stating:

> We are not, however, willing to transform the mandatory requirement in these specifications into a polite request. The ordinary reader of the specifications would regard them as calling for bids on all the terms specified. Awarding the contract to one who failed to submit bids on all terms necessarily created an inequality in the bidding and an opportunity for favoritism.
> [*Id.* at 356.]

The Court pointed out that the bidder who failed to bid on the longest term gained a competitive advantage because the municipality's desire for a long-term contract may have discouraged other bidders. *Id.* at 357-58.

Here, in response to the bid specifications that required bidding on Alternative No. 8, Braun put "not applicable" for Alternative No. 8. The Board's determination that "not applicable" meant "no change" is lacking in logic in that the phrases do not have the same, or even similar, meaning. The instructions plainly required Braun to put "no change" to connote that the alternative meant no change in the base price. The logical every day meaning of the phrase "Not applicable" in Alternative No. 8 was that Braun did not consider this alternative applicable to its bid. One is left to speculate the reason for the incongruous phrase in the Alternative No. 8 bid. Perhaps Braun misread the bidding instructions and thought it could decline to bid on the project without the classroom building E, which equaled one-third the cost in Muirfield's bid.

Ambiguity in the bidding process is kept to a minimum by the detailed specifications which must be uniformly followed by all bidders. *In re On-Line Games Contract, supra* at 605. Here, Braun's failure to follow the requirement to bid on all alternatives put it on a different footing than the other bidders who had to take the time and effort to actually consider cost figures and commit themselves to the alternative project if classroom E is not built. Braun's answer to Alternative No. 8 allowed it to avoid the time and effort of calculating the cost and the commitment to a considerably smaller project described in Alternative No. 8. Hence, Braun received an advantage on the other bidders and even over potential bidders who did not bid on the project because Alternative No. 8 was included and might be the final project. Plainly Braun's failure to include the required response to Alternative No. 8 deprived the Board of the ability to engage in a uniform comparison of bids. Thus, even though ultimately the Board did not choose Alternative No. 8 as part of the final project, the deviation was material because of the inequality in the bidding and the opportunity for favoritism in the entire bidding process. *L. Pucillo & Sons, Inc. supra* at 356.

The other deviation from the published bid specifications was the acceptance of Braun's bid past the published time. It is troubling that Braun's representative offered no explanation whatsoever, let alone a reasonable one, for his lateness and the Board accepted Braun's late bid without even asking the reason. This silence in light of the unusual waiving of the strict time limits had the capacity to undermine the entire bidding process by allowing all attending the bidding to speculate, correctly or not, that Braun was being treated differently than all other bidders. Obviously no extraordinary circumstances that were independently verifiable and beyond the control of the bidder such as in *Young v. West Orange Redev. Agency,* 125 *N.J. Super.* 440 (App. Div. 1973) existed that were given to the Board that justified the exceptional waiving of the time requirement.

The acceptance of Braun's bid late had the capacity to give Braun an unfair advantage. While Braun may have been looking for the switched room, he may also have been using the extra time to gain unfair advantage by changing the bid based on the competition, or lack thereof, that he saw in the room. Additionally, the bidding material did not specify the exact room the bidding was to take place so Braun's representative could not have been relying on merely having to reach the front office to be timely. It is possible that Braun's representative reached the original room one or two minutes after ten and it took him only five or six minutes to find the switched room. Thus, the casual waiving of the time limitation without an objective verifiable reason given at the time of the late arrival was arbitrary and unreasonable. Furthermore, it resulted in Braun being placed in a more favorable advantage and it undermined the common standard of competition.

The Supreme Court recently reiterated the need for strict compliance with public bidding laws, noting "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way. " *Meadowlands Carting, Inc., supra* at 314 (quoting *Hillside*, 25 *N.J.* at 326). Applying the two-prong test set forth in *Meadowbrook*

Carting, supra at 315 and *Township of Riverdale, supra* at 216, I **CONCLUDE** that each deviation was a material unwaivable defect which invalidated Braun's bid.

While I **CONCLUDE** that the Board was without the power to accept Braun's invalid bid, this conclusion, however, does not necessarily result in Muirfield's being awarded the contract. Rather, I **CONCLUDE** that the proper remedy is to return the matter to the Board to consider Muirfield's bid and its other options consonant with the restrictions and purposes of the public school contract law. *N.J.S.A.* 18A:18A-1 to -59.

ORDER

Based upon the foregoing, I hereby **ORDER** that the petitioner's Motion for Summary Decision is **GRANTED** and the Board's Motion for Summary Decision is **DENIED.** I further **ORDER** that the decision of the Board to accept the Braun's bid is hereby **REVERSED** and I further **ORDER** that the Board shall determine whether to accept Muirfield's bid.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan 7, 1997
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

1/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

MMH/dgi

EXHIBIT LIST

Petitioner

Certification of Carolyn Zabawa

Certification of Nicholas G. Sapnar

Respondent

Certification of Nilkanth Patel

OAL DKT. NO. EDU 11336-96
AGENCY DKT. NO. 517-11/96

MUIRFIELD CONSTRUCTION COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND HERMAN H. BRAUN, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties. Prior to the rendering of this decision, however, a proposed settlement agreement was submitted to the Commissioner for his review and approval. (See attached proposed settlement.)

Upon review of the terms of the proposed settlement, wherein the Board has agreed to pay petitioner the sum of $35,000 for release of its claim, the Commissioner herein declines his approval, finding that acceptance of such terms would effectively sanction a proposed subversion of the Public School Contracts Law set forth at *N.J.S.A.* 18A:18A-1 to-59 and would, thus, violate sound public policy. Additionally, the Commissioner finds the settlement defective in that a party to this matter, Respondent Herman Braun, Inc., is not a signatory to the agreement.

Wherefore, as this settlement cannot be countenanced, the Commissioner finds it appropriate to render a final determination on the merits of this matter.

Upon careful and independent review of the initial decision, the Commissioner determines to affirm the findings and conclusions of the Administrative Law Judge (ALJ) that this matter should be returned to the Board to consider petitioner's bid and its other options

consonant with the restrictions and purposes of the Public Schools Contracts Law set forth at *N.J.S.A.* 18A:18A-1 to -59. In so ruling, the Commissioner observes that Respondent Braun did not participate in the hearing and, therefore, proffered no facts that would permit the ALJ to consider whether the circumstances herein were such that Braun's bid could have been considered timely submitted, notwithstanding that it was received after the time specified, pursuant to *In the Matter of Code Environmental Services, Inc., Protest of Bid Award Bid Ref. #92-X-26498, Non-Emergency Remedial Action Services,* decided by the Superior Court of New Jersey, Appellate Division, April 15, 1993, A-5707-91T2. Therefore, the Commissioner must affirm the finding of the ALJ that the bid was untimely filed.

The Commissioner further concurs that Braun failed to follow instructions to bid on all alternatives in preparation of the bid, rendering its deviation material, as that standard has long been interpreted by the courts, see, *e.g., Meadowbrook Carting Co., Inc., supra,* and, thus, disallowable under *N.J.S.A.* 18A:18A-22.

Accordingly, the decision of the OAL is affirmed and this matter should be returned to the Board forthwith to consider petitioner's bid and its other options consonant with the restrictions and purposes of the Public School Contracts Law at *N.J.S.A.* 18A:18A-1 to -59.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

February 24, 1997
Date of Mailing, February 24, 1997

RELEASE AND SETTLEMENT AGREEMENT

This **RELEASE** dated February 10, 1997, is given by **MUIRFIELD CONSTRUCTION COMPANY, INC.**, hereinafter referred to as "Muirfield" or "Releasor", whose principal offices are located at 67 Riverside Avenue, Red Bank, New Jersey 07701

AND

the **BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD**, a school board organized under the laws of the State of New Jersey, whose principal offices are located at 12 Tenafly Road, Englewood, New Jersey 07631, hereinafter referred to as "Releasee".

The parties are involved in a litigation entitled Muirfield Construction Company, Inc. v. Board of Education of the City of Englewood, Bergen County and Herman H. Braun, Inc., OAL Docket No. EDU 11336-96, in which the parties are awaiting a Final Administrative Law Decision from the Commissioner of Education. Said decision is further appealable to the State Board of Education and the appellate divisions of the New Jersey court system, of which either or both parties may exercise their legal right to appeal, engendering legal costs on both sides. In addition, OAL Judge Margaret Hayden's decision to rescind the Board's award of the plumbing contract to Herman H. Braun did not award said contract to Releasor, but remanded the decision back to the Releasee for further consideration. The Releasee is considering rejecting Releasor's bid, which would be the second rejection of a plumbing services bid for this project, thereby offering Releasee an opportunity to negotiate said services pursuant to N.J.S.A. 18A:18A-5. Releasor disputes Releasee's right to reject its bid and to negotiate, and has indicated that if the Releasee chooses not to award said bid to Releasor, it may invoke further legal action, which will only further delay the project. It is imperative that Releasee complete the Quarles School construction project by the summer of 1997-1998 school year.

In light of all of these issues, and in order to avoid further litigation and legal costs, as well as possibly costly delays to the Quarles Elementary School expansion construction project, which not only impacts the Releasor and Releasee per se, but places additional costs on the Releasee due to construction delays to the general contractor and other subcontractors on the project, Releasor and Releasee agree as follows:

(1) Releasor, with the intention of binding itself, its successors and assigns, does hereby release and discharge the Releasee, its officials, employees, agents and assigns from any claims, demands, actions, judgments and executions which Releasor ever had, or now has, or may ever have, or which the Releasor's successors, or assigns may have, or claim to ever have, against the Releasee, its officers, employees, agents and assigns which arise or could arise out of a legal action that has been filed with the Commissioner of Education of the State of New Jersey, entitled Muirfield Construction Company, Inc. v. Englewood Board of Education and Herman H. Braun, Inc., OAL Docket No. EDU 11336-96, Agency Docket No. 517-11/96 (January 7, 1997).

(2) Furthermore, by said release, Releasor agrees not to file any further legal action against Releasee regarding the plumbing bid for the Quarles Elementary School expansion construction project, including, but not limited to, the rejection of the second Muirfield plumbing services bid nor shall Releasor contest the awarding of a plumbing services contract with any other company for the Quarles Elementary School expansion construction project, pursuant to the Local Public Schools Contract Law.

(3) In consideration for such actions by Releasor, Releasee agrees to pay the sum of $35,000.00, within ten (10) days of approval of this Agreement by the Commissioner which Releasor agrees expressly intends to effectuate the extinguishment of all of its obligations as set forth herein or possible in the future.

(4) Releasor hereby authorizes Robert Hedinger, Esq., its attorney, to receive the consideration mentioned above from the Releasee, with the check made payable to "Muirfield Construction Company, Inc. and Robert Hedinger, Esq."

(5) Both parties agree that nothing contained herein is an admission by either party of any wrongdoing, liability, unlawful conduct or breach of any duty or obligation and both parties explicitly deny same.

(6) This document shall be construed under the laws of the State of New Jersey. This document contains the entire understanding between both parties. It may not be changed unless the changes are in writing and signed by authorized representatives of the Releasor and the Releasee.

(7) Both parties acknowledge that they have carefully read this document, that they understand all of its terms and conditions, that they have voluntarily entered into this document, that their authorized representatives, as acknowledged by their signatures below, have been authorized to sign such document and that they have not relied upon any representation or statement, whether written or oral, not set forth in this document.

(8) The terms and conditions of this document are not only subject to the approval of both parties, but the Commissioner of Education as well and this Agreement shall be null and void unless the Commissioner approves the terms and conditions hereof.

Agreed and accepted:

Sworn and subscribed to before
me this 10th day of February, 1997.

JUNE R. SILANCE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires
Feb. 19. 2001

MUIRFIELD CONSTRUCTION CO., INC.
Nicholas G. Sapnar
Title: President

Sworn and subscribed to before
me this 10 day of February, 1997.

ENGLEWOOD BOARD OF EDUCATION
Title: PRESIDENT

BOARD SECRETARY

Approved by the New Jersey State Commissioner
of Education:

Dated: , 1997

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M.T., on behalf of minor children, L.T. AND H.T., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning parent challenged the Board's residency determination that her daughters, L.T. and H.T. , were not domiciliaries of the District and, thus, not entitled to a free public education.

ALJ concluded that L.T. and H.T. were not domiciliaries of the District as of March 1995. Although petitioner stated that she returned to Lindenwold to re-establish residency in the District, she presented no evidence to corroborate her assertion. ALJ directed Board to pursue appropriate action to recover funds due it.

Commissioner adopted initial decision with clarification, dismissing the petition and directing petitioner to remit to the Board the tuition representing the full period of ineligible attendance of L.T. and H.T.

February 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6471-96

AGENCY DKT. NO. 206-6/96

M.T., ON BEHALF OF MINOR CHILDREN,

L.T., AND H.T.,

Petitioners,

v.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

M.T., petitioner, *pro se*

Robert Birsner, Esq., for respondent (Maressa, Goldstein, Birsner, Patterson, Drinkwater & Oddo, attorneys)

Record Closed: October 28, 1996 Decided: January 2, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

The petitioner appealed to the State Department of Education and on July 23, 1996, the Bureau of Controversies and Disputes of the State Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was heard on October 28, 1996, at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey.

STATEMENT OF THE CASE

M.T., on behalf of her daughters, L.T. and H.T., has filed a petition claiming that her daughters were entitled to a free public education from the Lower Camden County Regional School District, pursuant to *N.J.S.A.* 18A:38-1. For the school years 1995-1996 and 1996-1997, M.T. enrolled L.T. and H.T. in Overbrook High School, which is within the Lower Camden County Regional School District. In this present action, Lower Camden County Regional School District is now seeking recovery of the tuition funds due to it, for L.T.'s attendance from November 6, 1995 through to the present, and for H.T.'s attendance, from November 6, 1995 through September 6, 1996.

DISCUSSION OF THE TESTIMONY AND EVIDENCE

Petitioner said that she and her daughters moved from Pine Hill, which is within the Lower Camden County Regional School District, to Erial, which is not in the Lower Camden County Regional School District, in March, 1995. Petitioner's two younger children were then enrolled in Gloucester Township Schools, but L.T., who in 1995-1996 was a senior, and H.T., who in 1995-1996 was a sophomore, were not withdrawn from Overbrook High School.

Petitioner claimed that, once she was notified that Lower Camden County Regional School District was challenging her residency, she re-established residency in the Lower Camden County Regional School District, in Lindenwold, 7 days before the end of the school term, so that her daughters could finish the year, and so that L.T. could graduate.

L.T. did not graduate with her class, because of her grades and because of poor attendance.

M.T. withdrew H.T. from Overbrook High School on September 6, 1996. H.T. is now enrolled in the Gloucester school system. To date, L.T. has not been withdrawn from Overbrook High School, although she has not returned to class.

A certification from Dr. Rita Hanna said that the average cost per pupil in Lower Camden County Regional School District was $8,399. in school year 1995-1996., and a similar cost, not available on the date of the hearing, for 1996-1997. (R-13)

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences therefrom, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1. M.T. and her daughters L.T. and H.T. moved out of the Lower Camden County Regional School District in March, 1995.

2. H.T. was withdrawn from Overbrook High School on September 6, 1996. To date, L.T. has not been withdrawn from Overbrook High School.

DISCUSSION

The relevant statute, *N.J.S.A.* 18A:38-1, states that public schools shall be free to all domiciliaries of the school district.

Despite M.T.'s statement that she returned to Lindenwold to re-establish residency in the Lower Camden County Regional School District, she presented no evidence to corroborate her assertion, which was, I **FIND,** self-serving and inherently unreliable.

CONCLUSION

I **FIND** and **CONCLUDE** that M.T. and her daughters, L.T. and H.T., were not domiciliaries of the school district as of March, 1995.

Respondent may now pursue an appropriate action before the Superior Court for the recovery of the tuition funds due to it.

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

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

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

Jan 2, 1997
DATE

KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

1/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

For Petitioner:

none

For Respondent:

R-1 certification of Dr. Rita Hanna

WITNESSES

For Petitioner:

M.T., petitioner

For Respondent:

Martin Dunn, Director of Security

OAL DKT. NO. EDU 6471-96
AGENCY DKT. NO. 206-6/96

M.T., on behalf of minor children, L.T. AND H.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the conclusions of the Administrative Law Judge (ALJ) that M.T. is not domiciled within respondent's District and, therefore, pursuant to *N.J.S.A.* 18A:38-1, L.T. and H.T. are not entitled to a free public education. It is observed that in reaching this decision, the Commissioner had no cause to question the ALJ's assessment of petitioner's credibility as such assessment is not belied by the record.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL dismissing the Petition of Appeal, clarifying that petitioner is hereby directed to remit to the Board tuition representing the full period of ineligible attendance of L.T. and H.T.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

February 24, 1997
Date of Mailing, February 24, 1997

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IN THE MATTER OF THE TENURE	:	
HEARING OF MARY CATLIN, STATE-	:	COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE	:	DECISION ON REMAND
CITY OF JERSEY CITY, HUDSON COUNTY.	:	
	:	

February 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9326-96

AGENCY DKT. NO. 203-6/95

IN THE MATTER OF THE TENURE HEARING OF MARY CATLIN, STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,

---

Charlotte Kitler, Esq., for petitioner, State Operated School District of Jersey City

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

Record Closed: December 3, 1996 Decided: January 7, 1997

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State-Operated School District of the City of Jersey City certified charges of inefficiency against respondent, Mary Catlin. Catlin is a tenured teacher employed by the District. On February 13, 1995, the District found probable cause to certify the tenure charge of inefficiency which, if true, would warrant Catlin's termination. On June 2 1995, the District filed the written charges with the Commissioner of Education.

The Department of Education transmitted the matter to the Office of Administrative Law on August 23, 1995 for determination as a contested case, pursuant

to *N.J.S.A.* 52:14B-1 to 15 and 52:14F-1 to -13. Hearings were scheduled for on June 7, 13 and 14, 1996.

A hearing was held on June 13 wherein the parties agreed to settle this matter. At the hearing, the respondent, Catlin, was carefully examined by her attorney wherein he was advised that the settlement agreement was subject to the approval of the Commissioner of Education. Further, that the Commissioner could refer this matter to the State Board of Examiners for further action. Thereafter, Catlin acknowledged that she fully understood the charges and the consequences of this settlement.

On June 28, 1996 an Initial Decision Settlement was issued by the undersigned. On August 14, 1996, the Commissioner issued a Decision rejecting the settlement finding that the initial decision did not satisfy the standard as set forth in *Cardonick Brookline Board of Education*, 1990 *S.L.D.* 842. Thus, the matter was remanded to the undersigned for a revision of settlement terms consistent with *Cardonick* decision.

On December 5, 1996 a hearing was held wherein the parties agreed that the *Cardonick* standards were satisfied at the June 13th hearing and that the initial decision should be modified to reflect same. In accordance with the decision of the State Board of Education in *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest. Cardonick at 850-51.

After a review of the entire record, I **FIND** that the proposed settlement is consistent with the public interest because it will save significant legal expenses and

costs as well as time expended by administrators and witnesses. I further **FIND** that Catlin had full opportunity to consult with legal counsel prior to entering into the agreement. Catlin is aware that pursuant to *N.J.A.C.* 6:11-3.6 the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, Catlin was informed by counsel that notwithstanding, the parties agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies. I further **CONCLUDE** that the terms of this settlement are in the public interest.

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDED**.

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

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

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

1/7/97
DATE

Irene Jones
IRENE JONES, ALJ

Jan. 9, 1997
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 10 1997
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

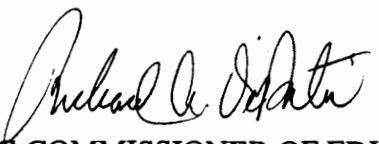
OAL DKT. NOS. EDU 9499-95 and EDU 9326-96 (ON REMAND)
AGENCY DKT. NO. 203-6/95

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY CATLIN, STATE-	:	COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE	:	DECISION ON REMAND
CITY OF JERSEY CITY, HUDSON COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

February 24, 1997
Date of Mailing, February 24, 1997

84-97

84-97 B

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MUNICIPAL COUNCIL OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $2,855,000 made by governing body following voter rejection of proposed budget on April 16, 1996.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions or reversal of increases to revenue was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to increase by $518,265 the General Fund tax levy for a total of $90,177,294 for 1996-97 school purposes.

February 24, 1997

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MUNICIPAL COUNCIL OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Board, Carl J. Palmisano, Esq. (Palmisano & Goodman, P.A.)

For the Township of Woodbridge, Paul M. Weiner, Esq. (Weiner Lesniak)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 14, 1996, through the filing of a Petition of Appeal by the Woodbridge Board of Education, seeking restoration of reductions to the school budget made by the Municipal Council of the Township of Woodbridge (Council) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 16, 1996.

At that election, the voters rejected a public question proposing a General Fund tax levy of $92,514,029 for the 1996-97 school year. On May 14, 1996, following consultation with the Board, as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of $89,659,029 as sufficient to provide for a thorough and efficient system of education (T & E) in the District. This amount represented a reduction of $2,855,000 from the tax levy proposed by the Board, and was effectuated through increases in two revenue line items

and cuts in 12 appropriation line items, for the reasons in Appendix A attached to the Council's May 14, 1996 resolution. By resolution dated May 23, 1996, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Council	
General Fund	$92,514,029	General Fund	$89,659,029

Amount of Reduction by Council		Amount of Reduction in Dispute	
General Fund	$ 2,855,000	General Fund	$ 2,855,000

An answer to the Board's petition was filed by the Council on June 28, 1996. On July 18, 1996 and July 19, 1996, respectively, the parties filed position statements pursuant to *N.J.A.C.* 6:24-7.8, followed by responsive statements on August 7, 1996 and August 12, 1996. The parties chose not to file final summations.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated March 13, 1996 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget, its June 30 financial report, and its year-end audit, the latter two for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus. Following review of the Board's annual audit report, on November 21, 1996 and November 27, 1996, and in response to the Commissioner's request for additional information regarding the Board's health benefits, the parties filed supplemental papers in response to the Commissioner's request and the Council filed a response thereto.

Upon filing of the parties' response submissions as noted above, the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education (T & E). The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T & E. *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township,* 116 *N.J.* 305 (1989).

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amt. Budgeted	Amt. Increased
120	10-303	Budgeted Fund Balance	$0	$840,000

In addition to the line item reductions imposed in the appropriation accounts, the Board seeks an increase in revenues through the appropriation of $840,000 in surplus. In order to reach this figure, the Board avers that the Council incorrectly assumed an estimated surplus of $3,941,195 as of June 30, 1996 which the Council finds to be $840,000 in excess of the permitted 3 percent surplus for the 1996-97 general fund budget. The Board contends that the unaudited cumulative surplus as of June 30, 1996 is $2,853,604, which equals the balance of the accumulated surplus as of June 30,1996, together with the operational surplus for 1995-96 in the

amount of $1,600,384. This calculation is based upon an assumption of a 3 percent permitted surplus for the 1996-97 General Fund budget, the Board would be permitted to carry a surplus of $3,101,195. Thus, the Board contends the available surplus is $2,853,603 which is significantly below the 3 percent permitted surplus and, the Municipal Council, therefore, has no surplus upon which to rely for its proposed cut.

The Board explains that at the time of the budget negotiations the consultant to the Municipal Council placed reliance upon expenditures as of April 17, 1996. It asserts that these figures, in accordance with GAAP, did not include encumbrances through the end of the school year for payments made upon voucher. The Board then attaches a payroll journal to reveal all expenditures that were not encumbered on April 17, 1996, but were, in fact, made prior to June 30, 1996. The Board summarized submitting that the Council's projection which disregarded these payments is fatally flawed and inaccurate beyond repair and must, therefore, be rejected as a foundation to the present budget cuts.

The Board further explains that the expenditure for paving consultants' fees of $625,720 could not have been anticipated. The need for paving arose from "the severe weather conditions in the winter of 1995/96 which resulted in extreme damage to the paved areas of numerous school facilities." Nor could the consultant fees be anticipated because the Board initiated a feasibility study to address the deteriorated condition of its physical plant. The Board determined to expand the scope of a bond issue to include all 24 educational facilities. The decision of the Board to expand this scope, it avers, resulted in an increase in the services required to be performed by the consultants. (Response Submission at pp. 2-3)

The Council's position is that this amount represents the estimated June 30, 1996 fund balance in excess of 3 percent of the 1996-97 General Fund Budget after recasting the additional balance anticipated during 1995-96 for additional excess revenues that were understated.

In its Position Statement (Appendix A), the Council avers that the Board's contention that the unaudited cumulative surplus as of June 30, 1996 is $2,853,603, as compared to the Council's projected surplus of $3,941,195, does not explain how the Board arrived at such a surplus balance. The Board's "advertised recapitulation of balances" included in the 1996-97 budget reflects additional balances of surplus to be appropriated during 1995-96 in the amount of

$50,000. The Board did appropriate $50,000 from surplus by resolution on February 15, 1996. However, the Board fails to mention that subsequent to the Council's approval of the tax levy for the 1996-97 budget on May 14, 1996, the Board substantially depleted its surplus below the permitted 3 percent surplus level by appropriating $625,720 for paving ($400,000) and consultant fees ($225,720).

In doing so, the Council asserted the Board failed to state in its appropriating resolutions that these costs were unanticipated. The Council notes the resolution appropriating the $50,000, as presented to the voters in the recapitulation of balances, does state the expenses were unanticipated and questions how the Board predicted $50,000 of unanticipated costs in one instance but overlooked $625,720 of other costs. The Council concludes stating that "[t]he approval of the utilization of additional surplus by the Board subsequent to the Council's certification of the tax levy appears to be a direct action to lower surplus below the level and amount projected by the Council." (Council's Position Statement, Appendix A)

Upon review, the Commissioner finds that the audited unreserved general fund surplus at June 30, 1996, per the annual year-end audit, was $3,375,338. When comparing this audited amount to the calculation of 3 percent of the proposed 1996-97 general fund budget amount of $103,788,168, or $3,113,645, there is $261,693 in excess of 3 percent. However, a review of the district's Advertised Recapitulation of Balances as contained in the proposed 1996-97 School District Budget Statement indicates that the Board of its own volition reduced its estimated general fund surplus below 3 percent during the 1995-96 school year, and, in fact, proposed a budget for 1996-97 with an estimated undesignated general fund balance of less than 3 percent. Accordingly, the Commissioner finds that the difference between the actual audited surplus of $3,375,338 and the Board's estimated surplus of $2,853,603 as entered into the record, that is, $521,735, shall be included in the 1996-97 budget as Budgeted Fund Balance rather than the $840,000 suggested by Council.

Disputed Line-Item Number 2

Line No.	Account No.	Description	Amt. Budgeted	Amt. Increased
250	10-1XXX	Revenues from Local Sources - Miscellaneous	$400,000	$1,600,000

The Board submits the certification of Frank Doyle, III, insurance consultant, to charge that the $1,000,000 retiree contributions to health benefits cannot be used as anticipated revenue. The remaining $600,000 of additional revenue upon which the Council relied are nonrecurring items. For example, in the 1995-96 school year, the Board sold school buses which provided additional revenue in the amount of $72,000. These buses are no longer available for sale and the revenues, therefore, will not recur. The balance of the funds include, for example, approximately $136,000 as reimbursement from insurance carriers for insured casualty losses, reimbursement of janitor overtime which is predicated upon the use of facilities by outside organizations, athletic activities, adult enrichment programs for which reimbursement was obtained and others all of which are set forth on the attached Miscellaneous Revenue Listing known as Exhibit C. With respect to the interest earned set forth on Exhibit C, the Board notes that this is a speculative figure, at best, dependent not only upon the interest rates, but upon the periods in which available surplus may be invested. Moreover, a major reduction in the amount of surplus held by the District will of necessity reduce the amount of interest which can be anticipated from these funds. The Board urges, therefore, that the Council improperly placed reliance upon these funds as if they were recurring and guaranteed available during the coming school year.

The Board argues that Mr. Doyle's submission explains that based on the current increase in claims experience and in light of the minimal 1 percent and 4 percent respectively, it is probable a large portion (if not all) of the $1,000,000 will be called by CIGNA in the upcoming year. To put this in perspective, through 11 months of the current year, CIGNA has used $644,985 of the $1,000,000 it had set aside in the APDF for the July 1, 1995 to July 1, 1996 policy year.

The Council states that the Board has included as miscellaneous revenues retiree health benefits for the 1994-95 and 1995-96 fiscal years. It challenges the Board's contention that the retiree health benefits of approximately $1,000,000 cannot be used as anticipated revenues as a major change in the application of accounting principles as applied to the realization of miscellaneous revenues. It avers the Board is suggesting an approximate 50 percent change in the manner in which it realizes miscellaneous revenues. Additionally, if its claims experience, with regard to health benefits, changes during the fiscal year 1996-97, the

Council avers the Board should rely on its surplus balance to absorb any costs that were unforeseen when it developed the 1996-97 budget. The Council explains that it is providing a 3 percent surplus balance to the District for unforeseen costs such as a poor claims experience. Furthermore, it contends the Board continually lapses unexpended budget balances.

Upon review, the Commissioner finds that the Board's accounting for the reimbursement of health care premiums made on the behalf of former District employees is inconsistent with generally accepted accounting principles. Under GAAP, any such reimbursed premiums are neither revenues nor expenditures of the district, and should not be included in the district's budget since they are not related to district employees but are merely offered under the COBRA system to provide the former employees health coverage at a lower cost. The proper treatment in the budget and accounting records is to charge that portion of the premium payment that relates to former employees to a balance sheet account known as an "accounts receivable." When payments are received from the former employees, they are applied as a reduction to the accounts receivable balance. This treatment allows the district to track the amounts owed to it from former employees and reflects as an insurance premium in the budget only that amount related to its current employees, which is the district's true expenditure in this area.

The "Analysis of the Recognition of Revenues for Retiree Health Care Contributions" provided by the Board's insurance consultant, Mr. Doyle, confirms that the Board's annual premium obligation to CIGNA for the 1996-97 fiscal year is $11,950,000, of which $900,000 relates to retirees. The consultant indicates that the District's 1996-97 budget did not contain full funding of the premium but, instead, reflected a $1,000,000 reduction, or $10,950,000 in District account #11-000-290-290-60-B-AD-00, with the $1,000,000 reduction effectuated through the collateralization of funds held by the carrier on behalf of the Board in an advance premium deposit fund (APDF) to fund claims that have been incurred but not reported (IBNR) by claimants. The IBNR claims are due to the carrier upon the termination of the insurance policy as "run-off" claims. Under GAAP, districts are required to show the IBNR amount as liability in the annual audit. Any funds held by the insurance agent in excess of the IBNR in an ADPF account are considered unreserved surplus. Mr. Doyle reported that the balance of the ADPF account was $3,143,343 and that the most recent IBNR obligation from CIGNA was $2,534,126. A review of the detailed budget submitted as Exhibit IIA to the petition

of appeal reflects a budgeted appropriation of $11,789,012 in account #11-000-290-290-60-B-AD-00. Through a subsequent request, the Board was asked to provide an explanation for the discrepancy in the amount reported as being budgeted per the consultant and the amount reflected in that detailed budget. The Board's explanation was that the difference of $839,012 represented amounts budgeted for payments to HMOs, employees who waive their insurance, the Vision Service Plan, and the Employee Assistance Plan. In response to that explanation statement, the Council submitted a letter from its certified public accountant offering agreement that other amounts other than the CIGNA premium are included in District account #11-000-290-290-60-B-AD-00 for hospitalization. The Council's response stated that its projection of the 1995-96 expenditures for those items was approximately $563,000, and that based on that projection, the budgeted figure of $839,012 represents a $276,012 increase or 49 percent for the 1996-97 year.

In the District's June 30, 1996 annual audit, a liability of $3,534,126 is reflected for the IBNR claims for the CIGNA plan, or an amount $1,000,000 in excess of the $2,534,126 reported by the Board's consultant as the liability, which is an apparent accrual of the funds collateralized. With the overstatement of the IBNR liability, the June 30, 1996 unreserved surplus is understated by $1,000,000.

The annual audit reflects miscellaneous income of $1,946,434 for 1995-96 and $2,041,212 for 1994-95. When these figures are reduced by retiree reimbursements recorded as revenue in those years they result in true audited miscellaneous revenues of approximately $1,000,000 for each of the two years, in comparison to the $300,000 and $350,000 budgeted. Although the earned revenues consist of some sources that are nonrecurring, the total realized revenues are comparable.

In conclusion, the Commissioner finds that although the District's budgeted CIGNA premium payments were reduced by the $1,000,000 collateralization of ADPF funds, that same amount has resulted in an understatement of surplus at June 30, 1996. The District is directed to make the necessary adjustments in its accounting records to reclassify the $1,000,000, from the IBNR liability to unreserved surplus. This $1,000,000 is considered available to be appropriated in the 1996-97 budget. Accordingly, the Commissioner determines to increase the amount included in the 1996-97 budget as Budgeted Fund Balance by an amount of $1,000,000, in addition to the $521,735 increase determined in disputed line-item 1. The Commissioner

further directs the District to follow proper accounting and budgeting procedures related to the insurance premium amounts reimbursed by former employees remaining on the Board's insurance policy. In addition, when comparing the actual miscellaneous revenue after adjustment for retiree reimbursements of approximately $1,000,000 in each of the past two years, the budgeted figure of $400,000 can be increased. Giving consideration to the audited figure of $74,000 for the proceeds of the sale of equipment as being a one-time revenue source and the impact of the directed reduction of surplus balances on investment income, the Commissioner directs an increase of $400,000 in the amount budgeted for miscellaneous revenues.

Disputed Line-Item Numbers 3-4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6440	11-000-213-300	Health Svcs. - Purchased Prof. & Tech. Svcs.	$209,700	$30,000
6460	11-000-213-600	Health Svcs. - Supplies & Materials	$ 59,165	$ 5,000

The Board contends the consultant for the Council erroneously grouped a series of accounts under Health Services. In fact, avers the Board, line item #11-000-213-300 is composed of a series of categories, including a consultant for the deaf, a consultant for pupil personnel, and a consultant for the blind and OT/PT therapy. The Board urges that a review of these accounts for the periods 1994-95 and 1995-96 yields an available figure of approximately $5,000, which, the Board argues, neglects the nature of the special education services which must be available for the students.

In response, the Council avers that the 1996-97 budget reflects excessive increases of 30 percent over the 1995-96 original budget in the first account and a 37 percent increase in the second account. The Council notes that even with the proposed cuts, the Board will achieve an 11.5 percent increase in the former account over last year's original budget and a 26 percent increase in the latter account.

Upon review, the Commissioner finds that the consultant services referred to in the Board's argument have been improperly coded to health services under the uniform minimum chart of accounts. If the consultant services relate to the evaluation of students for the

development of individualized education programs (IEPs), they should be coded under the Other Support Services - Students - Special function. A review of that account, #11-000-219-320, indicates that no funds have been budgeted therein. If the consultant services are related to the implementation of student IEPs, those services, as well as the OT/PT therapy services, are properly budgeted under the appropriate special education instruction cost center. A review of the District's budget indicates that no funds were budgeted in any of the special education instruction programs for purchased services.

The Commissioner finds that the Council's arguments are based on the increases in the amounts for the 1996-97 budget to the amounts originally budgeted for those same appropriation lines in 1995-96. Even though the annual audit for 1995-96 indicates actual expenditures of $199,456 for these services, the Board's own exhibit IIA reveals that as late as February 1, 1996, the Board anticipated that only $166,825 in expenditures would be incurred. Accordingly, it was not unreasonable for the Council to propose a reduction of this account to $179,700. The arguments filed by the Board provide no reasons for the additional actual expenditures which exceeded its own estimates. Additionally, the Board does not provide any documentation such as the number of students to be served or the individualized education programs which require the related services and establish the level of related services to be provided. It provides no documentation as to the terms of the consultant contracts as to hourly or per diem rates or caseloads. In short, the Board has not documented its need, one which exceeds its own prior year estimates, or provided data sufficient to ascertain it. Accordingly, the Commissioner sustains the reduction of $30,000 to account #11-000-213-300. The 1996-97 budgeted health supplies amount of $59,165 reflects a significant increase over the audited 1994-95 expenditures of $51,835 and 1995-96 audited expenditures of $46,369. In light of this increase and the Board's failure to document the necessity of the increase for provision of T & E, the Commissioner sustains the reduction of $5,000 to account #11-000-213-600.

Disputed Line-Item Numbers 5-6

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6490	11-000-218-104	Other Supp. Services - Reg. - Salaries of Other Prof. Staff	$2,085,097	$25,000
6910	11-000-230-100	Supp. Svcs. - Gen. Adm. Sal.	$ 994,785	$ 5,000

The Board says the first account addresses actual salaries of "other professional staff" and that the amount appropriated in the line item is $16,000 less than the actual expenditure for this line item in the 1995-96 school year. The second account represents actual salaries paid to the two Assistant Superintendents for the 1995-96 school year and that it is exactly the same amount of money as last year, which does not include any salary increase.

The Council avers the 1996-97 budget has been reduced based upon the 1995-96 expenditures for this line item projected to June 30, 1996 utilizing actual cash disbursements as of April 17, 1996 as the basis for the projection. Additionally, with regard to the second account, the Council points out that the sub-line item in the 1995-96 budget for labor negotiations in the amount of $50,000 should not be recurring in 1997.

The staffing information submitted by the Board in Exhibits IIA and IIB with its Petition of Appeal reflects one position reduction of Guidance/SAC staff in the 1996-97 budget. The aforementioned reduction of $16,000, combined with the Council suggested cut of $25,000, results in a total reduction of $41,000 for the 1996-97 budget in this account. With an average budgeted salary of $60,000 to $65,000, it appears that the reduction can be absorbed by the Board. Upon review, the Commissioner finds that the Board has not provided sufficient proof that the Council's cut would jeopardize provision of T & E and sustains the $25,000 reduction to account #11-000-218-104.

The staffing and budget information submitted by the Board indicates no change in staffing for the area of general administration and the Board argument is that the 1996-97 budgeted amount of $994,785 was based on 1995-96 salaries, with no budgeted salary increase. When compared to the 1995-96 audited expenditures for this account of $973,803, the increase in the 1996-97 budget more than exceeds the Council's $5,000 reduction in the account. Upon review, the Commissioner finds that the Board has not provided sufficient proof that the Council's cut would jeopardize provision of a T & E education and sustains the $5,000 reduction to account #11-000-230-100.

Disputed Line-Item Number 7

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6950	11-000-230-530	Supp. Svcs. - Gen. Admin. - Communications/Telephone	$344,424	$30,000

The Board argues that the Council's proposed cut of $30,000 in this line item includes costs of telephones. In fact, the appropriation for 1996-97 is approximately $353,000. The line item which has been submitted shows the sum as $324,032, the sum for communications. Explanation for the apparent difference in the amount to be expended for this line item is clear, avers the Board, since the sum represented the amounts of bills paid through May 31, 1996 and does not include the amounts of payments required for the month of June 1996. In addition to the amount budgeted for this line item, the District avers it has received communication from the IRS stating it is required to provide direct electronic fund transfer via personal computers. This necessitates the installation of a dedicated telephone line for which additional communication costs will be incurred. In addition to this item, the State of New Jersey Department of Purchasing has indicated that State contracts information, while currently available in hard copy form via computer link-up based upon the February 21, 1996, correspondence attached from transfer procedure, shall be implemented on a mandatory basis in the near future. This will necessitate additional dedicated phone services at additional cost to the District.

The Council purports that the 1996-97 budget of $344,424 has been reduced by $30,000 based upon the 1995-96 expenditures for this line item projected to June 30, 1996, utilizing actual cash disbursements as of April 17, 1996.

Upon review, the Commissioner notes that the 1996-97 figure of $353,000 referred to in the Board's argument relates to the Board's projection of 1995-96 actual expenditures and that actual audited expenditures were $339,855, or $13,115 less. The Commissioner also notes that the audited actual expenditures for 1995-96 exceed those for 1994-95 by $45,260, a significant 15 percent increase. The Commissioner also notes that the district's argument for future needs regarding dedicated phone lines is not a requirement in fiscal year 1996-97. The enrollment forms for the IRS automatic payment system submitted as Exhibit D to

the Board's position statement offer a number of payment input methods alternative to use of a personal computer. In addition, the State of New Jersey Department of Purchasing link-up system for state contracts information is not required at this time and the Board would experience offsetting savings on the Cooperative Purchasing subscriber membership fee at the point it changes to an electronic link-up system. In summary, the Board has not documented its need for the funds to be restored. The additional needs cited are without merit. Reliance on the audited expenditures for 1995-96 would require a determination that such level of expenditures was both efficient and necessary without any evidence to support such a determination. In fact, the only evidence on the record is that the 1995-96 expenditure was a 15 percent increase over the prior year and may likely be an aberration. Accordingly, the Commissioner sustains the $30,000 reduction.

Disputed Line-Item Number 8

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7040	11-000-240-110	Supp. Svcs. - School Admin. - Other Salaries	$536,689	$5,000

The Board states that a careful review of this line item indicates that the proposed budget is $536,689. The amount actually expended for the 1995-96 is $529,500. While this would appear to make the sum of $6,000 available, it fails to provide the District with any flexibility in the event conditions at the school require the employment of additional school aides to assist in the operation of the District's educational program.

The Council avers that the 1996-97 budget of $536,689 has been reduced by $5,000 based upon the 1995-96 expenditures for this line item projected to June 30, 1996, utilizing actual cash disbursements as of April 17, 1996. The revised budget amount still provides an 11.5 percent increase above the 1995-96 original budget.

Upon review, the Commissioner finds that the determination of the Council to cut this amount was reasonably based and that the Board has not met its burden of demonstrating that without this amount T & E would not be provided. Thus, the cut of $5,000 is sustained. The Commissioner also notes the existence of a possible coding error in this account. If the school aides discussed in the Board's argument are classroom aides having direct interaction with

students, their salaries would be recorded under the appropriate instructional program in Object 106, Other Salaries for Instruction. The District is directed to revise its budget accordingly.

Disputed Line-Item Numbers 9-12

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7100	11-000-260-100	Op. & Maint./ Plant Svcs. - Salaries	$4,204,168	$15,000
7120	11-000-260-420	Op. & Maint./Plant Svcs. - Cleaning, Repair & Maint. Svcs.	$ 404,186	$10,000
7140	11-000-260-490	Op. & Maint./ Plant Svcs. - Other Purchased Prop. Svcs.	$ 157,421	$50,000
7180	11-000-260-620	Op. & Maint./Plant Svcs. - Energy	$1,607,423	$30,000

The Board says the Council's proposed reductions in these line items is erroneously based upon 1995-96 projected expenditures for custodial overtime and service to machinery and this projection ignores the efforts of the District over the past several years to operate the District with significantly fewer custodial staff. Further, due to the condition of its physical plant, the Board argues it is necessary that the funds budgeted be maintained in order to deliver T & E and to maintain an appropriately safe environment for our students and personnel.

The Board argues that the cut to line item 7140 will affect the water service available to the District. In addition, the line item affects the sewer user fee which the Board is obligated to pay to the municipality.

It argues that the amounts budgeted for line item 7180 were increased over the 1995-96 expenditure in order to provide for the anticipated increase in gas consumption necessitated by the conversion of nine schools from fuel oil to gas during the 1995-96 school year. It contends it has made reasonable conservative estimates of the amounts of gas fuel needed to heat these nine additional school buildings.

In reply, the Council says the reduction in each of the line items is based upon the 1995-96 expenditures based upon the actual cash disbursements as of the April 17, 1996 of each of the above line-item reports.

Upon review, the Commissioner determines that the Council's suggested reduction of custodial overtime to $120,000 provides the Board with the flexibility requested, in that the Board's Position Statement reflects a 1995-96 expenditure in this area of $97,150, and accordingly sustains the reduction of $15,000 to account #11-000-260-100.

As to account # 11-000-260-420, the Board contends that the actual expenditures for 1995-96 were approximately $423,350, or about $20,000 more than the $404,186 requested for 1996-97. The Commissioner notes that the district's annual audit indicates actual expenditures for 1995-96 to be $397,849, more than $25,000 less than the amount the Board relied on in establishing its 1996-97 request. The 1995-96 actual expenditures represent a 47 percent increase over the 1994-95 audited expenditures, a consequence of the district's reduction in custodial staff. The Board cites the condition of its physical plant as argument for restoration, but does not provide any documentation or even a description of the conditions. In fact, the statement is so vague that only through implication can one deduce that conditions are not good. Given that the Board's original request was based on an erroneous, overstated estimate of 1995-96 expenditures, and that no documentation was provided beyond a vague reference to the physical plant's condition, the Commissioner sustains the $10,000 reduction.

As to account # 11-000-260-490, the Board argues that in addition to actual 1995-96 expenditures for both water and the sewer user fees, that it is appropriate to budget for anticipated increases in the rates for water service, as well as in user fees. However, no documentation was provided on either an actual basis, such as a notice to that effect from its utility provider or municipality, or a historical trend basis. Additionally, to rely solely on the prior actual expenditures is to assume that the district's use of water is efficient and that the district has taken all steps available to conserve water usage. No documentation or evidence has been entered on the record as to the district's efficiency or steps it has taken to conserve water usage. Given the lack of evidence as to need, the Commissioner sees no adverse affect to the district and sustains the $50,000 reduction.

As to the $30,000 reduction to account #11-000-260-620, the Board contends that there is no history of gas consumption on which to base an estimate, given that the conversion to gas from fuel oil only occurred during the 1995-96 school year. The Board further contends that the increase in gas consumption must be anticipated as a consequence of the conversion. Also

the Board contends that the original budget level is needed in case of a severe winter. The Commissioner notes that the Board provides no rationale for the conversion from fuel oil to gas heat, a conversion which a reasonable person would assume would provide significant savings. The Commissioner also notes that such conversions are not generally performed without a full analysis by the contractor as to the potential gas usage and costs or savings. Yet, rather than provide such information, the Board chooses to argue that no such estimate is possible due to a lack of historical data. The Commissioner notes that it is not necessary for budgets to be based on worst case scenarios such as severe winters; indeed, such rare or random occurrences are why the law permits surpluses, or "rainy day funds" as they are commonly called. The Commissioner also notes that the reduced appropriation exceeds the actual expenditure for 1994-95, the year prior to the conversion, by over 4 percent. Accordingly, the Commissioner sustains the $30,000 reduction to account #11-000-260-620.

Disputed Line-Item Number 13

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7360	11-100-290-100	Business & Other Support Svcs. - Salaries	$1,289,491	$40,000

The Board avers that this line item cannot be cut due to the fact that the salaries in the Board Secretary's office are approximately corresponding to the personnel employed in that office. In the 1995-96 school year, this salary was provided for in the superintendent's personnel line item. A review of that line item will note that it was reduced by $69,477. This includes the $48,000 allocated to the budget staff person referred to herein.

The Council says the reduction of $40,000 is based upon the salaries encumbered for 1995-96. The reduced appropriation provides for a 2 percent increase in salaries for 1996-97.

Upon review of Disputed Line-Item Number 6 for general administration salaries, it was found that the total 1996-97 budgeted appropriations for that line reflected an increase over the prior year actual expenditures of approximately $20,000 with no change in budgeted positions. The staffing and budget information submitted by the Board also indicates no change in staffing for the area of the business office. The 1996-97 budgeted appropriation for this

account of $1,289,491 reflects an approximate increase of $60,000 over the 1995-96 actual expenditures for this account. The total increase in budgeted appropriations to these accounts does not support the Board's argument of a shift in budgeted appropriations between the two lines. Therefore, the Commissioner finds that the Board has not provided sufficient proof that the Council's cut would jeopardize provision of a T&E education and sustains the $40,000 reduction to account #11-000-290-100.

Disputed Line-Item Number 14

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7370	11-000-290-220	Business & Other Support Svcs. - Social Security Contrib.	$1,590,000	$170,000

The Council proposes a reduction of $170,000 based upon the 1995-96 projected expenditures. The Board contends such cut would remove funding necessary for the District to pay the social security obligation for its employees for all payments other than TPAF contracted salaries. Additionally, the professional staff earn "other income" for services rendered to the District in excess of the contracted salaries for which the District is obliged to make in this contribution based upon a rate of 7.65 percent of those additional monies. The school district is also obligated to make this contribution for the supplemental compensation paid to employees upon retirement. The amount of supplemental contribution which the District must pay by contract during the 1996-97 school year is $1,343,642. The FICA obligation on that sum alone is $102,788.61. The District is also obligated to pay the FICA contribution for the vacation pay which will be due and payable at the conclusion of the 1996-97 school year. Further, for all salary payments made upon voucher for its noncontracted services, the District is also obligated to make FICA contributions. The Board finalizes its argument stating that the sums proposed by Council disregard this obligation and prohibit the District from meeting this legal requirement.

The Board then refers to Exhibit F in its petition which reflects the amounts paid during the 1995-96 school year. This data was used to project the amounts needed for 1996-97 expenditures. It stresses that these amounts do not anticipate any salary increases for the 1996-97 school year and thereafter.

Upon review, the Commissioner finds that the aforementioned calculation provided by the Board as Exhibit F is based on the total payroll of the District and does not take into consideration those employees whose salaries and related benefits are charged to grants or the food service program and, thus, are not included in the budget for the general fund social security appropriations account. A better basis for determination of funds needed for 1996-97 would be a comparison to the prior year actual expenditures with adjustment for changes in staffing and salaries. The staff count data sheet submitted as Exhibit IIB to the Petition of Appeal reflects an overall reduction in staff in the 1996-97 proposed budget. The 1996-97 proposed budgeted appropriations for account #11-000-290-220 of $1,590,000 is an increase of approximately $247,000 over the actual expenditures for 1995-96. In light of the decreased staffing level it appears that the Council's proposed cut would not jeopardize provision of T&E. Thus, the Commissioner determines to sustain the $170,000 reduction to this line item.

In summary, the Commissioner directs restoration or sustaining of the Council's line-item reductions to appropriations and/or increases to revenue in surplus accounts as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with *N.J.A.C.* 6:20-2A.11(b)3.[1]

Line Item	Description	**Sustained**	**Restored**
6440	Health Svcs. - Purchased Prof. & Tech. Svcs.	$ 30,000	$ -0-
6460	Health Svcs. - Supplies & Materials	$ 5,000	$ -0-
6490	Other Supp. Svcs. - Reg. - Salaries of Other Prof. Staff	$ 25,000	$ -0-
6910	Supp. Svcs. General Admin. - Salaries	$ 5,000	$ -0-
6950	Supp. Svcs. - General Admin. - Communications/Telephone	$ 30,000	$ -0-
7040	Supp. Svcs. - School Admin. - Other Salaries	$ 5,000	$ -0-
7100	Op. & Maint./Plant Svcs. - Salaries	$ 15,000	$ -0-
7120	Op. & Maint./Plant Svcs. - Cleaning, Rep., Mtn.	$ 10,000	$ -0-

[1] The Commissioner observes that data available within the department indicate that significant reallocation within the certified budget can be achieved. For instance, the district's administrative spending per pupil as defined in the Comparative Spending Guide exceeds the state average by $74 or a total of almost $890,000, and the 1996-97 budget contains an appropriation of $399,455 for food service operations, an enterprise which if efficiently operated, should be self-subsidizing. The Commissioner further notes that the Board did not enter into the record, nor is there any evidence that the Board provided to the municipality, the detailed appropriations in the format prescribed by law. He additionally observes that the 1996-97 proposed administration budget of March 28, 1996, which a review of the record indicates was the only detailed information relied upon by municipality, was difficult to read and analyze and required a good deal of effort to correlate to the statutory format.

7140	Op. & Maint./Plant Svcs. - Other Purchased Prop. Svcs.	$ 50,000	$ -0-
7180	Op. & Maint./Plant Svcs. - Energy	$ 30,000	$ -0-
7360	Business & Other Support Svcs. - Salaries	$ 40,000	$ -0-
7370	Business & Other Support Svcs. - Social Security Contrib.	$ 170,000	$ -0-
		$ 415,000	$ -0-

Account No.		Increase Sustained	Increase Rejected
10-303	Budgeted Fund Balance	$ 1,521,735[2]	$ (681,735)
10-1XXX	Miscellaneous Income	$ 400,000	$ 1,200,000[2]

Tax Levy Certified by Governing Body	$89,659,029
Restoration of Reductions:	$ -0-
Increases to Surplus/Income Rejected	$ 518,265
Total Tax Levy for 1996-97:	$90,177,294

Accordingly, the Middlesex County Board of Taxation is directed to make the necessary adjustments, as set forth above, subject to verification of surplus amounts through the year-end audit, to reflect a total of $90,177,294 to be raised in tax levy for General Fund purposes of the Woodbridge Board of Education for the 1996-97 school year.

Additionally, in view of the coding alterations required herein, the Commissioner directs the Board to submit a revised 1996-97 budget to the County Superintendent and the Office of Finance.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] See discussion of line item 2 at pp. 5-8 above.

February 24, 1997
Date of Mailing, February 24, 1997

86-97

86-97

H.B., on behalf of minor children, S.A., M.B. and P.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

FEBRUARY 26, 1997

OAL DKT. NO. EDU 4335-96
AGENCY DKT. NO. 108-3/96

H.B., on behalf of minor children, S.A., M.B. and P.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 26, 1997

DATE OF MAILING FEBRUARY 26, 1997

87-97

87-97

A.K., ON BEHALF OF MINOR CHILD, M.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 26, 1997

OAL DKT. NO. EDU 5282-96
AGENCY DKT. NO. 387-9/95

A.K., ON BEHALF OF MINOR CHILD, M.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-14.4, have been reviewed. Petitioner, in accordance with instructions provided by the OAL, filed a timely explanation before the Commissioner, indicating that her failure to appear at the hearing scheduled for January 22, 1997 is attributed to her receipt of a notice from the OAL advising of a hearing scheduled for March 21, 1997. A copy of said notice for a March 21, 1997 hearing is attached to petitioner's submission.

In the interest of fundamental fairness to a *pro se* litigant, and in view of the notice received by petitioner, as well as the absence of notice in the record before the Commissioner of a hearing scheduled for January 22, 1997, the Commissioner hereby returns this matter to the OAL for appropriate, expedited proceedings*.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Pursuant to N.J.S.A. 18A:38-1 *et seq.*, petitioner is entitled to an expedited hearing before the Commissioner of Education.

FEBRUARY 26, 1997
DATE OF MAILING FEBRUARY 26, 1997

88-97

88-97

ENGLISH PAVING COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 26, 1997

OAL DKT. NO. EDU 7947-96
AGENCY DKT. NO. 338-8/96

ENGLISH PAVING COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Notice of Withdrawal from the Office of Administrative Law (OAL) have been reviewed. Upon such review, the Commissioner notes a letter from counsel for petitioner to the OAL advising that although petitioner withdrew the emergent relief application in this matter, it did not withdraw its claim with respect to the underlying controversy. In that the Commissioner finds it clear from correspondence contained in the record that the parties agreed to the withdrawal of the emergent relief application in this matter, but fully intended for the matter to proceed for a plenary hearing on the merits, this matter is being remanded to OAL for such proceedings.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 26, 1997
DATE OF MAILING FEBRUARY 27, 1997

88-97

455-98 R
(88-97)

ENGLISH PAVING COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

OCTOBER 8, 1998

OAL DKT. NO. EDU 3351-97 (EDU 7947-96 ON REMAND)
AGENCY DKT. NO. 338-8/96

ENGLISH PAVING COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 8, 1998
DATE OF MAILING OCTOBER 8, 1998

89-97

89-97

DEBORAH ALFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

FEBRUARY 26, 1997

OAL DKT. NO. EDU 12341-95
AGENCY DKT. NO. 328-8/95

DEBORAH ALFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

FEBRUARY 26, 1997
DATE OF MAILING FEBRUARY 26, 1997

(SB) 89-97

DHPL #495-97
SB # 89-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF O.J.R. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, September 19, 1997

For the Petitioner-Appellant, O.J.R., pro se

O.J.R. (hereinafter "petitioner"), who was employed as a school bus mechanic by the Hunterdon County Educational Services Commission, was disqualified by the Office of Criminal History Review of the Department of Education from continued employment in the State's schools after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted of possession of controlled dangerous substances following arrests in April 1980 and May 1992. Petitioner sought to overturn his disqualification on the basis of rehabilitation.

In a letter decision dated September 19, 1997, the Assistant Commissioner of Education, Executive Services, upheld the disqualification,[1] concluding that petitioner had failed to demonstrate clear and convincing evidence of his rehabilitation under the standard set forth in N.J.S.A. 18A:6-7.1(e). Petitioner filed the instant appeal to the State Board.

[1] N.J.S.A. 18A:4-34 authorizes the Commissioner to assign to an assistant commissioner the "hearing and determination of controversies and disputes which may arise under the school laws...."

JAN. 7, 1998

We note initially that petitioner has submitted documents with his appeal which are not included in the record of this matter. Although petitioner has not requested to supplement the record on appeal, given his pro se status, we have supplemented the record sua sponte and have considered those documents in determining this matter.

After a careful review of the supplemented record, we affirm the decision of the Assistant Commissioner. While it is evident that petitioner is making impressive strides towards rehabilitation, in view of the serious nature of his disqualifying offenses and the fact that his efforts towards rehabilitation did not begin until April 1996, we are unable to conclude at this time that petitioner has affirmatively demonstrated his rehabilitation by clear and convincing evidence. We stress in so doing, however, that nothing in our decision herein precludes petitioner from reapplying to the Office of Criminal History Review once additional time has passed and seeking a determination from the Commissioner that he is qualified for school employment on the basis of rehabilitation.

January 7, 1998

Date of mailing JAN 0 9 1998

90-97

90-97

F.S., on behalf of her minor grandchild, K.F.M., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, : DECISION

RESPONDENT. :

_____:

FEBRUARY 26, 1997

OAL DKT. NO. EDU 12294-95
AGENCY DKT. NO. 413-10/95

F.S., on behalf of her minor grandchild, K.F.M., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, : DECISION

RESPONDENT. :

:

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

FEBRUARY 26, 1997
DATE OF MAILING FEBRUARY 26, 1997

(SB) 90-97

DHPL #529-97
SB # 90-97

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF E.E.T. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, October 3, 1997

For the Petitioner-Appellant, Robert V. Baer, Esq.

The decision of the Assistant Commissioner of Education disqualifying petitioner from school employment following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein.

Wendel E. Daniels opposed.

April 1, 1998

Date of mailing APR 0 3 1998

91-97

91-97

MICHAEL MALONEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 26, 1997

OAL DKT. NO. EDU 11770-95
AGENCY DKT. NO. 378-9/95

MICHAEL MALONEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

FEBRUARY 26, 1997
DATE OF MAILING FEBRUARY 26, 1997

92-97

92-97

BOARD OF EDUCATION OF THE CITY OF BAYONNE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF SCHOOL ESTIMATE OF THE CITY OF BAYONNE, AND MAYOR AND COUNCIL OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $2,035,500 made by board of school estimate and governing body following submission of proposed Type I budget pursuant to *N.J.S.A.* 18A:22-17, *et seq.*

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $1,343,055 for a total General Fund tax levy of $42,310,692 for 1996-97 school purposes.

FEBRUARY 27, 1997

BOARD OF EDUCATION OF THE CITY OF BAYONNE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF SCHOOL ESTIMATE OF THE CITY OF BAYONNE, AND MAYOR AND COUNCIL OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

For Petitioner, Francine Del Vescovo, Esq. (Oury & Mizdol)

For Respondents, John F. Coffey, II, Esq. (Joseph G. Nichols, City of Bayonne)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on May 16, 1996, through the filing of a Petition of Appeal by the Bayonne Board of Education (Board), seeking restoration of reductions to the school budget made by the Board of School Estimate and Mayor and Council pursuant to *N.J.S.A.* 18A:22-17 *et seq.*

Bayonne is a Type I school district. As such, the Board prepared the annual budget which was then submitted to the Board of School Estimate to determine "the amount of money necessary to be appropriated for the use of the public schools in the district for the ensuing school year, exclusive of the amount which shall have been apportioned to it by the commissioner***", and to certify this amount to the municipal governing body and the board of education. *N.J.S.A.* 18A:22-14.

On April 2, 1996, following consultation with the Board as required by law, the Board of School Estimate adopted a resolution determining to certify a General Fund Tax Levy of $40,967,637 as sufficient to provide for a thorough and efficient system of education (T & E) in the District. This amount represented a reduction of approximately $2 million from the tax levy proposed by the Board, and was effectuated through cuts in 22 line items, drawn from a list the Board of School Estimate had asked the school administration to prepare, which it did under protest, to effectuate a zero-tax-increase budget. By resolution, dated April 17, 1996, the Board determined to appeal these reductions and duly filed the within petition. On May 22, 1996, the Municipal Council of the City of Bayonne passed a resolution pursuant to *N.J.S.A.* 18A:22-17, certifying $40,967,637 as the local tax levy.

The amounts in dispute in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Council/Board of School Estimate	
General Fund	$43,006,599	General Fund	$40,967,637
Amount of Reduction by Council/Board of Estimate		**Amount of Reduction in Dispute**	
General Fund	$ 2,038,962	General Fund	$2,035,500

An answer to the Board's petition was filed by the Board of School Estimate and the Mayor and Council of the City of Bayonne (Respondents) on June 10, 1996. On July 5, 1996, the petitioner filed a position statement pursuant to *N.J.A.C.* 6:24-7.8. The respondents chose to rely on the statements made in their Answer, wherein it is contended that the reductions made were the product of meaningful dialogue with the Board of Education's representatives, that any and all budget cuts were made subject to the proper educational and practical considerations and were not the product of extra-educational reasons or political expediency, and that $2 million in the Board's budget can be removed without affecting programs or T & E.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated March 13, 1996, and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report and

annual year-end audit report, the latter two for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus.

In that no further submissions were filed by the parties, following receipt of the County Superintendent's June 30 financial report and annual year-end audit report, the record of the appeal was closed.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T & E. *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989).[1]

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Numbers 1-8

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2540	11-140-100-101	Grades 9-12 Teachers' Salaries	$4,276,056	$ 120,000

[1] Respondents also contend that the Board's appeal was filed out of time; however, the Commissioner finds this contention to be entirely without merit.

4810	11-230-100-101	Remedial Teachers' Salaries	$4,647,070	$ 270,000
2510	11-110-100-101	Preschool Kind./Teacher Salaries	$1,130,355	$ 30,000
2530	11-130-100-101	Grades 6-8 Teachers' Salaries	$4,609,358	$ 90,000
2530	11-130-100-101	Grades 6-8 Teachers' Salaries	$4,609,358	$ 150,000
2520	11-120-100-101	Grades 1-5 Teachers' Salaries	$6,054,497	$ 30,000
4990	11-3xx-100-101	Voc. Prog. Teachers' Salaries	$ 828,314	$ 30,000
4910	11-240-100-106	Other Salaries Bilingual	$ 90,500	$ 90,500

The Board argues that the above cuts will mean a substantial reduction of teachers and programs at Bayonne High School, in addition to that which the Board itself effectuated in order to keep costs at a minimum while still providing for T & E. Specifically, the proposed reduction would be in addition to 38 teachers who have already been subject to a reduction in force at the high school pursuant to the Board's original proposed budget. The respondents' recommendation also includes having Level C classroom teachers do remediation in their individual classrooms and, further, would result in the elimination of the District's all-day kindergarten, special subjects in the District's talented and gifted program, the District's prevocational program which focused on older children who had not yet graduated from school because of special needs, a work-study program, and in a loss of teachers from the bilingual and physical education programs, the latter of which would prevent the District from meeting State physical education requirements. Further, these reductions would result in extraordinarily large class sizes and, therefore, less effective instruction for the students of the City of Bayonne.

Upon review, the Commissioner notes that art and computer instruction is only a part of the district's overall program for talented and gifted students, and that these students' needs can be readily integrated into the regular program for these subjects courses. Accordingly, the Commissioner sustains the Council's reduction of $90,000. With regard to the remaining staff salaries, given the socioeconomic conditions of the district, size of the student population as well as its current programmatic and instructional staffing patterns, the Commissioner finds the remaining monies at issue herein are necessary for T & E, and accordingly, determines to restore $720,500 to these accounts.

Disputed Line-Item Number 9

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6370	11-000-211-100	Attend. & Soc. Work Salaries	$297,103	$ 78,000

The Board avers that this cut would reduce the attendance department by three staff members. It states it will be impossible for the one remaining staff member to accomplish the tasks required of this department as last year alone, the attendance department removed 53 nonresident students from the District's rolls. The year before, this department removed 51 nonresident students from the school roster which amounts to a considerable savings. It further asserts that many of the tasks that were performed by this department would have to be picked up by members of the administrative staff and classroom teachers thereby creating unreasonable burdens for overworked administrators and teachers who, as a result of the major reduction in force undertaken by the Board of Education, are experiencing ever increasing class sizes, sometimes into the thirties.

Upon review, the Commissioner notes that as late as the 1994-95 school year, this account's actual expenditures were only $223,203, or $73,900 less than requested for 1996-97 and $78,000 less than the actual expenditures for 1995-96. While the Commissioner recognizes that the enrollment of nonresident students is a problem, the Board in its arguments states that 51 nonresident students were identified in 1994-95 and 53 in 1995-96. The Board's own evidence supports the conclusion that there was no gain in identifying nonresident students despite the significant increase in salaries in this account during 1995-96. Further, the supporting documentation on budgeted positions contained in the prescribed budget statement and attached to the Board's petition indicates that four new staff were proposed in addition to four existing staff for this account. Additionally, the primary role of an attendance officer is seeing that students attend school, and the identification of nonresident students is something that can be accomplished through alternative types of staffing positions with no adverse effect on other duties. Hence, the Commissioner finds this amount not necessary for T & E and sustains the $78,000 reduction.

Disputed Line-Item Number 10

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6430	11-000-213-100	Health Services Salaries	$897,742	$120,000

The Board argues that this cut would represent the elimination of four nursing positions in the elementary schools. It contends that eight of the District's eleven schools would only have half-time nurses, which would place an extreme burden on the nurses in performing their state mandated activities and endanger the safety and welfare of the students.

Upon review, the Commissioner finds that the Board's proposed budget reflects 17 positions which at the salary amount proposed equates to an average salary of almost $53,000. Even if four nursing positions with average salaries of $30,000 were to be eliminated, 13 staff positions at an average salary of $59,000 would be available to cover the 11 schools. Accordingly, he finds that both the number of positions and level of funds available are sufficient to maintain the health and safety of the students and sustains the $120,000 reduction to this account.

Disputed Line-Item Numbers 11-12

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6770	11-000-221-105	Secretary & Clerical Salaries	$ 92,241	$ 68,000
6910	11-000-230-105	Secretary & Clerical Salaries	$972,631	$ 10,000

This reduction would mean the elimination of three secretary/clerk positions bringing the total of positions eliminated in this category to five. The Board avers it presently operates in an extremely cost-efficient manner, spending 64.9 percent of every dollar on classroom instruction (New Jersey Dept. of Ed. Comparative Spending Guide 2/96) and well over $1,000 less than the state average per pupil expenditure. As such, it contends this line item does not represent unnecessary spending.

Upon review, the Commissioner finds that, notwithstanding its claims of overall efficiency, the Board has made no argument as to the specific need for these positions in the provision of T &E. Accordingly, the Commissioner sustains these reductions.

Disputed Line-Item Numbers 13-14

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6910	11-000-230-102	General Administrative Salaries	$972,631	$140,000
6910	11-000-230-100	General Administrative Salaries	$972,631	$ 65,000

The Board argues that this cut would represent the elimination of four nursing positions in the elementary schools. It contends that eight of the District's eleven schools would only have half-time nurses, which would place an extreme burden on the nurses in performing their state mandated activities and endanger the safety and welfare of the students.

Upon review, the Commissioner finds that the Board's proposed budget reflects 17 positions which at the salary amount proposed equates to an average salary of almost $53,000. Even if four nursing positions with average salaries of $30,000 were to be eliminated, 13 staff positions at an average salary of $59,000 would be available to cover the 11 schools. Accordingly, he finds that both the number of positions and level of funds available are sufficient to maintain the health and safety of the students and sustains the $120,000 reduction to this account.

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Upon review, the Commissioner finds that, notwithstanding its claims of overall efficiency, the Board has made no argument as to the specific need for these positions in the provision of T &E. Accordingly, the Commissioner sustains these reductions.

Disputed Line-Item Numbers 13-14

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6910	11-000-230-102	General Administrative Salaries	$972,631	$140,000
6910	11-000-230-100	General Administrative Salaries	$972,631	$ 65,000

The Board contends that these amounts represent reductions in the Board's administrative staff by four, resulting in the total elimination or consolidation of eight administrative posts, as well as elimination of the Board Secretary position and a clerical position in the office of the Board Secretary, the latter of which would necessitate the school business administrator to take up the responsibilities of the Board Secretary. The Board notes that Bayonne is a District which has received the State Department's award two consecutive years in a row for low administrative costs.

Upon review, the Commissioner notes that the vast majority of school districts combine the positions of board secretary and business administrator. In a state which ranks very poorly in the proportion of dollars spent in the classroom, such limited-purpose positions cannot be considered, and are in fact not, necessary for a thorough and efficient education. Given this, the clerical position assigned to the board secretary is also not necessary. Accordingly, the Commissioner sustains the $65,000 reduction to this account. Upon review of the remaining staff data submitted by the Board, the Commissioner determines to restore $140,000 of these reductions, in that the Board demonstrated that its administrative structure, except for the positions in the board secretary's office, has already been reduced prior to the submission of the proposed 1996-97 budget and is appropriate for the provision of T & E.

Disputed Line-Item Number 15

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7100	11-000-260-100	Operation & Maintenance Salaries	$3,394,402	$ 70,000

The Board avers that such budget cut would require elimination of six per diem custodians and engineers thereby making it impossible for the District to replace workers who are out on leave, vacation or who are ill, which is not conducive to proper provision of T & E.

Upon review, the Commissioner finds that the Board has not demonstrated the necessity for retaining per diem custodians to replace workers who are on leave, vacation or who are ill; given that the budget support document attached to its petition reflects 109 full-time positions for 11 school buildings. Accordingly, the Commissioner determines to sustain the $70,000 reduction to this account.

Disputed Line-Item Numbers 16-17

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7420	11-000-290-290	Other Employee Benefits	$ 7,436,824	$304,000
7420	11-000-290-290	Other Employee Benefits	$ 7,436,824	$ 40,000

The Board explains that the above represent health insurance costs. The former line item represents benefits for all the teachers and staff members who have been subject to the reductions in force that have been effectuated because of the budget cuts. The latter cut would of necessity be implemented by offering incentives for spouse and HMO health coverage change to certain staff members. The Board maintains that the voluntary nature of this program would make it impossible to implement.

Consistent with his personnel determinations above, the Commissioner sustains $101,445 of reductions and restores $202,555 to account no. 11-000-290-290. The Commissioner also finds that alternatives to traditional health benefits coverage such as co-payments, movement to managed care plans or compensation to waive employee or spouse's benefits represent a common trend in both the private sector and government, and accordingly, sustains the $40,000 reduction to this account.

Disputed Line-Item Numbers 18-22

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7070	11-000-240-600	Supplies - School Administration	$ 261,988	$ 20,000
7170	11-000-260-610	Supplies - Operations & Maintenance	$ 621,000	$ 30,000
4860	11-230-100-610	Supplies Basic Skills	$ 61,528	$ 30,000
4870	11-230-100-640	Textbooks Basic Skills	$ 48,180	$ 20,000
2690	11-190-100-640	Textbooks Reg. Program	$ 351,591	$ 230,000

The Board contends the above cuts would mean a 4 percent reduction over last year's cost for supplies and materials in these various accounts. In light of the increased costs, this would mean an even larger reduction in the amount of supplies which the District would be able to purchase for its use in providing T & E to the students of Bayonne. The Board avers that the textbooks account reduction of $230,000 would totally eliminate the District's textbook replacement

program at a time when the District was moving up the grades in a literature-based reading program and a hand-held manipulative mass curriculum. This would mean no new textbooks in 1996 and 1997 and, in order for the District to return to its program of textbook replacement, would mean that the costs in this line item would be doubled in next year's budget.

Upon review, the Commissioner notes that, even after the $30,000 reduction to the operation and maintenance supplies account, the $591,400 balance reflects an increase of $31,508 (5.6%) over the actual audited expenditures for 1995-96. Given that the Board provides no specific rationale for the increase, the Commissioner sustains the $30,000 reduction to this account. Also, even after the $20,000 reduction to the school administration supplies account, the $241,988 balance reflects a slight increase over the actual expenditures for 1995-96. Given that the Board provides no specific rationale for the increase, the Commissioner sustains the $20,000 reduction to this account.

Upon review of the instructional supplies and textbooks accounts, the Commissioner finds that the original amounts proposed by the Board reflect only a slight increase over the actual expenditures for these accounts in 1995-96. Given the Board's argument as to the necessity of a stable textbook replacement program and the direct relationship of these items to classroom instruction, the Commissioner restores the $280,000 in reductions to these accounts.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board did not project an unreserved surplus, but allocated $100,000 as revenue. Since proper budgeting practices for New Jersey school districts do not allow the adoption of a deficit budget, it must be assumed that the Board improperly completed its advertised recapitulation of balances, and failed to reflect its projected year-end surplus. In the submission of its revised budget reflecting the reductions made by Council, the Board increased the appropriation of surplus as a revenue source to $250,000.

The Board's annual financial report filed pursuant to *N.J.S.A.* 18A:17-10 (June 30 Board Secretary's report) and the Board's 1995-96 annual year-end audit report reveal that there is in fact no meaningful fund balance as of that date.

Based on the above, the Commissioner determines, that no surplus monies are available to fund restorations made herein.

SUMMARY

In summary, the Commissioner directs restoration of respondents' line-item reductions to appropriations as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with *N.J.A.C.* 6:20-2A.11(b)3.

Line No.	Account No.	Description	Sustained	Restored
2540	11-140-100-101	Grades 9-12 Teachers' Salaries	- 0 -	$ 120,000
4810	11-230-100-101	Remedial Teachers' Salaries	- 0 -	$ 270,000
2510	11-110-100-101	Preschool Kind./Teacher Salaries	- 0 -	$ 30,000
2530	11-130-100-101	Grades 6-8 Teachers' Salaries	$ 90,000	- 0 -
2530	11-130-100-101	Grades 6-8 Teachers' Salaries	- 0 -	$ 150,000
2520	11-120-100-101	Grades 1-5 Teachers' Salaries	- 0 -	$ 30,000
4990	11-3xx-100-101	Vocational Prog. Teachers' Salaries	- 0 -	$ 30,000
4910	11-240-100-106	Other Salaries Bilingual	- 0 -	$ 90,500
6370	11-000-211-100	Attendance & Social Work Salaries	$ 78,000	- 0 -
6430	11-000-213-100	Health Services Salaries	$ 120,000	- 0 -
6770	11-000-221-105	Secretaries & Clerical Salaries	$ 68,000	- 0 -
6910	11-000-230-105	Secretaries & Clerical	$ 10,000	- 0 -
6910	11-000-230-102	General Administrative Salaries	- 0 -	$ 140,000
6910	11-000-230-100	General Administrative Salaries	$ 65,000	- 0 -
7100	11-000-260-100	Operations & Maintenance Salaries	$ 70,000	- 0 -
7420	11-000-290-290	Other Employee Benefits	$ 101,445	$ 202,555
7420	11-000-290-290	Other Employee Benefits	$ 40,000	- 0 -
7070	11-000-240-600	Supplies- School Administrators	$ 20,000	- 0 -
7170	11-000-260-610	Supplies - Operation & Maintenance	$ 30,000	- 0 -
4860	11-230-100-610	Supplies - Basic Skills	- 0 -	$ 30,000
4870	11-230-100-640	Textbooks - Basic Skills	- 0 -	$ 20,000
2690	11-190-100-640	Textbooks - Regular Program		$ 230,000
			$ 692,445	$1,343,055

Total Line-Item Determinations: 22

Tax Levy Certified by Governing Body	$40,967,637
Restoration of Reductions	$ 1,343,055
Amount of Restorations Funded by Surplus	- 0 -
Total Tax Levy for 1996-97	$42,310,692

Accordingly, the Hudson County Board of Taxation is directed to make the necessary adjustments, as set forth above, to reflect a total of $42,310,692 to be raised in tax levy for General Fund purposes of the Bayonne Board of Education for the 1996-97 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 27, 1997
DATE OF MAILING FEBRUARY 27, 1997

92-97

C #92-97
SB #32-97

BOARD OF EDUCATION OF THE CITY OF BAYONNE,	:	
PETITIONER-RESPONDENT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF SCHOOL ESTIMATE OF THE CITY OF BAYONNE AND MAYOR AND COUNCIL OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	
RESPONDENTS-APPELLANTS.	:	

Decided by the Commissioner of Education, February 27, 1997

For the Petitioner-Respondent, Oury & Mizdol (Francine Del Vescovo, Esq., of Counsel)

For the Respondents-Appellants, John F. Coffey, II, Esq.

The Board of Education of the City of Bayonne (hereinafter "Board") filed a petition of appeal with the Commissioner of Education challenging reductions in the amount of $2,035,500 made by the Board of School Estimate of the City of Bayonne, and the Mayor and Council of the City of Bayonne (hereinafter "appellants"), pursuant to N.J.S.A. 18A:22-17 et seq., to the Board's proposed budget for the 1996-97 school year. In a decision dated February 27, 1997, the Commissioner of Education determined to restore $1,343,055 of the reductions effectuated by the appellants and directed a total general fund tax levy of $42,310,692 for 1996-97.

On April 3, 1997, appellants filed a notice of appeal dated April 3 with the State Board.

5/7/97

By letter dated April 7, 1997, the counsel to the State Board advised appellants that their appeal had been due on April 1, thirty days from the filing date of the Commissioner's decision, and that this matter was therefore being referred to our Legal Committee for consideration of the effect of their failure to file timely notice. Appellants were given until April 15 to provide a written explanation of the reasons for their late filing.

On April 15, counsel for appellants filed an affidavit in which he explained that appellants had a "reasonable misunderstanding of the intricacies of the law," affidavit, at 4, believing that N.J.A.C. 6:2-1.4 did not require their notice of appeal to be filed until April 3.[1] Citing N.J.A.C. 6:2-1.4(c), counsel for appellants averred that appellants were "under the misguided impression that neither Saturday, nor Sunday counted towards the initial three day time frame [for computing the date on which the Commissioner's decision was deemed filed]. As such, they were operating under the belief that the three day time period was comprised of Friday February 28, 1997, Monday, March 3, 1997 and Tuesday March 4, 1997. In turn, they were of the belief that Wednesday March 5, 1997 was the first day of the thirty day appeal time frame and that April 3, 1997 was the last day for the filing of the appeal." Affidavit, at 4.

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[1] N.J.A.C. 6:2-1.4, "Computation of time," provides, in pertinent part:

> (a) A decision of the Commissioner or State Board of Examiners shall be deemed filed three days after the date of mailing to the parties.
>
> ....
>
> (c) In computing any period of time fixed by this chapter, the day of the act or event from which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday or legal holiday.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.15, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

We conclude that the statutory filing requirement with which appellants failed to comply is of such significance that we dismiss the appeal. In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause.

In this case, the Commissioner's decision was rendered on February 27, 1997 and mailed to the parties on that date.[2] Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was deemed filed on March 2, 1997, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a) and N.J.A.C. 6:2-1.4, appellants were required to file their notice of appeal to the State Board on or before April 1, 1997. Appellants' notice of appeal was dated April 3, 1997 and filed on that date.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this particular instance. Appeals from final decisions of the Commissioner must be taken "within 30 days after the decision appealed from is filed." N.J.S.A. 18A:6-28. A decision of the Commissioner is "deemed filed three days after the date of mailing to the parties." N.J.A.C. 6:2-1.4(a). The sentence in N.J.A.C. 6:2-1.4(c) cited by appellants is intended merely to clarify the filing deadline for documents due on a date which falls on a Saturday, Sunday or legal holiday. In that event, the filing period runs "until the end of the next day that is not a Saturday, Sunday or legal holiday."

However, even if appellant's interpretation of the regulation was reasonable in that regard, and the filing date of the Commissioner's decision could not be deemed to be a Sunday, appellant's notice of appeal was still untimely. Thus, even if Monday, March 3 were deemed to be the filing date of the Commissioner's decision, appellant's appeal was due by April 2, one day before it was filed. Moreover, under the plain language of N.J.A.C. 6:2-1.4(c), only the last day of a computed period is not counted if

[2] We note that a copy of the decision was also sent by fax to the counsel for the appellants on February 27. Affidavit, at 2.

it falls on a Sunday. We find nothing in that provision that could reasonably support appellant's belief that Saturday would also not be counted.[3] We reiterate, in addition, that counsel for appellants acknowledges that he received a copy of the Commissioner's decision on February 27, the date it was issued.

Consequently, for the reasons expressed herein, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations. See Yorke, supra.

May 7, 1997

Date of mailing MAY 09 1997

[3] Under appellant's interpretation of N.J.A.C. 6:2-1.4(c), a brief due on a date that falls on a Sunday would not have to be filed until the following Tuesday since Saturday would also be excluded in computing the time period.

93-97

93-97

GEORGE PUZIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEBRUARY 28, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12290-95

AGENCY. NO.: 426-10/95

GEORGE PUZIO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK,

Respondent.

Anthony P. Sciarrillo, Esq., for petitioner

Richard A. Friedman, Esq., for respondent
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: December 20, 1996 Decided: January 8, 1997

BEFORE: **JEFFREY A. GERSON**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on December 8, 1995, for determination as a contested case, pursuant to *N.J.S.A. 52:14B et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Memorandum of Agreement.

Having reviewed the contents of the attached Memorandum of Agreement, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Memorandum of Agreement meets the requirements of *N.J.A.C. 1:1-19.*1 and I hereby approve same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

Jan 8 97
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

1/14/97
DATE

DOH
DEPARTMENT OF EDUCATION

JAN 14 1997
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

MEMORANDUM OF AGREEMENT

DEC 23 11 02 AM '96

THIS MEMORANDUM OF AGREEMENT (hereinafter "Agreement") is executed this 10th day of Sept, 1996 by and between, GEORGE PUZIO, residing at 217 Fence Row Drive, Nazareth, Pennsylvania 18064 (hereinafter, "Puzio") and the Board of Education of Township of Pequannock, with offices at 85 Sunset Drive, Pompton Plains, New Jersey, 07444 (hereinafter, "Board");

WHEREAS, Puzio filed a Petition of Appeal with the Commissioner of Education on October 31, 1995, Docket No. EDUOR 12290-95N, naming the Board as Respondent; and

WHEREAS, the Board filed an Answer and Separate Defenses with the Commissioner on November 22, 1995; and

WHEREAS, the parties seek to amicably resolve the issues which gave rise to the Petition of Appeal and the Answer and Separate Defenses.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties do hereby acknowledge and agree as follows:

1. Puzio shall withdraw the Petition of Appeal.

2. The Board shall withdraw the Answer and Separate Defenses

3. Puzio shall be appointed Girls High School Varsity Soccer Coach for the Fall 1996 season at the rate set by the collective bargaining agreement.

4. The Board shall pay Puzio the sum of Five Hundred ($500.00) as additional compensation for the fall 1995 season.

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5. Entering into this Memorandum of Agreement shall not be an admission of liability, or wrong doing, nor shall it be used by any party in any other dispute which may arise between the parties.

6. The parties release, waive, and forever discharge any and all past, present and future claims they may have against each other arising out of the facts alleged in the Petition of Appeal, the Answer and Separate Defenses.

7. Each party has entered into this Agreement freely and voluntarily and without any inducement not contained in this document.

8. This Agreement contains the entire agreement and understanding between the parties and constitutes full and final settlement of any and all issues relating to the terms and conditions of Puzio's position as a Coach with the Board, subject to the collective bargaining agreement.

9. This Agreement shall be governed by the laws of the State of New Jersey.

10. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

11. The terms and conditions of this Agreement shall not be precedent setting, nor shall it extend to any matters past, present or future between the parties or the Pequannock Township Education Association.

12. The parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under all circumstances surrounding this matter.

13. The terms and conditions of this Agreement are subject to the ratification and approval by the Board.

14. In view of the circumstances surrounding this matter, the parties agree that the terms and conditions of this Agreement are consistent with the public interest.

15. The parties have entered into this Agreement with a full understanding of their rights and the contents of this Agreement.

16. Each party has had an opportunity to consult with legal counsel concerning the terms and conditions of this Agreement.

17. This Agreement shall have no bearing or effect on any other proceeding of any type for the purposes of establishing or denying precedent, policy or past practice, and shall not be admissible in, or utilized in connection with, any such proceeding.

18. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seals to this Agreement effective on the 10 day of SEPTEMBER, 1996.

Witness

GEORGE PUZIO

MICHAEL DONOW
Board Secretary
Board of Education
of the Township of Pequannock

RAYMOND X. McCOY
President, Board of Education
of the Township of Pequannock

OAL DKT. NO. EDU 12290-95
AGENCY DKT. NO. 426-10/95

GEORGE PUZIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the terms of the settlement appear to have already been effectuated and admonishes the parties that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

FEBRUARY 28, 1997
DATE OF MAILING FEBRUARY 28, 1997

97-97

IN THE MATTER OF THE TENURE	:	
HEARING OF ALICE BOHANNON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of insubordination and unbecoming conduct against respondent secretary.

ALJ found that respondent was guilty of the charges as she refused an assignment and used foul language in addressing the administrative assistant to the superintendent. ALJ concluded termination was too harsh a penalty. ALJ, however, concluded a substantial penalty was warranted; thus, it was ordered that the penalty imposed on respondent be the 120-day suspension served and the loss of her annual increment for a period of one year.

Commissioner adopted initial decision as his own with modification with respect to penalty. Commissioner directed respondent forfeit the 120 days' salary withheld following certification of the tenure charges, but increased penalty to denial of *two* annual employment and adjustment increments.

March 3, 1997

State of New Jersey
Office of Administrative Law

INITIAL DECISION
OAL DKT. NO. EDU 3698-96
AGENCY DKT. NO. 58-2/96

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,

Petitioner,

v.

ALICE BOHANNON,

Respondent.

Melvin C. Randall, Esq., for Petitioner
(Love & Randall, attorneys)

Sanford R. Oxfeld, Esq., for Respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: January 3, 1997 Decided: January 10, 1997

BEFORE **MARIA MANCINI LAFIANDRA,** ALJ:

STATEMENT OF THE CASE

Petitioner, East Orange Board of Education met in executive session on Tuesday, December 6, 1994, and determined by majority vote of the full board to certify charges of insubordination and conduct unbecoming a secretary against Respondent. These tenure charges were communicated to the Commissioner

of Education on December 8, 1994; however, although Respondent was properly served, the charges were not received in the Commissioner's office.

The charges were again communicated to the Department of Education on February 9, 1996; because Petitioner documented service upon the Respondent, the Department of Education accorded Respondent 20 days to respond to the petition at that time. An answer to the petition was filed on April 8, 1996. The matter was transmitted by the Department of Education, Bureau of Controversies and Disputes to the Office of Administrative Law (OAL), pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to 13 on April 9, 1996.

Initially, Respondent was suspended without pay for a period of 120 days, pursuant to the statutory requirement. At the expiration of the 120 days, she was continued on suspension until October 8, 1996, when, because she was being fully compensated, she was asked to return to her position in another location within the district.

The matter was heard on January 3, 1997.

FINDINGS OF FACT

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Respondent Bohannon has been employed by the Petitioner, East Orange Board of Education, as an assistant secretary since February, 1986.

2. Respondent has never before been involved in an incident which resulted in suspension. She has, however, received written reprimands for leaving work without notifying her supervisor (B-3) and another for failing to follow proper procedure regarding a lost key (B-4, B-5).

3. Respondent was advised, through those reprimands, that her attitude toward following regulations, procedures, and expectations needed improvement.

4. On October 19, 1994, Respondent was assigned to complete a priority project for Mr. Restaino, Administrative Assistant to the Superintendent of Schools.

5. Before Mr. Restaino could instruct Respondent on the assignment which she was to complete, Respondent left his office on account of a misunderstanding between the two; she subsequently returned, but left a second time, again without addressing the assignment for which she was responsible.

6. Respondent was advised by her immediate supervisor and the president of the secretaries' union to complete the assignment.

7. As a result of the misunderstanding between Respondent and Mr. Restaino, the Superintendent of Schools held a meeting at which he, Mr. Restaino, and Respondent were present.

8. At some time during the meeting, the Respondent refused to complete the assignment for the Administrative Assistant and used foul language in addressing Mr. Restaino as well.

DISCUSSION AND CONCLUSIONS

The Tenure Employees Hearing Law provides that no person shall be dismissed if she is a tenured employee except for inefficiency, incapacity, unbecoming conduct, or other just cause. *N. J.S.A.* 18A:6-10. In this case, the

Petitioner cites unbecoming conduct and insubordination as the causes for its determination to terminate Respondent's employment.

The testimony from both sides in this case is clear: Respondent did refuse to complete the work assigned to her and she did use foul language. Accordingly, there is no question that Respondent was insubordinate; moreover, she also engaged in conduct which was unbecoming an employee in addressing foul language to Mr. Restaino, whether or not it was overheard by the Superintendent or anyone else. The issue, therefore, is whether her conduct was so egregious as to require termination.

The district was preparing for a monitoring by the Department of Education. The Respondent was assigned to complete a priority assignment because the employee originally assigned was absent. Mr. Restaino had a deadline to meet. Clearly, everyone in the district was under heightened pressure and stress. Petitioner and Respondent differ on the details of the precipitating event, the reason the Respondent failed to do the assignment, as well as on the details of what led up to the unbecoming conduct. As is to be expected, Petitioner's version, that Respondent completely ignored, for no apparent reason except to continue a conversation with a parent, least two, and possibly three, direct requests that she proceed to Mr. Restaino's office for instruction supports and enhances the charge of insubordination. Equally predictable the support for Respondent in her statement that she became upset because Mr. Restaino was "hollering" at her and she needed time to compose herself.

These differences have no effect on the ultimate conclusion that Respondent was, indeed, insubordinate and engaged in conduct unbecoming an employee; however, although the behavior was injudicious, intemperate, and wholly inappropriate, it does not rise, without more, to such a level as to require termination. Accordingly, in light of all of the circumstances of this matter, namely, the effect the impending monitoring would have on the morale of supervisory and support staff, the last minute upheaval caused by the absence of the employee originally assigned to the priority and the fact that Respondent's personnel file reflected that she had had no major disciplinary problems prior to

this one, I **CONCLUDE** that termination is too harsh a penalty; however, I **FURTHER CONCLUDE** that respondent was insubordinate and did engage in conduct unbecoming and employee. She has also demonstrated an attitude in the past and throughout this incident by which she tends to avoid accepting responsibility for the consequences of her breach of regulations or procedure and tends to minimize them. Accordingly, I **CONCLUDE** that substantial penalty is warranted.

It is, therefore, **ORDERED** that the determination of Petitioner to dismiss Respondent be and hereby is **REVERSED**; it is **FURTHER ORDERED** that the penalty imposed on Respondent shall be the 120-day suspension already served and the loss of her annual increment for a period of one year, which has also already occurred.

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

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

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

January 10, 1997
DATE

Maria M LaFiandra
MARIA MANCINI LAFIANDRA, ALJ

Receipt Acknowledged:

Jan. 15, 1997
DATE

L. N Cantanautis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 16 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jrp

APPENDIX

LIST OF EXHIBITS

B-1 Evidence - Memorandum, dated October 19, 1994 to Dr. Kenneth King, Assistant Superintendent for Personnel, from John Howard, Jr. Re: Suspension of Mrs. Alice McRae Bohannon

B-2 Evidence - Memorandum, dated October 19, 1994 to Dr. Kenneth D. King, Assistant Superintendent for Personnel, from Mr. Carmen Restaino Re: Alice Bohannon

B-3 Evidence - Memorandum, dated June 17,1993 from Ms. Antoinette Lamb, Director of Curriculum to Ms. Alice McRae, Assistant Secretary

B-4 Evidence - Memorandum, dated November 29, 1993 from Mrs. Antoinette Lamb, Director of Curriculum to Mrs. Alice Bohannon, Assistant Secretary

B-5 Evidence - Memorandum, date November 23, 1993, from Ms. Ivy I. Montgomery, Executive Assistant to Mrs. Alice Bohannon, Assistant Secretary

B-6 Evidence - Memorandum, dated October 19, 1994, from Lamb to Bohannon

B-7 Evidence - Evaluation, dated November 30, 1987

R-1 Evidence - Letter, dated June 20, 1989, from Barbara Swicord, G/T Supervisor to Alice McRae, Curriculum Office

R-2 Evidence - Letter, dated April 22, 1989, from Clyde Richard to Ms. McRae

R-3 Evidence - Evaluation Record of Alice McRae, dated June 22, 1988

R-4 Evidence - Evaluation Record of Alice McRae, dated March 30, 1991

R-5 Evidence - Evaluation Record Narrative Comments Regarding the Evaluative Factors, dated March 30, 1991

LIST OF WITNESSES

Dr. John Howard, Jr.

Carmen Restaino

Dr. Kenneth King

Alice Bohannon

OAL DKT. NO. EDU 3698-96
AGENCY DKT. NO. 58-2/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ALICE BOHANNON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

The record of this matter, including transcripts of the hearing conducted by the Administrative Law Judge (ALJ), and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner initially notes that the Board has not excepted to the ALJ's determination that dismissal is too harsh a penalty in this matter and that respondent was reassigned and has been working in the District since October 8, 1996, with no apparent indication of further incident. The Commissioner wishes to stress, however, that respondent's behavior, as proven, cannot be countenanced in the school environment. Therefore, in order to impress upon respondent the seriousness of her infraction and the Commissioner's concern about the unprofessional attitude displayed during the incident leading to the instant tenure charges, and at prior times in respondent's employment history, as indicated by the record, in addition to the loss of 120 days' pay, the Commissioner herein increases respondent's penalty to the loss of *two* annual increments.

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein, except as above modified with respect to penalty. The Commissioner hereby directs that respondent forfeit the 120 days' salary withheld following certification of the within tenure charges and that she be denied two annual employment and adjustment increments.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

March 3, 1997
Date of Mailing, March 3, 1997

(SB) 97-97

DHPL #253-97
SB # 97-97

IN THE MATTER OF THE DISQUALIFICATION FROM SCHOOL EMPLOYMENT OF A.T. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, May 7, 1997

For the Petitioner-Appellant, A.T., pro se

On May 7, 1997, the Deputy Commissioner of Education issued a letter decision in which he disqualified A.T. (hereinafter "appellant") from school employment in the State after a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 revealed that he had been convicted of aggravated assault, a disqualifying offense.

On December 4, 1997, appellant, acting pro se, filed a notice of appeal with the State Board of Education. Appellant explained the lateness of his notice by indicating that he had not been aware that he could file an appeal to the State Board.[1] On December 11, appellant was advised that this matter was being referred to the Legal Committee of the State Board for consideration of the effect of his failure to file the appeal in a timely manner. On December 22, the director of the State Board Appeals Office notified appellant that the Legal Committee had determined at its meeting of

[1] N.J.S.A. 18A:6-28 provides that appeals to the State Board must be taken within 30 days after the decision appealed from is filed.

3/4/98

December 17 to accept his filing. Appellant was also advised that a brief in support of his appeal was due on or before January 15, 1998.

Appellant, however, failed to file a brief by that date. By letter dated January 20, 1998, appellant was notified of his failure to file a brief and informed that this matter was being referred to the Legal Committee once again for consideration of his failure to perfect the appeal.

Appellant has still failed to file a brief in support of his appeal, nearly seven weeks after the deadline for such filing and more than six weeks after he was notified of such failure. Nor has appellant offered any explanation for his failure to file a brief or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

March 4, 1998

Date of mailing MAR 06 1998

98-97

98-97

ARLENE MARKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

MARCH 5, 1997

OAL DKT. NO. EDU 11725-95
AGENCY DKT. NO. 369-9/95

ARLENE MARKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

MARCH 5, 1997
DATE OF MAILING MARCH 5, 1997

(SB) 98-97

DHPL #582-97
SB # 98-97

IN THE MATTER OF THE DISQUALIFI- :
CATION FROM SCHOOL EMPLOYMENT :
OF J.F.C. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, November 7, 1997

For the Petitioner-Appellant, Reinhardt & Schachter (Jonathan E. Diego, Esq., of Counsel)

The decision of the Assistant Commissioner of Education disqualifying petitioner from school employment as a custodian following a criminal history record review conducted pursuant to N.J.S.A. 18A:6-7.1 is affirmed for the reasons expressed therein.

Daniel J.P. Moroney opposed.

February 4, 1998

Date of mailing FEB 6 1998

99-97

BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY, STUART R. DUCKER AND KENNETH ARNDT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
SOUTHERN REGIONAL EDUCATION ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 5, 1997

OAL DKT. NO. EDU 12641-95
AGENCY DKT. NO. 456-11/95

BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY, STUART R. DUCKER AND KENNETH ARNDT,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
SOUTHERN REGIONAL EDUCATION ASSOCIATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

MARCH 5, 1997
DATE OF MAILING MARCH 5, 1997

100-97

100-97

DEBRA WRZESINSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

MARCH 5, 1997

OAL DKT. NO. EDU 9818-95
AGENCY DKT. NO. 307-8/95

DEBRA WRZESINSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

MARCH 5, 1997
DATE OF MAILING MARCH 5, 1997

101-97

101-97

WYNFIELD KORNREICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DISTRICT
RESPONDENT.	:	

MARCH 5, 1997

OAL DKT. NO. EDU 9324-96
AGENCY DKT. NO. 236-6/96

WYNFIELD KORNREICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DISTRICT
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

MARCH 5, 1997
DATE OF MAILING MARCH 5, 1997

102-97

102-97

M. KATHERINE MC GAVERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DISTRICT
RESPONDENT.	:	
	:	

MARCH 5, 1997

OAL DKT. NO. EDU 6984-96
AGENCY DKT. NO. 297-7/96

M. KATHERINE MC GAVERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DISTRICT
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

MARCH 5, 1997
DATE OF MAILING MARCH 5, 1997

103-97

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW,	:	
PETITIONER,	:	
V.	:	
MAYOR AND COUNCIL OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $109,869 made by Council following voter rejection of proposed budget on April 16, 1996.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to sustain the full amount of the reductions.

Board also appealed General Fund cap waiver in the amount of $62,098 rejected by voters.

Upon review of the record, Commissioner determined to order the increase of $24,040 in cap waiver monies through the reallocation of existing budget appropriations. Additionally, the Commissioner directed the Board to file a formal plan to eliminate the deficit with the County Superintendent and directed the Board to take specific actions within such plan. The Commissioner also identified areas of the budget which could be reduced without affecting the district's ability to provide a thorough and efficient education in order to eliminate the deficit.

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW,	:	
PETITIONER,	:	
V.	:	
MAYOR AND COUNCIL OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
AND		
IN THE MATTER OF THE CAP WAIVER APPEAL OF THE BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW, BERGEN COUNTY.	:	

For Petitioner, Francine Del Vescovo, Esq. (Oury & Mizdol, P.C.)
For Respondent, John L. Schettino, Esq. (Giblin & Giblin)

PROCEDURAL HISTORY

This consolidated matter was opened before the Commissioner of Education on June 14, 1996 through the filing of separate Petitions of Appeal by the Board of Education of the Borough of Fairview (Board), one seeking restoration of reductions to the school budget made by the Mayor and Council of the Borough of Fairview (Council) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 16, 1996, and the other seeking to appeal the defeat of the Board's cap waiver proposal at that same election.

In February 1996, the Board had advised the County Superintendent that the Board would need a "voter cap waiver" pursuant to *N.J.S.A.* 18A:7D-28(f) in order to be able to provide for a thorough and efficient education system of education (T & E) in the District. The

County Superintendent ultimately determined, by way of letter dated March 28, 1996, that a $62,098 voter cap waiver was necessary for T & E and, therefore, appealable in the event of voter defeat.

At the annual school election, the voters rejected a public question proposing a General Fund tax levy of $9,370,129 for the 1996-97 school year, as well as a proposed T & E cap waiver question of $62,098. Following consultation with the Board as required by law, the Council adopted a resolution determining to certify a General Fund tax levy of $9,260,260 as sufficient to provide for T & E in the District. This amount represented a reduction of $109,869 from the tax levy proposed by the Board, and was effectuated through cuts in eight (8) line items, for the reasons given in Schedule A attached to the implementing Council resolution. The Board duly resolved to appeal these reductions and the voter rejection of the T & E General Fund cap waiver in the amount of $62,098, and duly filed the within Petitions.

The Board filed a Petition on June 14, 1996, requesting the Commissioner to overturn the Council's action in failing to provide the necessary tax levy; the Council filed its Answer on June 20, 1996. A Petition contesting the cap waiver defeat was also filed on June 14, 1996 by the Board. The Council's Answer to this Petition was similarly filed on June 20, 1996.

On July 2, 1996, the Board filed a cap waiver appeal Final Summation and further advised that it would rely on its Petition, filed on June 14, 1996, with respect to the budget appeal line-item justifications and, therefore, would not file a separate Position Statement in this matter. No Position Statement nor response to the Board's cap waiver appeal Final Summation was filed by the Council.

On July 2, 1996, the Bergen County Superintendent of Schools filed his affidavit and supporting documents attesting to the process of review and analysis that led to his

conclusion, and that of the Department of Education's Cap Waiver Review panel, that a $62,098 "T & E voter cap waiver" should be granted to the Board so as to permit it to increase its General Fund budget beyond the established permissible level. Such submission indicated that the Board initially requested a voter cap waiver of $378,058, of which $282,598 was approved, reductions including $79,510 in reallocations and an adjustment of $15,950 related to an error in the increased enrollment calculation, for a total reduction in the requested $378,058 voter T & E cap waiver of $95,460.

On March 22, 1996, conditional approval was granted for a voter T & E cap waiver in the amount of $282,598. On March 27, 1996, the Board advised that there would be a $220,500 reduction in the amount of the required voter T & E cap due to a change in circumstances which included the incorporation of the Gifted and Talented Program into regular instruction for 1996-97, opening of an additional special education self-contained class, withdrawal from the State Health Benefits Plan, personnel adjustments and a deferral of purchases to 1997-98.

On March 28, 1996, approval of the cap waiver reduction of $220,500 was granted by the County Superintendent with the proviso that certain conditions be met and certified to by the Board, including a plan to reinstate the Gifted and Talented Program in 1997-98 and a Board Resolution approving the creation of the additional special education class. The Board evidenced compliance with such conditions in written correspondence, dated April 2, 1996, and a voter cap waiver of $62,098 was, therefore, approved by the County Superintendent. The County Superintendent's submission additionally reflects that the Board had also requested a Commissioner's cap waiver of $606,026, which amount included $234,400 for increased enrollment and $371,626 for increased special education costs. Such

Necessary for T & E

Account Title	Account Number	Amount
Tuition to Other LEAs - Regular	11-000-100-561	$ 24,040
Other Support/Special Professional Salaries	11-000-219-104	$ 35,000
Employee Benefits	11-000-290-290	$ 3,058
TOTAL AMOUNT		$ 62,098

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for T & E. The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of a thorough and efficient system of education. *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township,* 116 *N.J.* 305 (1989). Additionally, with respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is fully necessary for purposes of T & E and unable to be derived from further reallocation within the base budget. *Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County,*

State Board decision July 7, 1993, and *Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater and In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County,* State Board decision July 6, 1994.

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION - BUDGET

Preliminarily, the Board urges the Commissioner, in making his determination in this matter, to consider that the District is anticipating a budget deficit for the 1995-96 school year of approximately $370,000, which will have to be eliminated during the 1996-97 budget year. The Board asserts that now that the District has received the final word on its 1995-96 budget appeal, with the recommended cuts being allowed to stand, the District is faced with having to reduce the 1996-97 budget by a total of $479,000, taking into consideration the $109,000 that the Mayor and Council have proposed herein. The Board further states that the Mayor and Council have recently informed the District that they will not raise money via tax anticipation notes for the amount that was restored to the budget for the 1995-96 school year. It argues that, therefore, the Board is obligated to issue the tax anticipation notes and pay whatever interest these notes bear.

The Commissioner notes that the Board has now appealed three consecutive budget defeats, all of which included cap waivers, and despite sizable restorations has been unable to get its fiscal house in order. In fact, the annual independent audit at June 30, 1996 indicates the district is in a deficit position of $206,382. Its only efforts to date to eliminate the deficit have been two fiscally irresponsible proposals to refinance its lease purchase agreement neither of which met the applicable regulatory provisions. These flawed attempts, as well as the

original decision to enter a lease purchase agreement of almost $4 million with a five- year repayment schedule and in a manner which avoided the Commissioner's review and approval of such terms, reflect the poor financial decision making which has created this succession of budget appeals and the current deficit.

Accordingly, throughout this decision the Commissioner will identify areas of the budget where reallocation or reductions appear likely in this or future budgets and issue specific directives to the Board as to actions which it shall take and report to the county superintendent.

Under the New Jersey Code of Criminal Justice, it is a crime for a public official or employee to purposely and knowingly disburse, order or vote for the disbursement of moneys or incur obligations in excess of appropriations or an amount limited by law. The law applies to members or employees of a board of education and prohibits purposeful and knowing overspending regardless of motive. The consequences for a person convicted of this offense are serious. The offense is a crime of the fourth degree, and a person who commits it may be imprisoned for a term up to 18 months, and fined or ordered to make restitution. A conviction would also result in forfeiture of the current board membership or employment and would be a permanent disqualification from holding public office or employment.

It is imperative that the Board take the necessary corrective actions to eliminate this deficit and present a balanced budget proposal for the 1997-98 school year. The Board's deficit position at June 30, 1996 was reported to the Division of Criminal Justice on a routine basis. Failure to correct the situation will result in the Commissioner making a recommendation to the Director, Division of Criminal Justice for a formal investigation.

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2640	11-190-100-106	Other Salaries for Instruction	$51,850	$11,250

The Council argues that the District terminated employees during 1995-96. It recommends rehiring half of these former employees this year and perhaps the other half next year.

The Board asserts that this line item represents salaries for the aides in special education classes. It observes that during the 1994-95 school year, the District spent a total of $92,907 in this account, which includes salaries for special education classroom aides and bedside instruction. The Board states that currently the District has four special education classes at maximum enrollment, and plans to institute a new education class. It argues that the cost of paying these aides, which are mandated positions, is represented by the following equation: 35 weeks x 23 hours per week x $12.76 x 5 aides = $51,359.

Upon review, the Commissioner notes that based on the 1996-97 Application for State School Aid contained in section c of the Board's petition the district's on roll special education pupils in self-contained classes are 8 NI and 29 PI. Pursuant to *N.J.A.C.* 6:28-4.4, maximum class sizes without an aide are 8 for NI and 12 for PI. Accordingly, the evidence suggests that none of the four special education classes which the district operates requires an aide. Additionally, the council's reduction permits the district to employ more aides than were budgeted in 1995-96 since the council's reduction is only 22 percent of the amount originally budgeted and is an increase of $15,600 over the amount budgeted for 1995-96. Therefore, the Commissioner sustains the reduction of $11,250 to Account No. 11-190-100-106. The Commissioner directs the Board to assess its need of the $40,600 budgeted for aides to determine if reductions can be made to help eliminate the district's deficit and submit a written copy of such assessment to the county superintendent as part of an overall plan to eliminate the deficit. The Commissioner notes that the appropriate coding of special education classroom aides under the chart of accounts required for district use pursuant to *N.J.A.C.* 6:20-2A.2(m) would not be this

account, which is for regular instruction classroom aides. The Board is hereby directed to reclassify the budgeted amount to the proper special education program classifications.

Disputed Line - Item Numbers 2 & 3

Line No.	Account No.	Descriptions	Amount Budgeted	Amount Cut
2680	11-190-100-610	General Supplies	$100,000	$20,000
2700	11-190-100-800	Other Objects	$ 65,000	$15,000

The Board contends that line no. 2700 "Other Objects" pays for small classroom supplies other than books, crayons and pencils, i.e., chairs, tables and desks. The Commissioner notes that the types of expenditures budgeted by the Board to this account are considered supply items, which are properly budgeted to the applicable instruction program (regular, special education, etc.) under object 610. Accordingly, the Commissioner directs the Board to reclassify these items to the proper accounts.

The council contends that the adjusted budget for line item #2680 for the 1995-96 school year was $75,000. It states that a 6 percent increase is more than adequate for the 1996-97 year.

The Board contends that during the 1993-94 school year, the district spent $102,778 in this account. In the 1994-95 school year, general supplies were budgeted at $106,062. Due to the budget deficit which the district experienced, it has been forced to eliminate expenditures in this area. The result has been a general shortage of classroom and teaching supplies during this past school year. The Board argues that, to date, the district has spent $80,000 in this account, so that the $100,000 is not an exaggerated amount but, rather, a return to 1993-94 levels.

The counsel asserts that certain reductions were made to line item #2700 during 1995-96, and proffers that $4,000, representing an 8 percent increase, will provide sufficient funds for 1996-97.

The Board maintains that during the 1994-95 school year, $89,488 was spent in this category. During the 1995-96 school year, $52,000 has been spent. It asserts that the district economized and used up its entire stock of supplies and all reserves. The Board argues that, as the district's enrollment has been increasing and its stock of these items has been completely depleted by the recent cost savings strategy, the district needs its full $65,000 allotment in order to provide T & E for the children of Fairview.

In reviewing these accounts and arguments, the Commissioner will consider the entire amount both budgeted and after reductions for all textbooks and instructional supplies for regular, special education, basic skills and bilingual programs. The Board's original budget contained $197,400 for all textbooks and instructional supplies or $229 per pupil based on the Board's on roll budget estimate of 861 pupils. After council's reductions, the per pupil amount was $189 per pupil which is still higher than the 1995-96 audited state average of $185 per pupil and the median of $183 per pupil. Therefore, the Commissioner sustains the reductions of $20,000 to line #2680 and $15,000 to line #2700.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
4810	11-230-100-101	Salaries of Teachers	$158,975	$7,500

The Council states that certain staff reflected by this line item were terminated during 1995-96. It recommends the rehiring of half of these staff members this year and perhaps the other half next year.

The Board asserts that in 1994-95 the District spent $148,376 on this line item. In the 1995-96 school year, this amount was reduced to $139,685 because when the District reduced staff in January, one of the special education teachers was transferred to a position as a classroom teacher from her basic skills position. It argues that, due to changes in student needs, it is now absolutely necessary that this teacher return to her basic skills position and the Board needs the full amount budgeted in order to pay the necessary differential to do this. The Board maintains that the Mayor and Council's recommendation to reduce this line item by $7,500 is arbitrary and capricious in that such recommendation bears no rational relationship to the amount of the cut. Clearly, it asserts, for the people terminated last year (if any plural amount of teachers in this category had been terminated, which they were not), $7,500 would not mean the difference between rehiring half of them and rehiring none of them.

Upon review, the Commissioner notes that the district's basic skills budget for 1996-97 contains revised appropriations for 1995-96 of $139,685 for teachers' salaries, $47,000 for other salaries for instruction and $2,000 for other objects (which based on previous stipulations by the Board are likely supplies) for a total of $188,685. The Board in its petition attests to the $139,685 teachers' salaries appropriation for 1995-96 and indicates that an increase to $158,975 is needed to properly serve students' basic skills needs. Yet, a review of the annual audit for the 1995-96 school year, indicates that $152,364 was actually expended on teachers' salaries and $36,321 was actually expended in the nondescript category of "other objects" for a total of $188,685. These numbers bear little resemblance to those in the Board's proposed budget for 1995-96 revised appropriations at February 1, 1996 or to the amounts contained in their arguments.

Based on the annual audit, the Board's $205,975 request for the basic skills program exceeds actual 1995-96 expenditures by $17,290. Additionally, while the Board may

have justified the need for $158,975 for teachers, there is no explanation for the requested continuation of $47,000 in other instructional salaries which was budgeted but never expended in 1995-96. Having established that textbook and instructional supplies are sufficiently funded earlier, the Commissioner sustains the $7,500 reduction to this account series and further directs the Board to either reduce this account series by $39,500 to offset the cap waiver restoration through reallocation and to help eliminate the deficit or provide a specific rationale to the county superintendent as to any amount which cannot be reduced as part of an overall plan to eliminate the deficit.

Disputed Line-Item Number 5

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6430	11-000-213-100	Health Services Salaries	$52,370	$11,500

The Council contends that a health aide, with concomitant benefits, was hired in 1995-96. It recommends the elimination of this position.

In support of restoration of this line item, representing the salary of a health aide position, the Board argues that the District has two schools and that before this aide was hired, the District had one nurse who was servicing 800 students in these two buildings. The Board maintains that the District created the position of health aide to assist the nurse by relieving her of some of the overwhelming amount of paperwork that is required and to handle some of the more routine tasks such as weighing and measuring of students. The Board contends that this position is absolutely essential for the health and safety of the students of Fairview.

The Commissioner again notes that the Board has now appealed three consecutive budget defeats, requested three consecutive cap waivers, received sizable previous restorations, and is in a deficit position. The decision to hire new staff given these serious financial problems

is imprudent, especially where the duties require no educational certification or could be shared among existing staff members. Accordingly, the Commissioner sustains the $11,500 reduction of this account.

Disputed Line-Item Number 6

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6910	11-000-230-100	General Admin. Salaries	$331,010	$6,119

The Council argues that the raise for the Superintendent should be eliminated. It maintains that the current deficit situation rests with management. As such, it recommends that no raise be paid to the Chief School Administrator for 1996-97, and that his salary be frozen at its current level of $95,881 until such time as this deficit situation is resolved.

The Board argues that the elimination of the Superintendent's raise in order to achieve a savings of $6,119 is not feasible in that this raise is part of a contract that has been in place for the Superintendent and elimination of this raise would violate the terms of such contract.

Upon review, the Commissioner reasserts the financial problems cited earlier and notes that while the district's in-house classroom and instructional spending is below the state average per pupil for K-8 districts, its administrative costs, even after council's reductions, as defined within the Comparative Spending Guide exceed the state average for K-8 school districts by $107 per pupil or $92,127. Therefore, the Commissioner finds that the district's administrative budget is sufficient to meet its overall administrative needs and honor the superintendent's contract and he sustains the $6,119 reduction to this account. Additionally, in light of the district's deficit and its continued inability to address it, the Commissioner directs that the Board either reduce the $92,127 in excess of the state average in order to offset the cap waiver restoration through reallocation and to help eliminate the deficit or provide a specific

rationale to the county superintendent as to any amount which cannot be reduced as part of an overall plan to eliminate the deficit.

Disputed Line-Item Number 7

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7120	11-000-260-420	Cleaning, Repairs and Building Maintenance	$120,000	$31,000

The Council asserts that this recommended cut still leaves an increase of $6,447, or 8%, over the 1995-96 spending level, which it contends should more than cover the District's needs in this area.

The Board urges that the age of the facilities in this District requires constant maintenance to keep them in acceptable working order. It maintains that during the 1993-94 school year, the District spent $305,828 on this line item. In 1994-95, to effectuate savings, $173,086 was appropriated, and due to the budget shortfall during the current year, the District was forced to cut back in this area. The Board avers that certain repairs have now become absolutely mandatory, including repairing the stucco on the school building. In addition, maintenance of some of the District's upgraded facilities totals a large amount of this line item. It posits, as an example, that last year alone, the District spent $28,000 on the maintenance of its new heating system, $10,000 on the maintenance of its computer system for the bookkeeping department, $12,000 on the maintenance of its new alarm system, and $22,600 on maintenance and upkeep of its office copiers. The Board argues that reducing this amount to $89,000 would make it almost impossible to buy cleaning supplies and maintain buildings in a safe and healthy condition for students.

Upon careful review, the Commissioner determines that while the Board demonstrated the need for the original appropriation in this specific account, the overall

operation and maintenance of plant budget is excessive. Information available within the department shows that the operation and maintenance budget as defined in the Comparative Spending Guide exceeds the state average of $773 per pupil by $77 or $66,297 even after council's reductions. This status is primarily due to the salary account which based on the district's proposed budget in Section A of the petition contains eight full-time workers for two schools. Therefore, the Commissioner finds that the district's operation and maintenance budget is sufficient to meet its overall needs and he sustains the $31,000 reduction to this account series. Additionally, in light of the district's deficit and its continued inability to address it, the Commissioner directs that the Board either reduce the operation and maintenance budget by $66,297 to offset the cap waiver restoration through reallocation and to help eliminate the deficit or provide a specific rationale to the county superintendent as to any amount which cannot be reduced including an explanation for eight full-time employees to cover two school buildings as part of an overall plan to reduce the deficit.

Disputed Line-Item Number 8

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7420	11-000-290-290	Other Employee Benefits	$532,642	$7,500

The Council proffers that this cut represents benefits allocated to the health aide position which was recommended for elimination above.

The Board argues that the same rationale which applies to Account No. 11-000-213-100, salary of the health aide position, likewise applies to this one which represents the benefits paid to that individual. The Board contends that it cannot afford to eliminate this position of health aide (or that individual's benefits) in light of the fact that without such position, one nurse will be forced to care for more than 800 students single-handedly.

Upon review, consistent with the determination on the health aid position, the Commissioner sustains the $7,500 reduction.

COMMISSIONER'S DETERMINATION- CAP WAIVER

Line No.	Account No.	Description	Amount
6270	11-000-100-561	Tuition to Other LEAs/Reg.	$ 24,040

The Board argues that the need for this line item is self-evident, in that the District has had an unusually large influx of students entering its school this year, in part because of the construction of a new low to moderate income high rise that was built in the town. The Board demonstrates that it is required to pay $8,500 per student to Cliffside Park High School.

Upon review, the Commissioner finds that the amount required for tuition to Cliffside Park High School is consistent with amounts contained in the receiving district's budget statement and therefore the amount requested is necessary for T & E. The Commissioner directs that $24,040 be reallocated from any one or any combination of the following account series: 11-230-100-XXX, 11-000-230-XXX, 11-000-240-XXX, and/or 11-000-260-XXX.

Line No.	Account No.	Description	Amount
6580	11-000-219-104	Other Support/Spec. Prof. Salaries	$ 35,000

The Council contends that the Board has failed to demonstrate a need for an additional child study team member and, therefore, this request should be denied.

The Board points out that, based on statistics contained in its cap waiver request which showed that the costs for special education in the District increased 17.39% in the period between the prebudget year and the year prior to the prebudget year, the County Superintendent and the Commissioner of Education, by letter dated March 12, 1996, approved a $266,626 cap waiver in light of the District's increased costs for such special education pupils. The Board

argues that the Council has not taken into account the reality of this increase when looking at funding needs in the special education area, and contends that funds for an additional child study team member are entirely reasonable in light of the rapidly expanding special education program as documented in the cap waiver request.

Upon careful review, the Commissioner notes that the Board's supporting documentation for the budget contained in Section A of the petition indicates that the Board currently has two full-time and six part-time child study team positions and proposes the addition of another full-time position. The Commissioner also notes that about 74 percent of the district's classified students are served through resource centers and self-contained classes for perceptually impaired students indicating that the majority of classified pupils are either mildly disabled or do not require intensive services. Also assuming that part-time child study team members equate to a .5 full-time equivalent, the district currently has a resident enrollment ratio of 247 to 1 child study team member and a classified resident enrollment ratio of about 33 to 1 child study team member, ratios that appear more than reasonable. Such assumptions and analyses were necessitated because the Board's argument rested solely on the approval of a cap waiver for special education costs, an argument which alone does not document the need for additional child study team members only that special education costs have increased. The Board did not describe the make-up of its child study team nor did it provide the caseload or other information needed for a sound decision. Accordingly, the Commissioner finds the district did not document the need for the additional child study team member and sustains the $35,000 reduction to this account.

Line No.	Account No.	Description	Amount
7420	11-000-290-290	Other Employee Benefits	$ 3,058

The Council maintains that such benefit payments are unnecessary with the elimination of the child study team position.

The Board observes that these benefit monies, in connection with an additional child study team member above, are entirely justified due to the same reasons as stated in the salary account above.

Consistent with the above determination, the Commissioner sustains the $3,058 reduction to this account.

APPLICATION OF SURPLUS/ELIMINATION OF DEFICIT

In its advertised annual school district budget statement, the Board projected an unreserved surplus of $104,351 and allocated -0- as revenue, leaving $104,351 as undesignated unreserved general fund balance. However, the Board's annual independent audit and related Comprehensive Annual Financial Report indicate the Board has a general fund deficit of $206,382. Accordingly, no surplus is available. However, the Commissioner has identified potential budget reductions totaling $238,524 in account series: 11-190-100-106, 11-230-100-XXX, 11-000-230-XXX, 11-000-240-XXX, and 11-000-260-XXX of which $24,040 must be reallocated to restore the tuition reduction made by council. That leaves $214,484 in potential reductions, an amount sufficient to eliminate the deficit.

The Board is directed to file within 30 days of the date of this decision a formal plan to eliminate the deficit, which shall address all directives contained herein, with the county superintendent, a duplicate copy of which shall be filed with the Commissioner.

SUMMARY

In summary, the Commissioner finds that $24,040 appealed by the Board herein has been shown to be necessary for the provision of a thorough and efficient system of education in the District and, therefore, directs restoration of the Council's line-item reduction to

appropriations and waiver of expenditure limitations as set forth below. The Commissioner further notes that all restorations to line-item appropriations and waiver amounts granted are restricted in accordance with *N.J.A.C.* 6:20-2A.11(b)3, provided, however, that where amounts at issue have been incorrectly coded, as noted above, appropriations are restricted to the correct account. Finally, the Commissioner notes that sufficient funds are available within the originally certified budget to provide a thorough and efficient education and eliminate the deficit.

Line Item	Description	Sustained	Restored
2640	Other Salaries for Instruction	$ 11,250	- 0 -
2680	General Supplies	$ 20,000	- 0 -
2700	Other Objects	$ 15,000	- 0 -
4820	Basic Skills	$ 7,500	- 0 -
6430	Health Services Salaries	$ 11,500	- 0 -
6910	General Administration Salaries	$ 6,119	- 0 -
7120	Cleaning, Repairs and Building Maintenance	$ 31,000	- 0 -
7420	Other Employee Benefits	$ 7,500	- 0 -
	TOTAL LINE-ITEM DETERMINATIONS	$109,869	- 0 -

Cap Waiver Amounts	Not Necessary	Necessary
Tuition to Other LEAs/Reg.		$ 24,040
Other Support/Spec. Prof. Salaries	$ 35,000	- 0 -
Other Employee Benefits	$ 3,058	- 0 -
TOTAL CAP WAIVER AMOUNT	$ 38,058	$ 24,040

Tax Levy Certified by Council	$ 9,260,260
Restoration of Reductions	-0-
Cap Waiver Amount Approved	24,040
Approved Amount Funded by Reallocation	(24,040)
TOTAL TAX LEVY FOR 1996-97	$ 9,260,260

Accordingly, the tax levy of $9,260,260 shall stand as originally certified, having been deemed sufficient for General Fund purposes of the Fairview Board of Education for the 1996-97 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 5, 1997
DATE OF MAILING MARCH 5, 1997

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E.L. AND C.L., on behalf of minor child, W.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY, BOARD OF EDUCATION OF MORRIS COUNTY VOCATIONAL-TECHNICAL SCHOOLS, MORRIS COUNTY, *ET AL.*,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

March 7, 1997

OAL DKT. NO. EDU 1760-97
AGENCY DKT. NO. 23-1/97

E.L. AND C.L., on behalf of minor child, W.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY, BOARD OF EDUCATION OF MORRIS COUNTY VOCATIONAL-TECHNICAL SCHOOLS, MORRIS COUNTY, *ET AL.*,	:	DECISION ON MOTION
RESPONDENTS.	:	

For Petitioner, Tanya N. Helfand, Esq.

For Respondent, Dover Board of Education, *et al.,* Derlys Maria Gutierrez, Esq. (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross)

For Respondent, Morris County Vocational-Technical Schools Board of Education, *et al.,* John Mills, III, Esq. (Mills & Mills)

This matter was opened before the Commissioner of Education on January 23, 1997, by way of a Petition of Appeal and Motion for Emergent Relief filed by counsel for petitioners, seeking an order permitting W.L. to participate in a fully credited day of classes at Dover High School subsequent to his expulsion from his afternoon program at Morris County Vocational-Technical School. After receipt of Answers from respondents, this matter was transmitted, on February 10, 1997, to the Office of Administrative Law (OAL) for hearing.

Upon review of the record of this emergent matter which included the audiotape of proceedings before the Administrative Law Judge (ALJ), and his subsequent Order (attached), the Commissioner concurs with the ALJ's determination to grant emergent relief, as detailed in his Order, as the standards for the granting of such relief, as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), have been satisfied.

Accordingly, the Motion for Emergent Relief is hereby granted as expressed in the recommended Order, and the matter on the merits will proceed at the OAL consistent with the recommendation of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 7, 1997
Date of Mailing, March 7, 1997

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
FEB 21 1 36 PM '97

TANYA N. HELAND, ESQ.
ROCKAWAY TOWNSQUARE CONVENIENCE CENTER
ROCKAWAY, NJ 07866
(201) 366-3500
Attorney for Petitioner

Wilbert Lorenzo a minor by his parents/guaradians EFRAIN LORENZO and CANDIDA LORENZO Petitioners, vs. BOARD OF EDUCATION OF THE CITY OF DOVER, DOVER HIGH SCHOOL, MORRIS COUNTY BOARD OF EDUCATION, MORRIS COUNTY VO TECH SCHOOL, ROBERT BECKER, principal, NEAL KAPLAN, Vice Principal, JAMES DEWORKEN, Superintendent, MICHEAL PALSCHAKOV, Teacher, EDWARD BOLCAR, Vice Principal, Respondents.	:BEFORE THE COMMISIONER :OF EDUCATION OF :NEW JERSEY OAL Dkt. No. EDU 1760-9 Agency Docket No: 23-1/97 ORDER

This matter having been opened to the Office of Administrative Law on Feb. 19, 1997 by Tanya N. Helfand, Esq. for an emergent hearing on behalf of petitioner's Wilbert Lorenzo, Candida Lorenzo and Efrain Lorenzo in the presence of John Mills, III, Esq. and Derlys Gutierrez, Esq. attorneys for respondents and the court having considered the papers, testimony of witnesses and argument of counsel and for good cause shown.

IT IS ON THIS 21st DAY OF FEBRUARY 1997;

ORDERED that Petitioner W.L. be immediately reinstated at Dover High School for a full schedule of classes (4 in the morning and at least 4 in the afternoon) for the remainder of the school year. Said afternoon classes shall be chosen with the help of petitioner's guidance counsellor.

IT IS FURTHER ORDERED that Dover High School shall provide additional tutoring to W.L. to help him to "make up" for classes not attended to date. Scheduling of said tutoring shall also be determined by petitioners guidance counsellor. KS

IT IS FURTHER ORDERED that the court shall reserve its decision until a future nonemergent hearing with regard to petitioner's request for credit towards graduation for attending afternoon classes and additional tutoring.

IT IS FURTHER ORDERED that Respondent Morris County VoTech School will accept petitioner's application for the cosmetology program for the school year 1997-1998. Respondent shall consider petitioner for the program using the same [redacted] standards established for all applicants of the program. KS

[redacted] KS

Ken R. Springer

Ken Springer, ALJ

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner, Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner, Department of Education does not adopt modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

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M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12392-95
AGENCY DKT. NO. 446-11/95

MARGARET MASON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD,
Respondent.

Carlos Peay Jr., Esq., for petitioner

Joanne L. Butler, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: January 13, 1997 Decided: January 15, 1997

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

Statement of Facts

This is an appeal brought on behalf of a student seeking enrollment in respondent school district for the 1995-96 school year. The school district has counterclaimed seeking payment of prorated tuition. Basically, the issue is whether the child is eligible for free education in the district as an "affidavit student" under *N.J.S.A.* 18A:38-1(b). Petitioner alleges that her son and daughter-in-law are physically incapable of caring for her granddaughter and that petitioner is supporting her "gratis"

within the meaning of the statute. However, respondent denies that petitioner meets the statutory standard for obtaining a free public education in the district.

For the reasons which follow, petitioner abandoned the hearing request and offered no proofs in support of her allegations. Consequently, respondent is entitled to judgment on the counterclaim.

Procedural History

On November 20, 1995, petitioner filed a verified petition with the Commissioner of Education. The Board of Education of Bergenfield ("Board") filed its answer and counterclaim on December 13, 1995. Thereafter, on December 18, 1995, petitioner filed an answer to the counterclaim. Meanwhile, the Board agreed to admit petitioner's grandchild to school in the district pending the outcome of this appeal.

Subsequently, on December 18, 1995, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Originally, the OAL scheduled two days of hearing for November 6 and 7, 1996. At the request of both parties, this hearing was adjourned because of a tentative settlement. When the parties failed to submit a signed settlement agreement, the OAL rescheduled the matter for hearing on January 13, 1997. On that date, counsel representing both parties were present, but petitioner failed to appear. Counsel for petitioner placed on the record his unsuccessful efforts to obtain petitioner's cooperation in presenting her case and defending against the counterclaim.

Findings of Fact

Based on the representations of counsel, I **FIND** the following facts:

On July 29, 1996, the Board moved for an order compelling petitioner to answer interrogatories propounded by respondent. Despite an order entered on July 31, 1996

directing that petitioner submit responsive answers no later than August 27, 1996, petitioner failed to furnish answers to respondent's interrogatories. Petitioner's counsel sent three letters to petitioner in August 1996 attempting to schedule an appointment for petitioner to consult with him. Nonetheless, petitioner ignored these letters and failed to meet with her own attorney. By the end of the 1995-96 school year, petitioner's grandchild left New Jersey and returned to her parents in Alabama.

Counsel for both parties were able to negotiate a proposed settlement on mutually favorable terms. Ms. Butler drafted a written stipulation of settlement, which she sent to Mr. Peay on October 28, 1996. Mr. Peay forwarded a copy to his client on November 14, 1996, requesting that she come into his office and sign the stipulation. Petitioner did not reply. On December 30, 1996, Mr. Peay sent a second letter to his client, asking that she sign the settlement agreement and mail it back to him. Again, petitioner did not make any response. In fact, petitioner has not responded to any of Mr. Peay's correspondence and he has had no telephone contact with her since last August. Since Mr. Peay lacks authorization from his client, he cannot sign the proposed settlement papers in her name.

Petitioner failed to appear at the hearing on January 13, 1997. In her absence, no evidence was presented in support of her claim. The Board has submitted an affidavit establishing that the total prorated tuition for the 1995-96 school year amounts to $5,597.

Conclusions of Law

Based on the foregoing facts, I **CONCLUDE** that petitioner failed to appear at the hearing on January 13, 1997 without good cause, and that this nonappearance constitutes an abandonment of her hearing request.

N.J.S.A. 18A:38-1(b)(1) provides that a person over five and under twenty years of age may attend school free of charge in the district if satisfactory proofs show: (1)

that the child "is kept in the home of another person domiciled within the school district and supported by such other person gratis as if he were such other person's own child;" (2) that the child's parent or guardian "is not capable of supporting or providing care for the child due to a family or economic hardship;" and (3) that the child is "not residing with the resident of the district solely for the purpose of receiving a free public education within the district." When a board of education determines that the evidence does not support the validity of a claim, the resident may appeal the adverse decision to the Commissioner and "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education" under the statutory criteria. If the evidence does not support the claim of the resident, the Commissioner "shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district."

Here petitioner offered no proofs whatsoever in support of her claim. Accordingly, petitioner has failed to meet her burden of proof and the Commissioner must enter judgment for payment of prorated tuition.

Order

It is **ORDERED** that petitioner's request for relief is denied for lack of diligent prosecution.

And further **ORDERED** that petitioner pay the sum of $5,597 to the Bergenfield Board of Education.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

Jan. 15, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Jan. 23, 1997
DATE

Receipt Acknowledged:
D. M. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 24 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 12392-95
AGENCY DKT. NO. 446-11/95

M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge that petitioner's request for relief should be denied. Petitioner, by her failure to appear at the hearing, has abandoned her request for such hearing. Consequently, petitioner has not met her burden of proof in this matter and her granddaughter is not, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, entitled to a free education in the Board's District.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein. Petitioner is directed to remit $5,597 to the Board, representing tuition costs for that period of time in which petitioner's granddaughter was ineligible to attend school in the District, but nonetheless did so.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 7, 1997

DATE OF MAILING MARCH 7, 1997

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106-97

KATHLEEN MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured elementary school teacher, alleged the Board's action withholding her salary increment for unsatisfactory performance was arbitrary, capricious or unreasonable.

ALJ concluded Board's withholding action was not arbitrary, capricious or unreasonable. ALJ found the Board offered petitioner a meaningful remediation plan which petitioner did not implement. Moreover, the Board informed petitioner of all its observations, evaluations and reasons for withholding in a timely manner .

Commissioner adopted findings and determination in the initial decision as his own.

MARCH 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7847-95

AGENCY DKT. #225-6/95

KATHLEEN MILLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,

Respondent.

Brian Miller Adams, Esq., for petitioner (Dwyer & Canellis, attorneys)

Peter Schultz, Esq., for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: December 9, 1996 Decided: January 22, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

STATEMENT OF THE CASE

The petitioner claimed that the action of the Board in withholding her salary increment was arbitrary and unreasonable.

PROCEDURAL HISTORY

The petitioner appealed to the Department of Education and on June 27, 1995, the Department of Education transmitted this matter to the Office of Administrative Law for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for January 29 and 30, 1996. After an adjournment, the matter was heard on September 16, 1996 and on October 3, 1996, at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey.

DISCUSSION OF THE TESTIMONY AND EVIDENCE

The petitioner claimed that she was given no meaningful plan of remediation, and that the Board decided to withhold her increment in January, before improvement could take place.

The Board claimed that petitioner failed to perform throughout the school year, and that a plan had been put together for remediation, and petitioner was assisted but, although she did improve slightly, the overall result of her performance throughout the school year was unsatisfactory.

The first witness to testify was Kathleen Miller, petitioner. who said she had been a teacher since 1972. She said she has taught 1st, 2nd, 3rd, 5th and 6th grade, and taught 6th grade at Shull School in school year 1995-1996. Ms. Miller said she was evaluated on September 26, 1994 by the new Vice Principal, Ms. Wilson, who indicated problems in petitioner's decoding skills, teaching skills and classroom management. (This evaluation was not introduced as an exhibit, by mutual consent.) An observation by Ms. Herbeck of December 19, 1994 (J-1) indicated deficiencies in instructional skills and classroom management. Petitioner said she discussed the observation report with Ms. Herbeck, who made suggestions which petitioner said she followed. Petitioner said that, on January 1, 1995 (J-2), she was observed by Mr. Yurok, and that observation again indicated deficiencies in instructional skills and in classroom management.

Petitioner said she discussed the report with Mr. Yurok. Petitioner also said she observed other 6th grade teachers in action, before the January 9 meeting.

Petitioner said that, on January 9, 1995, a meeting was held to establish the "backbone" of her remediation program, which she said was a collaborative effort to help, not to punish, her. Petitioner said that her union representative, Norman Tankiewicz, was invited to the meeting, which was also attended by Mr. Uribe, Ms. Wilson, Ms. Herbeck, and M. Sellers. Petitioner said there was no mention of her increment at this meeting.

Petitioner said that, on January 11, 1996, petitioner received an evaluation (J-3) of the earlier observations (J-1 and J-2). Petitioner said that a meeting was to be planned to implement the strategies presented to her at the January 11 meeting, but that such a follow-up meeting never took place. Petitioner said that she wanted a discussion at a meeting, rather than communication through observation forms. Petitioner said that Mr. Yurok told her there was no time left for the follow-up meeting, as half the year had already passed. Petitioner said she did receive a handwritten remediation plan from Mr. Yurok on January 11, who asked petitioner to look it over and tell him what she thought, and that then Mr. Yurok would have the plan typed up and signed, but petitioner said that never happened

Petitioner said that Ms. Herbeck sent her instructional materials to read on teaching strategies and classroom management, which petitioner said she read. Petitioner said that she received mixed messages from the reading materials, which suggested overlooking situations and continue teaching, a strategy for which petitioner felt she had been criticized.

Petitioner said that only Mr. Sellers, Assistant Superintendent, indicated a time frame for her improvement, which was to the end of the year.

Petitioner said that she received another observation report from Ms. Herbeck (J-5) on March 7, 1995 in which her classroom skills were rated as "Unsatisfactory." Petitioner said that she received another observation report from Dr. DeStefano on March 14, 1995 (J-6), and another report from Dr. DeStefano on March 15, because petitioner said she asked Dr. DeStefano

to come back as there had been a fire drill while he was observing petitioner's class performance. Petitioner also said that Dr. DeStefano taught a demonstration class at her request. Petitioner said that Dr. DeStefano had rated her classroom management skills as Unsatisfactory, but had changed her rating for instructional skills from Unsatisfactory to Satisfactory on the second day of observation (J-7).

Petitioner said that the report of March 24, 1995, rated her classroom management as "I", or that improvement was needed. Petitioner said she should have been rated either Unsatisfactory or Satisfactory.

Petitioner said that the prior observations did not support the Unsatisfactory evaluation of March 7, 1995 by Uribe, Herbeck and Wilson (J-9), because it went back to the beginning of the year.

Petitioner said she went to a workshop at the Academy in Edison, on classroom management skills in April, which she had requested. (P-3)

Petitioner said she was notified, for the first time, at the end of the year that she would not receive an increment. Petitioner said she thought she had improved and had done what her supervisors wanted of her.

On cross, petitioner said that the problem with her decoding skills was an incident with one boy, at which Ms. Wilson put her arm around the boy and walked him out of the classroom. Petitioner said the September 26, 1994 report by Ms. Wilson was "pulled" by Mr. Uribe at the January 9 meeting, as an attempt to let petitioner "start fresh." All copies of the September 26, 1994 report were given to petitioner.

Petitioner said that her class was troublesome, and that she did not understand the professional improvement plan (B-1) which was part of the meeting of January 9, and which was also introduced as part of J-. At one point in her testimony, petitioner denied ever seeing B-1 before, and later said that she was handed B-1 by Mr. Uribe. Petitioner said she did not know

what to make of it (B-!) when she was given it by Mr. Uribe on January 9, and expected B-1 to be explained to her during a later meeting with Ms. Wilson, which meeting never took place.

Petitioner also said that Mr. Uribe wrote P-1, dated January 17, 1995.

The next witness was Norman Tankiewicz, petitioner's union representative, who said that petitioner came to him in late September, 1994 with a complaint that the problem with the boy colored Ms. Wilson's evaluation of September 26. Mr. Tankiewicz said her problem with the September 26 evaluation was resolved when Mr. Uribe "wiped the slate clean." Subsequently, in November, petitioner came to him and reported that she was having difficulty with her class, that they were a difficult group, and that she was unfamiliar with the curriculum.

Mr. Tankiewicz said that petitioner immediately came to him when she received J-1, and that Mr. Uribe called a meeting on January 9 and Mr. Uribe said that petitioner could bring her union representative. Mr. Tankiewicz said that the focus of this meeting was petitioner's classroom management skills. Mr. Tankiewicz said that he suggested a remediation plan, to forestall disciplinary action. Mr. Tankiewicz said that a remediation plan was not required by the collective bargaining agreement. Mr. Tankiewicz said that the petitioner was offered demonstration lessons and the opportunity to view other teachers, and was supplied with instructional materials.

Mr. Tankiewicz said that Mr. Sellers said that petitioner still had time to improve, until the end of the school year, and that if she improved there would be no disciplinary action. Mr. Tankiewicz said that at this point (January 9), he did not believe increment withholding was under consideration.

Mr. Tankiewicz said that he wrote P-1, in consultation with petitioner, as a summary of the January 9 meeting. Mr. Tankiewicz said that he had P-1 typed and sent to all parties to the January 9 meeting, and he did not expect P-1 to be signed by the parties.

Mr. Tankiewicz said that, in March, petitioner told him that the demonstration lessons were not offered, and if she wanted them, she had to arrange for them herself. Mr. Tankiewicz said that he did not expect there to another meeting, but did expect frequent contact on this matter. Mr. Tankiewicz said that he did not think there was frequent contact.

Mr. Tankiewicz said that the collective bargaining agreement did not require notice of increment withholding by any date, and that the Board voted on April 7 to withhold petitioner's increment.

The next witness was Julius Uribe, Principal, who said that Dr. DeStefano, Ms. Herbeck and Ms. Wilson had attempted to bring to petitioner's attention areas that needed improvement. Mr. Uribe said he called the January 9 meeting so that petitioner could be made aware of their serious concerns arising from the September-October evaluations. Mr. Uribe said that Ms. Wilson, an experienced Vice Principal (although new to Shull School) was concerned following her observations about petitioner's classroom management, instructional and leadership skills. Mr. Uribe said that petitioner was upset and refused to talk to Ms. Wilson following her September 26 observation, and that, following a telephone call from Mr. Tankiewicz, Mr. Uribe called the January 9 meeting and agreed to disregard the report from Ms. Wilson's September 26 observation, so that petitioner could start afresh. Mr. Uribe said he told petitioner to relax and just do her job.

Mr. Uribe said that petitioner had taught 5th grade in prior years, but as she had 20 years experience, he felt she could teach 6th grade, especially in that the enrollment in 6th grade was less than in the 5th grade.

Mr. Uribe said that he thought that petitioner would not benefit from constant correction, so he told Ms. Wilson, Ms. Herbeck and Mr. Yurok not to go into her classroom often, to let her have the opportunity to get back on track, but that once he walked by her class and the lights were out. Mr. Uribe said that he felt there was too much confusion in the classroom, and that one could not teach in that environment. Mr. Uribe said that petitioner had turned off the lights, but that he turned them back on, commenting to petitioner that the children had to learn the rules, and

that correction in that manner was inappropriate in that situation, and was usually used only for younger grades..

Mr. Uribe said that he received notes from the children in petitioner's class that they were very unhappy in petitioner's class, and that petitioner had telephoned one of the parents of a child in her class, in full view and earshot of her class, to complain about the student's behavior. Mr. Uribe asked petitioner not to place a call in that manner again, and to handle such problems with the parent directly.

Mr. Uribe said that his memo of November 22, 1994 (B-2) was a summary of his meeting that day with petitioner in which he advised her that she was to immediately stop threatening to use her cellular telephone to call parents while engaged in teaching her class, and instead to call parents during non-instructional time. Mr. Uribe also instructed petitioner in this memo not to ask the security guards to cover her class, directing her was to notify the office if she wished to be relieved. Petitioner was also not to attempt to prevent a student from speaking to a guidance counselor or administrator. was directed to use the office of the Vice Principal for serious discipline problems only, and was directed to remediate other discipline problems herself. Mr. Uribe said that petitioner's response to his directions was that what she had done was not wrong, but that she would work on it.

Mr. Uribe referred to another memo (B-3) regarding petitioner asking the security guards to cover her class. Petitioner had been paged by Vice Principal Angelo Bonarrigo at 8:50 a.m.. Petitioner called the Vice Principal at 9:05 to tell him that she could not do as he requested. The Vice Principal stated that she should have been at her post at 8:50, and also that she should not have asked a security guard to cover her class. The Vice Principal stated that petitioner should not allow herself to become so frustrated by a child that she and her class were placed in a compromising situation. Petitioner was warned that violations of these kinds could result in "a negative impact" on her professional status.

Mr. Uribe referred to his memo (B-4) regarding several requests by parents to have their children removed from petitioner's class. Mr. Uribe said that the parents reported to him that

they had observed petitioner's class, and met with her and with administrators, and were concerned about an "alleged lack of classroom management and poor student behavior." Mr. Uribe said that, because of the parents' requests to transfer students, petitioner's class size went from approximately 25 to 17 students. Mr. Uribe referred to a memo from the guidance counselor of January 5 (B-5) stating that, to date, she knew of 6 parents who had requested that their children be removed from petitioner's class.

Mr. Uribe said that his observations of petitioner's classroom performance were recorded in J-2, and he found her unsatisfactory in classroom management and instructional skills.

Mr. Uribe recalled the meeting in Mr. Sellers' office with petitioner in which Mr. Uribe stated that he was very concerned about petitioner's performance. Mr. Uribe said that the withholding of petitioner's salary increment was brought up then, and that no promises were made.

Mr. Uribe said that he completed his evaluation of petitioner (J-3) and gave it to her, listing 6 areas of concern. Mr. Uribe said he offered a remedial plan, to be accomplished under the guidance of himself (for areas of concern 1 and 5), of Ms. Herbeck (for areas of concern 3 and 4), and of Ms. Wilson (for areas of concern 2 and 6).

Mr. Uribe said that he gave B-1, which he said was 2/3 of the remediation plan, to petitioner within 1 week of the January 11 evaluation, in a private meeting with petitioner, Ms. Wilson and Ms. Herbeck. Mr. Uribe said that the other 1/3 of the remediation plan was the reading materials coming from Ms. Wilson.. Mr. Uribe said that petitioner did not want to talk about the remediation plan, but he hoped she would get back to him.

When she did not get back to him about the remediation plan, Mr. Uribe said he sent her a note (B-7), asking what was going on and attaching another copy of B-1. Mr. Uribe said he received no response from petitioner to B-7.

Mr. Uribe said that the second evaluation (J-9) of petitioner was most unusual, in that after being notified of her unsatisfactory performance and after being given a remedial plan, there was little if any improvement.

Mr. Uribe said that he continued to receive notes and letters (B-8 and B-9) and telephone calls from parents, who were "crying out" for action to improve the situation in petitioner's classroom. He also received a petition signed by petitioner's class, asking him to do something about petitioner screaming and calling their parents on her cellular telephone, and saying that they had learned nothing all year. (B-9, page 2).

Mr. Uribe said that a substitute teacher had been sent into petitioner's class, and the substitute reported no problems. Her report, Mr. Uribe said, was complimentary of the behavior of the class. (B-10, page 2). Petitioner complained that the substitute had given her class "busy work" (B-10, page 1).

On cross, Mr. Uribe said that the remediation plan was Mr. Tankiewicz's idea, and that Mr. Uribe embraced the idea to assist petitioner in improving. Mr. Uribe said that the evaluation of January 3 (J-3) did not come as a surprise to petitioner, as it was already fairly clear to petitioner that it was not going to be favorable.

Mr. Uribe said that the superintendent of the school district had wanted the decisions on staff increments by mid-March. Mr. Uribe said that the time period of September through mid-March was adequate for staff to be able to demonstrate what they were capable of doing. Mr. Uribe said that petitioner's increment would not have been withheld if enough progress had been shown. Mr. Uribe said that at the time of petitioner's March 27 evaluation, she had not shown the ability to control her students and create an environment conducive to learning. Mr. Uribe said that petitioner had not addressed the remedial plan sufficiently enough. Mr. Uribe was asked by the superintendent for increment recommendations by April 1 at the latest, so the superintendent could inform the Board by April 15. Mr. Uribe said that petitioner had improved her performance, but only marginally and not enough to counterweight her previous poor performance, and that she still had a long way to go.

On re-direct, Mr. Uribe said that he thought that petitioner had done Mr. Tankiewecz's plan, not Mr. Uribe's plan, which was the augmented plan. Referring to P-1, Mr. Uribe said that petitioner had not completed items 1, 2, 5, 6, 8 or 9. He said that she partially addressed item 3, and had complied with item 4 and 7. Mr. Uribe said that he gave petitioner some weeks before she was observed again, on April , 1995, and that petitioner was using the appropriate disciplinary forms, and was showing slight improvement in areas 6, 7, and 8. He said not all areas were improved, but that he tried not to be too critical of her.

On re-cross, Mr. Uribe said that, even if petitioner's performance had improved to satisfactory, her prior observations and evaluations would still be included in her final evaluation.

The next witness to testify was Barbara H. Wilson, Vice Principal of Stull School, who said that she wrote Ms. Miller a memo on November 28 (B-11) regarding her improper and incomplete discipline referrals, and her classroom management strategies, which Ms. Wilson said needed to be improved. Ms. Miller presented numerous disciplinary requests referred to her by Ms. Miller, mostly handwritten on scraps of paper, without dates (except the date noted by Ms. Miller), some demanding that a certain type of discipline be taken (B-12 and B-13). Ms. Wilson said that her efforts to observe Ms. Miller were unsuccessful, and that Mr. Uribe asked her to withdraw her September 26 observation of Ms. Miller, which Ms. Wilson did. Ms. Wilson said that, when she did observe Ms. Miller's class, she felt Ms. Miller's performance was unsatisfactory, and that she did not teach what she said at the start of the class she was going to teach.

Ms. Wilson said that, at none of the meetings she attended with Ms. Miller, was it ever said that anything (other than the September 26 observation) would not count toward Ms. Miller's overall evaluation. Ms. Wilson said that, when Ms. Miller was presented with the first part of the remedial plan on January 9 (B-1), Ms. Miller was impassive and did not indicate that she wanted any help Later (January 20), when Ms, Wilson met with Ms. Miller to discuss items 2 and 6 of the remediation plan, Ms. Wilson said that Ms. Miller still did not think she needed any help and was resistant to suggestions to improve. (B-14). Ms. Wilson said that her second meeting with Ms. Miller, on January 30, was similar to the first, in that Ms. Miller said that she

was a veteran teacher and that things would work out (B-15). Ms. Wilson said that she tried to open a dialogue with Ms. Miller, but that Ms. Miller's responses, or lack thereof, did not indicate that Ms. Miller heard Ms. Wilson.

Ms. Wilson said that, on February 9, 1995, she wrote to Ms. Miller about a second instance of leaving her assigned post (B-16).

Ms. Wilson said that she was called to Ms. Miller's classroom almost every day, and that it seemed to her that Ms. Miller's students were usually talking and doing things other than classwork, and that they were not on task. Ms. Wilson said that, following her September observation, she did not enter Ms. Miller's classroom with a clipboard in her hands until March, so as not to pressure Ms. Miller, although she never observed a different approach to teaching, even in her March 3 observation (J-4). Ms. Wilson said that, although the overall rating (J-4) was S minus, Ms. Miller's improvement was marginal, and her performance was never satisfactory..

Ms. Wilson said that she got to know the students in Ms. Miller's class throughout the year, and there were no basic skills students in Ms. Miller's class. Ms. Wilson said that although other teachers world refer their students for discipline, their numbers were minimal compared to Ms. Miller's.

The next witness was Georgeanne Herbeck, Supervisor of Elementary Education, who said that she began the school year informally stopping in the observe Ms. Miller's class, and did her first formal review on December 19, 1994. (J-1). Ms. Herbeck said that the class was chaotic when she observed it, and that Ms. Miller took 45 minutes to do 5 math problems, and "belabored" them. The students became bored, while Ms. Miller concentrated on the 4 or 5 students in the front of the class. Ms. Herbeck said that Ms. Miller would begin teaching before quieting the class, and that one girl stood and yelled "shut up" because the students were talking about things other than the mathematics being taught. Ms. Herbeck said that Ms. Miller appeared stunned when she saw the "U's" on her observation (J-1). Ms. Herbeck said that that she indicated that she was ready and willing to help Ms. Miller, but that she never made any promise

to "wipe the slate clean." Ms. Herbeck said that she went immediately to Mr. Uribe and told him that "we have a problem."

Ms. Herbeck said that, by March, it was clear that Ms. Miller's systems of teaching and of discipline were ineffective. Ms. Herbeck said that, during her March 7, 1995 observation of Ms. Miller's class, the students were not focused on her, and Ms. Miller began to lose patience, and began to scream at the students to quiet down, saying "I'm tired of this." Ms Herbeck gave Ms. Miller an overall Satisfactory rating for this observation.

Ms. Herbeck said that, based on Ms. Miller's performance for the school year 1994-1995, she considered Ms. Miller's performance to be unsatisfactory, and even though Ms. Miller's teaching performance improved toward the end of the year, Ms. Herbeck said that there was still room for improvement.

The last witness was Dr. Frank DeStefano, District Superintendent of Elementary Education, who said that Mr. Uribe asked him to observe Ms. Miller in February, but that Mr. Uribe did not tell him why or give any reasons for the observation. Dr. DeStefano said that, when he arrived to informally observe Ms. Miller's class on February 14, Ms. Miller asked him to return on the next day, but what Dr. DeStefano saw was a wild group out of their seats and roaming about, and the room lights were turned off. When Dr. DeStefano returned on February 15, Ms. Miller was reading and asked Dr. DeStefano to return another day, when she was giving a math class. Dr. DeStefano said that the students were shouting "let us out" and were standing at the door of the class wanting to leave the class.

Dr. DeStefano said that he had a pre-conference with Ms. Miller on February 23, in which she stated that he had seen her class on a bad day, and asked him to come back. Dr. DeStefano said that they discussed teaching methods and Ms. Miller seemed cooperative and said she would try the suggested methods. On March 2, Dr. DeStefano said that he came to observe Ms. Miller's class, but she asked him to come back another day and give a demonstration lesson. Dr. DeStefano said that he returned on March 8 and gave a demonstration lesson. Dr. DeStefano

said that the reaction of the students was favorable and responsive, and that they were well-behaved.

Dr. DeStefano said that he performed a formal observation (J-6) of Ms. Miller's math class on March 14, and the students were out of control, shouting and getting up and walking about. Dr. DeStefano said that the students were saying such things to Ms. Miller as "what do you care, you're not teaching." Conversations were going on in the class, and students in the back of the classroom were reading newspapers. Dr. DeStefano said that he discussed the situation with Ms. Miller, and she said it was very unusual, and he should come back another day. Dr. DeStefano reported unsatisfactory ratings in classroom management skills and in instructional skills, and an overall rating of unsatisfactory. Ms. Miller refused to sign the rating, and asked Dr. DeStefano to return the next day. Only after Dr. DeStefano agreed to do so did Ms. Miller sign the March 14 observation

Dr. DeStefano said that he returned the following day, March 15, and, although student behavior was better than the day before, the students were still not on task, and were calling out and engaged in private conversations. Dr. DeStefano noted that improvement in her classroom management skills was mandatory. (J-7)

Dr. DeStefano said that it was unusual for 2 evaluations of a teacher to be done during a school year, but that it was necessary in this case, and that even if an evaluation had been done, teaching doesn't stop.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences therefrom, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1. Kathleen Miller is a tenured teacher employed by the Perth Amboy Board of Education. She has been a teacher since 1972. During school year 1994-1995, Ms. Miller taught 6th grade at Shull School.

2. Professional evaluations and professional staff classroom observations are used to judge a teacher's performance.

3. The classroom observation of September 13, 1994, conducted by Ms. Wilson, was withdrawn by Mr. Uribe, as an accommodation to Ms. Miller. All copies of the evaluation were given to petitioner.

4. Following the destruction of the September 13, 1994 classroom observation papers, Mr. Uribe directed that Ms. Miller not be observed for awhile, to allow her an unpressured opportunity to improve.

5. On November 22, 1994, Mr. Uribe wrote (B-2) to Ms. Miller addressing items of concern. specifically, Ms. Miller's repeated threats to call parents during class time, asking a school security guard to cover her class, preventing students from speaking to guidance counselors, and declining to discipline her students herself, instead referring even minor discipline problems to a Vice Principal.

6. The classroom observation of Ms. Miller of December 19, 1994 (J-1), conducted by Ms. Herbeck, who had never observed Ms. Miller before, showed unsatisfactory ratings in classroom management skills and in instructional skills, and an overall rating of unsatisfactory.

7. On December 20, 1994, Mr. Uribe wrote to Ms. Miller regarding parental requests to have their children removed from petitioner's class (B-4).

8. The classroom observation of Ms. Miller of January 5, 1995 (J-2), conducted by Mr. Uribe, showed unsatisfactory ratings in classroom management skills and in instructional skills, and an overall rating of unsatisfactory.

9. A meeting was held on January 9, 1995, with Ms. Miller and Mr. Tankiewicz and school administration (Mr. Uribe, Ms. Wilson , Ms. Herbeck and Mr. Sellers) to discuss Ms. Miller's poor classroom performance and to discuss plans for improvement. A remediation plan (B-1) was prepared by the school administration and offered to Ms. Miller, at their meeting of January 9, 1995. At no time was Ms. Miller told that her performance up to that point would not be used in the evaluation of her overall performance for the year. Also, Ms. Miller's increment or the possible withholding thereof was not discussed at this meeting.

10. On January 11, 1995, Ms. Miller received her first evaluation for the 1994-1995 school year (J-3), which rated her performance as unsatisfactory. The remediation plan (B-1) was attached, and the name of the administrator who would assist Ms. Miller in each of 6 areas of weaknesses was noted.

11. On January 17, 1995, Mr. Uribe, Ms. Wilson and Ms. Herbeck met with Ms. Miller and presented her with an augmented remediation plan, the two-page document (B-1) and a package of reading material (B-6). Ms. Miller was asked if she had any questions or comments, and she had none. Mr. Uribe again decided not to have Ms. Miller observed formally until she had a chance to digest the material in the augmented remediation plan. On February 15, 1995, Mr. Uribe wrote to Ms. Miller that she could again expect formal observations of her classroom performance to recommence on or about February 21. (B-7, also P-2).

12. An observation of Ms. Miller of February 13, 1995, attempted by Dr. DeStefano, was rescheduled at the request of Ms. Miller to the next day. On February 14, 1995, Dr. DeStefano again attempted to observe Ms. Miller and she again requested a postponement..

13. On February 23, 1995, Dr. DeStefano met with Ms. Miller, and informed her that he would focus on her classroom management skills when he next came to observe her.

14. On March 2, 1995, Dr. DeStefano arrived to observe Ms. Miller, but she asked him to conduct a demonstration class at another time, instead. Dr. DeStefano conducted the

demonstration lesson on March 8, 1995, in which he found the class "very responsive, cooperative and well-behaved.:" (B-17).

15. On March 3, 1995, an observation of Ms. Miller was conducted by Ms. Wilson, who rated instructional planning as S minus, and classroom management as unsatisfactory, with an overall rating of S minus. (J-4).

16. On March 7, 1995, an observation of Ms. Miller was conducted by Ms. Herbeck, who rated classroom management as unsatisfactory, with an overall rating of satisfactory. (J-5).

17. The classroom observation of Ms. Miller by Dr. DeStefano was conducted on March 14, 1995, and he found her class "out of control." (J-6). Dr. DeStefano noted that Ms. Miller's attempts to quiet the class were ineffective. Dr. DeStefano reported unsatisfactory ratings in classroom management skills and in instructional skills, and an overall rating of unsatisfactory. Ms. Miller refused to sign the rating, and asked Dr. DeStefano to return the next day. Only after Dr. DeStefano agreed to do so did Ms. Miller sign the March 14 observation.

18. The classroom observation of Ms. Miller of March 15, 1995 (J-7), conducted by Dr. DeStefano, showed an unsatisfactory rating in classroom management skills and an overall rating of satisfactory.

19. The classroom observation of Ms. Miller of March 22, 1995 (J-10), conducted by Ms. Herbeck, showed satisfactory ratings in all areas and an overall rating of satisfactory.

20. On March 24, 1995, an observation of Ms. Miller was conducted by Mr. Uribe, who rated classroom management as "I", or "improvement needed", with an overall rating of satisfactory. (J-8).

21. On March 27, 1995, Ms. Miller received her second evaluation for the 1994-1995 school year (J-3), which rated her performance as unsatisfactory. (J-9). It is noted that, "although Ms. Miller has been provided with a specific plan of action to improve her classroom organization

and management skills, as well as suggestions for improving rapport with her students, little improvement has been observed by those involved with the evaluation of Ms. Miller." Attached to J-9 was a copy of the remediation plan. with notations by Mr. Uribe indicating those areas where petitioner had failed to improve.

22. Mr. Uribe made a recommendation to withhold Ms. Miller's increment after the evaluation of March 27, 1995. Recommendations on granting or withholding increments had to be forwarded to the Board by mid-April

23. On April 6, 1995, the Perth Amboy Board of Education voted to withhold Ms. Miller's increment.

24. Ms. Miller was advised on April 13, 1995, that her teaching, or employment, increment for the 1995-1996 school year would be withheld. (P-4)

25. The classroom observation of Ms. Miller of June 8, 1995 (J-11), conducted by Dr. DeStefano, showed satisfactory ratings in all areas except an "I" in instructional skills, and an overall rating of satisfactory.

DISCUSSION

N.J.S.A. 18A:29-14 provides that any board of education may withhold for inefficiency or other good cause, the employment increment, or the adjustment increment , or both.

Petitioner, in the written summation submitted by her counsel, said that neither of the 2 letters petitioner received from Dr. DeTalvo [1] contained reasons for the increment withholding as required by *N.J.S.A.* 18A:29-14. Subsequently, Dr. DeTalvo sent another letter to petitioner, of May 11, 1995 (P-6), which states the reasons for the increment withholding.

[1] The record reflects only P-4, apparently the second letter from Dr. DeTalvo, of April 13, 1995.

Petitioner's performance through the majority of the school year was deficient. She did improve her performance, slightly, and possibly thereby earned reappointment. [2] But her performance in school year 1994-95 cannot be said to be worthy of a merit increment.

The remedial plan was a generous and considerate offer by the school administration, and one which they were not obligated to make. It also was in furtherance of their objective, to provide quality education for the students. They knew they had a problem, and they took appropriate steps to fix that problem, which, while it has not yet been fully remediated, has of late (March-June of 1995) shown some improvement.

It cannot be found as fact that Mr. Sellers promised petitioner that she would have the entire school year to improve her performance, and that, if she did, there would be no adverse action, including withholding of an increment for the next school year. Mr. Sellers was not called to testify, even though he could have been subpoenaed. And even if it could be found as fact that Mr. Sellers offered a "hold-harmless" to petitioner, it is not clear to this bench that Mr. Sellers had the authority to bind the Principal and the School Board by his alleged statement, of which, apparently, they were unaware (if indeed it had been made). Ms. Miller and Mr. Tankiewicz claim that Mr. Sellers said that she had the balance of the school year, that she still had time, to improve. Everyone involved was attempting to achieve the improvement of Ms. Miller's performance, and it was recognized that teaching occurs until the end of the school year. The first observation by Ms. Wilson, of September 26, was withdrawn to accommodate petitioner. However, Ms. Miller had no cause to believe that the other observations and evaluations would not be used to judge her year's performance. At no time was Ms. Miller told her performance would not be used in her overall evaluation for the year.

The administrators seem to have been scrupulously cautious, overtly polite, reluctant and even hesitant about saying that Ms. Miller's performance was unacceptable, and apparently gave her every benefit of the doubt, and multiple "second chances."

[2] Petitioner was reappointed for the 1995-1996 school year. (P-5)

Petitioner, as a teacher of over 23 years experience, should not have needed a remediation plan. The school administration's efforts to help her (and improve their teaching staff) should not be held against them. At a minimum, Ms. Miller had an obligation as a teacher to perform satisfactorily. Her efforts to achieve the minimum standards were merely an attempt to do something she should have been doing all along.

Even though there was no requirement that petitioner be offered a plan of remediation, I **FIND** that the plan that was offered to her was a meaningful plan, which could have been effective if implemented by petitioner. I further **FIND** that the Board decided to withhold her increment in April, and the school administration and the Board allowed sufficient time for improvement to take place, before deciding to withhold petitioner's increment.

It also cannot be said that Ms. Miller was unaware of the reasons Mr. Uribe recommended withholding of her increment. She was directly and contemporaneously informed of all observations and evaluations, and was well aware of her repeated unsatisfactory ratings. The Board voted on April 6, she was notified on April 13, and fully, formally given the reasons for the withholding (reasons which repeated those given n her evaluations and observations) on May 11. The delay of approximately 3 weeks was, in this case, de minimus. I so **FIND**. Petitioner appealed in a timely manner, and the delay was not prejudicial to her interests in any way.

I also **FIND** that the actions of Mr. Uribe, in making the recommendation to withhold her increment by April 1, and of the Board, to vote on the withholding of her increment on April 6, were timely and proper. There was no requirement that either Mr. Uribe or the Board delay their actions until after the end of the school year, if indeed that were even possible. Additionally, even if the performance of Ms. Miller had improved vastly, more than it did, it remains unlikely than such a hypothetical, significant improvement would have counterbalanced her earlier inadequate performance. The marginal improvement shown here clearly would not have done so.

CONCLUSION

The action of the Board in withholding Kathleen Miller's salary increment was not arbitrary, capricious or unreasonable. The petition is **DENIED**.

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

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

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

Jan 27, 1997
DATE

KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

Jan. 23, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ej

DOCUMENTS IN EVIDENCE:

Joint Exhibits:

J-1 Staff Observation Report, dated December 19, 1994
J-2 Staff Observation Report, dated January 5, 1995
J-3 Evaluation, dated January 11, 1995
J-4 Staff Observation Report, dated March 7, 1995
J-5 Staff Observation Report, dated March 7, 1995
J-6 Staff Observation Report, dated March 14, 1995
J-7 Staff Observation Report, dated March 15, 1995
J-8 Staff Observation Report, dated March 24, 1995
J-9 Evaluation, dated March 27, 1995
J-10 Staff Observation Report, dated May 22, 1995
J-11 Staff Observation Report, dated June 8, 1995

For Petitioner:

P-1 Remediation Plan, dated January 17, 1995
P-2 Letter from J.F. Uribe to Kathleen Miller, dated February 15, 1995
P-3 Application Form, dated May 17, 1995
P-4 Memo from Jack DeTalvo to Kathleen Miller, dated April 13, 1995
P-5 Memo from Nancy Hernandez to Kathleen Miller, dated May 1, 1995
P-6 Letter from Jack DeTalvo to Kathleen Miller, dated May 11, 1995

For Respondent:

B-1 Classroom Organization and Management Skills chart
B-2 Letter from Julius F. Uribe to Kathleen Miller, dated November 22, 1994
B-3 Letter from Angelo J. Bonarrigo to Kathleen Miller, dated November 23, 1994

B-4 Letter from Julius F. Uribe to Kathleen Miller, dated December 20, 1994

B-5 Memo from Mrs. McHugh to Mr. Uribe, dated January 5, 1995

B-6 Packet of Material re: Teacher

B-7 Letter from J.F. Uribe to Kathleen Miller, dated February 15

B-8 Letter from Guillermina Lopez to J.F. Uribe, dated February 9, 1995

B-9 Letter from Teresa Canano to J.F. Uribe and Mrs. McHugh, dated December 2, 1994

B-10 Letter from Dawn Paver to J.F. Uribe, dated February 23, 1995

B-11 Letter from Barbara Wilson to Kathleen Miller, dated November 28, 1994

B-12 Letter from Barbara Wilson, undated

B-13 Packet of material

B-14 Memo from B.H. Wilson to Kathleen Miller, dated January 30, 1995

B-15 Memo from B.H. Wilson to Kathleen Miller, dated January 31, 1995

B-16 Memo from B.H. Wilson to Kathleen Miller, dated February 9, 1995

B-17 Memo from Frank V. DeStefano to J.F. Uribe, dated May 24, 1995

WITNESSES

For Petitioner:

Kathleen Miller, petitioner

Norman Tankiewicz, Perth Amboy Federation of Teachers, Local 857, District Representative

For Respondent:

Julius Uribe, Principal

Barbara H. Wilson, Vice Principal

Georgeanne Herbeck, District Supervisor of Elementary Education

Frank DeStefano, District Supervisor of Education

OAL DKT. NO. EDU 7847-95
AGENCY DKT. NO. 225-6/95

KATHLEEN MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties. It is, however, herein noted that on February 10, 1997, petitioner attempted to submit *pro se* "exceptions" in this matter. Such submission was apparently without the knowledge or consent of her attorney, nor was there any indication that it had been served on opposing counsel. By letter dated February 11, 1997, petitioner's submission was returned to her and she was advised by the Director of the Bureau of Controversies and Disputes that, pursuant to *N.J.A.C.* 1:1-5.1, a party to administrative proceedings may choose one of several options with respect to her representation and that, because petitioner elected throughout the course of the instant proceedings to be represented by counsel with all submissions in this matter being accomplished by and through such legal counsel, absent notification to the Bureau of Controversies and Disputes that she is no longer represented by an attorney, petitioner is unable to make submissions of any kind on her own behalf to the record of this matter.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that petitioner has not sustained her burden of establishing by a preponderance of the credible evidence that the Board's action in withholding her salary increment was arbitrary, capricious or unreasonable and, as such, her Petition of Appeal must be dismissed.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated by the ALJ therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 7, 1997

DATE OF MAILING MARCH 7, 1997

107-97

107-97

DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Education Association and its president asserted that the Board's action granting early tenure to two principals was arbitrary and capricious.

ALJ dismissed petition, finding that the Office of Administrative Law (OAL) does not issue declaratory or informational rulings on matters where there is not a contested case as defined by *N.J.A.C.* 1:1-2.1. (In this matter the two principals achieved statutory tenure during the pendency of the present proceedings.)

Upon review, the Commissioner determined to remand the matter to OAL to determine whether the Board acted within its authority in creating, and then rescinding, a policy to confer tenure upon all principals who had maintained continuous employment in the position of principal in the District for 24 months. Thus, Commissioner reversed the finding that the instant matter was moot because the individuals in question achieved tenure, finding that herein exist issues of public importance which are capable of repetition while evading review.

MARCH 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10691-95

AGENCY DKT. NO. 393-10/95

DIANE SWAIM, MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

Kenneth I. Nowak, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Douglas Kovats, Esq., for respondent (Kenney and Gross, attorneys)

Record Closed: December 9, 1996 Decided: January 23, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was opened by the petitioner, Diane Swaim. The petitioner claimed that the Board of Education's action in granting early tenure to two principals was arbitrary and capricious.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner filed her appeal on September 28, 1995 with the Commissioner of the Department of Education. On November 17, 1995, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The Middletown Board of Education passed a resolution on July 25, 1995 which granted tenure to all principals within the District who had maintained continuous employment in the position of principal for 24 months. As a result of this resolution, two principals, Dr. Antonia Martines and Alan Feuer were granted tenure. Dr. Martinez had been employed as a principal in the District since February 1, 1993 and Mr. Feuer had been employed as a principal in the District since July 1, 1993.

Principals are normally granted tenure after three years of service unless a lesser term is fixed by the Board for a category of employees, *N.J.S.A.* 18A:28-5(g).

One of the principals involved, Dr. Martinez, achieved three years of service on February 10, 1996, and thus would have attained tenure by operation of law if the contested resolution had not been passed. This date (February 10, 1996) was prior to the commencement of the hearing. Thus, on motion to dismiss before the hearing, I dismissed the matter in part, insofar as Dr. Martinez, as moot.

The other principal, Mr. Feuer, attained three years of service on July 1, 1996, and thus was entitled to tenure by operation of law, *N.J.S.A.* 18A:28-5(g), before the close of the hearing record.

The matter of standing to bring such an action was raised prior to the commencement of the hearing, specifically whether Ms. Swaim, either in her capacity as the union president or as a teacher, had standing to bring a challenge to the actions of the Board. Ms. Swaim was granted standing as a taxpayer in the District.

DISCUSSION

The Office of Administrative Law is not a court of general jurisdiction. As such, the OAL does not issue declaratory or informational rulings on matters were there is not a contested case.

N.J.A.C. 1:1-2.1 defines "contested case" as follows:

> "Contested case" means an adversary proceeding . . . in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them and disposing of their interests, after an opportunity for an agency hearing. N.J.S.A. 52:14B-2. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exist disputed questions of fact, law or disposition related to past, current or proposed activities or interests. Contested cases are not informational nor intended to provide a forum for expression of public sentiment on proposed agency action or broad policy issued affecting . . . undefined classes of people. (emphasis added).

If this bench were to render an opinion that the actions of the Board in granting tenure to Mr. Feuer on July 25, 1995 were improper, such opinion would be unavailing, redundant, and would have no effect upon Mr. Feuer's status. The potential issue raised by petitioner's counsel in his post-hearing submission, that the actual date upon which Mr. Feuer achieved tenure might have relevance in a seniority matter, is not before us in the case presented.

This bench sees nothing in the instant matter that might result from a decision that would not be purely informational, or prospective in application.

The petitioner's appeal is hereby **DISMISSED.**

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

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

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

Jan 23, 1997
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

1/24/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 28 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 10691-95
AGENCY DKT. NO. 393-10/95

DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.* No replies were filed by respondent.

Petitioners initially outline that the notice and agenda for the Board's July 25, 1995 meeting did not list or refer to a resolution or topic concerning changes in its tenure policy but that, "[the issue] was raised for the first time at the Board's closed July 25, 1995 meeting by the then-Superintendent***." (Petitioners' Exceptions at p. 2) They then note that on that date only two individuals fulfilled the Board's criterion and assert that the record reveals that the policy may not have been intended to set precedent. Petitioners observe that the policy was rescinded the following month but that the new resolution permitted those who obtained tenure by the early tenure policy to retain their tenure. (*Id.* at pp. 2-4)

Petitioners then except to the Administrative Law Judge's (ALJ) finding that the instant petition did not present a "contested case" as defined by *N.J.A.C.* 1:1-2.1 because the two

* Respondent filed an objection to petitioners' filing of exceptions on February 11, 1997, in the morning, as opposed to February 10, 1997. The Commissioner reviewed petitioners' reasons leading to this occurrence, and determined, however, that based on the clear showing of miscommunication in delivery, this filing must be accepted as timely filed in the interest of fairness.

principals at issue achieved statutory tenure during the pendency of the present proceedings. (*Id.* at p. 6) They contend that "the ALJ failed to consider that the matter at bar presents a text-book example of the well-known exception to the mootness doctrine." (*Id.*) To illustrate, petitioners cite *Murphy v. Hunt*, 455 *U.S.* 478, 482 (1982); *Cain v. New Jersey State Parole Board*, 78 *N.J.* 253, 255 (1978) which propose,

> ***When an issue is capable of repetition yet evading review because the challenged action is too short to be fully litigated prior to taking effect or ceasing, and where there is a possibility that the issue may occur again, the tribunal should not refuse to address the merits, particularly where the issue is one of public importance.***
> (Petitioners' Exceptions at p. 6)

Petitioners then posit that the instant matter presents such example as the Board's action here occurred within too short a time frame to permit a meritorious decision before the otherwise applicable tenure acquisition time elapsed. They draw similarities between the six months between the Board's recision of its resolution and the statutory tenure achieved by the principals at issue as "analogous to the archetypal nine month pregnancy which defined the exception to the mootness doctrine in *Roe v. Wade*." (Petitioners' Exceptions at p. 8)

Petitioners further argue that the issues presented are of public importance. They contend the Board violated the Open Public Meetings Act when it did not include the early tenure resolution as an agenda item. (*Id.*) Petitioners then cite numerous decisions by the Commissioner and the State Board which have held that early tenure decisions constitute an "abuse of discretion and are arbitrary and contrary to public policy, where *** they are explicitly directed for the benefit of specified individuals," including *Thomas v. Bd. of Ed. of Morris Twp.*, 89 *N.J. Super.* 327 (App. Div. 1965), aff'd 46 *N.J.* 351 (1966); *Roberts v. Bd. of Ed. of the Hudson County Vocational-Technical School District*, 1984 *S.L.D.* 999, aff'd State Board 1026; *King v. Bd. of Ed. of Atlantic County Vocational School*, 1975 *S.L.D.* 547 and *Pickering v. North Plainfield Bd. of Ed.*, 1987 *S.L.D.* 1393. To summarize, petitioners reiterate their position that the Board's intent was to create an exemption in the law for two principals by granting them early tenure on an *ad hoc* basis in violation of *N.J.S.A.* 18A: 28-5.

Upon a careful and independent review, the Commissioner determines to remand the present matter to the OAL to determine whether the respondent Board acted within its

authority in creating, and then rescinding, a policy to confer tenure upon all principals who had maintained continuous employment in the position of principal in the District for 24 months. In so ruling, the Commissioner reverses the finding that the instant matter is moot because the two principals who received tenure through the challenged policy would have received tenure during the pendency of proceedings at OAL, finding that herein exist issues of public importance which are capable of repetition while evading review.

Accordingly, the Commissioner determines to remand the decision of the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 7, 1997

DATE OF MAILING MARCH 7, 1997

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DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Education Association and its president asserted that the Board's action granting early tenure to two principals was arbitrary and capricious.

In 1997 initial decision, ALJ dismissed petition as moot. Commissioner, however, determined to remand the matter to OAL to determine whether the Board acted within its authority in creating, and then rescinding, a policy to confer tenure upon all principals who had maintained continuous employment in the position of principal in the District for 24 months. Thus, Commissioner reversed the finding that the instant matter was moot because the individuals in question achieved tenure, finding that herein exist issues of public importance which are capable of repetition while evading review.

On remand, ALJ determined that a board has the authority to shorten the period of time required for the acquisition of tenure if done for the general category of all such employees, regardless of how limited that category may be; that a board could rescind such a policy if the new requirement is uniform for all employees of the category; and that no notice of such a resolution is required if performed at a regularly scheduled meeting pursuant to the OPMA.

Commissioner determined that the ALJ did not render either factual findings or credibility assessments as to the seminal issue in this matter, *i.e.*, the intent of the Board in undertaking its actions and whether, in light of the circumstances existing in this matter, its actions were arbitrary, capricious or unreasonable. Thus, the Commissioner remanded this matter to the OAL for supplementation of the record and further findings sufficient to address these concerns.

AUGUST 10, 1998
DATE OF MAILING AUGUST 10, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2236-97

AGENCY DKT. NO. 393-10/95

(REMAND OF EDU 10691-95)

DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Petitioners

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY

Respondent.

Kenneth I. Nowak, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Douglas Kovats, Esq., for respondent (Kenney, Gross & McDonough, attorneys)

Record Closed: March 30, 1998 Decided: May 14, 1998

BEFORE **KATHRYN A. CLARK**, ALJ:

The Middletown Township Board of Education (respondent) passed a resolution on July 25, 1995, shortening the period of time required for all school district principals to obtain tenure. Instead of the statutory period of three years (*N.J.S.A.* 18A:28-5), tenure would be granted to all principals who had "24 months of full-time service as Principal in the School District". Of the

seventeen principals in the school district, there were only two non-tenured principals in the district at the time of this resolution: Dr. Antonia Martinez and Dr. Alan Feuer. Both principals had at least twenty four months of service, yet less than three years of service. By way of this resolution, both principals obtained tenure immediately.

One month later, the Board again changed its policy with regard to granting tenure to principals. On August 22, 1995, it passed a second resolution, stating that it "is now of the opinion that the reduced period of tenure is no longer in the best interests of the District." The resolution restored the time period for acquisition of tenure by principals to the statutory period of three years. The resolution noted that any principal who acquired tenure pursuant to the July 25, 1995 resolution would remain tenured. In essence, Dr. Martinez and Dr. Feuer were grandfathered as tenured principals.

Petitioners Diane Swaim and the Middletown Township Education Association (MTEA) appealed and, on November 17, 1995, this matter was transmitted to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

At a prehearing conference of February 13, 1996, hearing dates of June 10 and 11, 1996 were set. Before that, on June 4, 1996, respondent moved to dismiss the portion of the petition that concerned Dr. Martinez, since she had served three years and was entitled to statutory tenure, *N.J.S.A.* 18A:28-5. The motion was granted.

The hearing was conducted on June 10 and 11, 1996. The matter of the standing of the petitioners was raised, and the President of the MTEA, Diane Swaim, who was also a taxpayer of the School District, was granted standing individually. The record closed following submission by the parties of written summations on December 9, 1996.

The initial decision, OAL Docket No. EDU 10691-95, concluded that the petition did not present a contested case, as defined in *N.J.A.C.* 1:1-2.1, because the two individuals at issue had achieved tenure by operation of *N.J.S.A.* 18A:28-5 during the pendency of the case. Petitioners

filed exceptions, and the Commissioner of Education remanded the matter for a determination of whether the Board acted within its authority in creating, and then rescinding, such a policy.

The parties agreed to rely on the transcripts of the June 10, 1997 hearing, together with the evidence submitted.

LEGAL DISCUSSION

The statutory provision governing the grant of tenure to teachers and principals provides that:

> The services of all teaching staff members employed in the positions of . . . principal . . . shall be under tenure during good behavior and efficiency . . . after employment in such district or by such board for:
>
> > (a) Three consecutive calendar years, *or any shorter period which may be fixed by the employing board for such purposes* . . .
>
> [*N.J.S.A.* 18A:28-5 (emphasis added).]

The petitioner argues that the school board's actions were arbitrary, capricious and in bad faith. Specifically, she argues that although the statute allows for a shorter period of time to be set for principals to obtain tenure, here it was wrongly done for the sole benefit of two individuals. Additionally, she initially argued that the resolution was passed without proper notice. In his brief, petitioner's representative said that he would not argue this issue further, as he felt the Commissioner had limited the remand to the issue of tenure only. Nonetheless, this initial decision will address both issues.

In *Rall v. Board of Educ. of Bayonne*, 54 *N.J.* 373 (1969), a city board shortened the length of time required for a superintendent to achieve tenure to 6 ½ months. This was done by resolution, just as in the present case. The purpose of the resolution was to confer tenure upon Dr. Rall, the then-acting superintendent. He had assumed his post under a contract which was two years and eleven months in length, short of the three years required for tenure under the statute. After 6 ½ months, the board stated that Dr. Rall had efficiently performed his duties since commencement of the contract and thus rescinded his contract and granted him tenure by

unanimous vote. Two years later, prior to the date on which Dr. Rall's original contract was supposed to end, the board adopted a second resolution rescinding the former resolution and declaring the original contract to be the only valid and subsisting contract. The board declared that when Dr. Rall's contract expired the post would be vacant. It resolved that the prior resolution was void, "because it deprived the present board of such discretion, because it attempted to usurp the present board's legal duty and obligation, and because it violated the public policy of the State by denying the citizens of Bayonne the benefits of the probationary period required by statute to precede the acquisition of tenure by a school superintendent." *Rall v. Board of Educ. of Bayonne*, 104 *N.J. Super.* 236 (App. Div. 1965).

The Appellate Division held that the first resolution granting early tenure to Dr. Rall was void. It interpreted the statutory phrase that allows for boards to shorten the length of time required to achieve tenure as applying only to actions where the length of time is shortened for all present and future members of the job category, not a select individual. "The intent was plainly not to authorize *exemptions* from the three-year probationary term on an *ad hoc* basis in individual cases, as was so obviously done in the present instance." *Id.* at 243.

The NJ Supreme Court reversed. It stated that the board's actions were not undertaken arbitrarily or in bad faith, but in the true belief that the form of resolution was a proper legal method of accomplishing its purpose. "Under the circumstances we think the legislative act of the Board - the resolution - should be construed broadly to do what it was intended to do, *i.e.*, meet and satisfy the requirement of the statute. Therefore, we hold that the resolution shortened the period for acquisition of tenure for superintendents of schools generally - not just for Dr. Rall . . . That rule now prevails and will continue to do so unless and until a board of education adopts another rule of general application fixing a different tenure qualifying period." *Rall, supra,* 54 *N.J.* at 377. It mattered not to the Court that Dr. Rall was the only person in the particular job category of superintendent.

In the present case, the board adopted a resolution for the general category of principals. There were only two principals within the job category that were not tenured, and both were mentioned by name in the resolution. It is apparent from *Rall,* that the board has the power to

pass such a resolution if it applies to the whole category of employees, regardless of the number of individuals within that job category. Just as in *Rall,* the resolution remains valid until the board adopts another rule of general application. In the present action, the board adopted a second resolution changing the time period for acquiring tenure back to three years. This action is valid pursuant to the *Rall* decision.

The petitioner additionally urges that the first resolution be deemed void as arbitrary and in bad faith due to the board's alleged lack of notice of such resolution. She cites *Thomas v. Board of Educ. of Morris Twp.*, 89 *N.J. Super.* 327 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966), for the proposition that tenure decisions constitute some of the most vital and responsible duties a board of education must perform, and a board cannot exercise its discretion to shorten the tenure period in an arbitrary or capricious fashion. Rather, boards must act in good faith when making such decisions.

The facts in *Thomas* are distinguishable from the present matter. In *Thomas*, four minority board members in a politically charged community had no notice of the proposed contract alteration action. Here, there was notice that "personnel" items that would be discussed, along with notice that "formal action" would be taken on such items.

In *Thomas, supra,* a school district superintendent was extended a two year contract by the board. After 8 ½ months, on October 18, 1962, the board adopted a resolution revoking the first contract and giving the superintendent (Dr. Thomas) a three year contract. Thus, Dr. Thomas would achieve tenure by the terms of the contract since its time period, coupled with the time already served in the position, would extend beyond the statutory three year tenure requirement. But before the conclusion of Dr. Thomas' second year, the board (composed of several different members, including three newly elected members holding the seats of three defeated members of the past majority bloc) revoked the October 18, 1962 resolution. It declared that the resolution was against public policy, invalid and of no force and effect. The only valid and subsisting agreement was the original two year contract, according to the board's second resolution.

The court affirmed the State Board of Education's decision upholding the board's declaration that the October 18, 1962 resolution was invalid. It stated that there was substantial credible evidence in the record from which the State Board could have reasonably found the board's action on October 18, 1962 to be an abuse of discretion, arbitrary and contrary to public policy. *Id.* at 335. Such evidence showed that the decision to revoke the remainder of the two year contract and instead extend Dr. Thomas a three year contract (which in effect would guarantee him tenure) lacked the essential elements of notice, deliberation and fair opportunity to be heard. *Id.* at 334. The matter was privately discussed and planned in advance by the majority bloc of the board, without notice to the four other (minority) board members. A statement extolling Dr. Thomas' accomplishments was prepared in advance, along with the new, three year contract. On October 18, 1962 at the regular meeting of the board, two of the four minority members were present. These two members protested strongly when the proposed contract action was revealed. But although they voiced concerns that they had some "unanswered questions" regarding Dr. Thomas' performance, they were not provided an opportunity to ask such questions. Without further discussion the contract matter was moved, voted and adopted by a 5-2 vote. *Id.* at 330. When considered along with the political backdrop of the community, in that three of the five majority members were up for reelection a few months later (and were all defeated), the court held that the State Board could have reasonably found the board's action to be an abuse of discretion, arbitrary and contrary to public policy.

In the present case, the agenda stated that "personnel" items would be discussed, and that "formal action" would be taken with regard to such items. Additionally, members of the board were not caught off guard, as the minority board members were in *Thomas*, since the superintendent and the assistant superintendent had discussed possible changes in the tenure requirements for principals in the recent past at informal meetings. All members had ample opportunity to respond at the meeting. Only one member voted against the change, for reasons clearly stated and fully addressed.

The Appellate Division acknowledged in *Thomas, supra,* that "no statute, administrative rule or regulation requires the giving of notice to board members, or to the public, of matters to be considered at such a meeting." *Id.* at 334. This decision was prior to the adoption of the Open

Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 *et seq.* Yet, the OPMA does not necessarily require detailed notice of agenda items. In *La Fronz v. Weehawken Educ. Ass'n*, 164 *N.J. Super.* 5 (App. Div. 1978), certif. den. 79 *N.J.* 491 (1979) the court held that the resolutions adopted concerning personnel were valid since the agenda published for the meeting included among its listed items of business the subject matter "personnel," which was "good and sufficient notice to cover these resolutions." *Id.* at 7. Additionally, it noted that, pursuant to the OPMA, since the resolutions were adopted at a regular school board meeting, no further notice was required. *Id.*

N.J.S.A. 10:4-8(d), in defining "adequate notice" states: "Where annual notice or revisions thereof in compliance with section 13 of this act set forth the location of any meeting, no further notice shall be required for such meeting." Section 13 has been codified at *N.J.S.A.* 10:4-18, which describes regular meetings of a public body, and the requirement for publishing such a schedule for the year. It is undisputed that the resolution in question in the present case was proposed and adopted at a regularly scheduled school board meeting. Thus, it follows that no further notice was required of the items to be discussed. Additionally, the published agenda stating that "formal action" would be taken on "personnel" items goes further than required in providing adequate notice.

CONCLUSION

The board has the authority to shorten the period of time required for the acquisition of tenure if done for the general category of all such employees, regardless of how limited that category may be. Likewise, it could rescind such a policy if the new requirement is uniform for all employees of the job category. Additionally, no notice of such a resolution is required if performed at a regularly scheduled meeting, pursuant to the Open Public Meetings Act. The Board surpassed the notice requirements in publishing its agenda for the meeting that included "personnel" items.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 14, 1998
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

5/15/98
DATE

DNP
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 1998
DATE

Barbara A Hansel
OFFICE OF ADMINISTRATIVE LAW

DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were duly considered by the Commissioner in making his determination within.

Petitioners vigorously except to the Administrative Law Judge's (ALJ) focus in her initial decision, observing that they do not dispute a board's "statutory authority to shorten the period of time for the acquisition of tenure for a general category of employees, [or its] statutory authority to uniformly rescind such a requirement for the same general category.***" (Petitioner's Exceptions at p. 3). Rather, petitioners aver that the gravamen of their complaint, that this Board exercised its authority "in an arbitrary, capricious or bad faith manner in order to confer benefits on specific individual***" is left unaddressed by the ALJ's decision. (*Id.*)

Petitioners further object to the ALJ's failure to make specific findings of fact as required by the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 *et seq.,* arguing that the requirements of this Act, as interpreted by case law, (citations omitted) dictate that an initial decision "include findings of fact, conclusions of law and a sufficient explanation of how those findings of fact and conclusions of law led to that decision, such as would permit meaningful appellate review of that decision." (*Id.* at p. 4) They posit that the ALJ's failure to comply with these requirements is, in and of itself, fatal error. (*Id.*) Petitioners urge that, to rectify this error, the Commissioner "exercise his authority to 'modify' the initial decision by making the factual findings overlooked by the ALJ," rather than remanding this already protracted matter to the OAL. (*Id.* at p. 5) In this regard, petitioners set forth a detailed recitation of proposed findings of fact which they aver should be made by the Commissioner, and which lead to the inevitable conclusion that the Board's actions in the within matter should be invalidated as unlawful. (*Id.* at p. 18)

In response, the Board posits that its action of July 1995, shortening the period for acquisition of tenure "[for] all persons within the category of principals," was accomplished in accordance with statute and applicable case law (*Rall, supra*), and it avers that petitioners have advanced no "competent evidence" which establishes that such action was "impermissible." (Board's Reply Exceptions at pp. 2-3) As such, it argues, petitioners have failed to satisfy their burden of clearly demonstrating wrongful conduct on the part of the Board which would overcome the presumption of correctness attaching to Board action. (*Id.* at p. 7)

Upon careful and independent review of the record in this matter, which included a transcript of the hearing below,[1] the Commissioner finds merit in petitioners' exception argument that the seminal issue in the within matter has been left unaddressed and unresolved by the ALJ in her initial decision and he, therefore, determines that this matter must be remanded to the OAL for further proceedings. As persuasively argued by petitioners, the Commissioner concludes that the occurrences which exist in this matter as addressed by the ALJ's initial decision are largely undisputed. Rather, what is germane and controverted herein is the intent of the Board in undertaking such actions and whether, under the existing circumstances, the Board's conduct in light of its intent exceeded a reasonable exercise of its discretionary authority calling for an invalidation of its action. In that the ALJ rendered neither factual findings nor credibility assessments in this regard, the Commissioner is compelled to return this matter to the OAL for such findings so as to fairly resolve this issue.[2]

Accordingly, this matter is remanded to the OAL for supplementation of the record and further findings sufficient to address the concerns expressed herein.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] It is noted that the within record contains a transcript of the June 10, 1996 hearing.

[2] The Commissioner's determination herein does not reach to the ALJ's discussion with respect to petitioners' asserted Open Pubic Meetings Act violation charge in that petitioners' exception submission indicates that, as such issue was not mentioned in the Commissioner's previous remand of this matter, they specifically did not pursue it on remand. The Commissioner herein clarifies that his prior remand did not intend preclusion of pursuit of this claim and, to the extent petitioners wish to supplement the record as to this issue, on remand, for consideration, such supplementation is permissible.

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

AUGUST 10, 1998
DATE OF MAILING AUGUST 10, 1998

108-97

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $1,563,930 made by governing body following voter rejection of proposed budget on April 16, 1996.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line-item reductions was necessary in order to provide a thorough and efficient system of education in the District, Commissioner determined to restore $541,765 for a total General Fund tax levy of $26,367,084 for 1996-97 school purposes.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Francis J. Campbell, Esq. (Kalac, Newman, Lavender & Campbell)

For the Respondent, William T. Hiering, Jr., Esq. (Hiering, Hoffman & Gannon)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 13, 1996 through the filing of a Petition of Appeal by the Jackson Township Board of Education (Board), seeking restoration of reductions to the school budget made by the Township Committee of Jackson Township (Township) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 16, 1996.

At that election, the voters rejected a public question proposing a General Fund tax levy of $27,589,249 for the 1996-97 school year. The 1996-97 budget submitted to the voters included an approved Commissioner's cap waiver of $850,208 for enrollment and special education costs, and a non-T & E cap waiver in the amount of $372,120 for courtesy busing. On May 13, 1996, following consultation with the Board as required by law, the Township adopted a

resolution determining to certify a General Fund tax levy of $25,825,319 as sufficient to provide for a thorough and efficient system of education (T & E) in the District. This amount represented a reduction of $1,763,930 from the tax levy proposed by the Board, and was effectuated through cuts in 59 line items, and increases to revenue in two line items, for the reasons given in Exhibit A attached to the implementing Township resolution. By resolution dated May 20, 1996, the Board determined to appeal these reductions and duly filed the within petition.

The amounts in dispute in this appeal are as follows:

Tax Levy Proposed by Board		Tax Levy Certified by Township	
General Fund	$27,589,249	General Fund	$25,825,319

Amount of Reduction by Township		Amount of Reduction in Dispute	
General Fund	$ 1,763,930	General Fund	$ 1,563,930[1]

An answer to the Board's petition was filed by the Township on June 28, 1996. On July 19, 1996 and July 18, 1996, respectively, the parties filed position statements pursuant to *N.J.A.C.* 6:24-7.8, followed by responsive statements on July 30, 1996 and August 2, 1996, and final summations on August 12, 1996 and August 8, 1996. Thereafter, the record was closed, pending receipt of the June 30, 1996 report, below.

In addition, as the parties had previously been advised by letter from the Assistant Commissioner dated March 13, 1996 and distributed through the County Superintendent to boards and municipalities experiencing budget defeats, as part of the record of the within appeal,

[1] While the Township reduced the Board's budget by $1,763,930, the Board indicates that $200,000 of the reduction can be sustained, in that the proposed reduction to Health Benefits, Account No. 11-000-290-290, Other Employee Benefits, will not adversely affect its ability to offer a thorough and efficient system of education. Accordingly, the total number of line items in dispute, indicating both reductions to appropriations and increases to revenue is 60 rather than 61. The amount in dispute, therefore, is actually $1,563,930.

the Commissioner took official notice of the Board's revised budget and its June 30 financial report, the latter for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus.

Upon filing of the parties' final summations as noted above, the record of the appeal was closed, subject to review of the annual year-end audit.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such T & E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T & E. *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989). With respect to appeals involving cap waivers, before the Commissioner can direct restoration of any amount of a waiver defeated by the voters, the Commissioner must determine that such amount is both fully necessary for purposes of T & E and unable to be derived from further allocation within the base budget. *Board of Education of the Borough of Rutherford v. Mayor and Council of the Borough of Rutherford, Bergen County,* State Board decision July 7, 1993; *Board of Education of the Borough of Edgewater v. Mayor and Council of the Borough of Edgewater, Bergen County*, and

In the Matter of the Cap Waiver Appeal of the Board of Education of the Borough of Edgewater, Bergen County, State Board Decision July 6, 1994.

Mindful, then, of the standard to be applied, the Commissioner makes the specific determinations set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Numbers 1- 55

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02510	11-110-100-101	Preschool/Kind. Sal. of Teachers	$ 496,776	$ 11,885
02520	11-120-100-101	Grades 1-5 Salaries of Teachers	$5,249,691	$ 125,591
02530	11-130-100-101	Grades 6-8 Salaries of Teachers	$6,088,085	$ 145,648
02540	11-140-100-101	Grades 9-12 Salaries of Teachers	$6,263,825	$ 149,852
02640	11-190-100-106	Other Sal. for Instruc. (Reg. Prog.)	$ 198,572	$ 4,751
02820	11-202-100-106	Other Sal. for Instruc. (Special Ed.)	$ 15,651	$ 374
02910	11-202-100-106	Other Sal. for Instruc. (Special Ed.)	$ 15,622	$ 374
02990	11-204-100-101	Salaries of Teachers (Special Ed.)	$ 315,667	$ 7,552
03000	11-204-100-106	Other Sal. for Instruc. (Special Ed.)	$ 194,831	$ 4,661
03080	11-205-100-101	Salaries of Teachers (Special Ed.)	$ 532,849	$ 12,748
03090	11-205-100-106	Other Sal. for Instruc. (Special Ed.)	$ 161,085	$ 3,854
03180	11-206-100-106	Other Sal. for Instruc. (Special Ed.)	$ 16,778	$ 401
03260	11-207-100-101	Salaries of Teachers (Special Ed.)	$ 53,965	$ 1,291
03270	11-207-100-106	Other Sal. for Instruc. (Special Ed.)	$ 64,578	$ 1,545
03770	11-212-100-101	Salaries of Teachers (Special Ed.)	$ 146,550	$ 3,506
03780	11-212-100-106	Other Sal. for Instruc. (Special Ed.)	$ 51,446	$ 1,231
03860	11-213-100-101	Salaries of Teachers (Special Ed.)	$1,478,875	$ 35,380
03870	11-213-100-106	Other Sal. of Instruc. (Special Ed.)	$ 77,014	$ 1,842
04130	11-216-100-101	Salaries of Teachers (Special Ed.)	$ 83,875	$ 2,007
04140	11-216-100-106	Other Sal. for Instruc. (Special Ed.)	$ 81,341	$ 1,946

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
04310	11-218-100-101	Sal. of Teachers (Special Ed.)	$ 285,387	$ 6,827
04400	11-219-100-101	Sal. of Teachers (Special Ed.)	$ 170,000	$ 4,067
04410	11-219-100-106	Other Sal. for Instruc. (Special Ed.)	$ 115,408	$ 2,761
04810	11-230-100-101	Sal. of Teachers (Basic Skills)	$ 295, 826	$ 7,077
04820	11-230-100-106	Other Sal. for Instruc. (Basic Skills)	$ 128,832	$ 3,082
04900	11-240-100-101	Sal. of Teachers (Bilingual)	$ 99,600	$ 2,383
06030	11-401-100-100	Salaries/Co-Curric. Act.-Instruction	$ 182,624	$ 4,369
06090	11-402-100-100	Salaries/Athletics-Instruction	$ 542,581	$ 12,980
06150	11-4XX-100-100	Salaries/Other Instructional	$ 87,432	$ 2,092
06370	11-000-211-100	Salaries/Undistrib. Exp. (Attendance & Soc. Work)	$ 162,303	$ 3,883
06430	11-000-213-100	Sal./Undistrib. Exp. (Health Svc.)	$ 388,662	$ 9,298
06490	11-000-218-104	Sal./Other Professional (Other Support Svc.-Regular)	$ 999,230	$ 23,905
06500	11-000-218-105	Sal./Sec. & Clerical (Other Support Svc.-Regular)	$ 129,106	$ 3,089
06580	11-000-219-104	Sal./Other Professional (Other Support Svc.-Special)	$ 761,375	$ 18,215
06590	11-000-219-105	Sal./Sec. & Clerical (Other Support Svc.-Special)	$ 206,636	$ 4,943
06600	11-000-219-110	Other Salaries (Other Support Svc.-Special)	$ 3,000	$ 72
06760	11-000-221-104	Sal. Other Professional Staff (Improvement of Instruc. Svc)	$ 144,770	$ 3,463
06770	11-000-221-105	Sal./Sec. & Clerical (Improvement of Instruc. Svc.)	$ 93,627	$ 2,240
06780	11-000-221-110	Other Salaries (Improvement of Instruc. Svc.)	$ 12,335	$ 295
06850	11-000-222-100	Salaries/Library	$ 593,110	$ 14,189

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
06910	11-000-230-100	Sal./Support Svc./Gen'l Adm.	$ 275,215	$ 6,584
07010	11-000-240-103	Sal./Principals & Asst. Prin.	$1,424,900	$ 34,089
07030	11-000-240-105	Sal./Sec. & Clerical/Admin.	$ 543,984	$ 13,014
07040	11-000-240-110	Other Salaries/Sch. Admin.	$ 8,000	$ 191
07100	11-000-260-100	Sal./Op. & Maintenance	$2,759,069	$ 66,006
07210	11-000-270-107	Sal./Pupil Trans.-Reg.	$1,466,615	$ 35,086
07220	11-000-270-108	Sal./Pupil Trans.-Spec. Ed.	$ 576,862	$ 13,801
07230	11-000-270-109	Sal./Pupil Trans.-(Other)	$ 86,984	$ 2,081
07360	11-000-290-100	Sal./Busn. & Other Support Svc.	$ 720,565	$ 17,238
08400	13-422-100-101	Salaries of Teachers (Summer Sch.)	$ 66,344	$ 1,587
08660	13-4XX-100-101	Salaries of Teachers (Other Special Schools)	$ 71,190	$ 1,703
08820	13-601-100-101	Salaries of Teachers (Evening/Adult School)	$ 76,644	$ 1,834
08900	13-601-200-100	Sal./Support Svc. (Adult School)	$ 198,687	$ 4,753
08980	13-602-100-101	Salaries of Teachers (Adult Ed.)	$ 9,833	$ 235
08990	13-602-100-106	Oth. Sal. for Instruc. (Adult Ed.)	$ 2,449	$ 59
		Subtotal		$ 843,930

The Board notes that while its 1996-97 proposed budget contains an average salary increase of 4.5 percent, the Township has decreased that amount to a 2 percent increase. On July 23, 1996, the Board ratified a contract with the Transport Workers Union (noncertified employees) that included a salary increase of 3.2 percent for the 1996-97 school year. The increase was partially funded, the Board explains, by a change in health insurance benefits entailing a reduction in the health insurance coverage premiums payable by the Board. (Board's Reply at p. 4) The Board indicates that it is still negotiating its agreement with the Jackson Education Association (JEA) (teaching staff members, secretarial and clerical employees); said

negotiations with the JEA are at an impasse. However, the Board claims that it is unrealistic, based on an examination of the current contract settlements in comparable districts in Ocean County, to hold that only 2 percent should be made available, when the most recent settlements have been averaging a little under 4 percent.

The Board argues that the 55.5 percent reduction in the funds available for salary negotiations imposed by the Township would be unfair, impractical and an unworkable reduction to ratify. Such a reduction would be impossible to justify and would entail mass reductions in force and layoffs within the District. The Board contends that the Township Committee members have "gone on record" opposing any District layoffs of personnel resulting from budget reductions imposed by the governing body. (Board's Position Statement at pp. 4-5)

As to the statistical data offered by the Township, *infra*, the Board finds such data suspect, and maintains that the salary negotiations between the Board and its employee bargaining units should be compared to what has been negotiated with similar groups of employees working for other New Jersey school districts. In this regard, the Board attaches data on current settlements negotiated from January 1996 through June 1996, asserting that the cumulative average of salary increases negotiated for contracts covering the 1996-97 school year is 3.97 percent. (Board's Reply at p. 4)

Moreover, the Board asserts that while the Township is imposing a 2 percent limit on salary increases for all Board employees, it has approved increases of almost twice that percentage to Township employees, ranging from the lowest-paid clerks to the highest-paid management officials. (Board's Reply at p. 3)

The Board further warrants that, despite the increased student population over the past three years, there have been minimal increases in the number of teaching staff members in the District. A reduction of $843,930 would require the Board to terminate the employment of at

least 20 teaching staff members to save an average cost of approximately $42,000 per teacher in salary and benefits. The effect of such a layoff on a growing population, the Board asserts, would be drastic and unconscionable. The Board, thus, concludes that the District could not provide T & E if the Township's salary reductions are sustained. (Board's Position Statement at p. 5)

The Township determines that the Board's salary line items are overbudgeted by $843,930. The Township argues that the reduction is reasonable, based on statistics obtained from the Labor Market and Demographic Research Division, Department of Labor, State of New Jersey. These statistics reveal that the Board's teachers have been receiving annual salary increases above the average of all covered New Jersey government workers. The Township points out that the Board's teachers, over the last six years, have received annual salary increases of 42.6 percent, as compared to 24.8 percent for all covered New Jersey workers. Additionally, the Township argues that the Board's teachers have received 11.5 percent greater annual salary increases over the last six years when compared to their government counterparts.

Furthermore, upon review, the Township determines that the Board's budgeted increase in salaries was based in part on last year's budget which, as of April 30, 1996, had several salary line items that reflected available balances. These available balances, reasons the Township, will not be utilized, as all salaries are encumbered on the first day of the school year and spent down. Thus, the Township concludes that the reduction "holds the line" on salary increases without affecting staffing and would not have a negative effect upon the Board's ability to provide T & E. (Township's Position Statement at p. 3)

As to the Board's mention of the Township's pay raises given to its employees, the Township asserts that such statement was "both gratuitous and irrelevant." (Township's Summation at p. 2) It notes that Township employees have consistently been paid far below that

of Board employees. Moreover, the Township welcomes the fact that the Board has directed the Commissioner's attention to a listing of other negotiated contracts in New Jersey schools. "This [sic] data," the Township argues, "[demonstrate] the real problem -- how out of line the salary increases are for school employees throughout the State." (*Id.* at p. 3)

The salary reductions imposed by the Township will not, the Township argues, have a deleterious effect on the District's T & E.

Upon careful review, the Commissioner notes that the whole of the Board's arguments and T & E demonstrations carry very little weight or substance., relying on the pre-election decisions of the county superintendent and the state cap waiver review panel as demonstration of the T & E necessity for its restoration requests and even going so far as to assert that such actions should bar the Commissioner from considering anything other than changed circumstances. The Commissioner further notes that while the documentation supplied with the Board's petition supports its assertion of increased enrollment, the record is devoid of any documentation or explanation as to the impact of the increased enrollment in concert with the Township Committee's reductions on class size, program offerings, teaching staff needs, support staff needs, the need for instructional aides, the administrative structure or any aspect of school district operations. The only statement entered on the record as to the impact on T & E was that the salary reductions of $843,930 would require the elimination of 20 teachers which would prevent the district from providing T & E. The board also asserts that two additional resource room teachers are needed to address increased special education enrollments. The substance of the Board's argument on the salary reductions which were made by the Township Committee during contract negotiations is that they were arbitrary, and that the Township Committee provided larger increases to its own employees.

The Commissioner finds that case law is well established as to a board's legal responsibility to demonstrate that each line item reduction which it is seeking to be restored is required for T & E, notwithstanding pre-election actions taken by the department or the municipality's rationale for making the reduction or even the merit of such rationale. Given such a standard, rejection of the Board's requests for restoration in their entirety would be justifiable herein given that the Board fails to adequately demonstrate for any line item the T & E necessity for restoration. While it is not the Commissioner's responsibility to construct the demonstration of T & E necessity on behalf of the Board, he recognizes that all financial data available at the department indicate the district spends below the state average in the classroom, for student support, for administration and for operation and maintenance of plant, and that a careful review of each line item in concert with information available to the department must be undertaken to ensure that no harm comes to the students of Jackson Township because of the lack of effort on the part of the Board in making its case. Therefore, the Commissioner in making his determinations on each line item will consider the settlement of the teachers' contract with an increase of 3.86 percent as reported in the NJSBA Data Source Book, the 3.2 percent increase negotiated for transport workers, the actual expenditures for each line item as contained in the district's annual independent audit and related Comprehensive Annual Financial Report, the limited documentation provided by the petitioner, the relationship to direct instructional activities and prudent practice.

The amounts sustained and restored and a description of the determinations follow:

In the area of teachers' salaries for regular, special education, basic skills and bilingual programs, the actual salary expenditures during 1995-96 for each line account as reflected in the annual independent audit/comprehensive annual financial report are indexed by

3.86 percent and compared to the original amount budgeted for 1996-97. Amounts reduced by the township committee are sustained for the lesser of the excess of the original amount budgeted for 1996-97 over the indexed actual amounts for 1995-96 or the township committee reduction. On this basis, the Commissioner sustains $322,417 of reductions to teacher salary accounts and restores $193,397. The Commissioner notes that the total amounts appropriated in these accounts after restoration of $21,238,554 exceed the total actual indexed amounts for 1995-96 by $193,694, and are adequate to provide the negotiated increase of 3.86 percent and hire the four new teaching staff positions contained in the "Budgeted Positions" support document contained in the originally proposed budget. The Commissioner cites the district's low per pupil spending on classroom instruction and increased enrollments in allowing the addition of four new staff positions.

In the area of other salaries for instruction for regular, special education and basic skills programs, the Commissioner applies a stricter standard since no arguments or evidence are presented as to the need for maintaining the current level of non-certificated teaching staff or as to the services provided students by or activities of such staff. Reductions made by the township committee are sustained except where the original amount budgeted for 1996-97 is already reduced below the prior year's actual audited expenditures. On this basis, the Commissioner sustains $16,318 of reductions to these accounts and restores $10,504.

In the area of cocurricular activities, athletics and other instructional programs, the Commissioner applies the same standard as for other salaries for instruction for similar reasons. Accordingly, he sustains $2,092 in reductions to these accounts and restores $17,349.

In the areas of attendance and social work, health, guidance, child study team and library, the Commissioner applies the same standard as for teachers, with the exception of line items for secretaries, clerical and other, in that the district's student support services spending is

below the state average and such activities involve direct and regular interaction with students. For the line items for secretaries, clerical and other, the Commissioner applies the same standard as for other instructional salaries. Accordingly the Commissioner sustains $22,574 of reductions to these accounts and restores $55,020.

In the administrative areas of improvement of instruction, general administration, school administration and business and other support services, the Commissioner applies the same standard as for other instructional services citing that while the district's spending for administration is below the state average there is no direct, regular interaction with students and that the Board makes no demonstration of either T & E necessity or operational stability. Accordingly, he sustains $76,628 of reductions to these accounts and restores $486. The Commissioner notes that the reduced amount of $3,146,768 in these accounts represents a 3.73 percent increase over the actual audited salary expenditures for the prior year, notwithstanding the $76,628 in reductions sustained, an amount that approximates the 3.86 percent increase granted teachers.

In the area of operations and maintenance of plant, the Commissioner sustains $53,668 of the reduction to this account and restores $12,338. Based on actual audited salary expenditures for 1995-96, the restoration will permit the district to increase spending in this account commensurate with the 3.2 percent increase granted transport workers. The Commissioner cites the lack of any documentation in the record as to salary increases for these types of positions and that the district's spending in this area is below the state average for this determination.

In the area of pupil transportation, the Commissioner restores the entire $50,968 reduction made to this account since the original amount budgeted for 1996-97 represented a 5.7

percent decrease over actual audited salary expenditures for 1995-96 and because of the increase in enrollment.

In the area of summer school teachers, the Commissioner sustains the $1,587 reduction to this account as the reduced appropriation for this account exceeds the actual audited salary expenditures of the prior year by more than the 3.86 percent negotiated increase for teachers.

In the area of special school teachers. the Commissioner restores the $1,703 reduction to this account since the amount originally budgeted was already reduced below the prior year's actual audited salary expenditures.

In the area of adult/evening education salaries, the Commissioner sustains the $6,881 in reductions to these accounts as the reduced appropriations for these accounts exceed the actual audited salary expenditures of the prior year by more than the 3.86 percent negotiated increase for teachers and the record reflects no evidence as to what extent if any such salaries are supported by participant fees.

A detailed summary of these determinations follows.

Disputed Line-Item Numbers 1-55

Line No.	Account No.	Description	Amount Cut	Sustained	Restored
02510	11-110-100-101	Preschool/Kind. Sal. of Teachers	$11,885	$10,625	$1,260
02520	11-120-100-101	Grades 1-5 Salaries of Teachers	$125,591	$39,747	$85,844
02530	11-130-100-101	Grades 6-8 Salaries of Teachers	$145,648	$145,648	$-0-
02540	11-140-100-101	Grades 9-12 Salaries of Teachers	$149,852	$62,257	$87,595
02640	11-190-100-106	Other Sal. for Instruc. (Reg. Prog.)	$4,751	$4,751	$-0-
02820	11-202-100-106	Other Sal. for Instruc. (Special Ed.)	$374	$374	$-(

02910	11-202-100-106	Other Sal. for Instruc. (Special Ed.)	$374	$374	$-0-
02990	11-204-100-101	Salaries of Teachers (Special Ed.)	$7,552	$3,428	$4,124
03000	11-204-100-106	Other Sal. for Instruc. (Special Ed.)	$4,661	$-0-	$4,661
03080	11-205-100-101	Salaries of Teachers (Special Ed.)	$12,748	$12,748	$-0-
03090	11-205-100-106	Other Sal. for Instruc. (Special Ed.)	$3,854	$3,854	$-0-
03180	11-206-100-106	Other Sal. for Instruc. (Special Ed.)	$401	$401	$-0-
03260	11-207-100-101	Salaries of Teachers (Special Ed.)	$1,291	$-0-	$1,291
03270	11-207-100-106	Other Sal. for Instruc. (Special Ed.)	$1,545	$1,545	$-0-
03770	11-212-100-101	Salaries of Teachers (Special Ed.)	$3,506	$1,594	$1,912
03780	11-212-100-106	Other Sal. for Instruc. (Special Ed.)	$1,231	$1,231	$-0-
03860	11-213-100-101	Salaries of Teachers (Special Ed.)	$35,380	$35,380	$-0-
03870	11-213-100-106	Other Sal. of Instruc. (Special Ed.)	$1,842	$1,842	$-0-
04130	11-216-100-101	Salaries of Teachers (Special Ed.)	$2,007	$912	$1,095
04140	11-216-100-106	Other Sal. for Instruc. (Special Ed.)	$1,946	$1,946	$-0-
04310	11-218-100-101	Sal. of Teachers (Special Ed.)	$6,827	$-0-	$6,827
04400	11-219-100-101	Sal. of Teachers (Special Ed.)	$4,067	$3,001	$1,066
04410	11-219-100-106	Other Sal. for Instruc. (Special Ed.)	$2,761	$0-	$2,761
04810	11-230-100-101	Sal. of Teachers (Basic Skills)	$7,077	$7,077	$-0-
04820	11-230-100-106	Other Sal. for Instruc.(Basic Skills)	$3,082	$-0-	$3,082
04900	11-240-100-101	Sal. of Teachers (Bilingual)	$2,383	$-0-	$2,383
06030	11-401-100-100	Salaries/Co-Curric. Act.-Instruction	$4,369	$-0-	$4,369
06090	11-402-100-100	Salaries/Athletic-Instruction	$12,980	$-0-	$12,980
06150	11-4xx-100-100	Salaries/Other Instructional	$2,092	$2,092	$-0-
06370	11-000-211-100	Salaries/Undistrib. Exp. (Attendance & Soc. Work)	$3,883	$-0-	$3,883

06430	11-000-213-100	Sal./Undistrib. Exp. (Health Svc.)	$9,298	$9,298	$-0-
06490	11-000-218-104	Sal./Other Professional (Other Support Svc. Regular)	$23,905	$5,172	$18,73
06500	11-000-218-105	Sal./Sec. & Clerical (Other Support Svc. Regular)	$3,089	$3,089	$-0-
06580	11-000-219-104	Sal./Other Professional (Other Support Svc.-Special)	$18,215	$-0-	$18,215
06590	11-000-219-105	Sal./Sec. & Clerical (Other Support Svc. -Special)	$4,943	$4,943	$-0-
06600	11-000-219-110	Other Salaries (Other Support Svc. Special)	$72	$72	$-0-
06760	11-000-221-104	Sal. Other Professional Staff (Improvement of Instruc. Svc)	$3,463	$3,463	$-0-
06770	11-000-221-105	Sal./Sec. & Clerical (Improvement of Instruc. Svc.)	$2,240	$2,240	$-0-
06780	11-000-221-110	Other Salaries (Improvement of Instruc. Svc.)	$295	$-0-	$29[illegible]
06850	11-000-222-100	Salaries/Library	$14,189	$-0-	$14,189
06910	11-000-230-100	Sal./Support Svc./Gen'l Adm.	$6,584	$6,584	$-0-
07010	11-000-240-103	Sal./Principals & Asst. Prin.	$34,089	$34,089	-0-
07030	11-000-240-105	Sal./Sec. & Clerical/Admin.	$13,014	$13,014	$-0-
07040	11-000-240-110	Other Salaries/Sch. Admin.	$191	$-0-	$191
07100	11-000-260-100	Sal./Op. & Maintenance	$66,006	$53,668	$12,338
07210	11-000-270-107	Sal./Pupil Trans.-Reg.	$35,086	$-0-	$35,086
07220	11-000-270-108	Sal./Pupil Trans.-Spec. Ed.	$13,801	$-0-	13,801
07230	11-000-270-109	Sal./Pupil Trans.- (Other)	$2,081	$-0-	$2,081
07360	11-000-290-100	Sal./Busn. & Other Support Svc.	$17,238	$17,238	$-0-
08400	13-422-100-101	Salaries of Teachers (Summer Sch.)	$1,587	$1,587	$-0-

08660	13-4xx-100-101	Salaries of Teachers (Other Special Schools)	$1,703	$-0-	$1,703
08820	13-601-100-101	Salaries of Teachers (Evening/Adult School)	$1,834	$1,834	$-0-
08900	13-602-200-100	Sal./Support Svc. (Adult School)	$4,753	$4,753	$-0-
08980	13-602-100-101	Salaries of Teachers (Adult Ed.)	$235	$235	$-0-
08990	13-602-100-106	Oth. Sal. for Instruc. (Adult Ed.)	$59	$59	$-0-
		Subtotal	$843,930	$502,165	$341,765

Disputed Line-Item Numbers 56-58

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
08250	12-000-4XX-331	Legal Services	$ 20,000	
		(Facilities Acq. & Construc. Svc.)		
08260	12-000-4XX-390	Other Purch. Prof'l Svc.	$ 129,000	
		(Architectural Fees)		
08270	12-000-4XX-450	Construction Services	$ 177,160	
		a.) Replace Air-Condition. Units	$ 60,100	
		b.) Classroom Lighting	$ 23,000	
		c.) Ext. Door Hardware	$ 36,000	
		d.) Ceiling Replacement	$ 15,000	
		e.) Bleacher Repairs	$ 10,000	$ 200,000
		(Board's Support Documentation)		

The Board asserts that the Township Committee has segregated line-item amounts that add up to the sum of $293,100, without specifying why the designated reduction is $200,000. (Township's Position Statement at p. 4) Although the Township argues that the Board should be responsible for major improvements as part of "permanent financing," the Board contends it is clear that the ongoing cost of replacement of equipment and hardware listed in line item 12-000-

4XX-450 is not part of major physical improvements to the District's facilities. The Board reasons that districts which do not budget for maintenance of their physical facilities as part of the general fund on a continuing basis "***are doomed to exacerbate conditions of failing structures and decrepit physical facilities." (Board's Position Statement at p. 6)

The Board further contends that all items listed by the Township are at the point of failure or noncompliance with school building codes. Furthermore, it argues that replacement of air-conditioning units must be done during the summer months, and failure to do so would render certain essential classroom space unable to be occupied and many classrooms would not comply with code requirements for ventilation. Similarly, the Board argues that the classroom lighting work which is planned must be completed during the summer months when students are not present.

The Board next avers that the exterior door hardware that is required for certain aging school facilities must be replaced for reasons of security. Failure to do so, the Board asserts, places it at risk for further damage to school facilities that will be vulnerable to vandals and thieves. Additionally, replacement of ceiling tiles is an ongoing requirement precipitated by leaky roofs and acts of vandalism, according to the Board. The significant cost of replacing roofs in the District will be addressed by the Board as a major capital improvement where permanent financing must be obtained. Yet, the Board continues, until the roof replacement project can be financed and effectuated, the replacement of ceiling tiles is an ongoing cost that cannot be avoided. Additionally, in order for the ventilation system in several school buildings to function as per code requirements, the Board affirms that damaged ceiling tiles must be replaced so that the open return plenum will be functional and the ventilation system will comply with the school facilities code.

Failure to repair the District's bleachers, the Board continues, will place both students and the general public at risk of injury on dangerous equipment. The Board adds that the repairs to be made are required by the provisions of the building code.

The Board explains that, with regard to the architectural fees in the 1995-96 budget that were unexpended, these monies were part of the balance making up the $700,000 projection, *supra*. The Board asserts that the Township does not understand that professional fees that are related to the new elementary school which the Board is planning to construct have not been expended and must be budgeted in the 1996-97 school year. These professional services, the Board argues, are required before the new school construction referendum is posed to the voters in the Township. The Board contends these fees cannot be included as part of the referendum amount until after the referendum is approved. If so approved, then the expenditure of professional fees related to the construction of the new school will thereafter be included in monies approved as part of the bond indebtedness of the Township of Jackson. As for the Township's view that the Board has budgeted twice for these fees, the Board counters that the Township has failed to consider that the 1995-96 fees are reflected in the year-end unexpended balance and are accounted for in surplus balance. Thus, the Board maintains that it is reasonable that it should budget for the 1996-97 school year considering costs through June 30, 1997.

As to the Township's assertion that the Board transferred $193,367 from the current expense portion of the 1995-96 school budget to the capital outlay portion, *infra*, the Board argues that the transfer in question was made to correct a budgeting of the monies in the current expense portion of the budget when the same monies were supposed to be placed in the capital outlay portion of the budget, rather than in current expense line items. The Board warrants that, according to generally accepted accounting principles, these reallocated monies used to fund capital lease payments should have been placed in the capital outlay budget line

items from the start, since the money was intended to be used for 60 month capital lease payments during the 1995-96 school year. The Board further attests that, once transferred, the monies were used to make such capital lease payments. Further, the Board indicates that it was following Township direction by funding the acquisition of particular equipment by lease/purchase financing, after having solicited bids for the lease/purchase of particular equipment and receiving a favorable interest rate for the lease/purchase monies. (Board's Reply at p. 5)

The Board underscores that New Jersey statutes, specifically, *N.J.S.A.* 18A:33-1 and 18A:7A-5, compel maintenance and repair of school facilities. It observes that the school buildings and equipment that are budgeted for replacement or repair in the proposed budget are presently out of compliance with the above-cited statutory requirements. The Board cites *In re Upper Freehold Regional School District*, 86 *N.J.* 265 at 278 (1981) for the proposition that adequate facilities are a part of T & E. (Board's Position Statement at p. 8) Thus, the Board concludes that the line-item amounts which the Township has reduced are necessary to provide for "adequately equipped sanitary and secure facilities." (*Id.*) With respect to the items which the Township maintains should be funded through bonds, the Board replies, "Based on the voting record in Jackson, the school buildings will fall to the ground before the community will vote to approve a board referendum for roofs, HVAC [heating/air conditioning] and other necessary capital items.***" (Board's Summation at p. 3)

The Township points out that in 1995-96, the Board's adopted budget was $223,800, which increased by transfers of $193,367 during the year. The Township argues that the Board has overbudgeted in 1996-97 in order to have excess funds available to make these large capital outlay transfers. However, the Township maintains that these projects could be financed over their useful lives (5, 10, 15 years) by issuing bonds or utilizing certificates of

participation. The financing, according to the Township, would allow for a reduction of $200,000 in the 1996-97 budget, thereby lessening the tax burden. Additionally, upon review of the Board's appropriations report, the Township Committee notes that legal and architectural fees relating to the new elementary school were budgeted in both 1995-96 and 1996-97. Thus, the Township concludes that the $200,000 decrease in capital outlay will not negatively affect the Board's ability to provide T & E. (Township's Position Statement at p. 4)

The Township asserts that the Board fails to address the fact that the 1995-96 budget has appropriated $105,000 for legal and architectural fees, the majority of which has not been spent by April 30, 1996, and, in 1996-97, has budgeted $149,000 for the same elementary school project. The Township Committee maintains that the professional fees have been budgeted twice since the combined budgets amount of $254,000 for pre-referendum professional fees is grossly excessive. (Township's Reply at pp. 2, 3)

As to the Board's arguments regarding the need for the undesignated fund balance for possible roof repair, the Township argues that this argument demonstrates the Board's "**lack of a cogent capital plan ***." (*Id.* at p. 2) It further expresses concern that the Board is circumventing the budget process when in 1995-96 it transferred over $374,000 into the capital outlay fund from other line items. These funds, the Township contends, should have been allowed to lapse to fund balance. (*Id.*) Finally, the Township concludes that it was the Board's "cavalier approach" to its budget preparation which resulted in the transfer of $193,367 to correct its 1995-96 budget. (Township's Summation at p. 3) The Township argues that, since the Board admits that the unspent professional fees from 1995-96 have lapsed into surplus, the Township's rationale for increasing account number 10-303, Budgeted Fund Balance, is buttressed.

In response to the Township's claim that the Board has budgeted twice for professional fees, the Board claims that the 1995-96 fees are reflected in the year-end

unexpended balance and are accounted for in the surplus balance. (Board's Summation at p. 4) Consideration will be given to the impact of the available funds in the determination for disputed line-item number 60; Anticipated Revenue - Budgeted Fund Balance. The Board has also argued that these fees cannot be included as part of the referendum amount for the new elementary school until the referendum is approved. The Commissioner notes that the costs associated with architects, lawyers and construction managers are considered part of the overall cost of a capital construction project. Prior to the referendum, such costs are budgeted and charged to the general fund. However, the option exists to reimburse the amounts previously charged to the general fund from the capital projects fund after the approval of a referendum.

Upon review, the Commissioner finds that the Township has not presented an argument that the budgeted funds are not necessary for T&E but, instead, takes exception to the Board's history and manner of budgeting capital outlay appropriations. The Commissioner finds that these items have been proven necessary for T&E and in the absence of the approval of a bond referendum as a means to raise the funds, determines to restore the Township's reduction of $200,000.[2]

Disputed Line-Item Number 59

Line No.	Account No.	Description	Amount Budgeted	Amount Increased
00250	110-1XX	Anticipated Revenue (Miscellaneous)	$ 130,000	$220,000

The Board estimates miscellaneous income in the amount of $130,000 for the 1996-97 school year, and that such revenue will be precipitated by a reduction in health insurance

[2] The Commissioner finds that the Board's response to the Township's concerns regarding the transfers to capital outlay from general current expense as being necessary for compliance with GAAP [accounting rules] is inconsistent with the GAAP uniform chart of accounts. Under the chart of accounts, the payments made on capital leases for equipment are budgeted as a rental payment in the applicable program and function in general current expense for which the equipment is being used. Although the annual year-end audit report will reflect the acquisition of the equipment as a nonbudgetary transaction in the year of the inception of the lease, the monthly payments under the lease are budgeted and expended as a rental payment.

premiums that the Board will incur over the 1996-97 school year. However, the Board notes, the costs charged for the 1996-97 school year will depend on the Board's actual claims experience in the area of health insurance. The Board asserts that the actual claims experience can decline significantly in any single year. If 1996-97 is such a year, the Board argues that it may experience an increase in health insurance premiums rather than a decrease as is now anticipated. The Board maintains that it would not be fiscally prudent to overestimate its anticipated revenue and that even a few "bad claims" for health insurance in the 1996-97 school year could potentially wipe out any savings on health insurance premiums which the Board hopes to realize. The Board insists that it has prudently budgeted anticipated income for the 1996-97 school year in accordance with generally accepted accounting principles.

Moreover, the Board argues that revenue received in prior years does not guarantee that the revenue for the same amount will be realized for the 1996-97 school year. The Board argues that, even if it does realize revenues which exceed the estimate contained in its proposed budget, without any emergent expenditures required, any increase in surplus as the budget is now structured would keep the surplus figure well below the regulatory minimum figure of 3 percent of the total current expense school budget. It maintains that the Township's decision to increase the amount of anticipated revenue in this line item could force the Board into a situation where there would be a revenue shortfall during the 1996-97 school year, thus, compelling the Board to turn to surplus funds.

The Township contends that the anticipated revenues for the 1996-97 school budget were underestimated. The Board's previous years' actual miscellaneous income have, the Township argues, been consistently greater than the amount it budgeted in 1996-97. The Township further indicates that, as of April 30, 1996, the Board had realized $363,817 in miscellaneous income for the current 1995-96 school year. The Township Committee finds that

a $220,000 increase will not have a negative effect upon the T & E offered by the District. (Township's Position Statement at p.1) The Township argues that the Board's claim that surplus is below 3 percent of total current expense is irrelevant, inasmuch as it was the Board which originally structured its budget.

Moreover, the Township questions the Board's connection of this account to its health insurance premium costs. Here, the Township queries why, if health insurance premiums were such a concern, the Board agreed with the Township's $200,000 reduction to that line item. (See footnote 1, *supra.*) The Township argues that the individually budgeted line-item accounts should stand on their own and not be linked to other line items. It notes that such a budgeting principle does not fall within the purview of the generally accepted accounting principles.

The Commissioner took official notice of the Board's June 30 financial report for the purpose of identifying whether the Board underestimated in its 1996-97 budget the amount of anticipated undesignated surplus. Part of the review of the report for such determination includes a comparison of current year actual revenue amounts to those budgeted since an underestimation of revenues increases surplus balances. The June 30 financial report reflects actual realized miscellaneous revenues of $834,651.67 which is $734,651.67 in excess of the amount budgeted. Actual miscellaneous revenues of $910,644 were realized in 1995-96. The 1995-96 annual year-end audit reported an audited miscellaneous revenues amount of $888,187, of which $642,758 related to insurance reimbursements.

Upon review, the Commissioner finds that when compared to prior years' realized revenues, the Township's suggested $220,000 increase to $350,000 appears conservative and would provide allowance for a substantial decrease in the amount of insurance reimbursements. Accordingly, the Commissioner determines to increase the amount budgeted in miscellaneous revenues by $220,000.

Disputed Line-Item Number 60

Line No.	Account No.	Description	Amount Budgeted	Amount Increased
00120	10-303	Anticipated Revenue (Budgeted Fund Balance)	$ 700,000	$300,000

The Board observes that the Township directs the District to appropriate an additional $300,000 from undesignated fund balance that will accrue at the end of the 1995-96 school budget fiscal year. The Board's plan calls for appropriation of $700,000 of anticipated surplus monies to be used in the 1996-97 school budget, out of an aggregate sum of approximately $2,000,000 of surplus monies that the Board expects to realize from the 1995-96 budget year. The unexpended balance of $700,000, the Board points out, was generated by its decision not to procure additional student desks, equipment and other instructional necessities, which would normally have been ordered. The Board projects that it will maintain an undesignated fund balance for the 1996-97 budget year of $1,300,000. The effect of increasing funding to the 1996-97 school budget from the 1995-96 school surplus, the Board argues, would be to reduce the Board's undesignated fund balance to a figure that would be less than 2 percent of the proposed school budget, contrary to regulations requiring a minimum undesignated fund balance of 3 percent. (Board's Position Statement at pp. 10-11)

The Board reasons that to maintain such a precariously low surplus would be dangerous for the District, where the oldest school building, Switlik Elementary School, still has its original roof from approximately 1952 and it is on the brink of failure. Should the roof fail in the course of the coming school year, the Board posits that it could be faced with expenses amounting to hundreds of thousands of dollars. The Board further observes that it is under state mandate to tie in the Goetz Middle School to the new sewer line, which will require additional

funds in the future. Monies for replacement will, the Board contends, have to come from surplus. (Board's Summation at p. 2)

The Board concludes that, in a growing district, the need for surplus is quite apparent. It argues that the ever-increasing student population demands unanticipated expenses in the area of special education that cannot necessarily be budgeted for, and which require the Board to utilize surplus funds; the needs of even a few special education students may require expenditure of thousands of dollars not contained in the budget. By way of example, the Board notes that while its 1996-97 budget is merely a month old, it has had to hire an additional fourth grade teacher due to increased enrollment. This position, the Board claims, was not budgeted for in the 1996-97 budget, and the funds, therefore, for this position must come from surplus. Additionally, the Board observes that it must fund from surplus the salaries of two additional resource room teachers so that the District will be in compliance with federal special education program requirements. The Board argues that the two new positions cannot be avoided, and the positions could not have been justified for budgeting during the formation of the 1996-97 school year budget six months ago. Thus, the Board concludes that the Township's increase in this account would be an arbitrary reduction in the reasonable amount of surplus that the Board needs to protect itself from unanticipated, unbudgeted, but necessary, expenses that are likely to be incurred in the 1996-97 school year. (Board's Reply at p. 2)

The Township finds that the anticipated revenues for the 1996-97 budget were underestimated with respect to the budgeted fund balance. Upon review of the District's April 30, 1996 revenue and appropriations reports, the Township concludes that a more accurate representation of surplus anticipated from current year operations would be $1,000,000.[3] The

[3] In its summation, the Township states, "***The Township Committee believes that the June 30, 1996 unaudited undesignated fund balance figure of $1,352,558 estimated by the Board of Education is low and that, in fact, the actual figure will show an increase far greater than $300,000. The Township Committee has requested the Board of Education's June 30, 1996 Budget Summary Report in order to document its claim; however, to date, the Board of Education has not released this information." (Township's Summation at p. 2)

April 30, 1996 report, according to the Township, reflected numerous, large, encumbered balances in line items which traditionally are fully spent by that date. These amounts, the Township observes, would be canceled at year-end, and would become District surplus. (Township's Position Statement at p. 2)

In addition, the Township argues that the Board did not consider the substantial revenue it received over budget for the 1995-96 school year. Moreover, the Township notes that history has shown that the actual surplus realized from current year operations has been higher than the surplus anticipated during the Board's budget process. Thus, the $300,000 increase in the budgeted fund balance will not, according to the Township, negatively affect the Board's ability to provide T & E. *(Id.)* As to the Board's claim that the increase imposed by the Township will leave the Board below the 3 percent figure which is required, the Township again indicates that it was the Board's own budgeting process which left its undesignated fund balance below 3 percent. Therefore, the Township asserts that the Board's argument "***is not an issue." (Township's Reply at p. 2)

Upon review, the Commissioner notes that the 3 percent surplus level is not a required minimum that must be maintained by districts. Instead it is the department's policy to require districts to reduce their surplus to that level in instances where the district's budget includes a cap waiver or is under appeal to the Commissioner in the event of a budget defeat. There are no fixed restrictions on reducing surplus below that level. The Commissioner also notes that when the Board submitted its certified budget for approval to the county office of education, the recapitulation of balances was revised to include an additional $700,000 of additional balances anticipated from the 1995-96 budget resulting in a revised projected June 30, 1996 unreserved surplus amount of $2,037,328. The Board also increased the amount being appropriated into the 1996-97 budget to reflect the increased amount suggested by the

Township of $1,000,000. With these revisions, the projected undesignated unreserved surplus at June 30, 1996 was $400,000 higher than that presented to the voters in the advertised budget. The 1995-96 annual year-end report reflects an audited June 30, 1996 unreserved fund balance of $1,902,642. Accordingly, since the Board's revised projections and audited June 30, 1996 balance result in a higher surplus than that originally adopted and presented to the voters, the Commissioner determines to increase the amount budgeted as Miscellaneous Income (Budgeted Fund Balance) by the $300,000 suggested by the Township.

APPLICATION OF SURPLUS

As discussed in the determination for disputed line-item number 60, after designation of surplus funds into the 1996-97 budget as Budgeted Fund Balance, the Board has reduced its unreserved, undesignated surplus to below 3 percent of its 1996-97 budget.

Based on the above, the Commissioner determines that there are no excess surplus funds available to restore appropriations.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the Township's line-item reductions to appropriations and increases to revenue in surplus accounts as set forth below. The Commissioner further notes that all restorations to line-item appropriations are restricted in accordance with *N.J.A.C.* 6:20-2A.11(b)3.

APPROPRIATIONS:

Description	Account Number	Sustained	Restored
Salaries:	as listed, *supra,* disputed line items 1-55:	$502,165	$ 341,765
Facilities:		-0-	
• Legal Services (Facilities Acq. & Construction (Svc.)	12-000-4XX-331		$ 200,000

- Oth. Purch. Prof'l Svc. (Architectural Fees) 12-000-4XX-390
- Construction Services 12-000-4XX-450
  - a.) Replace Air-Condit. Units
  - b.) Classroom Lighting
  - c.) Ext. Door Hardware
  - d.) Ceiling Replacement
  - e.) Bleacher Repairs

TOTAL - 0 - $541,765

REVENUES:

Description	Account Number	Increase Sustained	Increase Rejected
Anticipated Revenue (Miscellaneous)	10-1XX	$220,000	-0-
Anticipated Revenue (Budgeted Fund Balance)	10-303	$300,000	-0-
	TOTAL	$520,000	

Tax Levy Certified by Governing Body:	$25,825,319
Restoration of Reductions:	$ 541,765
Amount of Restoration Funded by Surplus:	- 0 -
Total Tax Levy for 1996-97:	$26,367,084

Accordingly, the Ocean County Board of Taxation is directed to make the necessary adjustments, as set forth above, to reflect a total of $26,367,084 to be raised in tax levy for General Fund purposes of the Jackson Township Board of Education for the 1996-97 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 10, 1997
DATE OF MAILING MARCH 10, 1997

108-97

C #108-97
SB # 36-97

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 10, 1997

For the Petitioner-Appellant, Kalac, Newman, Lavender & Campbell (Francis J. Campbell, Esq., of Counsel)

For the Respondent-Respondent, Hiering, Hoffman, & Gannon (William T. Hiering, Jr., Esq., of Counsel)

This matter was initiated when the Board of Education of the Township of Jackson (hereinafter "Board") filed a Petition of Appeal to the Commissioner of Education pursuant to N.J.S.A. 18A:22-37. By its appeal, the Board challenged $1,563,930 of $1,763,930 in reductions made by the Township Committee of the Township of Jackson (hereinafter "Township Committee") to the proposed education budget for 1996-97 after it was defeated by the voters.

By decision dated March 10, 1997, the Commissioner directed restoration of $541,765 of those reductions, but sustained the remainder. The Board then filed an appeal with the State Board of Education.

8/6/97

Review of the brief submitted by the Board in support of its appeal indicates that it is not challenging the reductions that were sustained by the Commissioner. Rather, the Board's appeal constitutes a general challenge to the way the Commissioner has been considering budget appeals under N.J.S.A. 18A:22-37. Specifically, the Board asserts that the conclusions which the Commissioner reached failed to give due weight to the district's financial needs; that the Commissioner should have conducted a hearing as to the necessity of cap waiver monies after the municipal governing body reduced the education budget; and that the length of time it takes the Commissioner to issue budget decisions fails to eliminate the problems pointed out by the New Jersey Supreme Court in its decision in Board of Education of the Township of Deptford, 116 N.J. 305 (1989). However, the only relief which the Board seeks by the appeal is a "determination by the State Board of Education to correct the procedural deficiencies evident from the decision of the Commissioner in his budget decision...." Board's brief, at 16.

It is well settled that the role of the Commissioner in reviewing budget appeals pursuant to N.J.S.A. 18A:22-37 is not to function as an original budget-making body. Board of Education, East Brunswick Township v. Township Council, East Brunswick, 48 N.J. 94, 106 (1966). Rather, it is the function of the Commissioner, and of the State Board on appeal, to sit as a reviewing body which is charged with the responsibility of ensuring that the mandate for a thorough and efficient education is being carried out. Id. Accordingly, we are obligated to defer to a municipal budget decision such as the one involved here so long as we are satisfied that educational goals are not jeopardized. Deptford, supra; East Brunswick, supra.

We fully agree with the Board that it is important for the Commissioner to ensure timely review of budget appeals so that the disputed issues can be resolved to coincide with the school year covered by the budget to the extent possible. Id. However, this is not a case in which the budget involved has evaded meritorious review by the Commissioner. Deptford, supra. Hence, while we do not minimize the significance of the questions which the Board would like us to decide, we find that we can not properly or productively address such questions in the absence of a challenge to the budget reductions which the Commissioner sustained. In this respect, we stress that when the Commissioner rendered his decision in this matter, he made the determination that the resulting budget amount would be sufficient to enable the Board to provide a thorough and efficient education to its students for the school year in question.[1]

Therefore, for the reasons stated, we dismiss the appeal.

August 6, 1997

Date of mailing AUG 0 8 1997

[1] We note that on January 22, 1997, the Commissioner proposed new rules to us to govern the budget review and appeals process, and that since February 18, 1997, we have been entertaining public comment relating thereto pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. See 29 N.J.R. 2591 through 2608.

109-97

109-97 M

IN THE MATTER OF THE APPROVAL OF : COMMISSIONER OF EDUCATION
THE RED BANK CHARTER SCHOOL. : DECISION ON MOTION
:

For Movant Red Bank Board of Education, McOmber & McOmber, P.C.
(Arsen Zartarian, Esq.)

For Respondent, W. Michael Moore, President, Red Bank Charter School Association

This matter was opened by way of a motion filed on March 4, 1997, by the Board of Education of the Borough of Red Bank ("Board"). Therein, the Board seeks a stay of the Commissioner of Education's February 21, 1997 determination, currently on appeal to the State Board of Education pursuant to N.J.S.A. 18A:36A-4(d), to grant a charter to the Red Bank Charter School ("Charter School") pursuant to the authority granted him by N.J.S.A. 18A:36A-1 et seq. The Board seeks to stay, pending resolution of the appeal, both the Commissioner's approval of the charter and any action on the part of the Charter School to implement it. For the reasons which follow, the Board's motion is denied.

The standards for granting injunctive relief are well established. The party seeking such relief must demonstrate the existence of each of the following four separate conditions: 1) a clear probability that the movant will prevail on the merits of the underlying controversy; 2) in the absence of such a stay, the movant will suffer irreparable injury; 3) the probability of harm to other persons will not be greater than the harm the movant will suffer in the absence of such a stay; and 4) the public interest will not be adversely affected by such a stay. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Zoning Board of Adjustment of Sparta v. Services Electric Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). Each of these criteria will be addressed separately below.

March 10, 1997

Initially, a brief synopsis of the "Charter School Program Act of 1995", L. 1995, c. 426, codified at N.J.S.A. 18A:36A-1 et seq. is appropriate. The Act provides that it is the public policy of the State to encourage and facilitate the development of charter schools. N.J.S.A. 18A:36A-2. The Legislature has determined that charter schools will, among other things, increase the potential for pupil learning; increase educational choices for students and parents; encourage the use of different and innovative learning methods; establish a new form of accountability for schools; and make the school the unit for educational improvement. N.J.S.A. 18A:36A-2. The Commissioner of Education is given the authority to establish the charter school program in accordance with the Act, and is provided a specific list of information that must be considered in assessing applications to form charter schools. N.J.S.A. 18A:36A-3 and 5. The Act sets forth the powers and responsibilities of charter schools, and allows for the adoption of regulations necessary for implementing the provisions of the Act. It is with these legislative mandates in mind that the Board's application for stay of the Commissioner's decision must be considered.

The Board argues that it will suffer irreparable harm because the grant of the charter at issue has occurred at an inopportune time, as the Board has recently appointed two new supervisors, and is currently moving forward to align its curriculum with the Core Curriculum Content Standards. In addition, it is argued that the grant of a charter has created an air of uncertainty in the district and that "bedlam" will result if the Charter School begins to accept applications for employment and conduct an admissions process. Also, the Board argues that the $460,358.00 it must pay for the 60 students in the charter school will cause it to reduce staff, reduce supplies, eliminate a bus route, and increase taxes in order to avoid reductions in programs and services. In addition, the Board argues that its ability to provide a thorough and efficient education to its students could be compromised. Finally, the Board argues that uncertainty as to when the Charter School will find a facility and enroll students creates a concomitant uncertainty as to what amount will be reduced from its budget. Finally, the Board argues that irreparable harm may result to it and the community in the form of confusion and unrest, likely manifesting itself in defeat of the Board's budget proposal at the annual school election.

Upon review, the Commissioner finds that the reasons set forth by the Board do not constitute a demonstration of irreparable harm. First, the fact that it is an "inopportune time" for the Board does not constitute irreparable harm, nor does the fact that the Board has hired two new supervisors and is aligning its curriculum with the Core Curriculum Content Standards and would be inconvenienced by the creation of a charter school. The Board is free to continue to realign its curriculum and acclimate the new supervisors to the district, an effort on which the creation of a charter school should have no significant effect. Also, alignment of curriculum with the Core Curriculum Content Standards must happen regardless of whether new supervisors have been hired, and having to do so while a charter school is being formed in a district does not constitute irreparable harm.

In addition, allegations that uncertainty will be created, "bedlam" and community unrest will result, and the school budget may be defeated by the voters are unfounded and unsubstantiated, and provide no basis for staying the approval of the charter in this matter. The possibility that staff may be eliminated and that changes may occur in a district as a result of creation of a charter school could create uncertainty, but this does not rise to the level of irreparable harm. Pursuant to this argument, every school district wherein a charter school is approved would be irreparably harmed if uncertainty as to jobs and possible budget cuts would be created. There is no basis for such a conclusion. The Board will have to perform its functions within the bounds of its budget and regardless of any uncertainty that the grant of a charter may have created.

Likewise, the loss of money based on the per student payment to the charter school may affect the Board's budget and cause a reduction in staff or supplies, but this is balanced by a reduction in students and outweighed by the express Legislative directive that the local school district fund those students from the district enrolled in a charter school. Further, loss of money does not constitute irreparable harm. Crowe supra. at 132-33. Even assuming that the Charter School actually enrolls 60 students and that all students enrolled will come from Red Bank, a proposition that is purely speculative at this juncture, the Board will have fewer students to educate in the 1997-1998 school year if students from Red Bank enroll in the charter school, and will therefore require less money to educate its remaining students. In addition, the Charter School Act expressly contemplates that local school districts will have to become more

competitive and accountable for the education they provide, and mandates that charter schools be funded by enrolled students' district of residence. N.J.S.A. 18A:36A-2. Therefore, because the Legislature has directed that local school districts must fund those students from the district enrolled in the charter school, and because there will be concomitantly fewer students in the Red Bank schools to educate, there is no basis for a determination that the Board will be irreparably harmed if it loses money because students from Red Bank are enrolled in the Charter School.

Based on the foregoing, the Board has failed to demonstrate that it will be irreparably harmed if the grant of a charter to the Red Bank Charter School is not stayed.

With regard to the second criterion, the Board advances several reasons as to why it will succeed on the merits of its appeal before the State Board. First, it argues, the Commissioner failed to adhere to the time frames established in N.J.S.A. 18A:36A-4 for accepting applications for charter schools and, moreover, issued a conditional decision that is beyond the applicable time frames. This argument is without merit.

N.J.S.A. 18A:36A-4 does not establish a time after which applications may not be submitted, nor a date after which charters may not be granted. The statute requires only that applications be submitted "in the school year preceding the school year in which the charter school will be established." N.J.S.A. 18A:36A-4(c). The October 15, 1996 date referred to by the Board was established administratively by the Department of Education, and the charter school's application was submitted within that time frame. In order to properly assess the application, additional information was sought and accepted after that date by the Department. The Board, in the interest of obtaining all necessary information, was allowed to comment on both the initial application and any addendum filed by the Charter School. After receipt of the Board's last submission, a decision was reached as to whether or not to grant a charter.

The grant of the charter was final as of February 21, 1997. However, as noted in the letter granting the charter, documentation is required with regard to the facility wherein the school will be located. Failure to provide this documentation would result in a charter being rescinded. Until a facility is obtained by a charter school, this information cannot be provided. However, it is understood that until a charter is granted, a school cannot make arrangements to obtain a facility, as it is necessary to ensure that the application is approved prior to obtaining a

facility. Therefore, the Commissioner finds that the Board will not succeed on the merits of its claim based on this argument.

The Board next argues that the absence of rules and regulations governing the charter school program stripped the Commissioner of his authority to issue any charter, including the one at issue in this matter. The Board cites cases for the proposition that an administrative agency may not act in a manner that contravenes the statute authorizing it to act, and for the proposition that a rule or regulation must fall within the express or implied grant of power by the Legislature. Neither of these principles has any relevancy to this matter.

N.J.S.A. 18A:36A-18 authorizes the State Board of Education to adopt regulations necessary to effectuate the provisions of the Act. The statute does not mandate that regulations be in place prior to granting a charter. The Act itself provides the parameters for granting a charter by setting forth the required contents of an application, N.J.S.A. 18A:36A-5, all of which must be satisfied in order for a charter to be granted. Therefore, the cases cited by Red Bank are not applicable to this matter, as the Department acted in conformance with the enabling legislation when considering and approving the charter at issue.

Likewise, the Board's citations to cases such as Metromedia v. Director, Division of Taxation, 97 N.J. 313 (1984) for the proposition that an administrative agency may not act in the absence of rulemaking are inapplicable to this matter. The Department did not engage in invalid rulemaking by acting in the absence of regulations when granting the charter at issue. The Department acted in conformance with the Charter School Act when granting a charter to the Red Bank Charter School, so that the absence of regulations does not invalidate the grant of the charter.

The Board next argues that the Commissioner improperly created a funding formula for the Red Bank Charter School. In the absence of statutory authorization or validly promulgated regulation, the Board contends, the Department improperly determined the amount of funding that is to be provided the Charter School by the Board. However, as explained in the February 26, 1997 letter from Michael Azzara, director, Office of Finance, to the superintendent of the Red Bank Schools, the Department's calculation of estimated appropriations for the Red Bank Charter School is based on the Charter School Program Act of 1995, the Comprehensive

Educational Improvement and Financing Act, L. 1996, c. 138, proposed charter school regulations and proposed regulations for the school financing plan.

The Department of Education is currently acting in accordance with pending charter school regulations, as well as pending funding law regulations, in order to conform with the Legislature's intent that charter schools begin operations upon the effective date of the Charter School Program Act. Complying with these proposed regulations does not violate any express or implied legislative policies, as the regulations were drafted as per the directive of the Legislature in N.J.S.A. 18A:36A-1B. See Matter of Musick, 143 N.J. 206, 216 (1996) (when reviewing actions of administrative agencies, courts should act only if the agency action violates express or implied legislative policies). In accordance with N.J.S.A. 18A:36A-1 et seq., the regulations will be in effect when the charter schools begin operations, and must be followed, as they will have the force and effect of law. See Middle Tp. v. Pub. Developers, 240 N.J. Super. 445, 448 (Ch. Div. 1990) ("Administrative rules and regulations are not statutes, but if otherwise valid, properly promulgated and extant, they have the weight, force and effect of law."); Ronald Kelly v. City of Camden, A-6182-91T2, decided May 13, 1993 (reasonable for an administrative agency to follow pending rules when rendering a determination where no express or implied legislative policies were violated). Because compliance at this time is necessary in order to fulfill the mandate of N.J.S.A. 18A:36A-1 et seq. by enabling charter schools to begin operation, the Department of Education may reasonably follow the pending regulations in this case, as there is no other available basis for determining the amount of appropriations for charter schools in accordance with N.J.S.A. 18A:36A-1 et seq. In addition, at the time charter schools are provided with their appropriations, the regulations will likely have been enacted.

The Board also argues that the grant of a charter was improper in this case because the Board must be provided an opportunity for a hearing prior to the grant of a charter. The Board suggests that the United States and New Jersey Constitutions guarantee it the right to due process of law and thus to a hearing prior to the granting of a charter to the Red Bank Charter School. This argument is belied by N.J.S.A. 18A:36A-1 et seq., and provides no basis for a determination that the Board will prevail on the merits in this matter. To the contrary, N.J.S.A. 18A:36A-4(c) bestows the authority to grant or deny a charter upon the Commissioner of Education. A local board of education or the charter school applicant may appeal the

Commissioner's determination to the State Board of Education. However, the statute confers no right to a hearing prior to, or after, the Commissioner makes such determination.

Neither does the Board's due process argument provide a basis for concluding that the Board is entitled to a hearing before the Commissioner may render a determination as to whether or not to grant a charter. The Board's argument is premised on the assertion that the right to education is somehow being denied to unidentified parties. Because the Red Bank Board of Education is not a person or a student, it cannot allege the denial of a right to due process under the United States and New Jersey Constitutions. The Red Bank Board of Education has no right to an education. Likewise, it is not a person that either constitution contemplates may assert a due process right. Therefore, this argument provides no basis for a determination that the Board will succeed on the merits of its appeal. See generally, City of Newark v. New Jersey, 262 U.S. 192, 196, 43 S.Ct. 539, 540, 540 (1923) (as a subdivision of the State, "a city cannot invoke the protections of the Fourteenth Amendment against the State"). See also, McKenney v. Byrne, 82 N.J. 304, 315 n.4 (1980) (municipal corporations do not have standing to raise equal protection arguments against the State); North Bergen Tp. in Hudson County v. Hackensack Meadowlands Development Com'n, 200 N.J. Super. 579, 583 (App. Div. 1985); Booth v. Tp. of Winslow, 193 N.J. Super. 637, 639 (App Div. 1984), cert. denied, 97 N.J. 657 (1984), cert. denied, 469 U.S. 1107, 105 S.Ct. 781, 83 L.Ed.2d 776 (1985).

Finally, the Board's argument that it is entitled to a hearing in order to protect its right to due process is also misplaced because the grant of a charter is not an act that requires a hearing prior to reaching a determination. In High Horizons Development Company v. State Department of Transportation, 120 N.J. 40 (1990), the Supreme Court held that if an agency is acting in a quasi-judicial capacity, parties have a right to a hearing. If the agency is acting in a legislative capacity, there is no right to a hearing. In order to determine if an agency is acting in a judicial capacity, an inquiry should be made as to whether the agency must consider evidence and apply the law to the facts found. Id. at 50. In the within matter, a determination was made as to whether the application to form a charter school was complete and worthy of granting the charter. There was no need to gather evidence or apply law to the found facts. Thus, the determination to grant a charter is not a quasi-judicial function, but is more akin to a legislative or executive act.

Therefore, neither the applicant for a charter nor a local school board has a right to a hearing prior to a determination by the Commissioner as to whether a charter should be granted.

Based on the foregoing, the Board has failed to demonstrate a likelihood of success on the merits of its appeal. Therefore, the second criterion for issuance of a stay has not been satisfied.

With regard to the final two criteria, the weighing of the relative harms to those involved and the public interest, the Board has failed to demonstrate that it will be harmed in any meaningful way if the Commissioner does not stay his approval of the charter at issue. The Red Bank Charter School, on the other hand, will suffer irreparable harm if it is denied the opportunity to obtain a facility to house its school, begin to admit students, and take other preparatory steps necessary to begin operations in September 1997. Further, as set forth in N.J.S.A. 18A:36A-2, the Legislature has determined that it is the public policy of the State, and thus in the interest of the public, that charter schools be established. Therefore, the Board cannot satisfy the final two criteria for issuance of a stay.

Based on the foregoing, the Board's application for stay of the Commissioner's February 21, 1997 grant of a charter to the Red Bank Charter School is hereby DENIED.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that the Board objected to the Commissioner's acceptance of the Charter School's reply to its motion, as such reply was filed with the Commissioner within the specified time frame, but not served upon the Board until later in the day. The Board contends that this delay prejudiced its ability to file a reply to the Charter School's submission. The Commissioner rejects this assertion, however, in that, due to the urgency of this application, no reply to the Charter School's response was contemplated or requested as part of these proceedings, so that there has been no prejudice to the Board by the Commissioner's acceptance of the Charter School's filing.

March 10, 1997
Date Faxed, March 10, 1997
Date of Mailing, March 11, 1997

110-97

C & A WINDOW SERVICE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning contractor for window repair service alleged it was the successful bidder and sought to enjoin the District from rebidding, averring that the Board wrongfully rejected all bids due to a bid protest.

ALJ dismissed petition, concluding that the District could exercise its discretion to reject all bids and to readvertise a contract to provide district-wide window repair services. ALJ found that bids were not rejected solely because a protest had been filed.

Commissioner adopted findings and determination in initial decision as his own.

MARCH 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7679-96

AGENCY DKT. NO. 265-7/96

C & A WINDOW SERVICE,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Thomas Brugger, President of C & A Window Service, appearing pursuant to *N.J.A.C.* 1:1-5.4(a)5, for petitioner

Gregory G. Johnson, Esq., for respondent

Record Closed: January 16, 1997 Decided: January 24, 1997

BEFORE **EDITH KLINGER**, ALJ:

C & A Window Service, petitioner, alleges that it was the successful bidder for a contract to provide window repair services at the Oliver Street School in the State-Operated School District of the City of Newark (District). Petitioner appeals the District's rejection of all bids on the project and the District's subsequent solicitation of bids for district-wide window repair.

Thomas Brugger, President of C & A, filed a petition with the Commissioner on July 5, 1996, requesting that the decision of the District be reversed and that he be awarded the contract for the Oliver Street School. The District filed its answer on July 25, 1996. On July 30, 1996, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Brugger requested emergency relief enjoining the District from awarding the contract for window repair until after the decision of his appeal in this matter. The relief was denied in an order, dated August 5, 1996, by Richard McGill, Administrative Law Judge. This matter was then assigned to the undersigned for hearing. The hearing was held on January 16, 1997 and the record closed on that date.

REVIEW OF EVIDENCE

In June 1995, the Newark Board of Education decided to solicit bids to repair the windows at the Oliver Street School in the district. The plan was to fix that one building and no thought was given at the time to the repair of windows in other schools. Invitations to bid were sent to vendors which expressed interest in doing the work. The bids were to be opened on April 30, 1996.

The invitation to bid provided to prospective bidders contained the following specifications:

> D3.3 The District reserves the right to reject any and all proposals and waive any informality in any proposal and to make the award in the best interest of the school district. Award of contract will be subject to availability of funds.
>
> E8.2 The District may (a) reject any or all bids, (b) accept other than the lowest bid, and (c) waive informalities or minor irregularities in bids received.

Pursuant to paragraph G2.1, if a written contract is required, a bid is accepted by the District when a section, located on the first page of the invitation to bid, is completed which documents the approval of the Board of Education. If no written contract is needed, the invitation to bid and a notice of acceptance of the bid constitutes the contract between the District and the vendor. Brugger received neither of these acceptances from the District.

The total bidding price submitted by each vendor appears in the following form in the proposal:

ITEM NO.	DESCRIPTION	TOTAL
1	Repair 410 window units at Oliver Street School	_____
2	Contingency allowance to allot funds for unforeseen obstacles or supplies	+_____10%
	Last item	$_____

Nothing in the document requires that a vendor add a contingency allowance to its proposed price.

On April 30, 1996, the bids were opened and C & A's bid of $14,350 was the lowest. Out of the six vendors submitting bids, it was the only one which did not provide for a contingency allowance. Gregory Fox, the owner of Window Repair Systems, the second lowest bidder, verbally protested to the District that specification #3725, which related to the contingency allowance, was confusing. If Window Repair Systems had not submitted a ten-percent contingency allowance, it would have been the lowest bidder. John Murphy, vice president of sales and marketing for Window Repair Systems, wrote to Robert Burroughs, a Senior Buyer in the Purchasing Department of the Newark Board of Education, on May 17, 1996 to request that only its price of $13,940 without the contingency of $1,394 be considered as its bid for the contract.

Fox, who testified at hearing, has been in the window repair business since 1989 and has submitted bids on hundreds of school contracts. He stated, without contradiction, that he has never seen another invitation from a school system to bid which did not contain the requirement that the bidder provide a contingency in addition to the bid price. Brugger argues that the invitation to bid contains paragraph E5.1, which requires prospective bidders to seek, in writing, an explanation of any provision of the solicitation which they do not understand before submitting their proposals.

On April 30, 1996, Brugger called and spoke to Burroughs. Burroughs stated his opinion that C & A had been the lowest bidder and would probably get the contract. He did not represent to Brugger that he had the authority to approve a bid nor did he state that Brugger could rely upon his representations. On May 17, 1996, Burroughs drafted a Newark Public Schools, Purchasing Action Activity form recommending that the contract be awarded to C & A, whose bid conformed to all specifications, as the lowest bidder. He testified that this form, when finalized, is only his recommendation and does not in any sense constitute an acceptance of the bid by the District.

A draft of Burrough's Activity Form is in evidence. This was not the final version of the recommendation which could have been very different from the draft. Neither the final form nor the draft were ever provided to Brugger.

According to Burroughs, his decision is made solely on the basis of price. He drafts a Purchasing Action Activity form. After a meeting with his supervisor, Linda Armenio, a final draft of the form is submitted to "higher-ups" for their approval. If the recommendation is approved and a contract results, then a purchase order must be issued to the vendor. No purchase order was ever issued to Brugger. Armenio stated that the District has no liability to pay a vendor unless a purchase order is issued.

These events occurred during the time that the management of the Newark schools was in transition from the Board of Education to the State-Operated District. In June 1996, Robert Harding, Deputy General Services Administrator, Department of the

Treasury, was on loan to the Newark school system to serve as the Acting Executive Director of Purchasing and Warehousing.

On June 5, 1996, Harding approved, *pro forma*, the award of the Oliver Street School contract to C & A as the lowest bidder and the State District Superintendent signed the Purchasing Action Activity form on June 10, 1996. No one considered the nature of the project.

On June 19, 1996, Brugger wrote to Harding to complain about the protest from Window Repair Systems and to find out the status of C & A's bid. This letter caused Harding to review the bidding for Oliver Street and, as a result, to reconsider his prior approval of the award and, in fact, the whole project. He testified that his change of mind was based solely upon the nature of the work for which bids were solicited, not the protest of Window Repair Systems. The protest was merely the catalyst which caused him to look more closely at the project.

He explained that, upon reappraisal, he concluded that the manner in which bids were solicited was indicative of the generally poor planning he felt to be characteristic of the District. It takes as much time and effort to develop the specifications for this type of repair for one school building as it does for twenty buildings. The district would also enjoy greater savings if the volume of work to be bid on were larger. For these reasons, it was decided that it was in the best interest of the District to reject all of the bids for Oliver Street and to solicit vendors to bid on window repair services for a number of District school buildings. Brugger was notified of this decision and the reasons for it in a letter from Harding dated July 1, 1996. Harding also invited him to submit a bid on the new project.

A Purchasing Action Activity form, dated July 24, 1996, was submitted by Linda Armenio on July 22, 1996, approved by Harding and approved by Beverly L. Hall, State District Superintendent, on July 30, 1996. The document reads as follows:

> Bids were received on Tuesday, April 30, 1996, for Window Repair Service at Oliver Street School. A recommendation for award of contract was approved for C & A Window service.
>
> Upon further evaluation the specification, as written, did not represent the needs of the District and it was decided to reject all bids as per section D3, Paragraph D3.3 of the specification.
>
> A new bid specification will be developed to include multiple school locations which will be more cost effective and better address the window repair requirements within the District.
>
> It is recommended that the State District Superintendent approve the rejection of all bids associated with this specification.

Brugger indicated at hearing that he relied upon his position as lowest bidder and purchased materials in anticipation of being awarded the contract for the Oliver Street School.

FINDINGS OF FACT

Based upon the evidence presented, I **FIND** the following facts:

1. C & A was never awarded the contract to provide window repair services for the Oliver Street School. Petitioner erroneously concluded that he, as the lowest bidder, was automatically entitled to the award, in spite of the District's reservation of rights in paragraph D3.3 of the specification.

2. C & A had no reason to rely upon the opinion of Burroughs since Burroughs lacked authority to award a contract and Brugger never received any official notification from the District that he would be authorized to proceed with the work.

3. The District did not reject all of the bids because of the protest of Window Repair Systems. Harding's attention was called to the project because of the

Receipt Acknowledged:

1/28/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 30 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

For Petitioner:

Robert Burroughs

Robert Harding

For Respondent:

Thomas Brugger

Gregory Fox

Linda Armenio

Exhibits

J-1 Bid of C & A

J-2 Letter, Harding to Brugger, July 1, 1996

J-3 Purchasing Action Activity form, June 5, 1996

J-4 Letter, Brugger to Harding, June 19, 1996

J-5 Purchasing Action Activity form, July 24, 1996

P-1 Memorandum, Burroughs to File, May 20, 1996

P-2 Action Form Information (draft), May 17, 1996

R-1 Letter, Murphy to Burroughs, May 17, 1996

R-2 Tabulation, Spec 2750

OAL DKT. NO. EDU 7679-96
AGENCY DKT. NO. 265-7/96

C & A WINDOW SERVICE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by petitioner in conformance with *N.J.A.C.* 1:1-18.4. No replies were filed by respondent District.

Petitioner's exceptions essentially recast and reiterate arguments expressed before the Administrative Law Judge (ALJ) at hearing, contending that pursuant to applicable bidding statutes the District should not have rejected all bids, including its bid, simply because a competing company filed a protest. Petitioner sets forth what it considers as reasons for rejecting a bid as where,

> 1) All of the bidders prices exceed allotted amount; 2) None of the bidders are qualified to complete work; and; 3) Funds are not available. (Petitioner's Exceptions at p. 3)

Petitioner asserts that none of these reasons existed in the within matter. Consequently, petitioner takes exception to the ALJ's application of *Miller v. Passaic Valley Water Commission, supra,* concurring that it stands for the proposition that a school district has the right to reject all bids under proper circumstances, but denying that the proper circumstances for

rejecting bids existed herein. (Petitioner's Exceptions at p. 3) Petitioner notes that in its answer, the Board admitted that petitioner was low bidder. Lastly, petitioner avers that

> ***[s]ince this dispute began***, the Newark School District['s] position and statements have contained several inconsistencies.***
> (*Id.* at p. 4)

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ that the District's rejection of all bids for the window repair work at the Oliver Street School was a reasonable and proper exercise of its discretion and that bids were not rejected solely because a protest had been filed.

Accordingly, the Commissioner adopts the initial decision of the OAL for the reasons expressed therein and dismisses the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 11, 1997

DATE OF MAILING MARCH 11, 1997

111-97

P.A.A. and A.O.A., on behalf of minor child, A.A.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, AND JACQUELINE L. CUSACK,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

MARCH 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3006-96
AGENCY DKT. NO. 20-1/96

P.A.A. and A.O.A. on behalf of A.A.,
Petitioners,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, and JACQUELINE A. CUSACK,
Respondents,
and
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD,
Counterclaimant,
v.
P.A.A. and A.O.A. on behalf of A.A.,
Counterclaimant-Respondent.

Olubukola O. Adetula, Esq., for petitioners

Joanne L. Butler, Esq., for respondents,
(Schenck, Price, Smith & King, for respondent)

Record Closed: December 31, 1996 Decided: January 22, 1997

BEFORE: **ELINOR R. REINER**, ALJ:

On January 23, 1996, petitioners P.A.A. and A.O.A. on behalf of A.A., filed a petition of appeal with the Commissioner of Education alleging that A.A. was wrongfully denied admission into the South Orange-Maplewood school district as a student eligible for free public education within the school district. Respondents filed an answer and counterclaim on February 21, 1996, alleging that petitioners failed to satisfy the domicile and affidavit provisions of *N.J.S.A.* 18A:38-1 and seeking dismissal of the petition. Respondents also counterclaimed for tuition for the period of ineligible attendance of A.A. in respondent school district. On March 5, 1996, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on April 9, 1996, and a telephone prehearing conference scheduled for July 10, 1996. The prehearing conference was held on that date, at which time the issues were isolated and a hearing scheduled for December 5 and 6, 1996 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. As a result of settlement conferences held between the parties, a settlement was reached and the hearing was adjourned.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and Mutual Withdrawal of Pleadings, indicating the terms of settlement.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 22, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1/27/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 28 1997
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

al

DEC 31 10 42 AM '96

SCHENCK, PRICE, SMITH & KING
ATTORNEYS AT LAW

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NEW YORK OFFICE
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NEW YORK, N.Y. 10178-3898
(212) 986-6482

December 30, 1996

The Honorable Elinor R. Reiner
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Adeniran for A.A. v. South Orange/Maplewood Board of Education
Agency Reference #20-1/96
Our File No. 12459-0037

Dear Judge Reiner:

Enclosed for filing, please find an original and two (2) copies of executed Stipulation of Settlement and Mutual Withdrawal.

Kindly return one copy stamped "filed" in the enclosed envelope.

Your Honor's courtesy and attention in this regard have been greatly appreciated.

Respectfully submitted,

Joanne L. Butler

Joanne L. Butler

JLB:ss
Enclosures
cc: Olubukola O. Adetula, Esq.

F:\APPS\SSOLDATA\WPJLB\195440.1

DEC 31 10 42 AM '96

SCHENCK, PRICE, SMITH & KING
Attorneys at Law
10 Washington Street
P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for Respondents South Orange/
Maplewood Board of Education and
Jacqueline L. Cusack

PEJU O. ADEBO-ADENIRAN; AMOS OLADEJO ABOYADE and AYOADE ABOYADE, Petitioner, v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, and JACQUELINE L. CUSACK, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAK DKT NO. EDUOS 03006-96N AGENCY REF. NO. 20-1/96
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Counterclaimant, v. PEJU O. ADEBO-ADENIRAN and AMOS OLADEJO ABOYADE, Counterclaim Respondents.	**STIPULATION OF SETTLEMENT AND MUTUAL WITHDRAWAL OF PLEADINGS**

Petitioners/Counterclaim Respondents Peju O. Adebo-Adeniran Amos Oladejo Aboyade and Ayoade Aboyade, and Respondent/ Counterclaimant Board of Education of the School District of South Orange and Maplewood, and Respondent Dr. Jacqueline Cusack herein stipulate as follows:

1. This settlement is being made without any admission of

liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, and specifically release the other parties from any claims arising out of or related to these claims.

3. The pupil A.A. will be permitted to continue to attend District schools so long as he satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, et seq. Petitioner Amos Oladejo Aboyade must complete all resident registration documents and satisfy all registration criteria.

4. As a result of the foregoing, Petitioners hereby withdraw the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

PETITIONERS

Peju O. Adebo-Adeniran

Amos Oladejo Aboyade

Ayoade Aboyade

RESPONDENT BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

BY:

Respondent Dr. Jacqueline Cusack

OAL DKT. NO. EDU 3006-96
AGENCY DKT. NO. 20-1/96

P.A.A. and A.O.A., on behalf of minor child, A.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, AND JACQUELINE L. CUSACK,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MARCH 11, 1997

DATE OF MAILING MARCH 11, 1997

112-96

EDU #8770-95
C # 112-96
SB # 32-96
C # 68-97R
SB # 26-97

J.B., on behalf of her grandchild, R.H.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 25, 1996

Decision on motion by the State Board of Education, October 2, 1996

Remanded by the State Board of Education, December 4, 1996

Decision on remand by the Commissioner of Education, February 11, 1997

For the Petitioner-Respondent, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Appellant, Kramer, Kramer & Kilgallen (Honora O'Brien Kilgallen, Esq., of Counsel)

For the amicus curiae New Jersey School Boards Association, Donna M. Kaye, Esq.

This case commenced in August 1995 when J.B. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education challenging the determination of the Board of Education of the Township of Ocean (hereinafter "Board") that her

9/3/97

grandson, R.H., who was living with her within the district, was not entitled to a free public education in the district's schools.

On February 6, 1996, following a hearing, an Administrative Law Judge ("ALJ") concluded that petitioner had failed to establish that R.H.'s parents were not capable of supporting or providing care for him due to a family or economic hardship, as required by N.J.S.A. 18A:38-1(b)(1).[1] The ALJ stressed that "the only reason enunciated by petitioner for R.H. not living with his parents is because of family discord and because R.H. is much happier living with his grandmother." Initial Decision, slip op. at 10. The ALJ concluded that "this is not a legally sufficient reason for providing a free public education to a nonresident under the...statutory provisions." Id. Accordingly, the ALJ recommended dismissing the petition and directing petitioner to pay tuition to the Board for R.H.'s attendance in the District's schools.

On March 25, 1996, the Commissioner rejected the ALJ's recommended decision. The Commissioner agreed with the ALJ that petitioner had established that R.H. was being kept in her home and supported by her gratis and that petitioner had

---

[1] N.J.S.A. 18A:38-1 provides, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
> a. Any person who is domiciled within the school district;
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements....

assumed all personal obligations for R.H. with regard to school requirements. However, in contrast to the ALJ, the Commissioner found that "[t]he unique and compelling circumstances present in this matter...rise to the level of constituting family hardship sufficient to meet the standard of the pertinent statute." Commissioner's Decision, slip op. at 15. Accordingly, he concluded that "petitioner has demonstrated that R.H.'s parents are not capable of providing care for him due to family hardship, thereby establishing R.H.'s entitlement to a free public education in the School District of the Township of Ocean." Id. at 15-16. The Board filed an appeal from that decision to the State Board.

In a decision dated December 4, 1996, we remanded this matter to the Commissioner, explaining that:

> The express language of N.J.S.A. 18A:38-1(b) requires more than simply a finding of family hardship in order for a child kept in the home of another person domiciled within the district to be entitled to a free public education in that district. Rather, the hardship must be of such nature that the parents or guardian are not capable of supporting the child or providing care as a result of that hardship. The Commissioner found that the circumstances herein "[rose] to the level of constituting family hardship sufficient to meet the standard of the pertinent statute," Commissioner's decision, slip op. at 15, but only indicated that R.H.'s parents were not capable of providing care to him as a result of that hardship in conclusory fashion in the last line of his decision. Consequently, it is unclear to us whether the Commissioner applied the proper standard in determining this matter.

State Board's decision, slip op. at 3-4.

Thus, our decision stressed that N.J.S.A. 18A:38-1(b) provides a two-part test for establishing hardship. Under the statute, there must not only be a "family or economic hardship," but the child's parent or guardian must also be "incapable of supporting or

providing care for the child due to [that] hardship." It is also evident from the express language of the statute that neither the hardship nor the resultant incapability of the parent or guardian to provide care need be financial in nature.

As a result, we found it necessary to remand this matter to the Commissioner for a determination under the specific standard set forth in N.J.S.A. 18A:38-1(b) of whether R.H. was entitled to a free public education in Ocean Township, as well as for an articulation of his reasons for any rejection or modification of the ALJ's recommendation in conformity with the requirements of N.J.A.C. 1:1-18.6(b). Under the circumstances, we also directed that, in order to avoid any unnecessary disruption to R.H., he could continue to attend public school in Ocean Township free of charge pending a final determination on remand by the Commissioner.

On February 11, 1997, the Commissioner issued a decision on remand in which he reaffirmed his previous determination that R.H. was entitled to a free public education in Ocean Township. The Commissioner, in reliance upon the testimony as summarized by the ALJ,[2] found that "the mere fact that the family strife in this matter has continued, despite an apparent recognition of the serious and detrimental effects of such conflict on R.H., suggests that R.H.'s parents, sadly, are incapable of meeting his emotional, social and developmental needs." Commissioner's Decision on Remand, slip op. at 2-3. The Commissioner did not conduct additional hearings or reopen the record for purposes of this decision.

[2] We note that the parties did not provide the Commissioner or the State Board with a copy of the transcript from the hearing held in the Office of Administrative Law in this matter until August 28, when the Board sent a copy to us after the deadline for filing exceptions to the report of our Legal Committee.

The Board has filed the instant appeal to the State Board from the decision of the Commissioner on remand.

After a careful review of the record, we again remand this matter to the Commissioner.

We reiterate that N.J.S.A. 18A:38-1(b)(1) provides, inter alia, that a child kept in the home of another person domiciled within the district is entitled to a free public education in that district if the parent or guardian of the child "is not capable of supporting or providing care for the child due to a family or economic hardship." That language was added to the statute by L.1993, c. 380, § 1, effective January 11, 1994.

In this case, we are hesitant to conclude solely on the basis of the record before us, which did not include a copy of the transcript of the hearing held in the Office of Administrative Law,[3] that petitioner has demonstrated R.H.'s entitlement to a free public education in Ocean Township. However, we were also unable to determine on the basis of this record whether petitioner was provided with an adequate opportunity to demonstrate such entitlement under the proper legal standard, i.e., that R.H.'s parents are not currently capable of supporting him or providing care due to the existence of a family or economic hardship. We stress in that regard that the Commissioner did not conduct additional hearings prior to rendering his decision on remand, relying solely on the ALJ's summary of the testimony in rejecting the ALJ's legal conclusion.

Under these circumstances, and taking into consideration the fact that the 1994 amendment to N.J.S.A. 18A:38-1(b) significantly modified the statutory standard, we are compelled to remand this matter to the Commissioner for further proceedings in

[3] See n.2, supra.

order to ensure that petitioner is provided with a sufficient opportunity to demonstrate R.H.'s entitlement to a free public education in the schools of Ocean Township under the express standard set forth in N.J.S.A. 18A:38-1(b).[4] We emphasize that in order to satisfy that standard, the family or economic hardship must be real and demonstrable, evincing a current incapability on the part of R.H.'s parents to support him or provide care as the result of that hardship.

As in our previous decision, we direct that R.H. may continue to attend public school in Ocean Township free of charge pending a final determination by the Commissioner on the instant remand.

We do not retain jurisdiction.

Attorney exceptions are noted.

September 3, 1997

Date of mailing SEP 05 1997

[4] We note, in response to exceptions filed by the Board to the report of our Legal Committee, that there is nothing in our decision that would preclude the Commissioner from reviewing the transcript of the hearing held in the Office of Administrative Law, which is now part of the record in this matter. See n.2, supra.

113-97

ANNE PETERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7845-95

AGENCY DKT. NO. 243-7/95

ANNE PETERS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

Rodney T. Hara, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: January 8, 1997 Decided: January 23, 1997

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a petition filed with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9, *N.J.S.A.* 18A:29-14, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. The parties have now submitted a Resolution and Release in the matter which is annexed. Having reviewed the terms of settlement and it appearing that it fully disposes of issues in

controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the terms of settlement and that these proceedings be and hereby are concluded.

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

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

1/23/97
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

1/27/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

KLAUSNER & HUNTER

ATTORNEYS AT LAW

Stephen E. Klausner○
Stephen B. Hunter

James P. Madden
David L. Rosenberg

○*Member NJ and NY Bars*

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January 2, 1997

Reply to: ***Somerville***

Honorable Solomon Metzger
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, N.J. 08625

RE: ANNE PETERS vs. MARLBORO TOWNSHIP BOARD OF EDUCATION
DOCKET NO. EDUOR 97845-95S
AGENCY REFERENCE NO. 243-7/95

Dear Judge Metzger:

Enclosed please find the executed Settlement Agreement and pertinent Board resolution resolving the above captioned matter. The settlement, in pertinent part, resulted in the restoration of the increments at issue in this proceeding.

In light of this settlement Petitioner wishes to withdraw the above captioned Petition of Appeal.

Please contact me if you have any questions concerning this matter.

Respectfully submitted,

Stephen B. Hunter

SBH/vjb
Enclosures
cc: Rod Hara, Esq.
Anne Peters
Marc Abramson

Marlboro Township Public Schools

1980 TOWNSHIP DRIVE, MARLBORO, NEW JERSEY 07746-2298

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GAIL BECKER
GLORIA FISCHKIN
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CYNTHIA GREEN
MURRAY HOFFMAN
MARK ORENZOW
ADAM VICTOR REED

CAROL MAJONIS
PRESIDENT

WARREN BRUMEL
VICE PRESIDENT

ANNETTE BUNTING
BOARD SECRETARY/BUSINESS ADMINISTRATOR

MARC GASWIRTH
ACTING SUPERINTENDENT OF SCHOOLS

RESOLUTION

On motion of Adam Reed, seconded by Mark Orenzow, the Acting Superintendent of Schools submitted the following resolution for approval:

BE IT RESOLVED, that the salaries of employee number 069592, whose name is on file in the office of the Board Secretary/Business Administrator, be adjusted as indicated below:

School Year	From	To
9/1/95 through 6/30/96	$ 56,420.00* Per Annum	$ 58,470.00** Per Annum
9/1/96 through 6/30/97	58,620.00** Per Annum	60,670.00*** Per Annum

* Includes $2,100.00 longevity
** Includes $2,500.00 longevity
*** Includes $2,900.00 longevity

The resolution was approved and adopted by a vote of **5-0**.

I HEREBY CERTIFY THE ABOVE TO BE A TRUE AND EXACT COPY OF RESOLUTION APPROVED AND ADOPTED ON **DECEMBER 17, 1996.**

Annette Bunting

ANNETTE BUNTING
BOARD SECRETARY/BUSINESS ADMINISTRATOR

DEC17PER.WPD

RELEASE

This Release, dated November , 1996 , is given

BY the Releasor(s) ANNE PETERS

referred to as "I",

TO MARLBORO TOWNSHIP BOARD OF EDUCATION and present and former members, officers, employees and agents,

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

Any and all claims that pertain to any decision or action of the Board of Education, Harvey Abramson and any other member, officer, employee or agent of the Board of Education which are connected to or related to my employment with the Board of Education, except for a workers' compensation claim bearing case number 96-024014 and the prosecution of two grievances bearing docket numbers AR-96-75 and AR-96-488. No other administrative complaint or civil action may, however, be filed against the releasees in connection with the workers' compensation claim and grievances.

STATE OF NEW JERSEY, COUNTY OF MONMOUTH SS.: 144-32-7399

I CERTIFY that on NOV. 29, 1996,

ANNE C. PETERS personally came before me and stated under oath to my satisfaction that:

(a) this person was the subscribing witness to the signing of the attached instrument;

(b) this instrument was signed by ANNE C. PETERS

who is TEACHER of HARLBORO MIDDLE SCHOOL the entity named in this instrument, and was fully authorized to and did execute this instrument on its behalf; and,

(c) the subscribing witness signed this proof under oath to attest to the truth of these facts.

Signed and sworn to before me on , 19 .

(Print name of witness below signature)

(Print name and title below signature)

RELEASE

Dated: November , *19* 96

OAL DKT. NO. EDU 7845-95
AGENCY DKT. NO. 243-7/95

ANNE PETERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

MARCH 11, 1997
DATE OF MAILING MARCH 11, 1997

114-97

114-97

FRANK KARTAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured guidance counselor, alleged the Board violated his tenure rights when it assigned him one period of math teaching duties in addition to his primary responsibilities as a guidance counselor.

ALJ concluded that the Board properly exercised its managerial prerogative when it assigned petitioner to teach one math class in addition to his regular counseling duties as the assignment was within the scope of his instructional certificate. ALJ found that because petitioner was never "dismissed" from his guidance counselor position in any meaningful sense of the word and because he did not incur any reduction in compensation, he did not have a viable tenure claim. Petition was dismissed.

Commissioner adopted findings and determination in initial decision, clarifying that petitioner's assignment to teach one algebra period per day did not constitute a "transfer" from one position to another unlike petitioners in *Childs* and *Gerdes*. Petitioner herein remained in a full-time counseling position, even though his counseling duties may have been alleviated correspondingly to accommodate the newly assigned math duty and he suffered no loss in status or pay.

MARCH 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11371-95

AGENCY DKT. NO. 338-8/95

FRANK KARTAN,

Petitioner,

v.

NORTH ARLINGTON

BOARD OF EDUCATION,

Respondent.

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

Glenn T. Leonard, Esq., for respondent

Record Closed: October 15, 1996 Decided: January 22, 1997

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

Procedural History

This is an appeal by a tenured teaching staff member who objects to being assigned one period of teaching duties in addition to his primary responsibilities as a guidance counselor. Petitioner, who began his employment as a math teacher more than thirty years ago, has dual certification as a guidance counselor and a teacher of

mathematics. For the last eighteen years, however, he had served exclusively as a high-school guidance counselor. Essentially, petitioner contends that his assignment to teach a single class of math per day violates his tenure rights as a guidance counselor acquired under his educational-services certificate. North Arlington Board of Education ("Board") maintains that it must have the flexibility to assign teaching staff anywhere they are needed within the scope of whatever certificates they possess.

Procedural History

On August 18, 1995, petitioner Frank Kartan ("Kartan") filed a verified petition with the Commissioner of Education ("Commissioner"), challenging his assignment to teach one period of math per day for the 1995-96 academic year.[1] Thereafter, on October 4, 1995, the Board filed its answer. Subsequently, on October 5, 1995, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on September 11, 1996. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Most of the material facts have been stipulated by the parties.[2] **I FIND**:

Petitioner was employed by the Board as a teaching staff member for thirty-two years prior to the start of the 1995-96 school year. He began his service in the district as a teacher of mathematics. He was properly certified for such employment.[3] He was

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[1] The parties entered into a factual stipulation covering Kartan's continued assignment in the 1996-97 academic year. Thus, the controversy extends to the current academic year as well.

[2] References to the supporting joint exhibits have been omitted.

[3] Petitioner possessed a provisional instructional certificate with an endorsement as teacher of mathematics issued in June 1963 and a permanent certificate issued in January 1968. *N.J.A.C.* 6:11-6.2(a)(14).

employed as a full-time teacher of mathematics for the 1963-64 through 1971-71 school years inclusive and the 1972-74 through 1976-77 school years inclusive. He was employed in a guidance position for the 1972-73 school year. By virtue of his service and certification, petitioner gained tenure in a teaching position.[4]

For the 1977-78 through 1994-95 school years, inclusive, petitioner was employed as a full-time high school guidance counselor. He was properly certified for such employment.[5] By virtue of his service and certification, petitioner gained tenure as a guidance counselor.[6]

On June 19, 1995, the Board adopted a resolution approving various staff transfers for the 1995-96 school year, including the assignment of Frank Kartan "to the middle school for one period per day to serve as a certified math teacher." Petitioner was notified of the Board's action in a letter dated June 21, 1995. Respondent did not abolish any guidance counselor positions for the 1995-96 school year. Petitioner's compensation was not reduced by virtue of his assignment to teach one period of mathematics per day for the 1995-96 school year.[7] For the 1995-96 school year, petitioner was assigned to teach Algebra I to eighth grade pupils at respondent's middle school. This class was taught during the school's 0 period, which began at 7:10 a.m.[8]

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[4] *N.J.S.A.* 18A:28-5(b) provides that tenure accrues to teachers after employment in a school district for "three consecutive academic years, together with employment at the beginning of the next succeeding academic year."

[5]Petitioner possessed a provisional educational-services certificate with an endorsement in student personnel services issued in September 1972 and a permanent certificate issued in April 1973.

[6] *N.J.S.A.* 18A:28-6 (b) confers tenure on any tenured or tenure-eligible teaching staff member who is transferred or promoted to a new position after "employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year.:

[7]Guidance counselors in the district are paid on the same salary scale as teachers.
[8]A "zero period" is an extra period which takes place before the start of the regular school day.

On June 26, 1996, the respondent took action to transfer the petitioner to the middle school for Algebra I for the 1996-97 school year. Petitioner was notified of the respondent's action in a letter dated July 2, 1996. Respondent abolished an elementary guidance counselor position for the 1996-97 school year. Petitioner's compensation was not reduced by virtue of his assignment to teach mathematics one period per day. For the 1996-97 school year, petitioner has been assigned to teach Algebra I to eighth grade-pupils at respondent's middle school. The class is taught during the school's Period 2.

A job description adopted by the Board requires that a high school guidance counselor must have a certificate endorsed for student personnel services and must demonstrate "[a]t least five years of successful teaching experience." In addition to enumerated duties pertaining to counseling students and consulting with teachers and parents, a guidance counselor must be willing "[t]o accept and carry out additional professional responsibilities as requested by the building principal or Director of Student Personnel Services."

Over petitioner's objection, Dr. Jerilyn Caprio, the district's superintendent of schools, was allowed to testify about the educational reasons for Mr. Kartan's assignment. While petitioner does not seriously challenge the accuracy of her testimony, he argues that, as a matter of law, such reasons are irrelevant to a determination of his statutory tenure rights. According to Dr. Caprio, Kartan's transfer resulted from a consolidation of the sixth, seventh and eighth grades at the newly expanded middle school building. This change took two years of planning to accomplish. Previously, the eighth grade had been housed with the upper grades at the high school. The Board wanted to offer Algebra I to eighth graders, so that students would have an opportunity to take five years of mathematics before graduation. Due to scheduling conflicts in the middle school, Algebra I could only be scheduled for zero period. All of the other teachers certified to teach math were already teaching five classes, including Period 8 which is the last class of the day. None of them could be released earlier in the afternoon to compensate for having to

come in earlier in the morning to teach a zero-period class. Mr. Kartan was the only other teaching staff member in the district qualified to teach algebra.[9] Moreover, he enjoyed "a wonderful reputation as a math teacher."

Since the consolidation meant that the eighth-grade students became the responsibility of the middle school guidance counselor, Mr. Kartan's counseling load at the high school was correspondingly reduced. Last year, 116 eighth graders previously served by high-school guidance counselors were redistributed to the middle-school guidance counselor. School administrators were able to adjust Mr. Kartan's schedule so that he could teach Period 0 and finish his counseling duties at the end of Period 7. Consequently, his total number of working hours remained unchanged. He merely came to work and left one period early. In the current year, the district was able to revise Mr. Kartan's schedule so he could teach algebra during the regular school day.

Financial constraints in a district operating under a cap waiver caused the Board to reduce teaching staff in 1996-97. The superintendent is under instructions from the Board not to hire any new teachers. Even if adequate funds were available, Dr. Caprio emphasized the practical difficulty of recruiting a properly-certified math teacher willing to work only one period per day.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board properly exercised its managerial prerogative when it assigned petitioner to teach one math class in addition to his regular counseling duties.

Tenure is designed to protect capable teaching staff from dismissal "for unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63,

[9] Although an elementary endorsement allows one to teach the so-called "common branch subjects," such as reading, writing, and arithmetic, in the secondary schools, it does not permit the teaching of higher mathematics, including algebra. *See N.J.A.C.* 6:11-6.2(a)(6).

73 (1982). *Accord, Zimmerman v. Newark Bd. of Educ.*, 38 *N.J.* 65, 71 (1962), *cert. den.* 371 *U.S.* 956, 83 *S.Ct.* 508, 9 *L. Ed.* 2d 502 (1963). It aids in the establishment of a competent and efficient school system "by affording to principals and teachers a measure of security in the ranks they hold after years of service." *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). In general, an educator achieves tenure by serving a probationary period under a particular certificate.[10] *Dennery v. Passaic Cty. Reg. High Sch. Dist. #1*, 131 *N.J.* 626, 632-635 (1993). School employees are entitled to tenure if they (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. *Spiewak*, at 74

Both sides concur that Mr. Kartan has attained tenure in the position of teacher and separately in the position of guidance counselor. Initially, he accrued tenure as a teacher by serving under his *instructional certificate* for the requisite statutory period of three academic years and one day. *N.J.S.A.* 18A:28-5. Later, he also accrued tenure as a guidance counselor by serving under his *educational-services* certificate for two academic years and one day. *N.J.S.A.* 18A:28-6. Although the parties agree on Mr. Kartan's tenure status, they differ on the extent of his tenure rights. Petitioner asserts that the Board may not transfer him to a position outside the scope of his *educational-services* certificate, absent his consent or a reduction in force. But the Board maintains that it retains the managerial discretion to assign him to duties within the scope of his *instructional* certificate.

School boards have express statutory authority to transfer teaching staff members "by a recorded roll call majority vote of the full membership of the board." *N.J.S.A.* 18A:25-1. Furthermore, they retain the general power to "perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." *N.J.S.A.* 18A:11-1(d). Teacher transfers and reassignments are not

[10]State regulations establish three types of certificates: instructional, administrative, and educational services. *N.J.A.C.* 6:11-2.3. *Dennery,* at 633.

mandatorily negotiable terms and conditions of employment. New Jersey's highest court recognizes the importance of a school board's "managerial duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education." *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 *N.J.* 144, 156 (1978). Courts have upheld the transfer of a teacher from the high school to the junior high school, *Greenway v. Camden Bd. of Educ.*, 129 *N.J.L.* 46 (Sup. Ct. 1942), *aff'd* 129 *N.J.L.* 461 (E. & A. 1942), or of a principal from the high school to the middle school, *Williams v. Plainfield Bd. of Educ.*, 176 *N.J. Super.* 154 (App. Div. 1980), *certif. den.* 87 *N.J.* 306 (1981), even though the prospect of future salary increases may be lessened. *See also*, *Downs v. Hoboken Bd. of Educ.*, 12 *N. J. Misc.* 345 (Sup. Ct. 1934), *aff'd sub. nom. Fletcher v. Hoboken Bd. of Educ.*, 113 *N.J.L.* 401 (E. & A. 1934) (transfer of teachers to schools about to be closed); *Cheesman v. Gloucester City Bd. of Educ.*, 1 *N.J. Misc.* 318 (Sup. Ct. 1923) (transfer of teacher from seventh and eighth grade classes at one school to fifth and sixth grade classes at another). Similarly, the Commissioner has ruled that "[n]o teacher, in acquiring a tenure status, is guaranteed continuity of assignment or thereby acquires a vested right to any particular assignment, class or school." *Bigart v. Paramus Bd. of Educ.*, 1979 *S.L.D.* 123, 131 (Comm'r Feb. 23, 1979).

Each of these cases, however, involved the transfer of teaching staff members to different duties under the same certificate, as opposed to the present circumstances where Mr. Kartan continued his guidance duties under his educational-services certificate and assumed additional teaching duties under his instructional certificate. Support for petitioner's claim may be derived from *Childs v. Union Twp. Bd. of Educ.*, 1980 *S.L.D.* 1134 (Comm'r Sept. 29, 1980), *aff'd* 1981 S.L.D. 1404 (St. Bd. April 1, 1981), *aff'd* No. A-3603-80T1 (N.J. App. Div. July 19, 1982) [unofficially reported at 1982 *S.L.D.* 1456], *certif. den.* 91 *N.J.* 550 (1982), in which the Appellate Division held that a staff member had acquired tenure as a guidance counselor and, therefore, that the district could not transfer her involuntarily to her former tenured position as a teacher. Its reasoning was that the transfer to a position requiring a different certificate constitutes a "dismissal" within the meaning of *N.J.S.A.* 18A:28-5, which prohibits the

dismissal of a tenured staff member except for inefficiency, incapacity, unbecoming conduct or other just cause.

Several features distinguish *Childs* from our own case. Unlike *Childs* where the guidance counselor was switched to a full-time teaching position, here Mr. Kartan remained as a guidance counselor and was merely asked to teach one class in addition to his regular duties. In *Childs,* a vacancy was created in the guidance-counselor position which the board sought to fill with someone else, whereas Mr. Kartan continued as a high-school guidance counselor, albeit (like the other high-school guidance counselors in the district) he was relieved of some of his heavy caseload due to the transfer of eighth-grade students to the middle school. While the school administration in *Childs* posted a notice advertising for the guidance counselor's successor, the Board did not seek a replacement for Mr. Kartan. None of the evidence in *Childs* disclosed any valid educational reason for the transfer, while here the Board had the genuine educational purpose of strengthening its curriculum with an added year of mathematics. Although in *Childs* the petitioner suffered a reduction in compensation and a shortening of the school year, Mr. Kartan did not lose any salary or work any less number of hours. In short, Mr. Kartan's situation is substantially different from the factual pattern in *Childs* which the Appellate Division regarded as tantamount to a "dismissal" from her tenured position as a guidance counselor.

Other cases on which petitioner relies are equally dissimilar. For instance, *Gerdes v. Spotswood Bd. of Educ.*, 92 *N.J.A.R.* 2d (EDU) 168 (Comm'r Feb. 6, 1992) involved a school employee with tenure as a teacher under an instructional certificate and tenure as a cooperative-education coordinator under an educational-services certificate. She split her day between work performed under her instructional certificate and work performed under her educational services certificate. When the school board gave her cooperative-education duties to another person and assigned petitioner to full-time teaching duties, the Commissioner adopted the ALJ's analysis that petitioner's tenure rights had been violated. Analogizing the situation to one in which a tenured principal was reassigned back to a full-time classroom position, the ALJ commented, "While it is acknowledged a school principal may be assigned to teach certain classes,

there is no authority for a transfer from a tenure principal position *to a full-time teaching position.*" 92 *N.J.A.R.* 2d at 170 (Emphasis added). Thus, the deciding factor in *Gerdes* appears to be that petitioner was deprived of all cooperative-education responsibilities and relegated to a full-time teaching position. As noted earlier, nobody else edged Mr. Kartan out of his counseling duties and he continues to serve the district in the same capacity as a high-school guidance counselor.

Another case cited by petitioner, *Ayoub v. South Plainfield Bd. of Educ.*, 1988 *S.L.D.* 941 (Comm'r May 24, 1988), deals mainly with the unrelated issue of whether a school superintendent had the implied authority to act on behalf of the school board in assigning teaching staff. After working many years as a teacher, the petitioner in *Ayoub* was transferred to a coordinator position, where he remained for nearly six years. Despite the lack of any board resolution approving the transfer, the Commissioner held that petitioner had acquired tenure both as a teacher and as a coordinator. Later, the petitioner was transferred back to a full-time teaching position, while a recently-hired employee continued in the one remaining coordinator position. The Commissioner determined that the petitioner's reassignment to full-time teaching duties violated his tenure as a coordinator. Again, the situation is different from our own, in that Mr. Kartan did not actually forfeit his guidance position and was not replaced by someone without tenure.

Because Mr. Kartan was never "dismissed" from his guidance-counselor position in any meaningful sense of the word and because he did not incur any reduction in compensation, he does not have a viable tenure claim. Instead, the Board was merely exercising its inherent managerial prerogative to utilize its existing staff most efficiently and effectively. Boards of education find it advantageous to hire teaching staff with dual certification because of the greater flexibility it affords in scheduling classes and assigning staff. Here the Board's decision was based on valid educational reasons, notably curriculum needs and staffing conflicts in the district. It was not designed as a subterfuge to circumvent the tenure law, *see Ayoub, supra*, nor did it have the incidental effect of eroding "tenure rights which appear plain on the face of the statute." *Compare Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239, 243 (App. Div. 1987)

(full-time tenured art teacher reduced to part-time employment, while the district still retained a full-time nontenured art teacher.) Moreover, the proofs suggest that it would be economically impractical to hire a teacher for just one class. Recently, the New Jersey Supreme Court emphasized that application of the tenure system in individual cases must be sensitive to the legitimate concerns of professional educators:

> Courts will be vigilant to assure the proper application of the school laws and to forestall capricious or arbitrary administrative action. However, the courts cannot supplant educators; they are not at liberty to interfere with regulatory and administrative judgments of the professional in the field of public education unless those judgments are palpably arbitrary or depart from governing law.
>
> *Dennery*, 131 *N.J.* at 643.

Order

It is **ORDERED** that the relief requested by petitioner Frank Kartan is denied.

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

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

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

Jan. 22, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1/27/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 28 1997
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Dr. Jerilyn Caprio, superintendent of schools, North Arlington public school district

List of Exhibits

No.	Description
J-1	Copy of personnel record for Frank Kartan, covering the period 1963-64 to 1995-96
J-2	Copy of portion of the minutes of a public meeting of the Board of Education of North Arlington, held on June 19, 1995
J-3	Copy of letter to Frank Kartan from Dr. Jerilyn M. Caprio, dated June 21, 1995
J-4	Copy of letter to Frank Kartan from Dr. Jerilyn M. Caprio, dated July 2, 1996
J-5	Copy of job description for school counselor/high school/ grades 7 through 12, undated

OAL DKT. NO. EDU 11371-95
AGENCY DKT. NO. 338-8/95

FRANK KARTAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner initially asserts that the Administrative Law Judge (ALJ) improperly examines claims of flexibility, educational policy and management prerogative as justification for circumventing the tenure laws. (Petitioner's Exceptions at p. 1) Petitioner reasons that either his transfer "*** out of his tenure certification area violates his statutory tenure rights *** or it does not. The reasons given by the Board to justify a potential violation of statute have no bearing or relevance whatsoever." (*Id.* at pp. 3, 4) Issues of flexibility and management prerogative, petitioner maintains, cannot be used to defeat tenure rights.

Additionally, for the reasons set forth in briefings before the OAL, and duly considered by the ALJ, petitioner maintains that his tenure rights were violated by the Board.

Upon careful and independent review, the Commissioner finds petitioner's exception arguments to be unpersuasive and, thus, determines to affirm the initial decision of the ALJ, with clarification as provided herein. Under the particular circumstances of this matter, the Commissioner finds that petitioner's assignment to teach one algebra period per day, while still maintaining his position as a guidance counselor, simply does not constitute a "transfer" from one position to another in the manner contemplated by the school law decisions which he has invoked as applicable. As the ALJ aptly noted, unlike the petitioners in *Childs, supra,* and *Gerdes, supra,* petitioner remains in a full-time counseling position, although his counseling duties may have been alleviated correspondingly to accommodate the newly assigned algebra duty, and has suffered no loss in status or pay. The Commissioner thus determines that the Board's action in this matter, notwithstanding the choice of wording in its resolution, constituted nothing more than a revision of petitioner's duties to require that he teach one class period per day. This assignment, as concluded by the ALJ, was a good faith exercise of the Board's managerial discretion and resulted in no loss to petitioner. See *Frank Gargano v. Board of Education of the Township of Union,* 93 *N.J.A.R.* 2d (EDU) 670, 673. Thus, petitioner's tenure rights pursuant to *N.J.S.A.* 18A:6-10 are not violated.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein as clarified above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 11, 1997

DATE OF MAILING MARCH 11, 1997

114-97

EDU #11371-95
C # 114-97
SB # 33-97

FRANK KARTAN,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 11, 1997

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Glenn T. Leonard, Esq.

The facts herein are not in dispute. Frank Kartan (hereinafter "petitioner"), a tenured teaching staff member, alleged that the Board of Education of the Borough of North Arlington (hereinafter "Board") had violated his tenure rights when it "transferred" him to teach one class of mathematics per day in the 1995-96 and 1996-97 school years in addition to his regular duties as a high school guidance counselor. In order to accommodate petitioner's new teaching responsibilities, the Board adjusted his schedule by reducing his counseling duties correspondingly. Consequently, petitioner's total number of working hours remained unchanged. Nor did he suffer any reduction in his compensation as the result of the Board's action. It is undisputed that petitioner had achieved tenure as a teacher as a result of his previous employment in the district as a

MAY 6, 1998

teacher of mathematics. It is also undisputed that petitioner had achieved tenure under his educational services certificate as a result of his subsequent service as a guidance counselor. See Ellicott v. Board of Educ., 251 N.J. Super. 342 (App. Div. 1991).

Petitioner filed a petition of appeal with the Commissioner of Education, alleging that the Board had violated the tenure rights he had achieved under his educational services certificate when it transferred him to a teaching position for one period per day without his consent. As summarized by the Administrative Law Judge ("ALJ"), the parties agreed on petitioner's tenure status, but differed on the extent of his tenure rights: "Petitioner asserts that the Board may not transfer him to a position outside the scope of his educational-services certificate, absent his consent or a reduction in force. But the Board maintains that it retains the managerial discretion to assign him to duties within the scope of his instructional certificate." Initial Decision, slip op. at 6.

On January 22, 1997, the ALJ recommended dismissing the petition, concluding that the Board had properly exercised its managerial prerogative when it assigned petitioner to teach one period of math per day. The ALJ found that "because [petitioner] was never 'dismissed' from his guidance-counselor position in any meaningful sense of the word and because he did not incur any reduction in compensation, he does not have a viable tenure claim. Instead, the Board was merely exercising its inherent managerial prerogative to utilize its existing staff most efficiently and effectively....Here the Board's decision was based on valid educational reasons, notably curriculum needs and staffing conflicts in the district. It was not designed as a subterfuge to circumvent the tenure law...." Id. at 9.

On March 11, 1997, the Commissioner adopted with clarification the ALJ's recommendation and dismissed the petition. The Commissioner agreed that petitioner's tenure rights had not been violated, finding that his assignment to teach one period of math per day, while still maintaining his position as a guidance counselor, did not constitute an improper transfer from one position to another. The Commissioner noted that petitioner remained in a full-time counseling position, although his counseling duties had been "alleviated" correspondingly to accommodate his newly assigned mathematics duty, and that he had suffered no loss in status or salary. The Commissioner concluded that the Board's action constituted nothing more than a "revision" of petitioner's duties and was a good faith exercise of the Board's managerial discretion.

Petitioner filed the instant appeal to the State Board.

After a careful review of the record, we reverse the decision of the Commissioner. We conclude that the Board's action constituted an improper transfer in violation of petitioner's tenure rights.

A district board can reassign a tenured staff member to any other assignment within the scope of his certificate, but cannot transfer him to another separately tenurable position without his consent. Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner of Education, 1982 S.L.D. 1328, aff'd by the State Board of Education, 1983 S.L.D. 1554. In a case similar to the matter now before us, Childs v. Union Twp. Bd. of Educ., Docket #A-3603-80T1, 1982 S.L.D. 1456 (App. Div. 1982), certif. denied, 91 N.J. 550 (1982), the Court affirmed this agency's determination that a teaching staff member who had achieved tenure under her educational services

certificate as a result of her employment as a guidance counselor could not be transferred without her consent to a teaching position, notwithstanding the fact that she had previously achieved tenure in the district as a teacher. The Court stressed that "it is pure sophistry to assert [that the staff member's] 'transfer' is anything less than dismissal from her clearly tenured position. Such a view would render her statutory tenure in her 'new position' meaningless." 1982 S.L.D. 1456, at 1460.

In the case now before us, the Commissioner concluded that Childs was not applicable since the petitioner herein was only assigned to teach one period per day while retaining his "full-time" guidance counselor position. We disagree. Although petitioner was only transferred in part, we conclude that such action constituted an improper diminution of the statutory tenure rights he had achieved under his educational services certificate. Petitioner did not retain his full-time guidance counselor position. Rather, the Board reduced his counseling duties to part-time so as to permit him to also serve part-time under his instructional certificate.[1] Such action constituted a partial transfer from one tenured position to another and, if permitted to stand, would "erode tenure rights 'which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature.'" Ellicott, supra, at 351, quoting Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239, 243 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988). See Childs, supra.

The tenure laws are clear that a teaching staff member may not be dismissed from his or her tenured position except as the result of a reduction in force ("RIF")

[1] We note that the Board does not contend that its action in this case resulted from a reduction in force. Rather, the Board maintains that it acted for educational reasons and that such action constituted a proper exercise of its managerial prerogative.

effectuated pursuant to N.J.S.A. 18A:28-9 or for just cause after a hearing as prescribed in the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. We stress in that regard that even a partial dismissal from a tenured position constitutes a reduction in force, triggering the affected staff member's tenure rights. Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983) (a reduction in hours of employment is considered a reduction in force).

In this instance, petitioner was improperly removed in part from a position in which he had achieved tenure under his educational services certificate and transferred without his consent to another separately tenurable position under his instructional certificate. As in Childs, the fact that petitioner had previously achieved tenure under his instructional certificate is of no moment. Nor is this result altered by the fact that petitioner did not suffer any reduction in compensation, although it may affect the relief to which he is entitled.[2] See Carpenito v. Board of Education of the Borough of Rumson, decided by the State Board of Education, February 4, 1998; Sheffield v. New Jersey State Department of Human Services, decided by the State Board of Education, November 2, 1994; Parker and Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, decided by the State Board of Education, May 2, 1990.

In Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, 1989 S.L.D. 3057, we rejected the continuing viability of an "educationally-based reasons" standard in assessing the rights of tenured staff members affected by a reduction in force. We find no basis for a different result in the

[2] Petitioner does not seek back pay or other emoluments as a result of the Board's action.

case now before us, in which petitioner was partially removed from his tenured position as the result of a transfer. Statutory tenure rights afford a teaching staff member protection from dismissal or removal and may not be disturbed except under the limited circumstances described hereinabove.

Accordingly, we conclude that the Board's action in transferring petitioner to a teaching position for one period per day in 1995-96 and 1996-97 without his consent violated his tenure rights. We therefore reverse the decision of the Commissioner to dismiss the petition and, in the event that petitioner was again transferred to a teaching position in the 1997-98 school year, direct the Board to reinstate him to a full-time guidance counselor position.[3]

S. David Brandt opposed.

Attorney exceptions are noted.

May 6, 1998

Date of mailing MAY 08 1998

[3] We note that the petition herein was limited to the 1995-96 and 1996-97 school years and that the record does not indicate the current status of petitioner's employment.

115-97

115-97

VINCENT J. BASILE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher seeking restoration of 30 sick days sought enforcement of settlement terms of the agreement reached between the parties before the Division of Workers' Compensation.

ALJ concluded that petitioner must seek a clarification of the settlement agreement terms from Division of Workers' Compensation. ALJ concluded the issue of whether the settlement agreement violated public policy was not before the OAL. The Division of Workers' Compensation is the appropriate forum with the requisite expertise to decide this question. Petition was dismissed.

Commissioner affirmed the initial decision dismissing the petition as a controversy arising under the education laws.

MARCH 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. EDU 11724-95

AGENCY DKT. NO. 371-9/95

VINCENT J. BASILE

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY

Respondent.

Michael Barrett, Esq., for petitioner
(Barrett & Barrett, attorneys)

Steven Glickman, Esq., for respondent
(Ruderman & Glickman, attorneys)

Record Closed: December 9, 1996 Decided: January 22, 1997

BEFORE **MUMTAZ BARI-BROWN** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Vincent J. Basile, a teacher employed by respondent, Roselle Park Board of Education (Board), claims that he is owed 30 sick days from the Board based

on the settlement agreement between the parties before the Division of Workers' Compensation. The Board argues that the Workers' Compensation settlement relieved petitioner of all sick days advanced to him by the Board and did not include a 30 days sick "bank."

The matter was transmitted to the Office of Administrative Law (OAL) on October 24, 1995, as a contested case pursuant to *N.J.S.A.* 52 :14B-1 to-15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on September 4, 1996. The parties submitted post hearing briefs and the record closed on October 11, 1996.

On November 18, 1996, I reopened the record and directed the parties to submit their positions on whether the Commissioner of Education has jurisdiction to enforce a workers' compensation claim, and if so whether the parties' agreement violates public policy. The record closed on December 9, 1996.

FINDINGS OF FACT

Based on the evidence I **FIND** the following as **FACT**:

1. Petitioner has been employed as a teacher by the Board since 1984. (R-1).
2. Pursuant to the union contract, teaching staff are given 10 sick days each school year with the ability to carry forward unused sick days. (R-1)
3. For school year 1984-85, petitioner used 15 sick days leaving no sick days to carry forward into the next school year. (R-1)
4. For school year 1985-86, petitioner used 4 sick days and carried forward 6 sick days into the next school year. (R-1)
5. For school year 1986-87, petitioner used 3 sick days and carried forward 13 sick days into the next school year. (R-1)

6. For school year 1987-88, petitioner used 13 sick days and carried forward 10 sick days into the next school year. (R-1)

7. For school year 1988-89, petitioner used 14.5 sick days and carried forward 5.5 sick days into the next school year. (R-1)

8. For school year 1989-90, petitioner used 7 sick days and carried forward 8.5 sick days into the next school year. (R-1)

9. For school year 1990-91, petitioner used 19 sick days and had a balance of 0 sick days. (R-1)

10. For school year 1991-92, petitioner was credited with 10 sick days. As of November 5, 1991, he had used all of his sick days. (R-1). From November 6 through April 30, 1992, Basile used 59.5 sick days. *Id* His employee absence record reflects the sick time used: 2 days in September; 4 days in October; 5 days in November; 2 days in December; 6.5 days in January; 10 days in February; 21 days in March; and 20 days in April. *Id.*.

12. Many of Basile's absences were related to a medical problem which resulted in his filing a Workers' Compensation claim in 1992.

13. In January 1992, petitioner requested advanced sick days until his Workers' Compensation claim was settled. The Board agreed to six weeks advanced sick time.

14. On March 16, 1992 the Board met and discussed petitioner's status. The Board agreed to extend Basile's advanced sick time for an additional six weeks. By letter dated March 24, 1992, the Board set forth the conditions of petitioner's advanced sick leave time which states in part:

> This letter will serve to confirm our recent telephone conversation...
>
> 1. The Board confirmed the administration's decision to carry Mr. Basile on sick leave until March 17, 1992.
>
> 2. The board agreed to continue Mr. Basile on "advanced" sick leave for the next six (6) weeks while you and Mr. Basile aggressively pursue his Workmen's Compensation Claim....

> 3. If the Workmen's Compensation claim is ultimately approved, Mr. Basile will receive compensation in accordance with the state Statutes and Administrative Code. If the Board finds that the Workers' compensation claim is not being aggressively pursued or the claim is ultimately denied, sick leave benefits will immediately cease and Mr. Basile will be placed on an unpaid leave of absence. Upon his return, Mr. Basile shall be responsible to "return" to the Board all advanced sick leave.
>
> Enclosed please find a copy of this correspondence with a space for your signature. If you agree with the above, please sign and immediately return to me...
>
> [R-2]

Petitioner's counsel signed the agreement. *Id.*

13. On April 21, 1992, the Board voted "not to extend or advance any additional sick leave to Mr. Basile" and placed him on unpaid leave. R-3.

14. On December 22, 1992, the Board notified petitioner that he had used all of his contractual sick leave for school year 1992-93 and as of that date he had one personal day remaining for the school year. P-2. Petitioner acknowledged that he "used 15 days until approximately March [1993] and then went out at a substitute pay for the balance of the year." P-4.

15. On May 18, 1995, the Division of Workers' Compensation issued an Order approving settlement with dismissal.

ISSUE

The issue is whether the Board is obligated to restore 30 sick days to petitioner based upon the parties' settlement agreement in a Workers' Compensation settlement.

DISCUSSION

Jurisdiction

Petitioner's workers' compensation claim was settled for a lump sum amount and included restoration of 60 days of advanced sick leave. However, the parties disagree

as to the terms of the settlement regarding those days. Petitioner contends that he agreed to repay the Board for 30 sick leave days and "bank" the other 30 days for future sick leave time. The Board contends that the petitioner owes the Board for the total 60 sick leave days. The terms of the workers' compensation settlement are not memorialized and the only document of the agreement is the Order Approving Settlement with Dismissal dated May 18, 1995.[1] The order states that the respondent agreed to restore 60 sick days to petitioner. P-3.

Petitioner claims that under the terms of the agreement, he obligated himself to repay 30 days, not 60 days as claimed by respondent. Petitioner asserts that the Commissioner has jurisdiction to determine the terms of the agreement and to enforce the settlement. Petitioner avers that the workers' compensation court is a court of limited jurisdiction to award money damages of temporary or permanent disability payment. Thus, the Division of Workers' Compensation has no jurisdiction to order a board of education to restore sick days to petitioner. However, the Commissioner has jurisdiction under *N.J.S.A.* 18A:30-2.1 to direct boards to reinstate days upon a finding that petitioner is entitled to the relief sought. Petitioner submits that to decline jurisdiction in this matter would leave him without a remedy.

Respondent argues that the OAL does not have jurisdiction to enforce a workers' compensation claim settlement. Respondent avers that Workers' Compensation statutes and regulations have exclusive jurisdiction to resolve workers' compensation claims. Further, respondent argues that petitioner's interpretation of the agreement violated public policy. Under the settlement agreement, respondent's insurance provider agreed to pay the 60 sick days advanced by respondent to petitioner as compensable under Workers' Compensation. Respondent acknowledged that it received payment for 60 days. Therefore, respondent asserted that:

[1] Several proposals and responses/counter-proposals were exchanged between the parties and are reflected in the exhibits.

> If Petitioner's position interpreting his agreement with Respondent was to be credited, it would mean that Respondent would have been paid thirty (30) days compensation by its insurance carrier without those days having been taken by Petitioner. Especially with spiraling insurance costs and escalating instances of insurance fraud, it is against public policy for an individual or entity such as Respondent to receive insurance payments for circumstances that do not exist. It would be against public policy for Respondent to receive payment from its insurance carrier for days for which Petitioner was not absent due to a compensable claim, but rather for days which Petitioner "banks" against future illness which may or may not be compensable under the Workers' Compensation Statues.
>
> [Respondent's Supplemental Brief at 4-5].

Based on the reasons discussed, I conclude that the OAL does not have jurisdiction to enforce a workers' compensation settlement

The Commissioner of Education has jurisdiction over controversies arising under the school laws pursuant to *N.J.A.C.* 6:5-1.2(a)(1). Under the school laws, leaves of absence are governed by *N.J.S.A.* 18A:30-1 *et seq.* *N.J.S.A.* 18A:30-2.1 governs sick leave for service connected disabilities. It provides as follows

> Whenever an employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
>
> [*N.J.S.A.* 18A:30-2.1].

The Workers' Compensation statutes, *N.J.S.A.* 34:15-1 *et seq.*, govern work related injuries. *N.J.S.A.* 34:15-49 provides that: "The Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits under this chapter." Thus, both Workers' Compensation laws and the school

laws apply to disputes regarding a school employee's sick leave due to a work related injury. However, the courts and the State Board of Education have held that before the claim proceeds under the school laws for matters of sick leave time and reimbursement, the compensation court must exercise its jurisdiction first to determine if a compensable work related injury occurred.

In *Forgash v. Lower Camden County School*, 208 *N.J.Super.* 461 (App. Div. 1985), the court held that a determination as to compensable injury under the workers' compensation laws must be made before the issue on sick leave benefits pursuant to *N.J.S.A.* 18A:30-2.1 can be adjudicated. "By its terms, this statute [N.J.S.A. 18A:30-2.1] contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility of the injured employee for the additional benefits provided by statute." *Forgash*, 208 *N.J.Super.* at 467.

Further, in *Tompkins v. Hamilton Board of Ed.*, EDU 3274-86 (State Bd. of Ed., Dec. 2, 1987), the State Board of Education concluded that a proceeding to receive sick leave benefits under *N.J.S.A.* 18A:30-2.1 must be deferred pending the outcome of a proceeding in the Division of Workers' Compensation. Further, the State Board determined that abstention on the part of the Commissioner properly recognized the exclusive original jurisdiction of the Division of Workers' Compensation and is consistent with the legislative purpose of *N.J.S.A.* 18A:30-2.1, which is to provide leaves of absence with pay for work related injuries subject to the Workers' Compensation Act. *Id.* at 7. Moreover, the State Board determined that "although the breadth of the Commissioner's power is great, . . . this agency should abstain from considering the matter until a determination is made by the Division of Workmen's Compensation." *Ibid.* Additionally, the State Board concluded that deference should be given to the Division of Workers' Compensation as the agency with the greatest expertise in resolving such issues. *Id.* *See* also *Hackensack v.* Winner, 82 NJ 1 (1980); *Hinfey v. Matawan Regional Board of* Education, *77 NJ 514 (1978).* The State Board also determined that the prior determination of issues under the Workers'

Compensation laws avoids conflicting results and avoids supplanting the function of the compensation court. *Id.* at 8-9. Thus, since the compensation court is the only court with the expertise to determine whether an injury is work related under the workers' compensation statutes, a proceeding pursuant to *N.J.S.A.* 18A:30-2.1 regarding sick leave may not be used to supersede the function of the compensation court. *Forgash*, 208 *N.J.Super.* at 467.

Here, the issue is not whether the petitioner sustained a work related, compensable injury. Rather, the issue pertains to the disputed terms of the settlement agreement approved by the Division of Workers' Compensation. However, the same reasoning behind the Commissioner's abstention from deciding a sick leave benefits claim pending the workers' compensation decision applies here.

First, the Division of Workers' Compensation is the forum with the expertise to decide this issue. The Division is in the best position to decide what the parties to the settlement negotiation meant, what is equitable, and what is legal under the Workers' Compensation statutes (i.e. whether the settlement agreement violates public policy). As the court in *Forgash* stated, "the distinctive function and expertise of the compensation court qualified it as the more appropriate tribunal for the adjudication of petitioner's controverted claim for her work related injuries." *Forgash*, 208 *N.J. Super.* at 466.

Second, the Commissioner and thus the ALJ, may not utilize the sick leave benefits statute to supplant the function of the compensation court. *Forgash*, 208 *N.J.Super.* at 467. Here, pursuant to *N.J.S.A.* 34:15-49, the Division of Workers' Compensation has exclusive original jurisdiction over this matter as it involves a work related injury. The express function of *N.J.S.A.* 18A:30-2.1 is to complement workers' compensation benefits by allowing the injured party to continue to receive his or her salary and not lose sick leave time due to compensable work related injuries. *Ibid.* at 466. By its terms, *N.J.S.A.* 18A:30-2.1 contemplates a prior decision by the

compensation court before the additional sick leave benefits can be awarded. *Ibid.* Thus, the Commissioner and the ALJ cannot exercise jurisdiction in this case until the compensation court has rendered a final determination. To do otherwise would result in the ALJ and Commissioner supplanting the function of the compensation court.

Third, a workers' compensation case must be resolved in compensation court proceedings before the matter of sick leave benefits may be addressed by the Commissioner. Here, no resolution of the workers' compensation matter has been reached. Petitioner contends that the settlement agreement requires him to pay back 30 sick days while the Board contends that the agreement requires the petitioner to return all 60 days. The compensation court is entitled, if not required, to reach a final determination regarding the workers' compensation claim before the matter of additional sick leave benefits may be addressed by the Commissioner. *See Forgash*, 208 *N.J.Super.* at 466; *Tompkins*, State Bd. of Ed., Feb. 3, 1988 at 3. Therefore, neither the Commissioner nor the ALJ can assert jurisdiction over this matter until a final determination as to the terms of the settlement agreement has been reached. Once the terms of the settlement are clarified in the compensation court, the ALJ and the Commissioner may then proceed under those terms to award benefits under *N.J.S.A.* 18A:30-2.1. I **CONCLUDE** that petitioner must seek a clarification of the settlement agreement terms from the Division of Workers' Compensation..

Since the ALJ and the Commissioner of Education are without jurisdiction to proceed under *N.J.S.A.* 18A:30-2.1, I **CONCLUDE** that the issue of whether the settlement agreement violates public policy is not before the OAL. Further, this question cannot be answered until the terms of the settlement agreement are determined. The Division of Workers' Compensation is the appropriate forum with the requisite expertise to decide this question when it considers and makes a determination as to the terms of the settlement agreement.

ORDER

It is hereby **ORDERED** that petitioner's claim to restoration of 30 sick days based on the parties' settlement agreement before the Division of Workers Compensation be **DISMISSED**.

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

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

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

January 22, 1997
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

1/27/97
DATE

DNJ
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 28 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:
Vincent Basile

For Respondent:

Robert L. Zeglarski

Exhibits:

R-1(a) - (h)	Employee Absence Record of Vincent J. Basile (8 pages).
R-2	Letter from Steven S. Glickman, Esq., to Michael T. Barrett, Esq., dated March 24, 1992.
R-3	Letter from Steven S. Glickman, Esq., to Michael T. Barrett, Esq., dated April 23, 1992.
R-4	Letter from Robert L. Zeglarski, School Business Administrator Board Secretary, to Lisa Shanfeld, dated March 29, 1995.
P-2	Letter from Ernest J. Finizio, Jr., Superintendent of Schools, to Vincent Basile, dated December 22, 1992.
P-3	Order Approving Settlement with Dismissal dated May 18, 1995.
P-4	Letter from Michael T. Barrett, Esq., to Steven S. Glickman, Esq., dated April 23, 1992.

OAL DKT. NO. EDU 11724-95
AGENCY DKT. NO. 371-9/95

VINCENT J. BASILE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were untimely filed, pursuant to *N.J.A.C.* 1:1-18.4, and, therefore, are not considered herein.

Upon review, the Commissioner determines to affirm the decision of the Administrative Law Judge, finding that this matter raises no dispute under the education laws and concurring that the Commissioner of Education can neither interpret nor enforce a settlement arising out of proceedings before the Division of Workers' Compensation.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL dismissing the Petition of Appeal as a controversy arising under the education laws.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 11, 1997

DATE OF MAILING MARCH 11, 1997

115-97

EDU #11724-95
C # 115-97
SB # 34-97

VINCENT J. BASILE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 11, 1997

For the Petitioner-Appellant, Bergman & Barrett (Michael T. Barrett, Esq., of Counsel)

For the Respondent-Respondent, Ruderman & Glickman (Steven S. Glickman, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Like the Administrative Law Judge and Commissioner, we stress that the settlement agreement at issue herein arose from a workers' compensation claim filed by petitioner and was approved by the Division of Workers' Compensation. Consequently, we agree that the Division of Workers' Compensation is the proper forum for determining a dispute between the parties regarding the terms of that settlement.

August 6, 1997

Date of mailing AUG 08 1997

116-97

116-97E

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY AND WEST JERSEY AIR CONDITIONING & HEATING COMPANY, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

March 12, 1997

RECEIVED
OFFICE OF ADMINISTRATIVE LAW

DILWORTH, PAXSON, KALISH & KAUFFMAN
Three Greentree Centre, Suite 104
Route 73
Marlton, New Jersey 08053
(609) 751-8500
ATTORNEYS FOR Respondent, West Jersey Air Conditioning & Heating Company, Inc.

BUENA PLUMBING, INC.,

Petitioner,

-v-

THE BOARD OF EDUCATION OF THE CLAYTON PUBLIC SCHOOL DISTRICT and WEST JERSEY AIR CONDITIONING & HEATING COMPANY, INC.,

Respondent.

Before: COMMISSIONER OF EDUCATION OF NEW JERSEY

Agency Docket No. 57-2/97

OAL Docket No. EDU843-97

Civil Action

ORDER DENYING APPLICATION OF PETITIONER, BUENA PLUMBING, INC. FOR AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

Oral Argument, ~~March~~ February 26, 1997 before the Honorable Robert S. Miller, ALJ

THIS MATTER having come before the Court on Wednesday, ~~March~~ February 26, 1997, upon the motion of Petitioner, Buena Plumbing, Inc. ("Petitioner") for an Order to Show Cause and Temporary Restraints restraining the Respondents from entering into, executing or performing the HVAC contract for alterations and additions to the Clayton Middle School/High School until further order of the Commissioner, Darrell Fineman, Esquire appearing on behalf of Capizola, Fineman & Lapham, P.A., attorneys of Petitioner, and in the presence of Wayne C. Streitz, Esquire of Ware, Streitz & Thompson, attorneys for Respondent, The Board of Education of the Clayton Public

School District (the "Board"), and in the presence of Michael D. Varbalow, Esquire of the firm of Dilworth, Paxson, Kalish & Kauffman, attorneys of Respondent, West Jersey Air Conditioning & Heating Company, Inc. ("West Jersey"), and the Court having read and considered the Verified Petition, the Motion, the various Certifications and exhibits thereto and the Briefs filed on behalf of the Petitioner and on behalf of each of the Respondents, and the Court having considered the oral arguments of counsel for the respective parties, and having considered the criteria for interim relief and temporary restraints set forth in Crowe vs. Degoia, 90 N.J. 126 (1982), and the Court having found that the legal rights underlying Petitioner's claim are unsettled, and in particular, Petitioner's interpretation of N.J.S.A. 18A:18A-5d and 18A:18A-18, and the Court having further found that there does not exist the probability that Petitioner will prevail in these proceedings for the relief sought, and no cause appearing to the contrary;

IT IS on this 27th day of February, 1997, ORDERED that Petitioner's application for an order temporarily restraining Respondent, Board and Respondent, West Jersey from entering, executing or performing the HVAC contract for alterations and additions to the Clayton Middle School/High School until further order of the Commissioner of Education of the State of New Jersey is hereby DENIED.

Robert S. Miller

ROBERT S. MILLER, A.L.J.

DILWORTH, PAXSON,
KALISH & KAUFFMAN

ATTORNEYS AT LAW

THREE GREENTREE CENTRE
SUITE 104 - ROUTE 73
MARLTON, NEW JERSEY 08053

work/mdv/pleading/buena.ord

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

February 27, 1997
DATE

ROBERT S. MILLER, ALJ

AGENCY DKT. NO. 57-2/97
OAL DKT. NO. EDU 843-97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY AND WEST JERSEY AIR CONDITIONING & HEATING COMPANY, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

The audiotape of emergent proceedings by the ALJ, and the order on Motion for Emergent Relief of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge denying emergent relief to Petitioner, a bidder for a heating, ventilating and air conditioning contract (HVAC) with Clayton Middle School/ High School, having found that petitioners failed to meet each of the standards for such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *N.J.A.C.* 1:1-12.6, *R.* 4:52-1.

Accordingly, the Motion for Emergent Relief is denied for the reasons expressed by the ALJ and this matter shall duly proceed to a hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 12, 1997
Date of Mailing, March 12, 1997

118-97

118-97

IN THE MATTER OF THE TENURE	:	
HEARING OF LINDSAY HOOPER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
_____	:	

MARCH 14, 1997

AGENCY DKT. NO. 585-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF LINDSAY HOOPER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

For the Board, Louis R. Franzese, Esq.

This matter having been opened before the Commissioner of Education on December 11, 1996, through certification of tenure charges of unbecoming conduct against a tenured teaching staff member of the State-operated School District of Newark; and

The Commissioner having directed respondent, via both certified and regular mail, on December 12, 1996, to file an answer to the tenure charges against him; and

The Commissioner having sent such notice again on January 6, 1997, and on January 29, 1997, via regular and certified mail, and although the certified mail was returned as unclaimed, there is no indication that the regular mail was not duly received; and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against him is deemed to be admitted; now therefore

IT IS ORDERED this 14th day of March 1997 that summary judgment shall be granted to the District, and Lindsay Hooper shall be dismissed from his tenured position as a teaching staff member in the District's employ as of the date of this order.

IT IS FURTHER ORDERED that, pursuant to *N.J.A.C.* 6:11-3.7, this matter shall be referred to the State Board of Examiners for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

MARCH 14, 1997
DATE OF MAILING MARCH 14, 1997

119-97

119-97

C.E., on behalf of minor children, T.E., J.E. AND T.E.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MARCH 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 8986-96

AGENCY DKT. NO. 429-9/96

C.E. ON BEHALF OF MINOR CHILDREN,

T.E., J.E. AND T.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH

OF SOMERVILLE, SOMERSET COUNTY,

Respondent.

Elizabeth Szabo, Esq., for petitioner (Somerset-Sussex Legal Services Corp.)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: February 11, 1997 Decided: February 14, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was brought before the Office of Administrative Law (OAL) on October 30, 1996, as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. It was scheduled for hearing for January 30, 1997 at the OAL, Mercerville, New Jersey. Prior to the January 30, 1997 hearing date, the matter was adjourned at the request of both parties.

Based upon the attachment and with the consent of all parties the matter is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

Feb 14, 1997
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

2/19/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 1997
DATE

Barbara A Harnail
OFFICE OF ADMINISTRATIVE LAW

ej

RECEIVED
STATE OF N.J.
OFFICE OF LAW
FEB 11 10 31 AM '97

SOMERSET SUSSEX LEGAL SERVICES
By: Elizabeth Szabo, Esq.
Attorney for Celita Evans
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

CELITA EVANS, parent, on behalf of TYLITA EVANS JUERY EVANS, and TANEIFA EVANS	:	EDUC-08986-96s AGENCY DKT.NO. 429-9/96
Petitioner	:	
vs	:	
SOMERVILLE SCHOOL DISTRICT,	:	ORDER OF DISMISSAL WITH PREJUDICE
Respondent	:	

This matter having been opened to the Court on application of Somerset Sussex Legal Services, attorneys for petitioner, and McDonald, Rogers & Rizzolo, attorneys for respondent, and it appearing that the Somerville School District acknowledges that petitioner and her three minor children have been residents of Somerville since at least September 1, 1996 and are current residents of Somerville and that the minor children are entitled to a tuition-free education in the Somerville School District, and the parties having resolved the matter, and for good cause shown:

It is on this 14th day of February 1997

ORDERED that the petition of Celita Evans, on behalf of the three minor children be and hereby is dismissed with prejudice.

Hon. Kathryn Clark, ALJ

We hereby consent to the entry and form of the within Dismissal with Prejudice.

McDonald, Rogers & Rizzolo
attorneys for respondent

Michael J. Rogers, Esq.

Somerset Sussex Legal Services
Attorneys for petitioner

Elizabeth Szabo, Esq.

OAL DKT. NO. 8986-96
AGENCY DKT. NO. 429-9/96

C.E., on behalf of minor children, T.E., J.E. AND T.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the initial decision of the Office of Administrative Law, and the Order of Dismissal with Prejudice have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner approves the terms of the Order of Dismissal with Prejudice, noting that all parties have agreed to such terms.

Accordingly, the Commissioner adopts the initial decision of the Administrative Law Judge and the matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 14, 1997
DATE OF MAILING MARCH 14, 1997

120-97

120-97

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK PETRONE, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

MARCH 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1191-97

AGENCY. NO.: 525-11/96

STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY,

Petitioner

v.

FRANK PETRONE,

Respondent

Cherie L. Maxwell, Esq., for petitioner
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Eugene G. Liss, Esq., for respondent

Record Closed: January 29, 1997 Decided: January 30, 1997

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

This matter was transmitted to the Office of Administrative Law (OAL) on January 10 1997, for determination as a contested case, pursuant to *N.J.S.A. 52:14B et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached documents.

Having reviewed the contents of the attached documents, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C. 1:1-19.1* and I hereby approve same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

1/30/97
DATE

Thomas E Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

Feb. 3, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS

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WRITER'S DIRECT DIAL NUMBER:

ARTHUR J. SILLS (1917-1982)

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MICHAEL B. TISCHMAN
MORTON S. BUNIS
STANLEY TANNENBAUM
BARRY M. EPSTEIN
STEVEN E. GROSS
THOMAS J. DEMSKI
JEFFREY H. NEWMAN
LAWRENCE S. HORN
CHARLES J. WALSH
JEFFREY J. GREENBAUM
SIMON LEVIN
STEPHEN J. MOSES
MORRIS YAMNER
GERALD SPAN
JEFFREY BARTON CAHN
NOAH BRONKESH
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KENNETH F. OETTLE
ALAN E. SHERMAN
ROBERT J. ALTER
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ROBERT CRANE
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PHILIP R. SELLINGER

JACK M. ZACKIN
THOMAS S. NOVAK
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STUART M. FEINBLATT
MARGARET F. BLACK
BRIAN S. COVEN
TRENT S. DICKEY
RICHARD J. SCHULMAN[□]
BERNARD I. FLATEMAN
JOSEPH L. BUCKLEY
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STANLEY U. NORTH, III
JAMES D. TOLL
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RONALD C. RAK
MARK S. OLINSKY
RICHARD J. SAPINSKI
VICTOR H. BOYAJIAN
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ALAN J. COHEN
MARK J. BLUNDA
LORI G. SINGER
ROBERT W. BURKE
MARK E. DUCKSTEIN
BETH S. ROSE

OF COUNSEL

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VICTOR FUTTER[□]
DENA L. WOLF
MITCHEL E. OSTRER
KENNETH R. WEINER

NOEL D. HUMPHREYS
PATRICIA M. KERINS
DIANE M. LAVENDA
ROBERT R. DIVITA
BOHDAN S. KOSOVYCH
CHERIE LEE MAXWELL
GLENN E. DAVIS
HARRY B. NORETSKY
STEVEN B. JACKMAN[◊]
NATHAN E. ARNELL
STEVEN R. ROWLAND
JACK WENIK
ERIC D. MANN
SCOTT N. RUBIN
FREDERIC M. TUDOR
KENNETH L. MOSKOWITZ
ERIC W. SLEEPER
ALMA LUTJEN ABRAMS
A. ROSS PEARLSON
JEFFREY M. POLLOCK
BENNET SUSSER
JODI S. BRODSKY
SCOTT T. GRUBER
STEVEN S. KATZ
LINDA B. KATZ
RICHARD S. SCHKOLNICK
TED ZANGARI
N. LYNNE HUGHES
DERLYS MARIA GUTIERREZ
ALAN L. COHEN
PAUL P. JOSEPHSON
PATRICIA BROWN FUGEE
DOUGLAS R. WEIDER
STEVEN R. KAMEN
ROBERT M. CARDUCCI, M.D.
PAUL F. DODA

LORA L. FONG
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HELEN KLEINER
RHONDA SOBRAL O'TOOLE
CALVIN A. JONES
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ANDREW H. SHERMAN
MICHELLE E. MANFRO
ADAM J. KAISER
KEITH J. WEINGOLD
GAYLE N. WOLKENBERG
WILLIAM J. TINSLEY, JR.
WILLIAM R. STUART
JOHN J. COUGHLIN, IV
GARRY ROGERS
JENNIFER L. BOROFSKY
VAUGHN L. MCKOY
GWEN L. POSNER
SUSANNE K. ROSENZWEIG
MICHELE-LEE BERKO
LORI M. WALDRON
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ANTHONY F. VITIELLO
LAURA M. KALIK
ROSS L. YUSTEIN
STEVEN M. ZIOLKOWSKI
FRANCINE E. TAJFEL
PETER M. SCHULTZ
LAURA M. KOHANSOV
BEN-TZION H. ZUR
MICHAEL G. ALBANO
CAROLINE H. HAHN
DAVID JAY
LAURA E. KORFMANN
BARBARA A. SCHWARTZ
HARRIS C. GOLDBLAT

PLEASE REPLY TO NEWARK

□ ADMITTED IN NY ONLY
◊ ADMITTED IN JURISDICTION (S) OTHER THAN NJ

January 10, 1997

Dr. Leo F. Klagholz
Commissioner of Education
c/o Bureau of Controversies and Disputes
225 East State Street
CN 500
Trenton, New Jersey 08625-0500

Re: **In Re Tenure Charges of Frank Petrone**
State-Operated School District of the City of Newark
Agency Docket No. 525-11/96

Dear Dr. Klagholz:

We are counsel to the State-Operated School District of the City of Newark in the above-referenced matter. Tenure charges were certified to your office on November 7, 1996 and given the above docket number.

In light of the enclosed settlement agreement reached by the parties, the District respectfully requests that the charges be deemed withdrawn.

2 a

Thank you for your attention to this matter.

Very truly yours,

Cherie L. Maxwell

CHERIE L. MAXWELL

CLM:klr
Enc.
cc: Dr. Beverly L. Hall, State District Superintendent (w/o enc.)
Beatrice Collymore, State District Deputy Superintendent (w/o enc.)
Randall Kanter, State District Assistant Superintendent (w/o enc.)
Hope R. Blackburn, Senior Associate Counsel (w/enc.)
Eugene Liss, Esq. (w/enc.)

AGREEMENT

This Agreement, made this 11th day of December, 1996, by and between the State-Operated School District of the City of Newark (hereinafter "District") and Frank Petrone, a tenured teacher employed by the District (hereinafter "Petrone").

WHEREAS, Tenure charges against Petrone were filed with the District on or about October 15, 1996, and

WHEREAS, said charges were certified to the Department of Education on or about November 7, 1996, and

WHEREAS, the parties are desirous of amicably settling the outstanding issues without the necessity of formal litigation on the charges;

NOW THEREFORE, the parties hereby agree to resolve this matter on the following basis:

1. Petrone will submit to the District upon execution of this Agreement a letter of intent to resign his position of employment with the District for the purpose of retirement effective March 30, 1997, which resignation for the purpose of retirement shall be accepted by the District.

2. The District will withdraw the tenure charges against Petrone it has certified to the Department of Education.

3. Petrone will be placed on administrative leave, with pay, from November 30, 1996 through March 30, 1997, at which time he shall resign for the purpose of retirement

from his employment with the District. Petrone will receive his current rate of pay through the day of his resignation for the purpose of retirement. At the time of his resignation for the purpose of retirement, Petrone will receive payment as applicable for accrued sick leave and any other payment which may be due to Petrone pursuant to the terms of the applicable collective bargaining agreement at the conclusion of negotiations between the District and CASA. These payments shall constitute the total financial obligation of the District to Petrone and Petrone hereby waives any claims he may have to terminal leave and/or to any payments from the District other than as provided above.

4. Petrone understands and agrees that his resignation for the purpose of retirement and the entering into of this Agreement extinguishes, terminates, waives and/or revokes any and all tenure, employment and re-employment rights he may have as a teaching staff member with the District other than those set forth in this Agreement.

5. Petrone hereby releases, waives and forever discharges the District from any and all claims, demands, rights, actions, damages or liabilities of any description arising out of or related to Petrone's employment with the District, including but not limited to the aforementioned tenure charges, claims for compensation other than as set forth in Paragraph 3 above, and any claims for wrongful termination of employment.

6. This Agreement is not and shall not be construed to be an admission of liability or wrongdoing by either party. Rather, the parties have entered into the Agreement for the sole purpose of resolving the aforementioned tenure charges and all

other issues arising from Petrone's employment without the burden, expense, delay and uncertainties of litigation.

7. This Agreement is freely and voluntarily executed by each party hereto. Both parties have had the terms of this Agreement thoroughly explained by their respective legal counsel and understand such terms and the legal implications arising therefrom.

8. Consistent with In Re Cardonick, Petrone has been advised and is aware that pursuant to N.J.A.C. 6:11-3.6, the matter may be forwarded to the state Board of Examiners for consideration of revocation of his teaching certification.

9. This Agreement is subject to the approval of the Commissioner of Education. Should the Commissioner fail to approve the application for approval of the parties' settlement and withdrawal of the tenure charges, this Agreement shall be null and void.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

By: DR. BEVERLY HALL
State District Superintendent

Dated: 1/9/97

FRANK PETRONE

Dated: December 11, 1996

OAL DKT. NO. EDU 1191-97
AGENCY DKT. NO. 525-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK PETRONE, STATE-	:	
OPERATED SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF NEWARK, ESSEX COUNTY.	:	DECISION
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement, and will be forwarded to the State Board of Examiners for action as it deems appropriate, pursuant to *N.J.A.C.* 6:11-3.6.

COMMISSIONER OF EDUCATION

MARCH 14, 1997

DATE OF MAILING MARCH 14, 1997

124-97

124-97

JOSEPH LUPPINO-ESPOSITO, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, AND BOARD PRESIDENT CHARLES J. SEVERINO, :

RESPONDENTS. :

JOSEPH LUPPINO-ESPOSITO, : COMMISSIONER OF EDUCATION

PETITIONER, : EDUCATION

V. :

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, AND BOARD PRESIDENT CHARLES J. SEVERINO, :

RESPONDENTS. :

MARCH 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

JOSEPH LUPPINO-ESPOSITO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY AND BOARD PRESIDENT CHARLES J. SEVERINO,

Respondents.

OAL DKT. NO. EDU 3697-96

AGENCY DKT. NO. 89-3/96

JOSEPH LUPPINO-ESPOSITO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY AND BOARD PRESIDENT CHARLES J. SEVERINO,

Respondents.

OAL DKT. NO. EDU 5535-96

AGENCY DKT NO. 109-3/96

(CONSOLIDATED)

Joseph Luppino-Esposito, petitioner, *pro se*

Lane J. Biviano, Esq., attorney for respondent

OAL DKT. NOS. EDU 3697-96 and EDU 5535-96

Record Closed: January 27, 1997 Decided: January 27, 1997

BEFORE **MARIE P. SIMONELLI, A.L.J.**

Petitioner alleged that respondents improperly canceled a scheduled meeting and violated the Open Public Meetings Act by denying him his right to cast a vote on a Board of Education issue. Petitioner also alleged that the Board misappropriated public funds.

The Department of Education transferred these matters to the Office of Administrative Law (the OAL) on April 9, 1996 and May 24, 1996, respectively. The OAL scheduled a hearing for April 7, 8 and 9, 1997.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On January 27, 1997, they submitted the attached Stipulation of Settlement and Dismissal, dated January 21, 1997, which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and FIND:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Jan. 27, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

Feb. 3, 1997
DATE

DN Centanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

Jan 27 10 30 AM '97

LANE J. BIVIANO
ATTORNEY AT LAW
8 STATION SQUARE
P.O. BOX 4
RUTHERFORD, NEW JERSEY 07070
(201) 933-8080
Attorney for Respondents
Bogota Board of Education
and Board President Charles
J. Severino
Our File Nos. 1717.10 & 11

JOSEPH LUPPINO-ESPOSITO,
Petitioner

vs.

BOARD OF EDUCATION
OF THE BOROUGH OF BOGOTA
and BOARD PRESIDENT CHARLES J.
SEVERINO,

Respondents.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDUOT 03697-96N
AGENCY REFERENCE NO. 89-3/96 AND
OAL DOCKET NO. EDUOT 05535-96N
AGENCY REFERENCE NO. 109-3/96

STIPULATION OF SETTLEMENT AND DISMISSAL

It is hereby stipulated and agreed to by and between the parties, Joseph Luppino-Esposito ("Petitioner") and Respondents the Board of Education of the Borough of Bogota and Charles Severino Board President ("Respondents") hereto, that the above-captioned matter be and is hereby settled upon the following terms and conditions:

NOW, THEREFORE, in consideration of mutual covenants herein contained, the Petitioner and the Respondents agree as follows:

1. Petitioner has executed a letter to the administrative law judge withdrawing his petitions in the above referenced matters, a copy of which is attached hereto and made a part hereof as Exhibit A.

2. Respondents will not pursue legal fees and related costs sustained in the above referenced matters from Petitioner.

3. Petitioner has executed a release with regard to the above referenced matters, a copy of which is attached hereto and made a part hereof as Exhibit B.

4. Respondents have executed a release with regard to the above referenced matter, copy of which is attached hereto and made a part hereof as Exhibit C.

5. The Parties represent and acknowledge that they have had the right and opportunity to seek advice of independent legal counsel with respect to the interpretation, meaning and legal effect of consenting to this Stipulation and Dismissal.

PETITIONER

Joseph Luppino Esposito
Joseph Luppino-Esposito 1-21-97

RESPONDENTS

Charles J. Severino
Charles J. Severino
Board President
On behalf of the Bogota Board of Education and Board President Charles J. Severino

Joseph Luppino-Esposito
64 Cane Street
Bogota, N.J. 07603

January 20, 1997

Hon. Marie P. Simonelli
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, N.J. 07102

Re: Joseph Luppino-Esposito v.Board of Education of the Borough of Bogota, Bergen County and Board President Charles J. Severino
EDUOT 03697-96N, Agency #89-3\96 and
EDUOT 05535-96N, Agency # 109-3\96

Dear Judge Simonelli:

This is to advise you that I hereby voluntarily withdraw my petitions with prejudice in the above referenced matters.

Respectfully submitted,

Joseph Luppino-Esposito

Joseph Luppino-Esposito

cc. Charles J. Severino, Board President
Respondent Board Members
Board Secretary
Bureau of Controversies
and Disputes

EXHIBIT "A"

R E L E A S E

This Release dated January 21, 1997, is given

BY the Releasor(s) Joseph Luppino-Esposito, of 64 Cane Street, Bogota, New Jersey referred to **as "I"**

TO Bogota Board of Education and its individual members, their agents, servants, employees, successors and assigns, with offices at 1 Henry C. Luthin Place, Bogota New Jersey, referred to as **"You"**,

1. **Release.** I release and give up any and all claims and rights which I may have against you with regard to OAL Docket Nos. EDUOT-03697-96N, Agency Ref. No. 89-3/96 and EDUOT 05535-96N, Agency Ref. 109-3/96.

2. Payment. The Board will execute a release giving up any and all claims against me with regard to OAL Docket Nos. EDUOT-03697-96N, Agency Ref. No. 89-3/96 and EDUOT 05535-96N, Agency Ref. 109-3/96.

3. **Who is Bound.** I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor your estate.

4. **Signatures.** I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal affixed.

Witnessed by:

Beverly A. George

Joseph Luppino-Esposito (Seal)
JOSEPH LUPPINO-ESPOSITO

STATE OF NEW JERSEY, COUNTY OF Bergen SS: 148-52-0755

I CERTIFY that on 1-21-97, Joseph Luppino-Esposito personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

Prepared by:

Lane J. Biviano, Esq.

Beverly A. George
NOTARY PUBLIC BEVERLY A. GEORGE
NOTARY PUBLIC OF NEW JERSEY
No. 2163314
My Commission Expires March 15, 1999

STATE OF NEW JERSEY, COUNTY OF SS:

I CERTIFY that on _____, _____ personally came before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person is the secretary of the corporation named in this document;

(b) this person is the attesting witness to the signing of this document by the proper corporate officer who is the President of the corporation;

(c) this document was signed and delivered by the corporation as its voluntary act duly authorized by a proper resolution of its Board of Directors;

(d) this person knows the proper seal of the corporation which was affixed to this document; and

(e) this person signed this proof to attest to the truth of these facts.

Signed and sworn to before me on _____.

_____ _____
(Print name of attesting witness below signature)

R E L E A S E Dated:

JOSEPH LUPPINO-ESPOSITO Record and return to:

TO

BOGOTA BOARD OF EDUCATION
AND BOARD PRESIDENT CHARLES
J. SEVERINO

R E L E A S E

This Release dated January 21, 1997, is given

BY the Releasor(s) The Bogota Board of Education, and Board President Charles J. Severino with offices at 1 Henry C. Luthin Place, Bogota, New Jersey, referred to as "We",

TO Joseph Luppino-Esposito of 64 Cane Street, Bogota, New Jersey, referred to as "You",

1. Release. We release and give up any and all claims and rights which we may have against you with regard to Docket Nos. EDUOT 03697-96N, Agency Ref. No.89-3/96 and EDUOT 05535-96N, Agency Ref. No. 109-3/96.

2. Payment. Joseph Luppino-Esposito will execute a release giving up any and all claims against the Board and Board President Charles J. Severino with regard to Docket Nos. EDUOT 03697-96N, Agency Ref. No.89-3/96 and EDUOT 05535-96N Agency Ref. No. 109-3/96.

3. Who is Bound. We are bound by this Release. Anyone who succeeds to our rights and responsibilities, such as our heirs or the executors of our estates, are also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. We understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal affixed.

Witnessed by:

CHARLES A GRALL

Charles J. Severino (Seal)

CHARLES J. SEVERINO
BOARD PRESIDENT

STATE OF NEW JERSEY, COUNTY OF SS:

I CERTIFY that on 1/21/97, Charles J Severino personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

Prepared by:

Lane J. Biviano, Esq.

Eileen L. Lackey
NOTARY PUBLIC
Eileen L. Lackey
An attorney at law in the
State of New Jersey

STATE OF NEW JERSEY, COUNTY OF SS:

I CERTIFY that on 1/21/97, Charles Grau personally came before me and this person acknowledged under oath, to my satisfaction, that:

(a) this person is the Board secretary of the Bogota Board of Education the corporation named in this document;

(b) this person is the attesting witness to the signing of this document by the proper corporate officer who is Charles J Severino the Board President of the corporation;

(c) this document was signed and delivered by the corporation as its voluntary act duly authorized by a proper resolution of its Board of Directors;

(d) this person knows the proper seal of the corporation which was affixed to this document; and

(e) this person signed this proof to attest to the truth of these facts.

Signed and sworn to before me on 1/21/97.

Eileen L Lackey
signature)
Eileen L. Lackey
An attorney at law in
the State of New Jersey

(Print name of attesting witness below
CHARLES A. GRAU

R E L E A S E

Dated:

BOGOTA BOARD OF EDUCATION AND BOARD PRESIDENT CHARLES J. SEVERINO

TO

JOSEPH LUPPINO-ESPOSITO

Record and return to:

OAL DKT. NOS. EDU 3697-96 and EDU 5535-96 (CONSOLIDATED)
AGENCY DKT. NOS. 89-3/96 and 109-3/96

JOSEPH LUPPINO-ESPOSITO, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, AND BOARD PRESIDENT CHARLES J. SEVERINO, :

RESPONDENTS. :

JOSEPH LUPPINO-ESPOSITO, : COMMISSIONER OF EDUCATION

PETITIONER, : EDUCATION

V. :

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY, AND BOARD PRESIDENT CHARLES J. SEVERINO, :

RESPONDENTS. :

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MARCH 18, 1997
DATE OF MAILING MARCH 18, 1997

125-97

EMILY FOGERTY, SAWSON LABIB, EBEN MYERS AND JOHN PORTEE,

PETITIONERS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, tenured teaching staff members, appealed the District's decision to withhold their salary increments for allegedly unsatisfactory performance during the 1994-95 school year.

Having considered testimony of witnesses and the record, the ALJ concluded that the District had a reasonable basis for its actions and that petitioners failed to meet their burden of proof, by a preponderance of credible evidence, that the District's actions were unreasonable, arbitrary or capricious. Moreover, ALJ found that petitioners were provided written notice of the denial of their increments, an opportunity to submit a rebuttal and a hearing at OAL.

Citing *Sturn v. South Plainfield*, Commissioner adopted findings and determination in the initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 8490-94, EDU 8491-94 & EDU 7968-95
AGENCY DKT. NOS. 328-8/94, 323-8/94 & 324-8/94

EMILY FOGERTY, SAWSON LABIB,

EBEN MYERS AND JOHN PORTEE,

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT

OF THE CITY OF JERSEY CITY,

HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioners
(Feintuch, Porwich & Feintuch, attorneys)

Patricia Taylor, Esq., for respondent, State Operated School District of Jersey City
(Charlotte Kitler, General Counsel)

Record Closed: August 7, 1996 Decided: January 29, 1997

BEFORE **IRENE JONES**, ALJ:

PROCEDURAL HISTORY

Petitioners, Eben Myers, Emily Fogerty, James Boylan[1] , Sawson Labib, Carolyn Karoma[2] and John Portee appeal the decision by the State Operated School District of

[1] By letter dated August 18, 1995 counsel advised that James Boylan had abandoned his appeal.

Jersey City, Hudson County (District) to withhold their salary increments for unsatisfactory performance during the 1994-95 school year. The cases was consolidated by the Department of Education and designated as James Boylan, Emily Fogerty, Carolyn Karoma and Sawson Labib and assigned case number 328-8/94. The case of Eben Myers was assigned case number 323-8/94.

On September 1, 1994, the Department of Education transmitted the matters to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On August 8, 1995, an Order by ALJ Bari-Brown bifurcated the matter of John Portee from OAL DKT. NO. EDU 8488-94 and was subsequently assigned OAL Docket No EDU 7968-95. An Order of Consolidation was entered on EDU 7968-95 with 8490-94 and EDU 8491-94. After several adjournments, hearings were held on April 2, 4 and May 1, 1996. At the conclusion of the hearings, the parties submitted post hearing briefs on August 7, 1996 at which time the record was closed.

STATEMENT OF THE CASE

In each case, the petitioners' annual salary increments were denied based on unsatisfactory performance evaluations for the 1993-1994 school year. Petitioners generally allege that the respondent violated *N.J.S.A.* 10:4-6, the New Jersey Open Public Meetings Act, because the decisions to deny each increment was made by the State Superintendent of Schools in a closed meeting. Further, the petitioners contend that the District lacks the authority to withhold the salary increments. Finally, the petitioners' assert that the evaluations are wholly subjective and without any basis.

The respondent contends that the evidence supports that the petitioners' performance was below standard and thus the increments were properly denied.

[2] On May 1, 1996, an Order was entered dismissing the petition of Carolyn Karoma.

Further, that absence a showing that the denial was patently arbitrary, without basis or induced by improper motives the action should be sustained.

STANDARD OF LAW

N.J.S.A. 18A:29-14 provides that a board of education may withhold "a teacher's salary increment for inefficiency or other good cause." Salary increments are 'a reward for meritorious service" *Probst v. Haddonfield Bd. of Educ.,* 127 *N.J.* 518, 527 (1992). Thus, the Legislature has vested local boards with the power to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. A decision to withhold an increment is a matter of management prerogative which the Legislature has delegated to the local school board. *North Plainfield Educ. Ass'n v. No. Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernard Twp. Bd. of Educ., v. Bernard Twp. Educ. Ass'n,* 79 *N.J.* 311 (1979). Accordingly, the Commissioner is prohibited from substituting his judgment for that of the board.

The scope of review on appeal is limited to whether there exists a reasonable basis for the board's decision. The local board's exercise of discretionary powers may not be upset unless it is patently arbitrary, capricious, unreasonable or induced by improper motives. *Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288 (App. Div. 1975). Thus, the Commissioner must determine: "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts,..." *Id.* at 296-97. The burden proof proving that the increment withholding was arbitrary, capricious, or unreasonable rests with the person challenging the decision. *Kopera* at 297.

The petitioners contends that there are several fatal procedural defects in the District's decision to withhold their increments. First, it is contended that the District's actions violates the Open Public Meetings Act. *N.J.S.A.* 10:4-6. Second, the petitioners argues that the Legislature did not authorize the School District to withhold salary

increments. *N.J.S.A.* 18A:29-14 provides that salary increments are to be denied only by local Board of Education only after a majority vote of the full board and upon written notice and a right to appeal. In the case *subjudice* the School District has no board of education and no opportunity to appeal the denial was given to the petitioners. Further, *N.J.S.A.* 18A:7A-35(d) does not grant the superintendent the power to act in lieu of a board of education and decide to unilaterally deny salary increments to the teaching staff members. Further, *N.J.S.A.* 18A:7A-39 does not confer the State District Superintendent with the right to deny increments.

Having considered the petitioners argument, I **FIND** that the takeover legislation, *N.J.S.A.* 18A:7A-35(e) abolished the local Boards of Education and has vested in the superintendent in state-operated school districts with the essential authority previously granted to the local school board. Indeed, a state superintendent is empowered to engage in all necessary activities to allow the district to be fully functional. *N.J.A.C.* 18A:7A-35(e). This necessarily includes the power to act on a recommendation to withhold an increment. See *Brown v. State-Operated School Dist. of Jersey City,* 93 *N.J.A.R. 2d.* (EDU) 875. Thus, I **FIND** no merit to the petitioners contention that the superintendent is not empowered to effecutate personnel decisions.

Petitioners were given written notice of the denial and an opportunity to provide a rebuttal. The instant hearing is a review of the Superintendent's decision. Thus, I **FIND** that the instant appeal provides the petitioners with the right of appeal.

The State Superintendent is vested with wide discretion to effecutate the underlying intent of the takeover legislation. *N.J.S.A.* 18A:7A-35(d) provides that the State District superintendent shall perform all duties and possess all the powers assigned in Title 18A to central administration and supervisory staff, instructional and non instructional. Consquently, the takeover legislation provides the superintendent with the right to modify district rules and policies to effectuate the underlying intent of the Act. Since there is no local Board any meeting under the Open Public Meetings Act

would be meaningless. Thus, I **FIND** and **CONCLUDE** that there are no procedural infirmities presented that would defeat the School District's action.

The remaining issue is whether the petitioners have satisfied the burden of proof of demonstrating that the respondent's action was unreasonable, arbitrary and capricious. A review of each case is discussed below. Since the parties have stipulated certain facts to all petitioners those findings are incorporated herein. Additionally, this decision incorporate the stipulated facts as to each petitioner.

STIPULATED FACTS

The parties have stipulated the following facts as to all the petitioners.

1. The Jersey City Public School Instructional Observation Report (IOP) contains five (5) categories of Performance Factors to be rated:

(1) Demonstrates proficiency in subject matter;
(2) Assesses needs and evaluates progress of pupils;
(3) Employs effective organization and planning;
(4) Utilizes effective instructional techniques; and
(5) Addresses affective domain.

2. The Rating Scale for the Instructional Observation Report contains four possible ratings: 1) S - Satisfactory 2) N.I. - Needs Improvement 3) U - Unsatisfactory 4) N/A - Not Applicable.

3. The Instructional Observation Report specifies that any unsatisfactory rating requires a written comment.

4. The Public Schools of Jersey City Instructional Annual Written Performance Report (IAWPR) contains seven (7) categories of Performance Factors to be rated:

(1) Demonstrates proficiency in subject matter;

(2) Assesses needs and evaluates progress of pupils;

(3) Employs effective organization and planning;

(4) Utilizes effective instructional techniques;

(5) Exhibits professional attitudes and manner;

(6) Establishes rapport with pupils, staff and/or parents and community; and

(7) Implements and enforces school rules, administrative regulations and Board policy.

5. The Instructional Annual Written Performance Report specifies that any unsatisfactory rating requires a written comment.

6. All petitioners were notified that their increments would be withheld at the direction of the State District Superintendent, by letter dated May 12, 1994 from Judy Granick, State Executive Assistant, Human Resources.

FINDINGS OF FACT

Based on a review of the record evidence and a stipulation of facts as to each individual petition, I **FIND** the following **FACTS**.

SAWSON LABIB

Sawson Labib (Labib) was hired by the District in 1988 and served as a Special Education Instructor. In the 1993-94 school year, she was assigned to Public School (P.S.) # 16 and was transferred to P.S. 37 as a Special Education Teacher of the multiple handicapped. (J-1). On January 10, 1994, Labib was evaluated by Marvin Strynar, the Principal of P.S. #37. The evaluation consisted of a formal observation of Labib's performance in her classroom and it followed an informal observation. On the day of the formal observation, there were two children in the class. Labib was at her

desk and the children were seated at their respective desks. In Strynar's opinion "nothing" was being done in the class. Labib did not have a plan book, a teaching technique or display any organization in her classroom. Strynar concludes that the students could have been in an "unused store room". As a result of his observation, Strynar rated Labib as unsatisfactory in organization, planning and utilization of effective instructional techniques. Further, he rated Labib as Needing Improvement (N.I.) in demonstrating her proficiency in a subject matter. The only satisfactory rating that Labib received was in the area of addressing affective domain. (J-1).

Strynar spoke with Labib about her lack of organization and instructional techniques. Strynar was most concerned that Labib did not have a plan book. Finally, Strynar notes that J-2 reveals that Labib was excessively absent from work.

On February 22, 1994, William Ronzitti, Supervisor of Special Education conducted an evaluation of Labib using the IOP[3] . Although, he concluded that Labib satisfactorily demonstrated proficiency in her subject matter, Ronzitti found her unsatisfactory in organization, planning and in the use of effective instructional techniques. Moreover, he rated Labib as needing improvement in assessing the needs and evaluating the progress of her students.

Under cross examination, Ronzitti recalled that when Labib was first transferred to P.S. #37, she was given an aide to assist her with the transition. Labib did not have a permanent teacher's aide, because aides are only assigned on a permanent basis when there are eight or more students a class. A Special Education Teachers are required to have an Individualized Education Program (IEP) for each student. Labib did not present any IEPs and her plan book was a merger of her prior class from P.S. #16. Further, her plan book did not reflect newly enrolled students in her class and did not evidence any individualized instruction. (J-3).

[3] IOP refers to the formal evaluation that is designated Instructional Observation Report.

Labib testified that prior to her assignment at P.S. #37, she had never taught multiple-handicap students. Thus, she spoke with Ronzitti about her lack of experience and he directed that she speak with Strynar. Prior to the formal observation, Strynar never came to her class nor did he explain the school's rules and regulations.

Labib concedes she used her old plan book because new plan books were not available. On the day of Strynar's observation, she had inadvertently left her plan book in her car. Further, in January she requested materials and supplies, however none were available. Thus, she was without books, pencils and paper. The few books that were available were not relevant to the students. Subsequently, she did receive pencils and paper. Labib noted that two of the students in her class were classified as emotionally disturbed.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Labib's salary increment. I have considered Labib's testimony and her rebuttal letter to the evaluation, (P-1). The record amply demonstrates that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

Petitioner's failure to have a prepared and available plan book reflects a lack of preparedness to teach her class. The lack of IEP's for her student's clearly jeopardizes the provision of a meaningful education. I am not persuaded that the student's were so disruptive that Labib was prevented from providing an environment that was conducive to learning. It is important to note that a teacher must demonstrate that he/she is able to control her classroom. Petitioner readily admitted that she could not exercise control over her students.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1993-94 for unsatisfactory performance is **AFFIRMED** and the petition of appeal is hereby **DISMISSED**.

EMILY FOGERTY

Emily Fogerty (Fogerty) a twenty year veteran teacher retired from the School District in June, 1995. For ten years she taught basic skills to grades 2 through 8. Fogerty has a bachelor of arts in education, a masters of science in reading and is certified as a supervisor, a reading Teacher, a reading specialist and an elementary school teacher.

During the 1993-94 school year, Fogerty was assigned to teach the first grade at P.S. #14. On November 10, 1993, John Smiga, the Assistant Principal of P.S. #14, conducted formal observation of Fogerty's class. Fogerty was pre-warned about the observation and was told to present a lesson using collaborative learning techniques. Further, the evaluation followed several informal observations and a general staff meeting with all first grade teachers wherein evaluation tools were discussed. The class activity observed was reading - group work. Smiga observed that the students were using a work book to copy sentences. This was not a collaborative learning technique but was simply "busy work". Further, the classroom activity was more appropriately a homework assignment. Fogerty did not give the students an objective and there was no pupil interaction. As a result, Smiga rated Fogerty as needing improvement (NI) in several areas: demonstrating proficiency in a subject matter, utilizing effective instructional techniques and addressing effective domain of her classroom. With respect to the latter, Smiga noted that Fogerty failed to use her class aide when appropriate and loudly reprimanded her students.

Fogerty also received unsatisfactory ratings in assessing the needs and evaluating the progress of her students. Fogerty did not record the students grades in her record book. Nor did she have the required writing and math journals. Further, she had not evaluated the student's progress on a regular basis. Fogerty wrote the wrong date on the blackboard which she had the students copy. Although, she noted the

error she failed to correct it. (R-1). Further, Fogerty was observed using classroom instruction time to prepare report cards. (R-1).

Smiga also gave Fogerty an unsatisfactory rating in the area of displaying effective organization and planning. Here, Smiga stated that the class was "way behind" in their reading materials.

Smiga had a post conference meeting with Fogerty and it was agreed that Fogerty would meet with the District's Reading Consultant, Ms. Stone. However, Fogerty appeared late for that meeting and Smiga officially reprimanded Fogerty by memorandum dated February 28, 1994. (R-1). In the reprimand, Smiga noted Fogerty's tardiness, and that her report cards, plan book and school calendars were not timely issued.

Dr. Catherine Surdovel, Supervisor of Language Arts, informally observed Fogerty at least three times prior to conducting a formal evaluation on March 4, 1994. (J-6). She found that Fogerty had a "great" deficiency in the teaching of reading. Reading is a critical component of the teaching process for first graders. Specifically, Fogerty had difficulty with the Open Court reading program, an intensive phonics program in use in the district at that time.

On Fogerty's (IOP) evaluation, Dr. Surdovel reported that Fogerty's lack of knowledge of the Open Court Reading program led to a lack of focus. The students were confused. Fogerty needed to focus on planning and organization of the lesson. Finally, Fogerty had difficulties with the children's behavior. Thus, she gave Fogerty NI ratings for demonstrating proficiency in subject matter; assessing the needs and evaluating the progress of her pupils; utilizing effective instructional techniques; and addressing affective domain - N.I. (J-6); Fogerty also received an unsatisfactory rating for employing effective organization and planning.

Under cross examination, Surdovel admitted that she did not personally know whether Fogerty had received training in the District wide Open Court Program. Nevertheless, the lacking of training in the program should not have impacted Fogerty's ability to teach reading to first graders.

Sandra Harrison (Harrison), Principal of P.S. 14, also informally observed Fogerty on several occasions. Further, she reviewed the evaluations conducted by Smiga and Surdovel before conducting her own formal evaluation on March 21, 1994 (J-7). Harrison was concerned that Fogerty "needed help" with instruction and class management. The formal evaluation took place during a language arts lesson. Fogerty had listed words on the board, however the students could not pronounce the words appearing on the board. It was clear that there was "very little planning" since the objective listed in the plan book for that day did not match what was being taught. There were no varied activities planned to complement the lesson. Fogerty did not conduct an "informal assessment" of the students' progress or clarify the lesson as she taught.

Further, there were "major difficulties in class control". Some students were disruptive, walking around, hitting each other and were not engaged. A number of students missed what was being taught and were not redirected. Moreover, Fogerty was behind in the curriculum. She directed Fogerty to "pick up the pace." However, Fogerty remained behind to the end. Harrison gave Fogerty an NI in three areas: demonstrating proficiency in subject matter; assessing needs and evaluating the progress of her pupils; addressing affective domain. Fogerty was also given unsatisfactory ratings for failing to employ effective organization and planning the utilization of effective instructional techniques. (J-7).

A post-observation conference with Fogerty was held on March 28, 1994, wherein Harrison discussed the ratings and discussed strategies for improvement. Fogerty was given an additional copy of guidelines on the management of instructional strategies which all teachers had received at the beginning of the school year. Further,

Harrison reiterated that classroom seating be rearranged to manage disruptive students. Harrison also taught a model lesson in Fogerty's class. Subsequently, Harrison informed Fogerty that she would recommend an increment withholding for the successive school year. (J-8).

Emily Fogerty testified that she was employed by the District for twenty years before retiring in June 1995. For ten years, she taught Basic Skills to grades two through eight. She was not notified of an assignment change. Rather, it was only when she reported to the basic skills class in the Fall of 1993, that she was advised of her new assignment to teach the first grade. In spite of the new assignment, Fogerty maintains that she was advised as to a course of study. Thus, she went to other teachers to ascertain what was necessary for her to teach the class. She was given a plan book and a roll book. She knew nothing of cooperative learning. She soon discovered that she did not have all the materials, such as flash cards, or other necessary items.

Her first evaluation occurred on November 10 when Smiga came to her classroom during a reading lesson. The students were unable to write their names and could not identify the alphabet. A part of the lesson plan was to have the children copy sentences from one book to another.

The only experience that she had with the Open Court Reading Program was when she went to a summer class, on her own time and at her own initiative, and she learned very little. Surdovel observed that she did not have the necessary materials to teach Open Court and promised that she would get the necessary materials. Although she followed the recommendations of Surdovel, she was told that it takes years of practice to master the Open Court Program.

Fogerty further states that she evaluated student work books and had lesson plans. She was never advised that the objective of the lesson had to be put on the board. The report cards were not completed because she had been absent for about

three weeks and upon her return they were due. She concedes preparing the report cards in the classroom, however a teacher's aide was present and supervised the students.

Fogerty believes that it is proper for a teacher to raise their voice to quiet the students. Fogerty further noted that her students frequently requested permission to go to the bathroom. In order to avoid a constant stream of children leaving the classroom, she did not immediately reply to their requests. Further, a teacher's aide was not always present to escort the children to and from the bathroom. She was given instruction regarding classroom control and employed certain of the recommendations. However, not all of the recommendations worked.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Fogerty's salary increment.

I further **CONCLUDE** that petitioner has failed to meet her burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious. I **FIND** the testimonies of Harrison and Smiga to be credible. Petitioner could not control her class and displayed major deficiencies in teaching reading.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1993-94 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

JOHN PORTEE

John Portee (Portee), an eighteen-year veteran teacher, was assigned to Snyder High School as a Science Teacher during the 1993-1994 school year. He is Certified in Physical Education/Health, Science and Mathematics. Portee was subject to formal and informal evaluations by Gwendolyn Long (Long), Chairperson of the Science

Department at Snyder High School and Maria Cannizzaro (Cannizzaro), Supervisor of Science.

On December 2, 1993 Long conducted a formal evaluation of Portee's classroom. Long's duties as Department Supervisor required that she teach Science, conduct at least one evaluation of each teacher in the Science department and complete an end-of-year report on each teacher's performance. Prior to the formal evaluation, she was concerned about Portee's general interaction with his students and their reaction to him. During the evaluation, Portee was teaching a biology lesson on basic chemistry. The activity did not keep the students engaged because Portee had previously taught this lesson. Further, Long noted that spending too much time on one proficiency would cause Portee to fall behind in the curriculum.

Portee had problems with maintaining classroom control. His response to students who were acting out was negative and confrontational. Specifically, Portee would publicly reprimand the students and list their names and behavior grades on the blackboard. This technique was inappropriate because it embarrasses the student and could cause further "acting out." Further, the last entry in Portee's plan book was for November 17.

Long rated Portee as unsatisfactory in employing effective organization and planning. Further, she rated Portee as needing improvement in the utilization of effective instructional techniques and addressing affective domain.

Cannizzaro conducted a formal evaluation of Portee's teaching performance on February 17, 1994 (J-11). At the time of the observation, Portee was conducting a "seat-work" lesson on mitosis. The students were not instructed but worked individually at their seats on five questions Portee had placed on the board. Cannizzaro opined that this questions were rather fact-based instead of open-ended. Further, the lesson did not require any critical thinking on the part of the students but was busy work. The lesson could have been meaningful had class discussion taken place or had the

students work together in a cooperative learning situation. Cannizzaro concluded that a substitute could have delivered the lesson. She too noted that Portee's plan book was not current. Further, Portee's grade book revealed that the students were evaluated based upon test scores only, not notebooks or projects. Cannizzaro rated Portee as unsatisfactory in all areas. (J-11)

On the June 17, 1994 year-end performance evaluation, Long rated Portee as needing improvement in three areas: demonstrating proficiency in a subject matter; assessing needs and evaluation of student progress; and exhibiting a professional attitude and manner. Unsatisfactory ratings were given for: effective organization and planning; utilization of effective instructional technique; and establishing a rapport with students, staff and parents. The only satisfactory rating reflected was in the area of Portee's ability to implement and enforce school rules and administrative regulations. (J-13) The evaluation was a composite of all of Portee's evaluations in 1993-94.

John Portee testified that the biology class observed by Long was a difficult class. The students were fooling around, getting out of their seats. Therefore, discipline was absolutely necessary so that the student could be taught. Portee believes that Long was dissatisfied with the lesson because she wanted him to ask 30 questions on the handout and he asked only 25.

Portee disputes a lack of parental contact and notes that he had visited about ten homes prior to December 2, the date of the evaluation. Portee asserts that 70 percent of his students passed the midterm and final examinations.

Portee further noted that Cannazzaro had previously given him an excellent evaluation. Indeed, prior to December 2, evaluation, he had received excellent ratings on his prior evaluations. Portee concedes that if he had known that Cannazzaro was coming in for an observation, he would have given a different lesson. He teaches five periods a day, or twenty-five periods a week in addition to lab classes. Portee

concludes that Cannazzaro missed the lab section of his grade book and thus denies grading on test grades only.

Based on the careful review of the record, I **CONCLUDE** that the District had reasonable basis for its action to withhold Portee salary increment. The testimony of the District witnesses was credible and persuasive.

I further **CONCLUDE** that petitioner has failed to meet his burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1993-94 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

EBEN MYERS

During the 1993-1994 school year, Eben Myers (Myers) was assigned as a Crisis Intervention Teacher (CIT) at Snyder High School. Vernelle Harris, Vice-Principal of Snyder High School, conducted informal and formal observations of Myers' performance from September 1993 to October 1993. (J-15). Harris prepared an instruction observation report and an annual evaluation. (J-16, J-17). As the CIT, Myers' duties were to act as the "dean" of discipline under her direct supervision. Harris informed Myers that he needed to increase his presence in the halls between period changes. Further, that he needed to be aware of a student's disciplinary history and conduct follow-up. While Myers was effective at resolving conflict after it arose, he needed to develop a plan to reduce or avoid the need for disciplinary intervention. Harris further took exception to Myers' tactic of developing friendly relations with students, having them call him "uncle" and suggesting that they join the school track team. Myers was the coach of the track team. In her opinion Myers' "friendliness" with some students prevented discipline.

Harris also concluded that Myers would only suspend students who were not athletes, and did not recommend discipline for students who were athletes. (J-15) A critical flaw was Myers' failure to implement the code of conduct. Thus, she rated Myers as needing improvement in demonstrating proficiency in a subject matter, assessing the needs and evaluating the progress of pupils, and addressing affective domain. In the last two performance areas, employing effective organization and planning and utilization of effective instructional techniques, she rated Myers as unsatisfactory (J-15).

On December 14, 1993, Harris prepared an instructional observation report summarizing her observations of Myers' performance for the period of October 28 to December 14, 1993. Myers had made progress in clearing the hallways during class changes. Further, Myers had started to keep student files on suspension, however, he failed to follow-through. Indeed, the files were put away and were not used to monitor students' behavior. While Myers had students sign contracts agreeing to modify their behaviors these too were filed away and not enforced. (J-16).

Moreover, Myers was reluctant to recommend suspension as discipline without her insistence. There was inconsistency between Myers' discipline of familiar students and unfamiliar students. Myers continued to give athletes preferential treatment. Indeed he would allow members of his track team to congregate in his office which interfered with his job duties. Further, Myers continued his "friendliness" with students, thus impeding his ability to effectuate discipline. Harris concedes that Myers had a "great rapport" with students, parents and staff. Thus, he could have had a great impact on discipline if he had properly utilized his communications skills. Consequently, she rated Myers as needing improvement in all areas. (J-16).

On June 21, 1994, Harris completed an end-of-year report on Myers. (J-17) Although, Myers was still not performing to her satisfaction, he had made progress in four areas. However, he continued to need improvement in three areas: demonstrating

proficiency in subject matter; utilization of effective instructional techniques and exhibiting a professional attitude and manner. Harris recommended that Myers attend district workshops and training, organize his daily activities and prioritizes his responsibilities. Further, that Meyers read current literature on discipline. Additionally, she noted that Myers needed to report to work and sign in on time; effectively monitor and manage corridor activities; fairly execute disciplinary measures to all students; prevent his involvement in extra curricular activities from interfering with CIT duties. In spite of these deficiencies, she recommended Myers for a salary increment. (J-17) However, her supervisor overRuled her recommendation and the salary increment was denied.

Eben Myers testified that he has a B.A. in government, a Masters in Teaching and attended law school for 1.5 years. He became the crisis intervention teacher (CIT) at the request of the former principal during the time that he was a substitute teacher at Synder. There is no certification for a CIT. The CIT program was created by the state in 1990-91. As a CIT his primary duty is to maintain discipline. Harris and a security guard also are involved in discipline and they jointly monitor the hallways. Myers describes Synder High School as "something out of a comic book" where the students fight, carry guns and knives.

Myers disputes that he did not conduct follow-up with problem students. In addition to counseling students, he kept progress reports. The progress reports contained the names of the student's parents' a phone number and number of times he had saw a particular student. Further, during the school year he visited the houses of numerous students in addition to speaking with them by telephone. In the course of one day, he would see 20 to 30 students daily. In 1993-94 school term, he recommended to Harris that 400 students be suspended. However, only 275 -280 students were actually suspended. Myers disputes that he favored athletes and notes that he did suspend an athlete during the school term.

Myers asserts that crisis intervention cannot be pre-planned. Rather, the nature of the job requires spontaneous reaction. He also takes issue with the District's CIT training program and submits that it is inadequate because it fails to teach crisis intervention.

Based on a review of the record, I **FIND** that Myers improved his performance and was rated satisfactory in four areas. However, he needed improvement in three areas. (J-17). Myers did not receive any unsatisfactory ratings. A review of J-15 and J-16 reveals that Myers made significant improvement from the beginning of the school year where he was rated as unsatisfactory in two areas and needing improvement in the remaining performance factors. From October 1993 to December 1993, Myers' performance was still below par and he generally needed improvement in all areas. The issue is whether the improvement exhibited on J-17 warrants a salary increment.

Briefly, it must be reemphasized that Myers bears the burden of proving the burden of proving by a preponderance of the credible evidence that the District's action was unreasonable, arbitrary or capricious. Initially, it must be noted that the decision of a board of education, in this case the state superintendent, duly created and empowered by legislative fiat, it entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. The board's determinations must be accepted if supported by substantial credible evidence. *Thomas v. Bd. Of Educ. of The Township of Morris,* 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966).

For an action to be declared arbitrary and capricious, it must lack a rational basis. *Bayshore Sewerage Co. V. Dep't Envtl. Protection, N.J.,* 122 *N.J. Super* 184, 199 (Ch. Div. 1973), citing *Bicknell v. U.S.* 422 *F.2d* 1055, 1057 (5th Cir. 1970). An arbitrary and capricious action by an administrative body means willful and unreasoned action, without consideration and in disregard of circumstances. *Bayshore*, *supra*, at 199. An abuse of discretion occurs when a decision is not premised upon a consideration of all relevant factors, is based upon a consideration of irrelevant or

inappropriate factors, or amount to a clear error in judgment. *State v. Bender*, 80 *N.J.* 84, 93 (1979).

Applying the law to the instant matter, I **CONCLUDE** that the denial of Myers' salary increment was not arbitrary or capricious or unreasonable. The respondent had before it three evaluations. The first two evaluations, (J-15 and J-16) *prima facie* establish that Myers' performance was below par. The third evaluation while exhibiting that Myers had improved and satisfactorily performed in four areas, still indicated that he needed improvement in demonstrating his proficiency as a disciplinarian; utilizing techniques and exhibiting a professional attitude and manner. These performance factors are significant as they go to the very core of the job. I therefore, **CONCLUDE** that petitioner has failed to meet his burden of proof, by a preponderance of the credible evidence, that the District's action was unreasonable, arbitrary, or capricious.

It is hereby **ORDERED** that the District's determination to withhold petitioner's increment for school year 1993-94 for unsatisfactory performance is **AFFIRMED** and the petition of appeal be **DISMISSED**.

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

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

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

1/30/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

Feb. 3, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

EXHIBITS

Witnesses:

For Petitioners:

Sawson Labib

Emily Fogerty

John Portee

Eben Myers

For Respondent:

Marvin Strynar

William Ronzitti

John Smiga

Catherine Surdovel

Sandra Harrison

Gwendolyn Long

Maria Cannizzaro

Vernelle Harris

Exhibits:

J-1 IOP of Labib dated 1/10/94.

J-2 Memorandum dated 2/18/94.

J-3 IOP of Labib dated 2/22/94.

J-4 Letter dated 5/12/94.

J-5 IOP of Fogerty dated 11/10/93.

J-6 IOP of Fogerty dated 3/4/94.

J-7 IOP of Fogerty dated 3/21/94.

J-8 Letter dated 3/28/94.

J-9 Letter dated 5/12/94.

J-10 IOP of Portee dated 12/2/93.

J-11 IOP of Portee dated 2/17/94.

J-12 Letter to John Portee.

J-13 IAWPR dated 6/17/94.

J-14 Letter dated 5/12/94.

J-15 IOP of Myers dated 10/27/93.

J-16 IOP of Myers dated 12/14/93.

J-17 IAWPR dated 6/21/94.

J-18 Letter dated 5/12/94.

P-1 Rebuttal to Evaluation dated 1/10/94.

R-1 Letter of reprimand dated 2/28/94.

EMILY FOGERTY, SAWSON LABIB, EBEN MYERS AND JOHN PORTEE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. To the extent these submissions are essentially a reiteration of those arguments raised before the Administrative Law Judge (ALJ) and fairly considered by her, they are not recounted herein.

Petitioners assert that the ALJ erred in interpreting the facts in this case. In so doing, petitioners identify testimony adduced at the hearing which, they contend, the ALJ failed to consider. (Petitioners' Exceptions at pp. 5, 6) With respect to Sawson Labib, petitioners aver that the ALJ failed to consider that she did not begin her duties at P.S. #37 at the beginning of the school year; that the principal, Marvin Strynar, observed her only once during the entire year; that prior to Strynar's single evaluation, he felt there was no teaching going on in Labib's room; that Strynar never asked to see Labib's plan book, but assumed she did not have one; that Labib

was never advised that her increment was in danger because of her teaching effort or product, yet was advised that her increment *was* in danger due to her poor attendance; that, prior to Strynar's evaluation, all of Labib's evaluations contained all "satisfactory's"; that there is no written policy establishing the standard for denial of an increment; that Labib had never previously taught multiple handicapped children; and that Labib was not given a plan book, in accordance with the District's responsibility, despite having asked for one. (*Id.* at p. 5)

As to Emily Fogerty, petitioners contend the ALJ failed to consider that, prior to the years in question, Fogerty taught Basic Skills for ten years and never taught first grade; that, prior to reporting to school for the 1993-94 school year, Fogerty was never advised that she would not be teaching Basic Skills; that, when Fogerty arrived at P.S. #14, there were no materials for her; that she was never given a course of study; that, at no time prior to her first evaluation did anyone come to her room to help her; that although Assistant Principal Smiga faulted her for not writing the day's learning objective on the board, no one had advised her that same was required; that, while Smiga took exception to her writing the wrong date on the board, when she discovered the error, she corrected it; that Smiga did not consider her reasons for not allowing children to go to the bathroom; that Catherine Surdovel, Supervisor of Language Arts, who was asked to come to Fogerty's room to aid her, noted as late as March 1994 that Fogerty did not have all the necessary teaching materials; that Surdovel did not intend her evaluation to be used in determining whether Fogerty was to receive an increment; and that Fogerty was evaluated only once by each of the three evaluators. (*Id.* at pp. 5, 6)

As to John Portee, petitioners affirm that the ALJ failed to consider that the first person to observe and evaluate Portee was Ms. Cannazzarro, Supervisor of Science, who did not

know that her evaluation would be used as a device to deny Portee's increment; that Gwen Long, Science Department Supervisor, who next evaluated Portee, admitted that his lesson was consistent with the course of study and that he was approximately at the point in the curriculum where he should have been; that Ms. Long admitted Portee did not have enough materials for the class; that Ms. Long took issue with the fact that Portee reprimanded students who were out of order; that, while Ms. Long testified that she felt Portee was spending too much time on one proficiency, she did not know if the class had mastered the proficiency being taught; that Ms. Long observed and evaluated him only once and had no knowledge of the success or failure rate of the students in his class. (*Id.* at p. 6)

As to Eben Myers, petitioners contend that the ALJ failed to consider that Myers was not a classroom teacher, yet the evaluation form used by the District was one for classroom teachers; that Myers had no students assigned to him; that he was evaluated by only one person, Vernelle Harris, Vice Principal of Snyder High School, who recommended that he receive his increment; and that no one recommended that Myers be denied his increment, and no testimony was offered as to why he did not receive same. (*Id.*)

Finally, petitioners again assert that the evaluation process as conducted by three supervisors and administrators was subjective and arbitrary, and "***[i]n some cases the visit was unannounced.***" (*Id.* at p. 7) Additionally, petitioners reiterate that the District failed to comply with the due process requirements of *N.J.S.A.* 18A:29-14. (*Id.* at pp. 7, 8)

Upon careful and independent review, and finding petitioners' exception arguments to be unpersuasive, the Commissioner determines to affirm the initial decision of the ALJ. As the District properly instructs, it is petitioners' burden to prove, by a preponderance of

credible evidence, that the District's decision to withhold petitioners' increments was *unreasonable*, based on the facts. *Kopera, supra.* They have failed to do so.

Further, petitioners have shown no fault with the number and conduct of the District's evaluations. In the instant matter, the District conducted two formal evaluations of Petitioner Labib by two different evaluators, three formal evaluations of Petitioner Fogerty by three different evaluators, three formal evaluations of Petitioner Portee by two different evaluators,[1] and three formal evaluations of Petitioner Myers by a single evaluator. That an evaluation will include subjective assessments by an administrator or supervisor of an individual's progress and performance is inevitable.

Moreover, that petitioners note evaluators' visits were, at times, unannounced, suggests their performances would have been better if they had been warned of the evaluator's upcoming visit. Yet, the Commissioner finds it entirely proper for the District to assume that it could evaluate any one of its staff members *on any day* and *at any time* and expect meritorious performance. It is further noted that, even when Petitioner Fogerty *was* provided notice that Assistant Principal Smiga would conduct a formal observation and was also told that her lesson should utilize cooperative learning techniques, Petitioner Fogerty nonetheless failed to employ these techniques and testified that "[s]he knew nothing of cooperative learning," (Initial Decision at p. 12), notwithstanding that she was a 20-year veteran of teaching.

As to Petitioner Myers, the Commissioner finds that the ALJ fairly concluded that, notwithstanding Ms. Harris' recommendation to the contrary, the District's decision to

[1] It is noted that the final evaluation was a composite of the previous two evaluations in 1993-94. (Initial Decision at p. 15)

withhold Myers' increment *was* rationally based upon his observed and documented need for improvement in areas which directly implicate the duties of his job.[2] (Initial decision at p. 20)

With respect to petitioners' arguments regarding the alleged procedural infirmities of the District's actions, the Commissioner concurs with the ALJ's view that the State Superintendent is "***empowered to engage in all necessary activities to allow the district to be fully functional," (Initial Decision at p. 4) and, indeed, is expressly authorized to make all personnel determinations relative to the employment of all officers and employees of the District, pursuant to *N.J.S.A.* 18A:7A-42a(3), which would include the power to act on a recommendation to withhold an increment. Moreover, to the extent petitioners assert they were not provided fair notice, the Commissioner reiterates the role that the performance evaluation plays for the diligent staff member:

> The State Board, in *Yorke v. Piscataway BOE*, OAL Dkt. No. EDU 9267-88 (Aug. 10, 1989), rev'd Comm'r (Sept. 18, 1989), *rev'd* State Board (July 5, 1990), rejected the petitioner's argument that the board's action was unreasonable in that she received no advance notice that her performance was viewed as being so deficient as to result in the withholding of her increments. In so deciding, the State Board noted that the "underlying purpose behind the evaluation procedure is to ensure that a teacher receives adequate notice of any unsatisfactory performance and of ways to improve performance." *Id.* Since concerns about her teaching performance were brought to the teacher's attention during various observations that year and the evaluations noted deficiencies, adequate notice was given. ***
>
> In *Loewengart v. Randolph BOE*, OAL Dkt. No. EDU 5721-87 (June 20, 1988), *adopted* by Comm'r (July 29, 1988), the Commissioner concluded that it could not be said that "no notice or insufficient notice was provided or that the withholding came as a surprise." The petitioner "knew or should have known" early in the year that the principal who evaluates her performance was concerned about various aspects of it. *** The Commissioner

[2] Among the areas "needing improvement," as cited on Myers' June 21, 1994 evaluation, was "Management of discipline on the second floor." (J-17)

noted that N.J.S.A. 18A:29-14 has no requirement for advance written notice of the intent to withhold. ***

The Commissioner, in *Rosania v. Middlesex BOE*, OAL Dkt. No. EDU 5723-87, EDU 5303-86, remanded (Dec. 14, 1987), *adopted with modification* on remand by Comm'r (Jan. 22, 1988), noted that case law has established the requirement of some notice and opportunity to correct defects in a withholding case; however, the Commissioner also emphasized that this requirement *** "certainly do[es] not rise to that required in a tenure matter." ***(emphasis in text) *Sturn v. South Plainfield Board of Education*, 92 *N.J.A.R.* 2d (EDU) 661, 668, 669.

In the instant matter, as seasoned professionals for the most part, petitioners cannot credibly claim that they were without notice that their respective performances were below District standards. Moreover, as the ALJ correctly noted, petitioners were provided written notice of the denial of their increments and an opportunity to submit a rebuttal. The hearing at the OAL further provided petitioners with the right of appeal. (Initial Decision at p. 4) Thus, any claim by petitioners as to denial of notice and opportunity to be heard is dismissed as without merit.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The Petitions of Appeal in this matter are hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 18, 1997
DATE OF MAILING MARCH 18, 1997

125-97

EDU #8490-94, #8491-94 and #7968-95 (consolidated)
C # 125-97
SB # 31-97

EMILY FOGERTY, SAWSON LABIB, EBEN MYERS AND JOHN PORTEE,

PETITIONERS-APPELLANTS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 18, 1997

For the Petitioners-Appellants, Feintuch, Porwich & Feintuch (Alan S. Porwich, Esq., of Counsel)

For the Respondent-Respondent, Patricia Taylor, Esq.

On March 18, 1997, the Commissioner of Education issued a decision in which he dismissed the consolidated petitions filed by Emily Fogerty, Sawson Labib, Eben Myers and John Portee (hereinafter "appellants"), tenured teaching staff members who challenged the State-operated District's action in withholding their salary increments for the 1994-95 school year.

On April 2, 1997, appellants filed a notice of appeal with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), appellants' brief in support of their appeal was due on April 22, 1997, 20 days after the notice of appeal was filed. Appellants,

7/2/97

however, failed to file a brief by that date. By letter dated April 29, 1997, the counsel for the State Board notified appellants that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of their failure to perfect the appeal. As a result of that notice, counsel for appellants requested that the filing deadline be extended until May 7. Appellants, however, have still failed to file a brief in support of their appeal, nearly two months after the extended deadline for such filing, or to offer any explanation for their failure to do so. Nor have appellants requested an additional extension of time for such filing.

Consequently, under the circumstances, the State Board of Education dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

July 2, 1997

Date of mailing JUL 08 1997

125-97

EDU #8490-94, #8491-94 and #7968-95 (consolidated)
C # 125-97
SB # 31-97

EMILY FOGERTY, SAWSON LABIB, EBEN MYERS AND JOHN PORTEE,

PETITIONERS-APPELLANTS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, March 18, 1997

Decided by the State Board of Education, July 2, 1997

For the Petitioners-Appellants, Feintuch, Porwich & Feintuch (Alan S. Porwich, Esq., of Counsel)

For the Respondent-Respondent, Patricia Taylor, Esq.

On March 18, 1997, the Commissioner of Education issued a decision in which he dismissed the consolidated petitions filed by appellants herein, tenured teaching staff members who challenged the State-operated District's actions in withholding their salary increments for the 1994-95 school year. On April 2, 1997, appellants filed a notice of appeal from that decision with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), appellants' brief in support of their appeal was due on April 22, 1997. However, no brief was filed by that date. By letter dated April 29, 1997, we notified the counsel for appellants that no appeal brief had been filed

10/1/97

and that this matter was therefore being referred to our Legal Committee for consideration of appellants' failure to perfect the appeal. As a result of that notice, the counsel for appellants requested that the filing deadline be extended until May 7. We granted that request. However, the counsel for appellants still failed to file a brief in support of the appeal or to offer any explanation for his failure to do so. Nor did he request an additional extension of time for such filing. Consequently, on July 2, 1997, eight weeks after the extended deadline, we dismissed the appeal for failure to perfect, pursuant to N.J.A.C. 6:2-1.12(a), which authorizes dismissal of an appeal for failure to meet the filing deadline for an appeal brief. See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

On July 22, appellants filed the instant motion for reconsideration of that decision. In a certification submitted with the motion, the counsel for appellants explains his failure to file a brief by indicating that he has been under treatment for chronic depression and attention deficit disorder. He avers that "[a]s a result of these conditions, I have had difficulty in meeting the pressures of my work load and have been unable to meet time deadlines on certain matters, such as this." He adds that his secretary had "missed a significant amount of time recently due to personal reasons causing a further back-up of my workload."

A "Psychological Summary" by Patricia M. Brady, Ed.D. dated June 24, 1997, a week prior to our decision dismissing the appeal, confirms that the counsel for appellants has been under treatment for "Major Depression" since August 1996 and indicates that he has "made improvements." She also relates that he has been under

treatment for "Attention Deficit Disorder" since April 1997. She adds: "It is notable that since beginning this medication, [the counsel for appellants] is reporting increased productivity and an awareness of both attention and memory improvements, all of which have been validated for him by the positive comments of coworkers."

After a review of the papers submitted, we find no basis for reconsidering our decision. The counsel for the appellants was notified by letter dated April 29 of his failure to file a brief by the April 22 filing deadline. As a result of that notice, he requested and was granted an extension until May 7. Yet, he still failed to file a brief in support of the appeal. Nor did he request an additional extension, provide any explanation for such failure or otherwise contact us with regard to this matter. He was subsequently advised by letter dated June 20 that this matter was scheduled for consideration by the State Board at our meeting of July 2. He did not respond to that notice. Nor did he file a brief in support of the appeal. As a result, we dismissed the petition, nearly two months after the extended deadline.

We note, in addition, that the documentation provided with the motion indicates that the counsel for appellants was under treatment and showing improvement, including increased productivity, during the relevant periods at issue herein. Nonetheless, despite his request to extend the filing deadline, he still failed to file a brief in support of the appeal or to offer any explanation for his repeated failures to comply with our filing requirements until July 22, when he filed the instant motion for reconsideration, three weeks after our decision to dismiss the appeal and three months after appellants' brief had originally been due.

As noted by the Court in Paszamant, supra, slip op. at 3, "[a]n entity such as the State Board of Education has to be free to enforce its own procedural rules, providing that it does not do so in a manner which is arbitrary, capricious or unreasonable." It was the obligation and responsibility of the counsel for appellants to assure compliance with the regulations, and, under the particular circumstances before us, we find no basis for reconsidering our decision to dismiss the appeal. Nor does this case present us with a matter of public importance or substantive issues of transcendent importance compelling resolution. Consequently, we deny appellants' motion for reconsideration of our decision dated July 2, 1997 in this matter.

October 1, 1997

Date of mailing OCT 03 1997

126-97

126-97

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

March 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL DECISION
DISMISSAL
OAL DKT. NO. EDU 4712-95
AGENCY DKT. NO. 111-4/95

ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

Viji Sargis, petitioner, *pro se*

Louis M. Flora, Esq., for respondent School District of the City of Paterson

Record Closed: August 22, 1996 Decided: September 17, 1996

This is a transcript of the administrative law judge's oral decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE: **ELINOR R. REINER**, ALJ:

PROCEDURAL HISTORY

On or about April 24, 1995, petitioner Viji Sargis filed a petition of appeal with the Commissioner of Education, requesting an inquiry into alleged violations of statutorily prescribed election procedures in the annual school election held in the School District of the City of Paterson. The matter was transmitted to the Office of Administrative Law (OAL) on May 10, 1995, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The case was assigned to the undersigned judge

on June 2, 1995, and a telephone prehearing conference was scheduled for July 6, 1995. That date was subsequently adjourned, and the telephone prehearing conference was held on August 22, 1995, at which time the issues were isolated. The issues, as stated in the prehearing order, are whether there were any improprieties and/or violations of law in the conduct of the school election held in the School District of the City of Paterson, Passaic County, on April 18, 1995, and, if so, what is the appropriate relief. Respondent was to file its answer to the petition on or before August 31, 1995. Respondent filed its answer to the petition on September 5, 1995. The parties were required to propound interrogatories and request the production of documents on or before September 29, 1995. Those interrogatories were to be answered on or before October 27, 1995. By letter dated August 31, 1995, enclosing a corrected copy of the prehearing order, the OAL notified the parties that the hearing was scheduled for March 22 and 29, and April 1 and 2, 1996

As stated above, the case was scheduled to be heard beginning March 22, 1996, at which point there was a pending motion filed by respondent in regard to the Commissioner's jurisdiction of this matter. Various cases pending before the OAL entailed the same jurisdictional issue. They were consolidated for determination by Chief Judge and Director Barbara Harned, who ruled that the Office of Administrative Law did in fact have jurisdiction over these cases. As a result, this matter was rescheduled for today's date. There is a motion, however, that is pending by respondent, the School District of the City of Paterson, and that motion originally related to the jurisdictional issue which has since been determined by Judge Harned. Still open, however, are the issues of mootness and dismissal of the claim due to petitioner's failure to provide discovery.

DISCUSSION

I have considered respondent's motion to dismiss on the grounds of mootness and failure to provide discovery, in addition to failure to respond to the motions and orders of this tribunal. Having done so, I am inclined to grant respondent's motion to

dismiss on the basis of failure to provide discovery. Let me begin by saying that in regard to the issue of mootness, I am not now inclined to dismiss on that basis. Petitioner has alleged a number of improprieties which really have at this point in time not been addressed. It may be that petitioner's allegations are out of time, it may be that they are moot, it may be that if the facts were known there would be a proper motion for summary decision filed. At this point in time, I am not inclined to grant respondent's motion to dismiss on the basis of mootness, because I do not think that I have enough facts at this juncture to make that determination.

However, I do have enough facts before me to conclude that the appropriate sanction regarding failure to answer discovery is to dismiss this matter. Let me refer you to *N.J.A.C.* 1:1-10.1(a), which sets forth the purpose and function of discovery: "The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary." In the instant case, had petitioner provided discovery, perhaps respondent could have made a more appropriate motion in regard to petitioner's claim. This could not be done because petitioner did not answer respondent's discovery request.

N.J.A.C. 1:1-10.1(b) indicates that it is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. If one looks at *N.J.A.C.* 1:1-10.2, any party may notify another party to provide discovery by one or more of the following methods: 1. written interrogatories; 2. production of documents or things; 3. (not relevant here) permission to enter upon land or other property for inspection or other purposes; and 4. requests for admissions, which were in fact requested here. Depositions can also be utilized under certain circumstances. But, of import here is *N.J.A.C.* 1:1-10.4, which provides that the parties in any contested case shall commence immediately to exchange information voluntarily, to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material. The parties shall

immediately serve discovery requests and notices and make discovery motions. No later than fifteen days from receipt of a notice requesting discovery, the receiving party shall provide the requested information, material or access or offer a schedule for reasonable compliance with the notice; or, in the case of a notice requesting admissions, each matter therein shall be admitted unless within the fifteen days the receiving party answers, admits or denies the request or objects to it pursuant to *N.J.A.C.* 1:1-10.4(d). Subsection (d) states that a party who wishes to object to a discovery notice shall place a telephone conference call to the judge and the other parties within ten days from receipt of the notice.. A party who wishes to compel a response to a discovery notice shall place a telephone conference call to the judge and the other parties within ten days of the notice due date. A party who wishes to object to a discovery response shall place a telephone call to the judge and the other parties within ten days of receiving the response. If a party fails without good reason to place a timely telephone call, the judge may deny that party's objection or decline to compel the discovery. The parties shall complete all discovery no later than five days before the first scheduled evidentiary hearing or by such date ordered by the judge at the prehearing conference.

In the instant case, it is clear to me, and petitioner admits, that she in fact received respondent's discovery request. Whether that discovery request came on September 29 or on September 30, she has had the discovery request since on or about September 29, 1995, and has failed in almost one year to comply with that discovery request. We have had numerous conferences. There was a scheduled hearing date in March 1996, at which petitioner appeared, and still petitioner has failed to answer those interrogatories. In addition, a motion was filed by respondent seeking sanctions. Even after that motion was filed, and even at my request by telephone call of July 29 to respond to that motion, there has never been a response to respondent's set of interrogatories. In fact, there has never really been a real response to the motion from petitioner as to why she failed to answer those interrogatories. Petitioner says in the hearing today, "I failed to answer interrogatories because he already has the information." It is not petitioner's choice to proceed in that manner. I understand that petitioner is *pro se*. However, petitioner is able to cite numerous statutes, which she

feels that respondent has not complied with and which establish improprieties. She has to then comply with the rules of this tribunal, and she has in fact failed to do that. Applicable as a result is *N.J.A.C.* 1:1-10.5, the sanctions provision, which provides that by motion of a party or on his or her own motion, the judge may impose sanctions pursuant to *N.J.A.C.* 1:1-14.14 for failure to comply with the requirements of this subchapter. Before imposing sanctions the judge shall provide an opportunity to be heard.

If one looks at *N.J.A.C.* 1:1-14.14, it indicates that (a) for unreasonable failure to comply with any order of the judge or with any requirements of this chapter, the judge may: 1. Dismiss or grant the motion or application; 2. Suppress a defense or claim; 3. Exclude evidence; 4. Order costs or reasonable expenses; or 5. Take other appropriate case-related action. In this case, I am going to dismiss the petition for failure to comply with discovery. The discovery was supposed to be completed by petitioner by October 27, 1995. It has not been completed to date. There has been no reasonable response by petitioner as to why that has not been accomplished and, as a result, I do not believe that I have any recourse but to grant respondent's motion. So, I will ask respondent to prepare an order under the five-day rule. This decision will be incorporated into a written decision dismissing petitioner's claim.

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

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

Within thirteen (13) days from the date on which this recommended oral decision

was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision as edited by the ALJ for form but not substance, rendered in the above matter on August 22, 1996.

DATE — ANNA M. LEGGETT

DATE — **ELINOR R. REINER**, ALJ

Receipt Acknowledged:

DATE — DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE — OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NOS. EDU 11553-96 AND EDU 4712-95 (ON REMAND)

AGENCY DKT. NO. 111-4/95

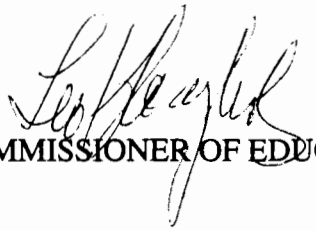
IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
STATE-OPERATED SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

The record of this matter, which includes the initial decision of the Office of Administrative Law (OAL), petitioner's exceptions, and the previous decision of the Commissioner dated October 28, 1996, remanding this matter to OAL for review of the Administrative Law Judge's (ALJ) recommended sanction, having been returned to this agency, has been reviewed. Although the parties were provided with the opportunity to submit comments on the requested return of this file, and the proposed action to vacate the Commissioner's prior decision, no such comments were filed.

Upon review, the Commissioner has determined to vacate his decision of October 28, 1996, and to affirm the initial decision of the ALJ for the reasons expressed therein. In so ruling, the Commissioner recognizes that the recommended sanction of dismissal for petitioner's failure to comply with discovery requirements is within the Commissioner's jurisdiction and that no remand of the instant matter to the OAL Director for imposition of sanction is necessary.

Accordingly, the Commissioner vacates his decision of October 28, 1996, and for the reasons expressed therein, adopts the initial decision of the OAL dismissing the within Petition of Appeal.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

March 19, 1997
Date of Mailing, March 19, 1997

126-97

EDU #4712-95
C # 126-97
SB # 42-97

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
STATE-OPERATED SCHOOL DISTRICT : STATE BOARD OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC : DECISION
COUNTY. :

Decided by the Commissioner of Education, March 19, 1997

For the Petitioner- Appellant, Dr. Viji Sarjis, pro se

For the Respondent-Respondent, Louis M. Flora, Esq.

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

September 3, 1997

Date of mailing SEP 05 1997

127-97

127-97

ROSE BACHRATY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

March 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9262-95
AGENCY DKT. NO. 221-6/95

ROSE BACHRATY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TP. OF CLARK,

Respondent.

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

Mark S. Tabenkin, Esq., for respondent (Kenney & Gross, attorneys)

Record Closed: January 23, 1997 Decided: January 27, 1997

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

This matter was transmitted to the Office of Administrative Law as a contested case by the Department of Education in August 1995 and involved a claim by the petitioner, Rose Bachraty, that the respondent Board of Education of Clark, had violated her tenure and seniority rights by failing to offer her reemployment for the 1995-96 school year. A prehearing was held on April 29, 1996 which resulted in the amendment of a prehearing order which previously had been entered on November 2, 1995. Hearings were scheduled for October 21, 1996. Prior to the hearing date I was

advised that the case had been settled and that a stipulation of settlement would be filed.

That stipulation, containing the terms and conditions of the agreement between the parties, has now been submitted to me. It provides for payment by the Board to petitioner in the amount of $11,500 and the withdrawal by Bachraty, with prejudice, of her petition of appeal. In addition, it provides that she retains any and all reemployment rights to which she may be entitled under *N.J.S.A.* 18A:28-12.

Having reviewed the terms of the settlement agreement I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by their signatures.

2. The settlement as set forth fully disposes of all issues in controversy and is consistent with law.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended,

this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

January 27, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

Feb. 4, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

/mh

ROSE BACHRATY,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	Agency Ref. No. 221-6/95
-vs.-	:	OAL Docket No. EDU 9262-95N
CLARK TOWNSHIP BOARD OF EDUCATION,	:	
Respondent.	:	SETTLEMENT AGREEMENT

WHEREAS on or about June 14, 1995 petitioner ROSE BACHRATY ("Bachraty") filed a Petition of Appeal against respondent CLARK TOWNSHIP BOARD OF EDUCATION (the "Board"), contesting the Board's failure to appoint her to the position of Computer Teacher for the 1995-96 school year; and

WHEREAS the aforesaid Petition of Appeal is currently pending before the Commissioner of Education as Agency Ref. No. 221-6/95 (OAL Docket No. EDU 9262-95N); and

WHEREAS the Board and Bachraty now desire to resolve the matter in dispute between them amicably and without the need for further litigation.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the CLARK TOWNSHIP BOARD OF EDUCATION and ROSE BACHRATY agree as follows:

1. The Board shall pay to Bachraty the sum of $11,500 in full settlement of the claim set forth in Agency

Ref. No. 221-6/95 (OAL Docket No. EDU 9262-95N) for the 1995-96 school year.

2. Bachraty shall withdraw, with prejudice, her pending Petition of Appeal in Agency Ref. No. 221-6/95 (OAL Docket No. EDU 9262-95N).

3. Bachraty retains any and all re-employment rights which she may have under N.J.S.A. 18A:28-12.

CLARK BOARD OF EDUCATION ROSE BACHRATY

Paul Ptenzio 10/16/96 Rose A Bachraty 10/3/96

OAL DKT. NO. EDU 9262-95
AGENCY DKT. NO. 221-6/95

ROSE BACHRATY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

March 19, 1997
Date of Mailing, March 19, 1997

128-97

128-97

BERNARD LAUFGAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLIAM GAHRES, ROBERT L. HORBELT, PAUL CARR AND BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

March 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5222-95

AGENCY DKT. NO. #20 - 1/95

BERNARD LAUFGAS,

Petitioner,

v.

WILLIAM GAHRES, ROBERT L. HORBELT, BARNEGAT TOWNSHIP BOARD OF EDUCATION AND PAUL CARR

Respondents.

Bernard Laufgas, petitioner pro se

Bradley W. Henson, Sr., Esq., for respondents

Record Closed: February 3, 1997 Decided: February 3, 1997

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner charged that the respondents violated laws relative to the making, maintenance and confidentiality of pupil records and respondents denied any such violation.

After petitioner did not return messages requesting that he contact my office to advise of dates when he could be present for a hearing for this case, he was notified in writing that, by a date certain, he should telephone my office for that purpose and that, if he did not do so, I would assume that he did not wish to continue his claim and that his claim would be dismissed. Petitioner did not telephone my office and, consequently, the claim is dismissed. N.J.A.C. 1:1 -14.6, -14.14.

PROCEDURAL HISTORY
AND
FINDINGS OF FACT

On January 30, 1995, the petitioner's "Complaint" (claim) was filed with the New Jersey Department of Education's Bureau of Controversies and Disputes. N.J.S.A. 18A:6-9. On May 4, 1995, the respondents' "Response to Petition," prepared by respondent Carr, was so filed. The Bureau transmitted the papers to the Office of Administrative Law (OAL) where, on May 19, 1995, the matter was filed as a contested case. N.J.S.A. 52:14B-2(b). The case was assigned to me and I scheduled a telephone conference, etc., which were adjourned. By letter dated February 16, 1996, I notified respondent Carr, that, in view of his status as a party, he could not also appear as the respondents' attorney and I requested that he notify me of the attorney who would appear for respondents. By letter dated March 27, 1996, respondent Carr notified me that he had not been served with a copy of the "Complaint," wherein he was named as a respondent, etc. Thereafter, there was correspondence relative to discovery, the respondents' attorney, etc. On August 7, 1996, a substitution of attorney was filed and Mr. Henson began his representation of respondents.

A December 12, 1996 hearing date was adjourned and, before the December 1996 holidays, my secretary telephoned and left messages for petitioner requesting that he contact my office and advise us of dates on which he could be present for a hearing. On or about January 21, 1997, having had no response from petitioner, my office mailed to him my letter in that regard and that letter has not been returned. State v. Wenoff, 102 N.J. 370, 375-76 (App. Div. 1968). My letter stated:

> My secretary informs me that before the December holidays, she left messages for you requesting that you contact us and advise us of dates on which you can be present for a hearing. Since then, my secretary tells me, you have not responded. This is notice to you that, if by January 31, 1997, you have not telephoned my office to advise that you will be present for a hearing on May 31, 1997, then I will assume that you do not wish to continue your claim and I will dismiss your case.
>
> [ALJ-1.]

My secretary and I have received no message from petitioner in response to the above letter and we have received no other message from anyone on behalf of petitioner explaining and/or excusing his failure to respond to the above letter.

CONCLUSIONS OF LAW

In litigation, administrative adjudication and dispute resolution generally, to assure due process and fairness, a party must cooperate and participate in the scheduling of a hearing, etc. A party's failure and/or refusal to so cooperate and participate would deprive an adverse party of the opportunity to protect its interest and prevent the making of a fair record on which a judge would make findings and conclusions. Consistent with these notions, a judge may schedule conferences, appearances and hearings and the judge may take such other actions as necessary for the expeditious and fair conduct of the case. N.J.A.C. 1:1-14.6. Consistent with these notions also, where a party unreasonably fails to cooperate and comply with the judge's directions relative to, e.g., scheduling a hearing, his or her claim for relief (petition) may be dismissed. N.J.A.C. 1:1 -14.14.

Despite notice to the petitioner that his petition would be dismissed for failure and/or refusal to confirm that he will make himself available for a hearing, he has unreasonably failed to provide such confirmation. The petitioner has resisted compliance with reasonable scheduling and adjudication requirements and, consistent with the above-noted notions of due process and fundamental fairness, his petition must be dismissed. Mueller v. Pannucci, Paredes and Brick Twp. BOE, OAL DKT NO. EDU 2152-95, Commissioner's Decision (November 15, 1995).

ORDER

I **ORDER** the petitioner's claims **DISMISSED.**

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

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

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

Feb. 3, 1997
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

2/5/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 3 1997
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 5222-95
AGENCY DKT. NO. 20-1/95

BERNARD LAUFGAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLIAM GAHRES, ROBERT L. HORBELT, PAUL CARR AND BOARD OF EDUCATION OF THE TOWNSHIP OF BARNEGAT, OCEAN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the conclusions of the Administrative Law Judge (ALJ) that pursuant to *N.J.A.C.* 1:1-14.14, petitioner's failure to respond to the ALJ's communications warranted dismissal of the instant case.

Accordingly, the Commissioner adopts the initial decision of the OAL for the reasons expressed therein and dismisses the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 19, 1997
Date of Mailing, March 19, 1997

129-97

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW PHILLIPS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF ROSELLE, UNION	:	
COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against special education teacher for allegedly falsifying grades of students.

Following motion by Board for Summary Decision, the ALJ granted Board's motion since respondent failed to comply with the provisions of *N.J.A.C.* 1:1-12.5 regarding responses to motions for summary decision. ALJ dismissed respondent's appeal. However, the ALJ granted respondent's motion to resume his salary, effective December 27, 1996.

Commissioner adopted in part, and modified in part, the recommended decision of the ALJ. The Commissioner clarified that the tenure matter before him was brought by the Board and was not the result of a Petition of Appeal filed by respondent as noted in the initial decision. Further, the Commissioner concurred with the ALJ's view that respondent was entitled by statute to a resumption of his salary as of December 27, 1996, he agreed with respondent's contention that his benefits should also recommence as of that date. Commissioner granted the Board's motion for summary decision to the extent that the Commissioner determined that respondent was guilty of conduct unbecoming a teaching staff member. However, he remanded the matter to OAL solely for proceedings as are necessary to submit evidence regarding the assignment or mitigation of penalty.

March 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION AND CROSS-MOTION
OAL DKT. NO. EDU 11163-96
AGENCY DKT. NO. 391-9/96

IN THE MATTER OF THE TENURE HEARING OF ANDREW PHILLIPS, BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY

Neil M. Cohen, Esq., attorney for petitioner (Gill & Cohen, attorneys)

Sheldon H. Pincus, Esq., attorney for respondent (Bucceri & Pincus, attorneys)

Record Closed: December 23, 1996 Decided: January 24, 1997

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioner, Board of Education of the Borough of Roselle, Union County (the Board) brings tenure charges against respondent, Andrew Phillips (Mr. Phillips), pursuant to *N.J.S.A.* 18A:6-10 for alleged unbecoming conduct.

PROCEDURAL HISTORY

On August 28, 1996, the Board voted to support tenure charges against Mr. Phillips for conduct unbecoming a teacher and to suspend him without pay. The Board certified the charges on September 3, 1996, and it filed a Certificate of Determination with the Commissioner of the Department of Education (the Commissioner) on September 6, 1996. On October 23, 1996, the Commissioner transferred the matter to the Office of Administrative Law (the OAL) for a hearing as a contested case.

On December 5, 1996, Mr. Phillips filed a motion for an Order compelling the Board to resume his salary, effective December 27, 1996. On December 17, 1996, the Board filed a reply to that motion and it filed a cross-motion for summary decision and an expedited hearing date. Mr. Phillips filed a reply to the cross-motion on December 23, 1996.

MR. PHILLIPS'S MOTION

Mr. Phillips seeks an Order compelling the Board to resume his salary, effective December 27, 1996. In support of his motion, Mr. Phillips argues that *N.J.S.A.* 18A:6-14 authorizes a suspension without pay for 120 days. That 120 days expired on December 26, 1996. Thus, Mr. Phillips argues that he is entitled to resume his salary as of December 27, 1996.

In opposition to this motion, the Board argues that Mr. Phillips allegedly admitted that he committed a fraud in falsifying grades of special education students. Thus, the Board argues that Mr. Phillips should not have to be paid and should be dismissed from his teaching position as a matter of law.

The suspension of Mr. Phillips without pay is governed by *N.J.S.A.* 18A:6-14, which provides:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

Pursuant to this statute, the Board has the authority to suspend an employee without pay if it certifies tenure charges against that employee. Once the charges are certified, this statute allows the suspension to continue without pay for only 120 calendar days after certification of the charges. This statute mandates that the resumption of the suspended employee's full salary must begin on the 121st day after the certification of the charges and must continue until the Commissioner of Education determines the charge. The Commissioner has held that the time period of suspension without pay is limited to a total of 120 calendar days, including weekends, vacations, holidays, summer vacations and any other day falling within a period of 120 days from the commencement of the suspension. *In re Tenure Hearing of Walter Kizer*, 1974 *S.L.D.* 501; *In re Tenure Hearing of Anthony Polito*, 1974 *S.L.D.* 662; *In re Tenure Hearing of Matilda Grabert*, 1977 *S.L.D.* 163.

The Board suspended Mr. Phillips without pay on August 28, 1996. The 120-day time period expired on December 26, 1996. Although the undersigned understands the Board's reluctance to continue paying Mr. Phillips under the circumstances of this case, the law is clear that it must do so. According to the language of *N.J.S.A.* 18A:6-14, Mr. Phillips's salary must resume on December 27, 1996 and continue until the Commissioner makes a determination in this matter.

THE BOARD'S CROSS-MOTION FOR SUMMARY DECISION

The Board moves for Summary Decision on the grounds that Mr. Phillips admitted that he falsified and made up grades for his special education students because he failed to give them tests. To support this argument, the Board submitted the affidavit of Kathleen Smith-Gomes (Ms.

Smith-Gomes), the person to whom Mr. Phillips admitted his improper conduct. The Board argues that, based upon his admitted improper conduct, Mr. Phillips should be dismissed as a matter of law with no further testimony. Mr. Phillips has submitted no affidavit in response to the facts contained in Ms. Smith-Gomes's affidavit. Instead, Mr. Phillips improperly relies only on arguments made in a letter brief.

N.J.A.C. 1:1-12.5 provides that a motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." In order to defeat a motion for summary decision, the adverse party must comply with the provisions of *N.J.A.C.* 1:1-12.5, which requires, in pertinent part:

> [W]hen a motion for summary decision is made and supported, an adverse party in order to prevail *must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.* If the adverse party does not so respond, a summary decision, if appropriate, shall be entered. (Emphasis added.)

Mr. Phillips has failed to comply with the provisions of *N.J.A.C.* 1:1-12.5. Thus, it must be determined whether or not summary decision is appropriate at this time.

It is clear to the undersigned from the facts set forth in Ms. Smith-Gomes's affidavit that Mr. Phillips falsified grades of his special education students. It is, therefore, **CONCLUDED** that this conduct constitutes unbecoming conduct and other just cause for termination pursuant to *N.J.S.A.* 18A:6-10, *et seq.*

ORDER

Based upon the foregoing, it is hereby **ORDERED** as follows:

1. Mr. Phillips's motion to resume his salary, effective December 27, 1996, be and hereby is **GRANTED.** The Board shall resume Mr. Phillips's salary effective December 27, 1996 and shall continue his salary until the Commissioner makes a determination in this matter.

2. The Board's cross-motion for summary decision be and hereby is **GRANTED.** Mr. Phillips's appeal be and hereby is **DENIED** and this matter be and hereby is **DISMISSED**.

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

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

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

Jan 24, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

2/3/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 11163-96
AGENCY DKT. NO. 391-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW PHILLIPS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF ROSELLE, UNION	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were filed in accordance with *N.J.A.C.* 1:1-18.4. The Board's reply was untimely filed and is not, therefore, considered herein.

Respondent initially asserts that, under the Tenure Employees Hearing Law, he is entitled to a hearing before the Commissioner of Education. The Board may not, according to respondent, determine whether he is guilty of the charge; nor may the Board determine the appropriate penalty. (Respondent's Exceptions at p. 1) Rather, respondent refers to *N.J.S.A.* 18A:6-16 and argues that

> ***The statute speaks in declarative terms. It does not state that the Commissioner *may* conduct a hearing, but rather makes it clear that the Commissioner will have one. A hearing is necessary because the Commissioner is required to determine the penalty to be imposed after hearing all the evidence relating to the extent of the penalty appropriate for the employee's conduct.*** (emphasis in text) (*Id.* at p. 2)

Similarly, respondent avers that he is entitled to discovery prior to a decision being rendered in this matter. Respondent herein notes that he wrote to the OAL on November 4, 1996, requesting a prehearing conference in order to establish a schedule for discovery, among other things. (*Id.* at p. 4) Moreover, respondent contends that he is also entitled to confront and cross-examine the witnesses who will testify against him, as well as to submit evidence with respect to the appropriate penalty.

Respondent next asserts that the initial decision violates his constitutional right to procedural due process. Respondent emphasizes that he has acquired a property interest in his position and that due process demands that prior to termination, he be provided a hearing and an opportunity to challenge the sufficiency of the charges.

Additionally, respondent takes exception to the initial decision's treatment of the Board's petition in this matter as respondent's appeal of a dismissal decision. Respondent observes that, on page five of the initial decision, the ALJ determines that, "Mr. Phillips's appeal be and hereby is DENIED ***." (Initial Decision at p. 5) However, respondent remarks,

> ***In the instant matter, the Board filed the charges and then made a motion for Summary Judgment. It did not submit any additional affidavits or certifications in support of its motion, but merely supplied a copy of the original charge.*** (Respondent's Exceptions at p. 6)

Respondent underscores that he previously denied the charges in his Answer, which was not verified inasmuch as the New Jersey Administrative Code does not so require. Yet, respondent observes, the Board's charges are required by *N.J.S.A.* 18A:6-11 to be supported by a written statement of evidence under oath.

Finally, respondent avers that while the initial decision grants his motion to resume his salary, his motion was to resume his salary *and benefits*. (*Id.* at p. 8) Thus, respondent urges that the Commissioner modify the initial decision to include the resumption of respondent's salary and benefits, effective December 27, 1996, and to reverse the initial decision with respect to the Board's motion for summary judgment. "Summary Judgment," according to respondent, "is inappropriate in a matter brought under the Tenure Employees Hearing Law.***" (*Id.* at p. 6)

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt in part, and modify in part, the recommended decision of the OAL. Initially, the Commissioner notes and herein clarifies that the tenure matter before him was brought by the Board and was not the result of a Petition of Appeal filed by Phillips, as noted in the initial decision at page five. Further, while the Commissioner concurs with the ALJ's view that Respondent Phillips was entitled, by statute, to a resumption of his salary as of December 27, 1996, he duly notes, and is in accord with, respondent's contention that his benefits should also recommence as of that date.

As to the Board's Cross-Motion for Summary Decision, the Commissioner recognizes that while he has the duty to conduct a hearing and render a decision in all tenure matters, such hearings will necessarily be in accordance with the Uniform Administrative Procedure Rules of Practice, *N.J.A.C.* 1:1. Contrary to respondent's view, these rules contemplate motions for summary decision, and decisions on said motions, before the ALJ. See *N.J.A.C.* 6:24-1.10(b) and *N.J.A.C.* 1:1-12.5.

In the instant matter, while the Commissioner concurs with the ALJ that the Board's motion for summary decision may properly be granted, his reason for this determination is rooted not in a technical deficiency, but in a substantive failing. The ALJ granted the Board's motion for summary decision on the basis of a technical defect in respondent's reply; that is, "***[respondent] submitted no affidavit in response to the facts contained in Ms. Smith-Gomes's affidavit. Instead, Mr. Phillips improperly relie[d] only on arguments made in a letter brief." (Initial Decision at p. 4)

However, the Commissioner herein finds that, even accepting that the arguments advanced in respondent's reply brief are technically sufficient, said arguments do not offer evidence to contradict the *specific facts* which underlie the Board's tenure charges in the instant matter, notwithstanding that respondent's prior submissions, in general, deny the Board's resulting accusation that he falsified students' final examination grades sufficient to constitute conduct unbecoming a teaching staff member.* "It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98, citing *Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the *conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." Contini v.*

* Respondent's Answer states, in pertinent part, "The allegations and charges of unbecoming conduct and other just cause for termination are denied." (Answer at p. 1) In a later submission before the OAL, respondent asserts, "Petitioner's claim of an admission on Phillips' part is of no moment at this juncture, nor is it conceded without cross-examination at a hearing where, purportedly, such a statement may be offered in evidence. Moreover, discovery is needed as to the timing and particulars of the alleged admission since it is not clear. Moreover, it is reasonably believed that petitioner's proffer may be inadmissible pursuant to New Jersey Evidence Rule 408. ***" (Respondent's Memorandum in Opposition to Notice of Cross-Motion at p. 4) Not only does respondent fail to dispute the material facts in this matter, but his claim as to the possible inadmissibility of the proffer in question rests upon a rule of evidence which has no apparent bearing on the instant matter, since Rule 408 establishes that evidence of statements or conduct by parties in the course of settlement negotiations shall not be admissible to prove liability for, or invalidity of, or amount of a disputed claim. N.J. Evid. R. 408.

Board of Education of Newark, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc.* v. *Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994) (emphasis added). Summary disposition in favor of the Board is, therefore, appropriate, inasmuch as respondent has failed to show "that there is a *genuine issue* which can only be determined in an evidentiary proceeding." (emphasis added) (*N.J.A.C.* 1:1-12.5(b))

Notwithstanding this outcome, the Commissioner nonetheless recognizes that his exclusive jurisdiction to hear and decide tenure cases necessarily requires him to make a concomitant determination as to the appropriate penalty. See *In re Fulcomer,* 93 *N.J. Super.* 404 at 412. Inasmuch as the record is devoid of evidence regarding the assignment or mitigation of penalty, the Commissioner is compelled to remand this matter to the OAL *solely* for proceedings as are necessary to submit such evidence and to make recommendations, as appropriate.

Accordingly, the initial decision of the ALJ is affirmed in part and modified as set forth above. The respondent's motion to resume his salary, effective December 27, 1996, is hereby granted. Additionally, the Board's motion for summary decision is granted to the extent that the Commissioner determines that respondent is guilty of conduct unbecoming a teaching staff member. However, this matter is remanded to the OAL for proceedings on the question of the appropriate penalty to impose under the circumstances in this case.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 20, 1997
Date of Mailing, March 20, 1997

129-97

519-97 R
(129-97)

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW PHILLIPS,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF ROSELLE, UNION	:	DECISION ON REMAND
COUNTY.	:	

SEPTEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3640-97

AGENCY DKT. NO. 391-9/96

IN THE MATTER OF THE TENURE HEARING OF ANDREW PHILLIPS, BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY

Neil Cohen, Esq., attorney for petitioner (Gill & Cohen, attorneys)

Sheldon H. Pincus, Esq., for respondent (Bucceri & Pincus, Esqs., attorneys)

Record Closed: July 31, 1997 Decided: August 5, 1997

BEFORE **MARIE P. SIMONELLI, A.L.J.**

Petitioner, Board of Education of the Borough of Roselle, Union County (the Board), brought tenure charges against respondent, Andrew Phillips (Mr. Phillips), pursuant to *N.J.S.A.* 18A:6-10 for alleged unbecoming conduct.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on October 23, 1996, for a hearing as a contested case. The OAL scheduled a hearing for July 15, 1997.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On July 31, 1997, they submitted the attached Memorandum of Agreement which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Aug. 5, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

8/13/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ...

MEMORANDUM OF AGREEMENT

JUL 31 3 59 PM '97

This Agreement, made this 15th day of July, 1997, by and between the Board of Education of the Borough of Roselle, with business offices located at 710 Locust Street, Roselle, New Jersey 07203, (hereinafter referred to as the "Board"),

AND

Andrew Phillips, residing at 864 South 14th Street, Newark, New Jersey 07108 (hereinafter referred to as "Mr. Phillips").

WITNESSETH:

WHEREAS, Phillips is a tenured teaching staff employed by the Board; and,

WHEREAS, the Board certified tenure charges of conduct unbecoming a teaching staff member on or about August 28, 1996, and suspended Phillips without pay; and

WHEREAS, by decision dated March 20, 1997, the Commissioner of Education: (a) determined that Phillips was guilty of the charge; (b) remanded the matter to the Office of Administrative Law for a hearing on the issue on the appropriate penalty to be imposed under the circumstances in this case; and (c) affirmed a determination that Phillips was entitled to a resumption of his full salary and benefits effective December 27, 1996; and

WHEREAS, by decision and order dated June 30, 1997, the Honorable Marie P. Simonelli, A.L.J., granted Phillips' Motion in Aid of Litigant's Rights and required the Board: (a) to resume Phillips' full salary and benefits, effective December 27, 1996, and to continue his full salary and benefits until the Commissioner makes a final determination; and (b) to pay Phillips any and all monies deducted from his salary for substitute teachers, together with interest, from January 24, 1997 to the date of payment; and,

WHEREAS, in lieu of proceeding to hearing as scheduled on July 15, 1997, Phillips has indicated his desire to resign from all employment with the Board effective at the close of business on September 30, 1997, upon certain terms and conditions to be stipulated in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Phillips shall submit, in the form annexed hereto as Exhibit A, an irrevocable letter of resignation from all employment with the Board effective at the close of business on September 30, 1997. The Board shall be permitted to resolve to accept his resignation upon its execution of this Memorandum of Agreement.

2. The Board shall immediately comply with the decisions of the Administrative Law Judge and the Commissioner of Education relating to Phillips' salary and benefits dated January 24, 1997, March 20, 1997 and June 30, 1997. The Board shall therefore pay to Phillips his full salary and benefits effective December 27, 1997 through June 30, 1997. Said salary

shall not be offset by any deductions for payments made by the Board for substitute teachers. Said salary shall further include interest at 5.5 percent per annum (R.4:42-11) on the gross sum due, from ~~December 27, 1997~~ January 24, 1998 until payment is made to Phillips.

3. The only deductions taken from the gross sum due in Paragraph 2 above shall be the normal payroll deductions for State and Federal income taxes, pension contribution and union dues.

4. For the period September 1, 1997 through September 30, 1997, the Board agrees that Phillips shall continue to be paid his full salary and benefits. The salary shall be paid to Phillips in the normal course of business net of the normal payroll deductions for State and Federal income taxes, pension contribution and union dues.

5. Through September 30, 1997, the Board agrees to continue to provide Phillips with all insurance coverage presently provided to other teaching staff members in the Roselle School District.

6. The Board agrees that it shall cooperate, without delay, in the execution and filing of any and all papers associated with Phillips filing for or securing pension benefits.

7. Upon his separation from employment, and consistent with his rights under the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), Phillips shall be able to purchase at his own cost and expense, the insurance coverages presently provided to other teaching staff members in the Roselle School District.

8. It is understood that Phillips shall not receive any other benefits or emoluments of employment specified in the present collective negotiations agreement except as otherwise provided for in this Memorandum of Agreement.

9. Phillips and the Board agree that their respective executions of this Agreement shall constitute mutual general releases in favor of the other through the date of this Agreement.

10. Phillips and the Board acknowledge that the terms of this Agreement are subject to approval by Administrative Law Judge Marie P. Simonelli, A.L.J., and the New Jersey Commissioner of Education. In the event approval is denied, the terms of this Agreement shall be null and void and the parties shall be returned to the status quo which existed as of the date of this Agreement.

11. Phillips acknowledges that he is aware that the Commissioner has a duty to refer this settlement to the New Jersey State Board of Examiners for review and consideration of whether certification revocation should follow.

12. The Board agrees that Phillips shall be provided a convenient opportunity to obtain whatever personal belongings of his that remain within the school district.

13. The parties recognize that each has been represented by legal counsel of his or its own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

14. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

15. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

16. This Agreement shall be subject to the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

_____, witness

Dated: 7/1/97

_____
Andrew Phillips

THE BOARD OF EDUCATION
OF THE BOROUGH OF ROSELLE

_____, witness

Dated: 7/21/97

By: _____

ANDREW PHILLIPS
864 South 14th Street
Newark New Jersey 07108

July 15, 1997

Darlene Roberto, Interim Superintendent
Roselle Borough Public Schools
710 Locust Street
Roselle, New Jersey 07203

Re: Letter of Resignation

Dear Ms. Roberto:

I hereby resign from my employment as a teaching staff member employed by the Roselle School District effective September 30, 1997. This resignation is expressly conditioned upon the Board's compliance with the Memorandum of Agreement dated July 15, 1997, and shall be null and void if the terms of that Agreement are not met. This resignation is otherwise irrevocable.

Very truly yours,

Andrew Phillips

/lg

OAL DKT. NOS. EDU 3640-97 AND EDU 11163-96 (ON REMAND)
AGENCY DKT. NO. 391-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW PHILLIPS,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF ROSELLE, UNION	:	DECISION ON REMAND
COUNTY.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. This matter shall be forwarded to the State Board of Examiners for review in accordance with *N.J.A.C.* 6:11-3.6.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1997
DATE OF MAILING SEPTEMBER 29, 1997

130-97

130-97

JOSEPH CAGGIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

March 20, 1997

OAL DKT. NO. EDU 1104-96
AGENCY DKT. NO. 466-12/95

JOSEPH CAGGIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

March 20, 1997
Date of Mailing, March 21, 1997

131-97

131-97

BENITO STRAVATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

March 20, 1997

OAL DKT. NO. EDU 12339-95
AGENCY DKT. NO. 341-8/95

BENITO STRAVATO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

March 20, 1997
Date of Mailing, March 21, 1997

132-97

132-97

ROBERT ZEOLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 20, 1997

OAL DKT. NO. EDU 11373-95
AGENCY DKT. NO. 361-9/95

ROBERT ZEOLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

March 20, 1997
Date of Mailing March 21, 1997

14097

140-97

DONALD RICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 24, 1997

OAL DKT. NO. EDU 6775-95
AGENCY DKT. NO. 201-6/95

DONALD RICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MARCH 24, 1997
DATE OF MAILING MARCH 24, 1997

141-97

141-97

CAROL MIKOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH HUNTERDON-VOORHEES REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

March 24, 1997

OAL DKT. NO. EDU 6877-96
AGENCY DKT. NO. 223-6/96

CAROL MIKOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH HUNTERDON-VOORHEES REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MARCH 24, 1997
DATE OF MAILING MARCH 24, 1997

138-97

138-97

H.B., on behalf of minor children, P.B., S.A. and M.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MARCH 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08438-96S

AGENCY DKT. NO. 395-9/96

H.B. ON BEHALF OF MINOR CHILDREN P.B., S.A. AND M.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Respondent.

Diane K. Smith, Esq., for petitioner (Somerset Sussex Legal Services)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers and Rizzolo, attorneys)

Record Closed: January 24, 1997 Decided: February 5, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a Petition to the Commissioner of the Department of Education filed by petitioner, dated September 6, 1996, seeking admission to the schools of the Somerville School District. The matter was transmitted to the Office of Administrative Law on September 23, 1996, by the Department of Education, Bureau of Controversies and Disputes, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Order of Dismissal with Prejudice indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

February 5, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

Feb. 7, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

RECEIVED
JAN 24 10 38 AM '97
STATE BOARD OF EDUCATION

SOMERSET SUSSEX LEGAL SERVICES
By: Diane K. Smith, Esq.
Attorney for petitioner
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

HELEN B. BORLAND, parent, on behalf of Steven Aguilar, Michael Aguilar and Patrick Borland, Petitioner	:	OAL Docket # EDUOS 08438-96S Agency Ref. # 395-9/96
vs	:	
SOMERVILLE SCHOOL DISTRICT, Respondent	:	ORDER OF DISMISSAL WITH PREJUDICE

This matter having been opened to the Court on application of Somerset Sussex Legal Services, attorneys for petitioner, and McDonald, Rogers & Rizzolo, attorneys for respondent, and it appearing that Helen Borland has relocated outside of the District of Somerville with the minors, Steven Aguilar and Michael Aguilar, and the Somerville School District having represented that it shall not seek reimbursement of education costs for the education provided to Steven Aguilar and Michael Aguilar prior to their relocations; and it further appearing that Patrick Borland continues to reside in the Somerville School District with his paternal grandmother, and the Somerville School District having acknowledged that Patrick Borland is a resident of the Somerville School District and entitled to a tuition-free education in the

Somerville School District, and the parties having resolved the matter, and for good cause shown;

IT IS on this 24 day of January 1997

ORDERED that the petition of Helen Borland, on behalf of the minor children be and hereby is dismissed with prejudice.

Hon. Jeff Masin, ALJ

We hereby consent to the entry and form of the within Dismissal with Prejudice.

McDonald, Rogers & Rizzolo
Attorneys for respondent

By: Michael J. Rogers, Esq.

Somerset Sussex Legal Services
Attorneys for petitioner

Diane K. Smith, Esq.

OAL DKT. NO. EDU 8438-96
AGENCY DKT. NO. 395-9/96

H.B., on behalf of minor children, P.B., S.A. and M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MARCH 24, 1997
DATE OF MAILING MARCH 24, 1997

139-97

139-97 DHP-B

IN THE MATTER OF THE DISQUALIFI- :

CATION FROM SCHOOL EMPLOYMENT : COMMISSIONER OF EDUCATION

OF V. E. K. : DECISION

_____:

MARCH 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8330-96

AGENCY DKT. NO. DHP # 57-96

VIRGINIA E. KOVALAK,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Virginia E. Kovalak, petitioner, pro se

New Jersey State Department of Education, respondent, appearing pursuant to N.J.S.A. 1:1-5.6(a)

Record Closed: December 30, 1996 Decided: February 4, 1997

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

This matter concerns the appeal of the petitioner, Virginia E. Kovalak, from her disqualification from employment as a school bus driver, pursuant to N.J.S.A. 18A:6-7.1 and 18A:39-19.1.

By letter dated June 10, 1996, the Department of Education (Department) notified petitioner that she was potentially disqualified from employment as a school bus driver due to her

criminal history, and that she had thirty days to submit documentation to show either a mistake in her criminal record or evidence of rehabilitation for consideration by the Commissioner of Education (Commissioner). The petitioner filed an appeal, with documents as to rehabilitation. On September 16, 1996, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing took place on December 30, 1996, and the record closed on that date.

FINDINGS OF FACT

I **FIND** the facts in this matter are not in dispute.

The petitioner is employed as a school bus driver by the McGough Bus Company, located in Gloucester County. Pursuant to N.J.S.A. 18A:6-7.1 and 18A:39-19.1, school bus drivers are subject to a criminal history record check. Through this check, the Department was informed that the petitioner was arrested in Philadelphia, Pennsylvania, for possession of a controlled dangerous substance with intent to distribute on October 16, 1987. She was found guilty of this offense on February 16, 1989, and was sentenced to 11-23 months in county prison, supervision as a psychiatric risk, and two years of probation. R-1a. By law, the drug conviction is a disqualifying offense.

The Department was also informed that the petitioner was arrested for burglary on March 31, 1972, which is not a disqualifying offense. She was found guilty of this offense on July 24, 1972, and sentenced to three months' suspended confinement, one year of probation, and a $150 fine. R-1a.

By letter dated June 10, 1996, the Department notified the petitioner that its criminal record check had revealed a disqualifying offense, and gave the petitioner the opportunity to challenge the accuracy of the criminal record or to establish rehabilitation (R-1i).

In response to the Department's letter, the petitioner admitted the convictions but argued that she has been rehabilitated. Even though it was not revealed in the criminal check requested by the Department, the petitioner informed the Department that on September 1, 1994, in the United States District Court for the Eastern District of Pennsylvania she was convicted of conspiracy to distribute cocaine; she was sentenced to three years' probation with home detention for six months, required to have mental health treatment, and assessed a fine of $500. This conviction was based on her drug-related activities in 1987.

According to the petitioner, the Philadelphia police delayed her trial after the 1987 arrest since the police wanted her to testify against the drug dealer. Although she initially cooperated, the petitioner later refused to testify after she received a threat that her children would be killed if she testified. After the federal agents arrested her for the drug-related conspiracy charge, they also wanted her cooperation, but she refused because she feared for the safety of her children.

In a letter dated June 24, 1996, Edward C. D'Arcy, a senior United States probation officer, stated that based on her 1994 conviction for conspiracy, the petitioner is still participating in a probation program. Mr. D'Arcy stated that the petitioner has adhered to the conditions of her probation and that her response to supervision has been favorable. R-1f.

As part of the federal probation program, the petitioner was referred to the Community Mental Health Center on October 20, 1994, for treatment for depression. For a short period in 1994-95, the petitioner was prescribed medication for her depression. She does not take any medicine now, and she sees Ronald Eckstein, a licensed psychologist, every eight weeks. In his letter dated June 18, 1996, Mr. Eckstein stated:

> Ms. Kovalak has maintained emotional and behavioral stability and is no longer clinically depressed. Since her release from prison, she has not abused any illicit street drug. She has been working two part-time jobs (convenience store relief manager and school bus driver) and works about 40 to 60 hours a week. She is a hard worker and appears to be a conscientious employee. She is devoted to her children and somehow is able to be supportive and helpful to them. Thus far, she has been able to demonstrate satisfactory judgment in managing her affairs and has been free from any criminal involvement. Ms. Kovalak is trying very hard to

> maintain her emotional equilibrium despite some stressors in her life. She continues to use her therapy time to review her life experiences and derive better understanding and insight into her motivations and decisions.
>
> [R-1h.]

On behalf of the petitioner, Henry A. McGough III, president of McGough Bus Company, Inc., in a letter dated June 28, 1996, wrote that Ms. Kovalak is a very considerate and dependable employee. Mr. McGough stated that the petitioner candidly admitted her prior convictions and that he does not doubt that she is rehabilitated. Also, Mr. McGough wrote that as an employee of the company, Ms. Kovalak is subject to random drug testing. R-1c.

At the hearing, the petitioner testified that she got involved with drugs when she was young because of bad memories from her childhood, including sexual abuse by her father. In 1987, she was separated from her husband and she was raising their children. After her arrest in 1987, the petitioner changed her life and she no longer associates with her former friends who are involved with drugs.

The petitioner went to school to study industrial cooking, and for a while she worked for Drexel University. She then moved to New Jersey, and currently she works as a school bus driver during the day and at a local WaWa store in the evenings. Her children are now twenty-eight, twenty-six, and twenty-two years old, and she still helps support the youngest.

The petitioner stated that she has been drug free for many years. She has admitted her prior drug use and convictions to her employers and to the parents of the children she drives to school. The petitioner likes driving a bus and wants to continue doing this job.

Bridgette L. Turner, a parent of one of the children who rides on petitioner's bus, submitted a letter attesting to petitioner's competency and responsibility as a school bus driver and urged that the petitioner be allowed to continue to work as a driver (R-1d). In addition, two friends of petitioner, Patrolman John McKeown and Louise Baker, submitted letters indicting that the petitioner is a good mother and does not now use drugs (R-1e; R-1g).

During the hearing, Elizabeth Ann Rosell testified for the petitioner. Ms. Rosell is a bus aide and she rides with the petitioner. The students on petitioner's bus are all special education students, ages five to fourteen. Ms. Rosell stated that all the students love the petitioner and consider her to be their "second" mother.

CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:6-7.1(e), a person with a criminal record will not be disqualified from being a school bus driver if said person shows clear and convincing evidence of his or her rehabilitation. This section sets forth a number of factors to be considered in determining whether the person has affirmatively demonstrated rehabilitation. These factors are:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Having reviewed the testimony and the documents admitted into evidence, I **CONCLUDE** that the petitioner has affirmatively demonstrated rehabilitation.

Although the petitioner's drug-related convictions took place in 1989 and 1994, the charges were based on her drug-related criminal activities in 1987. She has successfully completed the term of probation imposed for the 1989 conviction, and has almost completed the term of probation imposed for the 1994 conviction. Since her drug involvement in 1987, the petitioner no longer associates with drug users and has changed her life, and she has shown her commitment to being a good school bus driver.

Therefore, I **ORDER** that the petitioner is not disqualified from employment as a school bus driver.

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

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

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

February 4, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

Feb. 7, 1997
DATE

Donald Constantates Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 1997
DATE

Barbara A. Hermesdorf
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

R-1a Letter from Carl H. Carabelli to Debbie Antanaitis, dated July 18, 1996

R-1b Certified letter from Virginia E. Kovalak to Carl Carabelli, dated June 28, 1996

R-1c Certified letter from Henry A. McGough III to Carl Carabelli, dated June 28, 1996

R-1d Certified letter from Bridgette L. Turner, dated June 17, 1996

R-1e Certified letter from Patrolman John McKeown, dated June 28, 1996

R-1f Letter from Edward C. D'Arcy to the Department of Education, dated June 24, 1996

R-1g Certified letter from Louise Baker, dated June 14, 1996

R-1h Certified letter from Ronald Eckstein to Carl H. Carabelli, dated June 18, 1996

R-1i Letter from Carl H. Carabelli to Virginia E. Kovalak, dated June 10, 1996

R-1j Letter from Francis R. Conaway to the New Jersey Department of Education, dated May 30, 1996, with attachments

R-1k Letter from Carl H. Carabelli to Clerk of Quarter Sessions, dated June 6, 1996

R-1l Letter from Carl H. Carabelli to Clerk of Quarter Sessions, dated April 24, 1996

R-1m Letter from Carl H. Carabelli to Clerk of Quarter Sessions, dated December 20, 1995

R-1n Information regarding the criminal record of Virginia E. Kovalak from the Federal Bureau of Investigation

R-1o Information regarding the criminal record of Virginia E. Kovalak from the New Jersey State Police

R-1p Applicant Authorization and Certification signed by Virginia Kovalak

WITNESSES:

For the Petitioner:

Virginia E. Kovalak

Elizabeth Ann Rosell

For the Respondent:

None

OAL DKT. NO. EDU 8330-96
AGENCY DKT. NO. DHP 57-96

IN THE MATTER OF THE DISQUALIFI-	:	
CATION FROM SCHOOL EMPLOYMENT	:	COMMISSIONER OF EDUCATION
OF V. E. K.	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner cannot concur with the conclusion of the Administrative Law Judge (ALJ) that Ms. K. has demonstrated clear and convincing evidence of rehabilitation in accordance with *N.J.S.A.* 18A:6-7.1, and is, therefore, qualified for employment as a school bus driver within the intent of the criminal history record check laws.

As the ALJ noted, Ms. K. was charged in 1987 with possession of a controlled dangerous substance with intent to distribute, and was sentenced in 1989 to serve 11-23 months in county prison, placed under supervision as a psychiatric risk, and ordered to serve two years' probation. (Initial Decision at p. 2) As a consequence of the same offense,* appellant was also convicted in federal court and was, on September 1, 1994, sentenced to three years' probation,

* The record shows that Ms. K.'s participation in the federal offense spanned from early 1987 through October 16, 1987. (R-1f)

with special conditions of home detention for six months, ordered to pay a $500 fine and to participate in mental health treatment.

The Commissioner underscores that the nature and responsibility of the position for which the appellant applies, school bus driver, is particularly sensitive and laden with great responsibility, as it charges the individual with the physical care and safety of potentially large groups of children under what are often challenging and even adverse conditions. That obligation is enhanced by the fact that the children appellant would transport are special education students. (Initial Decision at p. 5) Thus, the serious nature and circumstances of appellant's crime, together with the recognition that she was 35 years old at the time of this offense and was, presumably, mature enough to understand the potentially dangerous consequences of her conduct, preclude the Commissioner from finding that Ms. K. has clearly and convincingly demonstrated her rehabilitation. This is so notwithstanding appellant's apparent progress toward such rehabilitation, as the State cannot subject children to even the possibility of dangers associated with drugs or drug use.

Accordingly, the initial decision of the ALJ is reversed and Ms. K.'s disqualification from school employment is sustained.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 24, 1997
DATE OF MAILING MARCH 24, 1997

142-97

142-97

C.K. and J.K., on behalf of their minor child, E.K.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF ALEXANDRIA, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MARCH 25, 1997

OAL DKT. NO. EDU 2664-96
AGENCY DKT. NO. 84-3/96

C.K. and J.K., on behalf of their minor child, E.K.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF ALEXANDRIA, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MARCH 25, 1997
DATE OF MAILING MARCH 25, 1997

143-97

JOSEPH MC GOVERN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MARCH 25, 1997

OAL DKT. NO. EDU 8578-95
AGENCY DKT. NO. 290-7/95

JOSEPH MC GOVERN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MARCH 25, 1997
DATE OF MAILING MARCH 25, 1997

144-97

144-97

JOYCE SHIP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 25, 1997

OAL DKT. NO. EDU 8103-95
AGENCY DKT. NO. 275-7/95

JOYCE SHIP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MARCH 25, 1997
DATE OF MAILING MARCH 25, 1997

145-97

145-97

D.H., on behalf of minor, A.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 25, 1997

OAL DKT. NO. EDU 3236-96
AGENCY DKT. NO. 14-1/96

D.H., on behalf of minor, A.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MARCH 25, 1997
DATE OF MAILING MARCH 25, 1997

146-97

146-97

SARAH M. HOWE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MARCH 25, 1997

OAL DKT. NO. EDU 3727-95
AGENCY DKT. NO. 30-2/95

SARAH M. HOWE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MARCH 25, 1997
DATE OF MAILING MARCH 25, 1997

149-97

149-97

IN THE MATTER OF THE TENURE :

HEARING OF ROBERT R. VITACCO, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE BOROUGH : DECISION

OF LINCOLN PARK, MORRIS COUNTY. :

:

SYNOPSIS

Board certified tenure charges of unbecoming conduct against former Superintendent Vitacco, for alleged financial mismanagement and other improprieties, seeking his dismissal. During the course of these proceedings, Vitacco pled guilty in Federal District Court to two counts of tax evasion. Vitacco contended tenure matter was moot since the Board accepted his resignation and he indicated willingness to surrender his certificates.

ALJ concluded that Vitacco forfeited his public employment in the District, pursuant to the forfeiture statute, N.J.S.A. 2C:51-2, by virtue of his conviction for an offense involving dishonesty and a crime of the third degree. Although a literal reading of *N.J.S.A.* 2C:51-2g calls for forfeiture only if ordered by a court of the State upon application of the County Prosecutor or the Attorney General, the ALJ stated one should avoid a literal interpretation of individual statutory terms or provisions that would be inconsistent with the overall purpose of the statute. ALJ found that it would not make much sense to require a school board to bear the heavy cost of prosecuting complex charges at a plenary tenure hearing when a court of competent jurisdiction has already found the respondent guilty of a forfeitable offense. ALJ ordered that Vitacco forfeited his employment at the time of entry of his federal guilty plea on November 2, 1995.

Commissioner overturned the ALJ's recommended decision that, pursuant to *N.J.S.A.* 2C:51-2, Vitacco forfeited his public employment at the time of his guilty plea, finding that pursuant to the recent amendment made to this criminal statute, *P.L.* 1995, *c.* 250, the Commissioner of Education lacks jurisdiction to order forfeiture. Thus, the Commissioner had to determine whether the tenure charges were moot and, if not, whether the criminal conduct of Vitacco amounted to unbecoming conduct, pursuant to *N.J.S.A.* 18A:6-10. Citing the *Barshatky* State Board decision, the Commissioner concurred with the ALJ that the tenure charges were not rendered moot by Vitacco's voluntary resignation in that he retained his certificates which qualify him for employment in the State and he had an outstanding claim for benefits arising out of the employment relationship. Commissioner agreed that he should not be allowed to resign in good standing. Moreover, the Commissioner determined that the conduct giving rise to Vitacco's federal conviction amply established the Board's charges of unbecoming conduct and called for his removal from his tenured position. Commissioner ordered Vitacco dismissed from his tenured employment for conduct unbecoming a superintendent of schools. Commissioner forwarded matter to the State Board of Examiners for further appropriate action.

MARCH 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7871-94
AGENCY DKT. NO. 253-6/94

IN THE MATTER OF THE TENURE HEARING OF ROBERT R. VITACCO

Anthony P. Sciarrillo, Esq., for petitioner

David L. Rosenberg, Esq., for respondent
(Klausner & Hunter, attorneys)

Record Closed: February 6, 1997 Decided: February 6, 1997

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

Statement of the Case

This case involves tenure charges certified by the Lincoln Park Board of Education ("Board") against its former superintendent of schools. Basically, the Board seeks to dismiss respondent Robert Vitacco ("Vitacco") from its employment for various alleged acts of conduct unbecoming a public employee, including tax evasion, misappropriation of public funds, misuse of vacation days, destruction of public records, and financial mismanagement. Presently, the matter comes before the Office of Administrative Law on cross-motions for summary decision.

Vitacco contends that the tenure charges against him have become moot, since the Board has accepted his resignation and he has indicated his willingness to surrender all teaching certificates in his possession. However, the Board seeks a

declaratory ruling that Vitacco forfeited his public office under *N.J.A.C.* 2C:51-2 by virtue of his recent federal criminal conviction for income tax evasion. Initially, the Board contends that the conviction was for "an offense involving dishonesty or a crime of the third degree or above," falling within the automatic forfeiture provision of *N.J.A.C.* 2C:51-2(a)(1). Alternatively, the Board alleges that Vitacco was convicted of "an offense involving or touching [his] office, position or employment" within the meaning of *N.J.S.A* 2C:51-2(a)(2). For the reasons which follow, the dispute is not moot and must be resolved on the merits. Further, it is determined that Vitacco forfeited his position by operation of law for conviction of an offense involving dishonesty as well as an offense constituting a crime of the third degree.

Procedural History

The Board certified tenure charges to the Commissioner of Education ("Commissioner") on June 20, 1994. Subsequently, on August 16, 1994, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing. On March 24, 1995, respondent filed a notice of motion to dismiss the tenure charges for mootness, together with a supporting affidavit and brief. Thereafter, on December 12, 1995, the Board filed a motion for declaratory relief on the forfeiture issue. In support of its motion, the Board submitted briefs on December 12, 1995 and February 14, 1996. Respondent filed an opposing brief on March 8, 1996, and the Board filed a reply brief on April 17, 1996. With the consent of all parties, the OAL deferred ruling on these motions pending completion of related criminal proceedings in federal district court. After the federal criminal case was concluded, the OAL held oral argument on August 29, 1996. At the request of the OAL, the parties filed supplemental briefs on the issue of the Commissioner's subject matter jurisdiction. On February 6, 1997, the OAL conducted a conference telephone call regarding the jurisdictional issue. Exhibits considered in deciding these motions are listed in the appendix.

Findings of Fact

All of the relevant facts necessary for disposition of this matter are undisputed. I **FIND**:

During calendar years 1991 and 1992, Robert R. Vitacco was employed as superintendent of schools in Lincoln Park, New Jersey. On January 22, 1992, Vitacco and the Board entered into a written termination agreement, as a result of which Vitacco agreed "to resign his position as Superintendent of Schools to take effect September 30, 1995." Before that resignation took effect, on or about March 21, 1995, a federal grand jury in New Jersey handed down a twelve-count indictment charging Vitacco and a codefendant with various criminal offenses, including criminal conspiracy, embezzlement, and attempt to evade or defeat taxes by underreporting his true income for five separate years.

Ultimately, on October 30, 1995, Vitacco and the United States Attorneys Office worked out a plea bargain, wherein Vitacco agreed to plead guilty to Counts 6 and 7 of the indictment and the Government agreed to dismiss the remaining criminal charges against him. Count 6 alleged that Vitacco had filed a false 1991 federal income tax return that "did not include about $24,842.84 in additional taxable income received by defendant Robert Vitacco from the Lincoln Park School District," in violation of 26 *U.S.C.A.* §7201. Similarly, Count 7 alleged that Vitacco filed a false 1992 federal income tax return that "did not include about $29,054.04 in additional taxable income received by defendant Robert Vitacco from the Lincoln Park School District, including approximately $15,000 he received as an independent contractor in connection with labor negotiations and his monthly car allowance," again in violation of 26 *U.S.C.A.* §7201.

Each violation of 26 *U.S.C.A.* §7201 carries a statutory maximum penalty of five years' imprisonment and a $100,000 fine, together with the costs of prosecution.

Pursuant to 18 *U.S.C.* §3571, the sentencing judge could impose an alternative fine of up to $25,000 or twice the gross profits to the defendant or the gross loss to any victim of the offense. As part of the plea agreement, Vitacco stipulated that, under the applicable federal sentencing guidelines, "[a] two-level enhancement for abuse of position of trust is appropriate."

On November 2, 1995, Vitacco formally entered a guilty plea to Counts 6 and 7 in a proceeding before United States District Judge Harold A. Ackerman. In response to questioning by the Court, Vitacco admitted under oath that in 1991 and 1992, he had "receive[d] money from the school district and as a consultant in the labor negotiations" which he failed to report. Although the source of some of the unreported income was the school district, Vitacco never admitted that he obtained the money by fraudulent means. Insofar as the plea proceedings reflect, the income which Vitacco concealed from the tax authorities was legally earned. At the plea hearing, Vitacco admitted that in 1991, he underreported his actual income by "the amount of $16,520.45" and, therefore, that he actually owed the United States "additional taxes in the amount of approximately $5,016.90." He also admitted that on his 1992 tax return, he underreported his taxable income by "the amount of $29,064.04" and that he "actually owe[d] the United States additional taxes in the amount of approximately $9,009.85." Significantly, Vitacco acknowledged that he willfully signed and filed false tax returns "with the knowledge that the information contained on each return did not accurately reflect the amount of gross and taxable income [he] received in 1991 and 1992" and that he did so "to attempt to evade the income tax owed to the government" in those years."

Vitacco appeared before Judge Ackerman for sentencing on June 18, 1996. Speaking on his own behalf before the judge passed sentence, Vitacco apologized to the Court "for his stupidity and transgressions" and to his family "for the dishonor and the three years of stress [he] brought upon [them]." He did not, however, make any apology to the school children and citizens of Lincoln Park. In his explanation of the sentence, Judge Ackerman emphasized that Vitacco and his codefendant "occupied

extraordinarily important positions in the Lincoln Park School District." Discounting Vitacco's claim that he had been merely "stupid," Judge Ackerman commented that Vitacco's underlying motivation was "Greed. Pure and simple." Noting that government would be unable to function "if individuals, whatever their place in life, don't pay their taxes," the Judge added that when an individual like Vitacco occupies a position of trust, "that responsibility . . . is increased proportionately."

Applying the federal sentencing guidelines, Judge Ackerman determined that "the guideline range for imprisonment is six to twelve months." Judge Ackerman sentenced Vitacco "to be imprisoned for a term of ten months on each count to be served concurrently." Additionally, he imposed fines totaling $15,000 and directed that Vitacco be placed on supervision for two years after release from prison. Vitacco's codefendant, the school business administrator for the Lincoln Park School District, was sentenced at the same proceeding. Of particular relevance here, Judge Ackerman expressed very strong doubts "whether any school authority will subject itself to taking either one of you gentlemen back into its ranks in light of your past record[.]" Vitacco has not appealed his sentence and the time for appeal has expired.[1]

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Vitacco forfeited his public office by virtue of his conviction of an offense involving dishonesty and of a crime of the third degree

At the outset, Vitacco argues that the tenure charges against him have been rendered moot by his voluntary resignation from the Board's employment. In his moving papers, Vitacco relied on the Commissioner's decision in *In re Barshatky*, 95 *N.J.A.R.* 2d (EDU) 71 (Comm'r Oct. 26, 1994), which approved the dismissal of inefficiency charges against a teacher who resigned prior to issuance of a decision in a

[1] *Fed. R. App. P.* 4(b) requires that a defendant file a notice of appeal within ten days after entry of judgment or order from which the appeal is taken..

lengthy tenure hearing. However, *Barshatky* is distinguishable since, unlike Vitacco's criminal misconduct, the tenure charges "contain[ed] no allegations of wrongdoing or misconduct which might nevertheless require determination by the Commissioner of Education for the imposition of a sanction or reprimand." 95 *N.J.A.R.* 2d at 73. Moreover, the Commissioner regarded the inefficiency charges as moot because the resolution of the tenure charges on their merits would have no impact on the teacher's entitlement to salary payments or pension credit. Vitacco still asserts a claim for salary during the first 120 days of his suspension, which he may recover only if the tenure charges are resolved in his favor. *N.J.S.A.* 18A:6-14.

More importantly, as respondent's attorney commendably brought out, the State Board of Education later reversed the Commissioner's decision in *Barshatky* and held that the tenure proceedings were not moot. *In re Barshatky*, No. SB 51-94 (St. Bd. May 3, 1996). Despite Barshatky's sworn statement of his intention not to teach in New Jersey, the State Board noted that he "retains his teaching certificates, which qualify him for employment in the state as a teacher." (slip op at 5). Similarly, Vitacco has offered to surrender his certificates, but has not actually done so. Further, in *Barshatky,* the State Board declared it to be "required in the public interest" to create an adequate record for use by the teacher-licensing authority in future deliberations concerning Barshatky's retention of his certificates. *Ibid.* In addition, the State Board mentioned that Barshatky had an outstanding contractual claim for accumulated sick leave and that his right to relief turned on whether the tenure charges are ultimately sustained. Here too, Vitacco has a pending suit in the Superior Court for amounts allegedly due under the resignation agreement. Vitacco's defense of mootness would be more convincing if he were not actively pursing a claim for benefits arising out of the employment relationship. Simply put, the community is entitled to a public declaration that Vitacco's behavior required his removal. He should not be permitted to resign in good standing.

Forfeiture is not a sentencing disposition, but a civil penalty which is a collateral consequence of conviction. Its intent is to provide complete and adequate safeguards

to the public against those who breach its trust. *Ayars v. N. J. Dep't of Corrections*, 251 *N. J. Super.* 223, 228 (App. Div. 1991). *N.J.S.A.* 2C:51-2(a) provides, in pertinent part::

> A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving *dishonesty* or *a crime of the third degree above* or under the laws of another state or of the United States of an offense or crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an *offense involving or touching such office, position or employment*[.] (Emphasis Added).

Subsection (a)(1), expressed in the disjunctive, clearly sets forth two separate grounds for automatic forfeiture: conviction either of a crime of dishonesty or of a crime of the third degree or above. "Dishonest" is defined as "characterized by lack of truth, honesty, probity or trustworthiness or by an inclination to mislead, lie, cheat or defraud." *Webster's New International Dictionary* 650 (3d ed. 1976). 26 *U.S.C.A.* §7201, the federal crime to which Vitacco pled guilty, pertains to someone who "willfully attempts in any manner to evade or defeat any tax imposed by this title[.]" When Vitacco entered his guilty plea, he admitted signing tax returns with knowledge that the information he provided was untrue. Case law treats tax cheating as an offense of dishonesty. Illustratively, in *State v. Musto*, 187 *N.J. Super.* 264, 280-81 (Law Div. 1982), *aff'd* 188 *N.J. Super.* 106 (App. Div. 1983), the trial judge considered a conviction for the federal crime of willfully subscribing to a false tax return in violation of 26 *U.S.C.A.* §2706(1) as encompassing acts of perjury or false swearing, which "clearly involve dishonesty since the offense reveals an attempt to defraud the Federal Government." *See also, State v. Botti*, 189 *N.J. Super.* 127, 132 (Law Div. 1982), where the defendant conceded that a conviction for income tax evasion under the identical federal statute as here involved dishonesty. Generally, any theft from the public is regarded as an offense of dishonesty. *State v. Lee*, 258 *N.J. Super.* 313, 316 (App. Div. 1992) (theft by deception). *In re Saunders*, 1981 *S.L.D.* 433 (Comm'r April 21, 1981), *aff'd* 1981 *S.L.D.* 442 (St. Bd. 1981) (fraudulent receipt of insurance

benefits). In order to sustain the forfeiture, one need look no further than that Vitacco was convicted of a crime of dishonesty.

It is equally clear, however, that the federal crime of which Vitacco was convicted is equivalent to a crime of the third degree under New Jersey law. Offenses under the laws of other states or of the United States are classified, for purposes of forfeiture, by analogizing the crime to a New Jersey offense. Depending on the seriousness of the offense, the New Jersey Criminal Code classifies crimes as being of the first, second, third or fourth degree. *N.J.S.A.* 2C:43-1. Faced with a forfeiture proceeding in which the crime was "ungraded," the Appellate Division looked to the maximum sentence allowable to determine the degree of the crime. *Old Bridge Public Workers v. Old Bridge Twp*, 231 *N.J. Super.* 205 (App. Div. 1989). Unless otherwise provided, the maximum term of imprisonment imposed for commission of a crime of the third degree is five years. *N.J.S.A.* 2C:43-6(a)(3). Crimes referred to as "high misdemeanors" before adoption of the New Jersey Criminal Code "are crimes of the first, second or third degree." *N.J.S.A.* 2C:1-4(d).[2]

Under federal law, any person "who willfully attempts in any manner to evade or defeat any tax imposed by this title" commits a felony punishable by not more than five years imprisonment and a $100,000 fine. 26 *U.S.C.A.* § 7201. Under New Jersey law, the corresponding offense of filing a false or fraudulent return "with the intent to evade, avoid or otherwise not make timely payment of any tax" is a crime of the third degree. *N.J.S.A.* 54:52-10.[3] Since 26 *U.S.C.A.* §7201 requires proof of essentially the same elements as *N.J.S.A.* 54:52-10, carries a maximum penalty of five years and is designated a felony, the federal crime translates into a crime of the third degree under the New Jersey sentencing system.

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[2] Historically, New Jersey did not utilize the common law distinction between "felonies" and "misdemeanors, but rather used the term "high misdemeanor" to refer to the more serious crimes. *State v. Doyle*, 42 *N.J.* 334, 348 (1964).

[3] Failure to file a tax return with intent to defraud or evade payment of any tax, *N.J.S.A.* 54:52-8, and failure to pay or turn over any tax with intent to evade payment, *N.J.S.A.* 54:52-9, also constitute third degree offenses under New Jersey law.

See Ayars, supra, where the Appellate Division regarded conviction of the state crime of failing to file an income tax return with intent to defraud the state or to evade or avoid the tax, *N.J.S.A.* 54:52-8, as a third degree offense requiring mandatory forfeiture. Likewise, in *Musto*, *supra*, the trial judge regarded federal income tax evasion as tantamount to perjury, which in New Jersey would amount to a crime of the third degree. *N.J.S.A.* 2C:28-1.[4]

Vitacco cannot derive any comfort from *In re Wilentz*, 69 *N.J.* 121 (1976), in which the New Jersey Supreme Court imposed a one-year suspension on an attorney convicted of failing to file a federal income tax return. In the first place, the facts are substantially different. While in *Wilentz* the attorney's neglect "resulted from an unfortunate family problem and was not motivated by any desire to evade his tax obligations" (at 122), Judge Ackerman expressly found that Vitacco was motivated by unmitigated "greed" and an unwillingness to contribute his fair share of taxes. Furthermore, in *Wilentz,* the Supreme Court was exercising its supervisory authority over the practice of law and had no occasion to consider the interpretation of an applicable statute. *See Wyzykowski v. Rizas*, 132 *N.J.* 509, 533 (1993) (distinguishing between the regulation of lawyers by the Court and the regulation of public officials by the Legislature). It is within the province of the Legislature to prescribe a higher standard for governmental employees who have betrayed the public trust. Consequently, the Commissioner lacks the discretion which the Supreme Court was able to exercise in the matter before it.

Whenever a public employee is convicted of an offense of dishonesty or a crime of the third degree or above, forfeiture is automatic and self-executing. *Lee*, 258 *N.J. Super.* at 316. In cases within the scope of subsection (a)(1) of the forfeiture statute, it is unnecessary to hold a plenary hearing and the matter may be disposed of by summary decision. *Turner v. State-Operated Sch. Dist. of Newark*, 96 *N.J.A.R.* 2d (CSV) 147 (Merit Sys. Bd. Nov. 1, 1995); *Alsheimer v. Cty. of Middlesex*, 96 *N.J.A.R.* 2d

[4]It should be added, however, that the trial judge also considered the federal offense to be comparable to false swearing, which is only an offense of the fourth degree.

(CSV) 7 (Merit Sys. Bd. Sept. 9, 1995). Both of the cases cited by Vitacco for the necessity of a hearing fall under subsection (a)(2), which pertains to offenses *"involving or touching"* employment. *Bergenfield Bd. of Educ. v Efferen*, 95 *N.J.A.R.* 2d (EDU) 304 (Comm'r June 24, 1994) (fourth-degree criminal sexual conduct); *Sch. Dist. of Garfield v. Olek*, 92 *N.J.A.R.* 323 (Comm'r June 27, 1991), *rev'd* 92 *N.J.A.R.* 323 (St. Bd. March 4, 1992) (disorderly-persons offenses). Even crimes not grave enough to trigger automatic forfeiture under subsection (a)(1) may have an obvious connection to employment that would alert the trial court and the perpetrator that forfeiture would follow from a conviction. *Moore v. Youth Correctional Inst.*, 119 *N.J.* 256 (1990). Most often, however, such comparatively minor offenses "require an analysis of the nexus between the crime and the employment to determine if there is a sufficient relationship between the two to warrant the harsh penalty of forfeiture." *Moore*, at 266. *Accord*, *State v. Baber*, 256 *N.J. Super.* 240 (Law Div. 1992). Municipal courts "may not possess thorough knowledge of the defendant's job requirements necessary to determine whether forfeiture is appropriate." *Moore, at 266*. If an examination of the connection between the conviction and job duties must be made, the Supreme Court has stated that, "It is far more efficient to grant the employee's department and administrative agencies initial jurisdiction to make the careful consideration of whether the offense should lead to forfeiture." *Moore,* at 267.

Although the Board insists that Vitacco's employment as superintendent enabled him to conceal his true income from the Internal Revenue Service, his guilty plea to the charge of falsifying his federal tax return does not establish that contention. Nor does Vitacco's cheating on his personal tax return necessarily implicate his ability to perform his duties as superintendent, except insofar as commission of a crime of dishonesty reflects adversely on his integrity and trustworthiness. Thus, a hearing would be required to evaluate the various factors relevant to ascertaining whether his conviction "involved and touched" his employment. *Moore*, at 269. In light of the definitive conclusion that Vitacco has forfeited his public employment via subsection (a)(1), it would be wasteful and unproductive to hold a hearing to determine whether he should forfeit his employment via subsection (a)(2) as well.

Finally, this decision will address the Commissioner's jurisdiction to declare a forfeiture in the event of a criminal conviction under federal law. Prior to the recent amendment effective September 12, 1995, *N.J.S.A.* 2C:51-2(b) provided that a forfeiture would occur at time of conviction only if the trial judge expressly ordered it. Otherwise, a forfeiture would not occur until time of sentencing, unless the trial judge ordered a stay for good cause. Because of concern that a convicted public official might continue to hold office while awaiting sentence, the Legislature amended the forfeiture statute to make it mandatory that a court of this state impose forfeiture of the public office immediately upon conviction or entry of guilty plea, unless the court orders a stay. Also, a court's discretion to issue a stay was limited to cases in which the court is clearly convinced that there is a substantial likelihood of success on appeal. *L.* 1995, *c.* 250. *Office of the Governor News Release* (Sept. 12, 1995). Quite clearly, the Legislature did not intend to hinder the forfeiture process. A statement accompanying the proposed legislation explains that it "strengthens law governing forfeiture of public office or employment upon conviction of certain crimes." *Statement Attached to Assembly Bill No.* 673 (1994).

Nonetheless, the amendment added new language which, if construed strictly, could make it more difficult for the Commissioner to remove tenured school employees convicted of federal crimes. As revised, *N.J.S.A.* 2C:51-2(b)(2) provides that:

> A court of this State shall enter a forfeiture . . .upon application of the county prosecutor or the Attorney General, when the forfeiture is based upon a conviction of an offense under the laws of another state or of the United States. An order of forfeiture pursuant to this paragraph shall be deemed to have taken effect on the date the person was found guilty by the trier of fact or pled guilty to the offense.

Read literally, this language could be taken to suggest that the Commissioner may not recognize a forfeiture for conviction of a federal crime unless the County Prosecutor or Attorney General applies for a formal judicial declaration. Board counsel advises that

the Attorney General's Office has declined to pursue forfeiture proceedings because Vitacco "has indicated that he is retiring from his position with the Lincoln Park Board of Education." That would leave the Commissioner with the unacceptable choice of either dropping the tenure charges or conducting a full-fledged tenure hearing, even though Vitacco has pled guilty to a forfeitable offense.

Fortunately, the Legislature has added further language amplifying its intent that a public employee convicted of a forfeitable offense should not be permitted to retain his position merely because the County Prosecutor or Attorney General decide not to act. *N.J.S.A.* 2C:51-2(g) continues:

> In any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilty, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General or upon application of the public officer of public entity having authority to remove the person convicted from his public office, position or employment. *The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to remove the person convicted from seeking to remove or suspend the person from his office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.* (Emphasis Added).

When interpreting statutes, the overriding goal should be to determine the legislative intent. *Young v. Schering Corp.*, 141 *N.J.* 16, 25 (1995). One should avoid a literal interpretation of individual statutory terms or provisions that would be inconsistent with the overall purpose of the statute. *Eg., Suter v. San Angelo Foundry & Mach. Co.*, 81 *N.J.* 150, 160 (1979); *Laboda v. Twp. of Clark*, 40 *N.J.* 424, 435 (1963). *Wene v. Meyner*, 13 *N.J.* 185, 197 (1953). Frequently, the doctrine of probable legislative intent can be "a more reliable guide than the overly literal reading" of a piece of legislation. *Young,* at 25. *See Amerada Hess Corp. v. Director, Div. of Taxation*, 107 *N.J.* 307, 322 (1987), *aff'd* 490 *U.S.* 66, 109 *S. Ct.* 1617, 104 *L. Ed.* 2d 58 (1989).

Although an administrative agency is not a "court" in a technical sense, *In re Tyler*, 236 *N.J. Super.* 478 (App. Div. 1989), *certif. den.* 121 *N.J.* 615 (1990), it performs an adjudicatory function termed "quasi-judicial" in nature. *City of Hackensack v. Winner*, 82 *N.J.* 1, 28 (1980). Jurisdiction over tenure charges brought by a school board seeking dismissal of a tenured employee is vested exclusively with the Commissioner. *N.J.S.A.* 18A:6-10 to -18.1. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). In seeking to "strengthen" the forfeiture law, it is doubtful that the Legislature wanted to make it more difficult to remove criminally-culpable teaching staff members. Instead, the more reasonable reading of subsection (g) is that where, for whatever reason, the issue of forfeiture is not ordered by any court, a school district having authority to initiate the removal of a teaching staff member may litigate the forfeiture issue as part of a pending tenure proceeding. *Cf. Sukin v. Northfield Bd. of Educ.*, 171 *N.J. Super.* 184 (App. Div. 1982) (Commissioner possesses incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws). Indeed, the New Jersey Supreme Court has acknowledged that, under some circumstances, it may be "far more efficient" to have the employer and administrative agency decide whether a particular offense should lead to forfeiture. *Moore,* at 267. Surely it would not make much sense to require a school board to bear the heavy cost of prosecuting complex charges at a plenary tenure hearing when a court of competent jurisdiction has already found respondent guilty of a forfeitable offense.

Order

It is **ORDERED** that Robert Vitacco forfeited his public employment in the district at the time of entry of his guilty plea on November 2, 1995.

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

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

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

Feb. 6, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Feb. 7, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

Appendix

List of Exhibits

No.	Description
J-1	Copy of termination agreement between Lincoln Park Board of Education and Robert Vitacco, dated January 22, 1992
J-2	Copy of Indictment No. 95-132(01) in the matter entitled *U.S.A. v. Vitacco, et al*, returned on or about March 21, 1995
J-3	Copy of plea agreement with Robert Vitacco, dated October 30, 1995
J-4	Copy of minutes of proceedings in the matter entitled *U.S.A. v. Vitacco*, Dkt. No. CR-95-132(01), dated November 2, 1995
J-5	Copy of transcript of the plea proceedings in the matter entitled *U.S.A. v. Vitacco*, Dkt. No. CR-95-132(01), held on November 2, 1995
J-6	Copy of transcript of the sentencing proceedings *U.S.A. v. Vitacco, et al,* Dkt. No. CR-95-132(01), held on June 18, 1996
P-id	Copy of letter to the Hon. Harold A. Ackerman from Patricia Schwartz, Ass't U.S. Atty., dated May 8, 1996
P-id	Copy of presentence report prepared on March 4, 1996 and revised on April 26, 1996
P-3	Copy of letter to Anthony P. Sciarrillo from Larry J. Burris, U.S. Probation Office, dated August 27, 1996
R-id	Copy of letter to the U.S. Probation Office from Joseph P. Afflito, Sr., Esq., dated April 17, 1996
R-id	Copy of letter to the Hon. Harold A. Ackerman from Joseph P. Afflito, Sr., Esq., dated June 13, 1996

OAL DKT. NO. EDU 7871-94
AGENCY DKT. NO. 253-6/94

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT R. VITACCO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF LINCOLN PARK, MORRIS COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of Respondent Vitacco were timely filed in accordance with *N.J.A.C.* 1:1-18.4. The Board advised that it would not be submitting exceptions to the decision of the Administrative Law Judge (ALJ).

Vitacco's exceptions specifically enumerate and incorporate by reference each of the prior submissions he has made to the record of this matter, essentially relying on the arguments advanced therein. With respect to the Commissioner's jurisdiction to enter an order of forfeiture pursuant to *N.J.S.A.* 2C:51-2, Vitacco's exceptions contend that, although recognizing that the language of the latest amendment to the forfeiture law, *N.J.S.A.* 2C:51-2g, deprives the Commissioner of such jurisdiction, the ALJ "refuses to adhere to the plain language and intent of the statute by claiming that the deprivation 'would leave the Commissioner with the unacceptable choice of either dropping the tenure charges or conducting a full fledged tenure hearing, even though Vitacco has pled guilty to a forfeitable offense.' (Initial Decision at Page 12.)" (Vitacco's Exceptions at p. 4) Vitacco avers that the ALJ's analysis here "misses the

entire point." (*Id.*) He asserts that the tenure laws, which permit removal of an individual from his position for inefficiency, incapacity, unbecoming conduct, or other just cause (*N.J.S.A.* 18A:6-10) and the forfeiture law removing one for certain criminal convictions, "are wholly distinguishable statutes with different purposes and different avenues for removal of a public employee." (*Id.*) He argues that neither of these statutory constructions can be utilized as a "substitute" for the other. Vitacco maintains that the ALJ in his decision has "confused the two concepts," (*Id.* at p. 5) by impermissibly engrafting the standards of the forfeiture law upon the tenure laws. Vitacco avers

> ***if the agency chooses to hear, as part of a *tenure* case, conduct to which the Respondent pled guilty in a criminal proceeding, it may do so, so long as it is relevant and responsive under the tenure statutes. Judge Springer's conclusion, however, that his finding that Respondent's conduct would amount to a forfeiture under the forfeiture law enables him to find, as a matter of law, that the Board of Education has proved its tenure case, *is not in compliance with the tenure laws*. The [Legislature] has made clear that only a Court of this State upon application of the County Prosecutor or Attorney General or upon application of the public officer or public entity having authority to remove the person may enter a forfeiture. Concomitantly, the Commissioner (through its hearing officers in the Office of Administrative Law) must conduct evidentiary hearings and weigh whether a complaining Board of Education has met the applicable standard.*** (emphasis in text) (*Id.* at pp. 5-6)

He argues that the need for a tenure hearing in the within matter is clearly evident by virtue of the ALJ's concession that he does not know whether Vitacco's conduct "involved and touched" his employment, and he concludes that it is precisely for this reason that a tenure hearing is required. (*Id.* at p. 6)

Vitacco requests that the Commissioner overturn the ALJ's initial decision and find either that he lacks jurisdiction to enter a forfeiture of public office under the forfeiture law,

or, if the Commissioner concludes that he has such jurisdiction, to find that no forfeiture occurred here and the matter must be remanded for tenure proceedings, or that Vitacco's offer of resignation renders the tenure matter moot.

Upon an independent and comprehensive review of the record in this matter and the exceptions advanced by Vitacco, the Commissioner determines that he is required to reject the ultimate conclusion of the ALJ as he determines that the Commissioner of Education lacks jurisdiction to declare that Vitacco forfeited his position by operation of law as a result of his conviction of an offense involving dishonesty and a crime of the third degree.

Initially, it is noted that the question of whether an individual forfeits his public position by virtue of his established criminal conduct involves the application of the specific statutory provision governing this action, *N.J.S.A.* 2C:51-2, part of the criminal code of the State of New Jersey. While it is axiomatic that the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-9, has jurisdiction to hear and determine all controversies and disputes arising under the school laws, the forfeiture statute does not arise under school law. Thus, authority for entry of an order that an individual has forfeited his public employment must be derived solely from the provisions of the controlling criminal statute. As aptly noted by the ALJ, prior to the recent amendment to *N.J.S.A.* 2C:51-2, (*P.L.* 1995, *c.* 250), which became effective September 12, 1995, forfeiture of an individual's public employment based on a conviction for either a crime of dishonesty or a crime of the third degree or above, "would occur at time of conviction only if the trial judge expressly ordered it. Otherwise, a forfeiture would not occur until time of sentencing, unless the trial judge ordered a stay for good cause." (Initial Decision at p. 11) As such, absent affirmative action of the trial judge at the time of conviction or

sentencing, such forfeiture of the position of an individual similarly situated to Vitacco in this matter, *would automatically occur by operation of law at the time of his sentencing.* The Commissioner observes, notwithstanding the ALJ's cogent discussion of the legislative and logical intent of the latest revision to this criminal statute, *i.e.*, to "'strengthen' the forfeiture law" (Initial Decision at pp. 11-13), such revision, by its unambiguous language, precludes the Commissioner from entering an order of a forfeiture of Vitacco's position herein. Specifically, *N.J.S.A.* 2C:51-2b(2) reads:

> A court of this State shall enter an order of forfeiture***[u]pon application of the county prosecutor or the Attorney General, when the forfeiture is based upon a conviction of an offense under the laws of another state or of the United States.***

Clearly, pursuant to the dictates of this section, the Commissioner may not recognize a forfeiture for conviction of a federal crime unless the County Prosecutor or Attorney General applies for a formal judicial declaration. As noted by the ALJ, because of Vitacco's indications that he is retiring from his tenured position with the within Board, the Attorney General's Office has declined to pursue forfeiture proceedings in this case. (Initial Decision at p. 12) Further, the Commissioner derives no encouragement from the additional language included in the Legislature's amendment, *N.J.S.A.* 2C:51-2g, in that he cannot concur with the ALJ's discussion, (Initial Decision at pp. 12-13), advocating the use of a liberal rather than a literal interpretation of this provision. While essentially agreeing with the observation of the ALJ that when interpreting statutes, "the overriding goal should be to determine the legislative intent" and "[o]ne should avoid a literal interpretation of individual statutory terms or provisions that would be inconsistent with the overall purpose of the statute" (citations omitted) (Initial Decision at p. 12), the Commissioner must remain mindful that, with respect to statutory interpretation outside those

contained in the Education Laws, the decision of the Commissioner of Education is not entitled to deference from the courts of this State. (See *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85 (1973); also see *Innkeeper, Inc., v. Remington, Inc.*, 287 *N.J. Super.* 54, 58 (App. Div. 1995).

Consequently, the Commissioner concludes that unless and until the Legislature sees fit to modify or extend the clear language of the statute, he does not have jurisdiction to enter orders for forfeiture of public employment, pursuant to *N.J.S.A.* 2C:51-2, as amended by *P.L.* 1995, *c.* 250.

In that the Commissioner has determined that forfeiture of Vitacco's position, pursuant to *N.J.S.A.* 2C:51-2, is inapplicable in the instant matter, it must, therefore, be determined whether the criminal conduct committed by Vitacco amounts to unbecoming conduct pursuant to *N.J.S.A.* 18A:6-10. Preliminarily, in this regard, the Commissioner is in full agreement with the ALJ that the tenure charges in this matter have not been rendered moot by Vitacco's voluntary resignation from the Board's employment. In that Vitacco retains his certificates which qualify him for employment in the State and has an outstanding claim for benefits arising out of the employment relationship, a finding of mootness of the tenure charges is clearly precluded by the State Board's decision in *In the Matter of the Tenure Hearing of Jerry Barshatky, School District of the Freehold Regional High School District, Monmouth County*, decided by the State Board May 1, 1996. Moreover, the Commissioner finds, as did the ALJ, that "the community is entitled to a public declaration that Vitacco's behavior required his removal. He should not be permitted to resign in good standing." (Initial Decision at p. 6)

Notwithstanding that the within tenure charges are not mooted by Vitacco's resignation of his employment in the District, the Commissioner concludes that, upon review of the record in its totality and the circumstances present in the instant matter, he can find no justification for the expenditure of scarce time and resources to conduct a plenary hearing, as he determines that the conduct giving rise to Vitacco's federal conviction amply establishes the Board's charges of unbecoming conduct and calls for his removal from his tenured position.

It is observed that Vitacco's submissions to the record of this matter claim entitlement to an adjudication on the merits of the tenure charges by virtue of the fact that his federal conviction relates to charges that do not, in any way, touch upon or involve his duties as Superintendent in the Lincoln Park School District. (See Vitacco's Letter Brief, dated March 7, 1996, at pp. 8-11.) Such contention is clearly belied by reasoned reading of the full context of the transcript of Vitacco's criminal plea on November 2, 1995 and that of his sentencing on June 18, 1996 before the Honorable Harold A. Ackerman of Federal District Court, which establish a readily apparent nexus between the crimes to which Vitacco pled guilty and his position in the District. Moreover, in this connection, the Commissioner notes that it is undisputed that Vitacco's federal plea agreement contains a stipulation wherein he agrees that a 2-level enhancement to his penalty in the tax evasion matters for "abuse of position of trust" is appropriate*. It is further noted that such enhancement is made pursuant to U.S. Sentencing Guidelines (U.S.S.G.) Section 3B1.3 which provides

> If the defendant abused a position of public or private trust *** in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.***
> (Guidelines Manual dated November 1, 1994, at 232)

* See Plea Agreement with Robert Vitacco, Schedule A.

The applicability of this provision is clarified in 1. of the Commentary to this Section which specifies

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. *For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense* (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors. (emphasis added) (*Id.*)

In that Vitacco expressly acknowledges and agrees that his criminal conduct constituted an abuse of a position of trust, and given the specificity of the applicability of this penalty enhancement, the Commissioner finds that there can be no dispute as to the existence of an unequivocal nexus between the administration of his position and his criminal conduct. As such, no purpose would be served in conducting a hearing pursuant to *N.J.S.A.* 18A:6-10 in order to convince the Commissioner that the Board's tenure charges are true in fact, and sufficient to warrant this individual's dismissal or reduction in salary. The Commissioner finds that the record is abundantly clear that the charges of unbecoming conduct have been sustained and, consequently, Vitacco can claim no entitlement to compensation for the initial 120-day term of his suspension. Moreover, with respect to an appropriate penalty herein, it is long-established that such determination

> should be based upon ***findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the ***conduct may have had on the maintenance of discipline and the proper administration of the school district.
> *In re Fulcomer*, 93 *N.J. Super.* 404, 422 (App. Div. 1967).

Here, the Commissioner concludes that a hearing for the limited purpose of receiving additional evidence with regard to the appropriate penalty would go beyond the intent of the Tenure Employees Hearing Act. Even fully crediting, *arguendo*, the mitigating circumstances surrounding his criminal conduct advanced by Vitacco at his sentencing before Federal District Court Judge Harold A. Ackerman, including his long service in the District with a successful and exemplary record, (see Sentencing Transcript at pp. 11-15), in light of the importance of the position he occupied in the District and the obvious resultant detrimental effect his criminal behavior occasioned for the Board, students and taxpayers, it is determined that such mitigation evidence cannot serve to alter the compelling conclusion that the appropriate penalty herein is Vitacco's removal from his position.

In this connection, it must be remembered that a superintendent of schools serves as chief executive officer of a school district who is statutorily responsible for the "general supervision over the schools of the district***under rules and regulations prescribed by the state board***." *N.J.S.A.* 18A:17-20. The occupant of such a position is one in whom the board and the members of the community are required to place considerable reliance with respect to his ability, honesty, integrity, efficiency, judgment and faithfulness in the performance of his duties. As such, the professional conduct demanded of this individual is significant. As observed by the State Board in *In the Matter of the Tenure Hearing of Frank J. Napoli*, 1988 *S.L.D.* 284:

> If the standard of behavior required of teachers is stringent, the standard for high administrative personnel must be even more stringent. As was noted in *In the Matter of the Tenure Hearing of Louis Cirangle*, 1980 *S.L.D.* 95, 96, *aff'd* by the State Board, 1980 *S.L.D.* 97, *aff'd*, Docket #A-3967-79A (App. Div. Jan. 30, 1981), *certif. denied*, 87 *N.J.* 347 (1981):
>
> > The position of Chief School Administrator, difficult at best, cannot be exemplified by one who displays less than the self-restraint and controlled behavior requisite as an example to the Board, teachers and pupils alike.
>
> The Respondent, as superintendent of schools, occupies a crucial position within the school district and community. He is entrusted with the responsibility for providing educational leadership and for administering the school district so as [to] ensure proper implementation of board policy with respect to personnel matters as well as educational programming.*** (at 288)

The Commissioner is persuaded that the within record is abundantly clear that Vitacco utilized his position as superintendent of schools dishonestly, evidencing a total lack of the integrity and personal responsibility requisite to such a position. His admission to two criminal counts which involved an "abuse of his position," spanning a two-year period of time, and which was, found by Federal District Court Judge Ackerman to be motivated by

> [g]reed. Pure and simple. A desire to rip off the system, carry out your very important responsibilities in terms of the education and the educational health of the school district in, to say the least, a hypocritical manner (Sentencing Transcript at p. 27)

obviously constitutes an appalling breach of the high level of trust required by his position and a violation of the fiduciary duty owed to his Board and the members of the community.

For all of the foregoing reasons, a finding that the appropriate penalty in this matter is Vitacco's dismissal from his position is dictated. The Commissioner opines that a penalty determination was necessary in this case, notwithstanding that the record indicates that Vitacco has already relinquished his position in the District, in order that the State Board of

Examiners may have an adequate opportunity to review the broadest record possible if it chooses to take action with respect to Vitacco's certificates.

Accordingly, the recommended decision of the OAL ordering that, pursuant to *N.J.S.A.* 2C:51-2, Robert Vitacco forfeited his public employment at the time of entry of his guilty plea on November 2, 1995, is hereby overturned for lack of Commissioner of Education jurisdiction to order such forfeiture. Rather, it is ordered that Robert Vitacco be deemed dismissed from his tenured employment with the Lincoln Park Board of Education, pursuant to *N.J.S.A.* 18A:6-10, for conduct unbecoming a superintendent of schools. This matter will be forwarded to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 24, 1997

DATE OF MAILING MARCH 25, 1997

149-97

EDU # 7871-94
C # 149-97
SB # 41-97

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT R. VITACCO,	:	
SCHOOL DISTRICT OF THE	:	STATE BOARD OF EDUCATION
BOROUGH OF LINCOLN PARK,	:	DECISION
MORRIS COUNTY.	:	

Decided by the Commissioner of Education, March 24, 1997

For the Petitioner-Respondent, Lindabury, McCormick & Estabrook (Anthony P. Sciarrillo, Esq.)

For the Respondent-Appellant, Klausner & Hunter (David L. Rosenberg, Esq., of Counsel)

Robert R. Vitacco (hereinafter "respondent" or "Vitacco") was employed as Superintendent of Schools by the Board of Education of the Borough of Lincoln Park (hereinafter "Board") since 1975, inclusive of calendar years 1991 and 1992, achieving tenure in the position. On January 22, 1992, the respondent and the Board entered into a written termination agreement ("Agreement"), in which Vitacco agreed "to resign his position as Superintendent of Schools to take effect September 30, 1995." Paragraphs Seven and Eight of the Agreement also set forth terms under which the respondent was to receive an additional $15,000 in compensation for his service as a consultant with respect to labor negotiations.

However, on June 20, 1994, the Board certified tenure charges against Vitacco seeking his removal as Superintendent. The Board alleged that Vitacco and the

APR. 5, 2000

district's business administrator, Leonard Marano ("Marano"), had engaged in criminal conduct that constituted unbecoming conduct within the meaning of N.J.S.A. 18A:6-10. The alleged criminal conduct included tax evasion, misappropriation of public funds, misuse of vacation days, destruction of public records and financial mismanagement.

On August 16, 1994, the Commissioner of Education transmitted the matter to the Office of Administrative Law ("OAL") for a hearing.

On March 21, 1995, six months prior to the date designated by the Agreement as respondent's resignation date, Vitacco and Marano were both indicted under a 12-count federal indictment for various criminal offenses, including criminal conspiracy, embezzlement and attempt to evade taxes by underreporting income for five separate years.

On March 24, 1995, the respondent filed a motion seeking dismissal of the tenure charges. Respondent contended that the charges were moot since the Board had accepted his resignation and he had indicated his willingness to surrender his teaching certificates. During this period, from September 1, 1994 through September 30, 1995, the respondent was on a paid leave of absence pursuant to the termination agreement with the Board, following which his formal resignation would take effect.

On November 2, 1995, the respondent pleaded guilty before U.S. District Court Judge Harold Ackerman to two counts of tax evasion for filing false tax returns for 1991 and 1992 and for underreporting his income by $16,520.45 in 1991 and by $29,054.04 in 1992. The respondent's unreported income included vacation reimbursement, a monthly car allowance and payment he had received as a consultant in labor

negotiations.

On December 12, 1995, the Board filed a motion seeking a declaration that respondent could be removed from his position by operation of law, based on the forfeiture statute, N.J.S.A. 2C:51-2, as amended on September 12, 1995. With the consent of the parties, the Administrative Law Judge ("ALJ") deferred ruling on the Board's motion until completion of the criminal proceedings.

On June 18, 1996, the respondent was sentenced to ten months' imprisonment on each criminal count, to be served concurrently, and fines totaling $15,000. As part of his plea agreement, Vitacco agreed that under federal sentencing guidelines, a two-level enhancement for abuse of a position of trust was appropriate. Judge Ackerman specifically addressed the higher level of penalty, explaining that it was necessary not only to penalize "these individuals for their own conduct but to also send a message to those who have privileged positions as public servants and the penalty one pays for abusing that trust they have been given by the public." Transcript of June 18, 1996, Vitacco's Sentencing Hearing, at 26. Judge Ackerman stressed that a superintendent's position is such that his responsibility is increased proportionately.

The pre-sentencing report was also considered during the sentencing hearing. That report provides specific accounts by various school employees that confirm the continuous nature of the respondent's actions and the adverse effect of his actions on their employment.

On August 29, 1996, oral argument was held before the ALJ with respect to the respondent's motion to dismiss the tenure charges. On February 6, 1997, the ALJ recommended granting summary judgment on the Board's motion and denying the

respondent's motion to dismiss the tenure charges. Based on the seriousness of the respondent's criminal actions, as well as his continued claims for salary reimbursement during the first 120 days of his suspension and an outstanding claim for benefits, the ALJ concluded that the respondent's resignation would not render the tenure charges moot. With respect to the jurisdictional question, the ALJ found that the Commissioner did have jurisdiction and that, pursuant to N.J.S.A. 2C:51-2, the respondent's actions warranted the forfeiture of his position in the district as of November 2, 1995, the date on which he had entered his guilty plea.

On March 24, 1997, the Commissioner rejected the ALJ's recommendation, concluding that he did not have subject matter jurisdiction to render a determination on forfeiture under N.J.S.A. 2C:51-2. Nonetheless, the Commissioner agreed with the ALJ that the tenure charges in this matter were not moot since the respondent had retained his teaching certificates and had an outstanding claim for benefits arising out of his employment. The Commissioner also concluded that the conduct which gave rise to the respondent's federal conviction amply established the Board's charges of unbecoming conduct and that, as a result, an evidentiary hearing was not necessary.[1]

The respondent filed the instant appeal to the State Board from the Commissioner's ruling with regard to the tenure charges. The Board filed a

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[1] N.J.S.A. 18A:6-10 provides in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state...except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person....

cross-appeal from the Commissioner's determination that he lacked subject matter jurisdiction under the forfeiture statute.

In its cross-appeal, the Board requested guidance on the application of N.J.S.A. 2C:51-2(a)(1). Specifically, the Board sought a declaration that this agency has the authority to file an application for forfeiture in state court pursuant to N.J.S.A. 2C:51-2(g) as a "public entity having authority to remove the person convicted from his public office, position or employment."

We reject the Board's contention. Quite simply, the terms of the statutes show that N.J.S.A. 2C:51-2(g) is not applicable to this case. Nor does any other provision provide the authority in this matter for either the Commissioner or the Board to seek a forfeiture from our state courts under these circumstances.

N.J.S.A. 2C:51-2(a) provides that:

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment.

N.J.S.A. 2C:51-2(b) further provides that a Court of this State shall enter an Order of Forfeiture of Public Office by a person holding such public office:

> (1) Immediately upon a finding of guilt by the trier of fact or a plea of guilt entered in any court of this State unless the court, for good cause shown, orders a stay of such forfeiture

pending a hearing on the merits at the time of sentencing; or

(2) upon application of the County Prosecutor or the Attorney General, when the forfeiture is based upon a conviction of an offense under the laws of another State or of the United States. An order of forfeiture pursuant to this paragraph shall be deemed to have taken effect on the date the person was found guilty by the trier of fact or pled guilty to the offense.

N.J.S.A. 2C:51-2(d) emphasizes that:

> In addition to the punishment prescribed for the offense, and the forfeiture set forth in subsection a. of N.J.S.A. 2C:51-2, any person convicted of any offense involving or touching on his public office, position or employment shall be forever disqualified from holding any office or position of honor, trust or profit under this State of any its administrative or political subdivisions.

N.J.S.A. 2C:51-2(g), in pertinent part, also states that:

> in any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General or upon application of the public officer or public entity having authority to remove the person convicted from his public office, position or employment. The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to remove the person convicted from seeking to remove or suspend the person from his office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.

As detailed above, the respondent pleaded guilty to federal tax evasion in U.S. District Court. Consequently, his conviction was for an offense under the laws of the United States, rather than those of the State of New Jersey. Hence, a forfeiture may be sought and declared in New Jersey State court only after the procedures specified in

N.J.S.A. 2C:51-2(b)(2) have been followed. As set forth above, a court of this State can declare forfeiture under these circumstances only upon application of the County Prosecutor or the Attorney General.

This result is not altered by the fact that the Commissioner may have the jurisdiction to seek a forfeiture under N.J.S.A. 2C:51-2(g) in a case where sentencing was in state court and the issue was not raised in that court at the time of sentencing. As previously stated, the guilty plea in this case was in federal court under the laws of the United States. Because the plea was not entered in a "court of this State," N.J.S.A. 2C:51-2(g) does not apply here.

As the Commissioner found, the language of the statute as amended in September 1995 is clear and unambiguous. Hence, we need look no further than the words of the statute. Nonetheless, we stress that state courts and federal courts constitute separate judicial systems based on distinctly derived jurisdictional authority. The statutory framework involved here reflects that distinction.

In short, the statute unquestionably confers the authority on either the County Prosecutor or the Attorney General in these circumstances to seek a forfeiture in state court. Nothing extends that authority to the Commissioner of Education or to district boards of education where the plea was entered in federal district court under the laws of the United States. The fact that the Attorney General did not exercise that authority in this case cannot alter the terms of the statute. Consequently, we affirm the Commissioner's determination that he lacked the jurisdiction to declare a forfeiture or to authorize the district board to seek such a declaration in this instance.

We further agree with the Commissioner that the tenure charges in this case are

not moot. We also concur that the conduct established in this matter by the respondent's guilty plea warrants the conclusion that respondent was guilty of unbecoming conduct. We further concur with the Commissioner that this conduct warrants the dismissal of the respondent from his tenured employment.

As the Commissioner stressed, the respondent has a claim for benefits arising out of his employment in the school district. More significantly, his voluntary resignation would not preclude him from employment in the public schools of New Jersey or in those of other states. This result is unconscionable given the seriousness of the federal charges to which respondent pleaded guilty and the nexus of those charges to his position in the school district. In this respect, we emphasize that, as described above, the respondent's plea agreement included a stipulation which provided for a two-level enhancement to his penalty since his conduct clearly reflected an abuse of the position of trust which he had held with the district.

Accordingly, for the reasons expressed herein, as well as those articulated by the Commissioner, we affirm the Commissioner's determination in this matter.

Attorney exceptions are noted.

April 5, 2000

Date of mailing APR 7 2000

150-97

ANITA LEWIS AND DEBRA ANN SKAWINSKI,

PETITIONERS,

V.

STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In consolidated matter, petitioners, two tenured teaching staff members who were riffed in May 1994, sought back pay for the District's failure to employ them during the 1994-95 and 1995-96 school years.

ALJ concluded that petitioners were not entitled to the positions they sought. In addition, the ALJ found that in-house suspension teacher and alternative program roles constituted assignments in which teachers serve at the discretion of the principal, not positions with tenure or seniority rights. Thus, petitions were dismissed.

Upon review of the record, including transcripts from the hearings, the Commissioner reversed the initial decision. Commissioner found that subsequent to the RIF in May 1994, there were positions to which both petitioners could have been assigned by virtue of their superior tenure and seniority rights as compared to those individuals who were actually assigned to the positions. Commissioner ordered the District to calculate the sums due petitioners, mitigated compensation for school years 1994-95 and 1995-96, until March 1, 1996, the date on which they were offered positions in the District. Moreover, the Commissioner directed the District to establish job positions and titles, as appropriate, for the positions discussed, to produce job descriptions that include certification requirements, *inter alia*, for each such position, and to submit positions bearing unrecognized titles to the County Superintendent for approval of designation of appropriate certification.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 9743-94 & 9745-94

AGENCY DKT. NOS. 306-7/94 & 313-7/94

ANITA LEWIS and DEBRA ANN SKAWINSKI,

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,

Respondent.

(CONSOLIDATED)

Gail Oxfeld Kanef, Esq., attorney for petitioner Anita Lewis (Balk, Oxfeld, Mandell & Cohen, attorneys)

Kathleen A. Naprstek, Esq., attorney for petitioner Debra Ann Skawinski (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Joseph F. Skinner, Esq., attorney for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: January 14, 1997 Decided: January 30, 1997

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Petitioners, Anita Lewis (Ms. Lewis) and Debra Ann Skawinski (Ms. Skawinski) seek damages against respondent, State Operated School District of Paterson, Passaic County (the District) for back pay.

PROCEDURAL HISTORY

On July 26, 1994, Ms. Lewis filed a Petition. The District filed an Answer on September 26, 1994. On July 28, 1994, Ms. Skawinski filed a Petition. The District filed an Answer on September 23, 1994. The Department of Education transmitted these matters to the Office of Administrative Law on October 6, 1994.

On February 17, 1995, the undersigned entered an Order of Consolidation. The undersigned held a Prehearing Conference and entered a Prehearing Order on April 26, 1995. The hearing was held on June 10 and 27, 1996. The record closed on January 14, 1997, after the submission of all post-hearing Briefs.

ISSUE

Ms. Lewis and Ms. Skawinski do not challenge the validity of the Board's reduction in force (RIF). Rather, they seek money damages for back pay. Ms. Lewis seeks back pay in the amount of $20,504.40, and Ms. Skawinski seeks back pay in the amount of $15,363, plus back pay for her discontinued participation as a peer counselor, a bedside instructor and a summer school teacher. The issue, therefore, is whether or not they are entitled to back pay.

FACTS

The parties stipulated the following which I **FIND** as **FACTS** in this case:

1. Ms. Lewis holds a teaching certificate with endorsements in Comprehensive Business Education, including data processing.

2. Ms. Lewis commenced employment with the District on September 1, 1986 as a Business Education Teacher.

3. Ms. Lewis acquired tenure as a Business Education Teacher.

4. Robert Salviano (Mr. Salviano) holds a teaching certificate with an endorsement in General Business Studies.

5. Mr. Salviano commenced employment with the District on September 23, 1986, as a Business Education Teacher.

6. Mr. Salviano acquired tenure as a Business Education Teacher.

7. In May 1994, the District voted to abolish Mr. Salviano's position.

8. Commencing September 1, 1994, the District transferred Ms. Lewis to the position of Teacher's Aide. Ms. Lewis served in this position from September 1, 1994 to March 4, 1996. On March 4, 1996, the District reappointed her to the position of Business Education Teacher.

9. For the 1993-94 school year, Ms. Lewis earned $44,548.40, which is equivalent to Step 6 on the 1993-94 salary guide, plus longevity pay.

10. For the 1994-95 school year, Ms. Lewis earned $33,497.60.

11. During the 1995-96 school year, Ms. Lewis earned $34,624.00.

12. Ms. Lewis has more than 24 years of service in the District.

13. Ms. Lewis has a Master's Degree plus 30 credits.

14. Catherine Zehnacker (Ms. Zehnacker) is employed by the District as a Teacher of Computers.

15. Ms. Zehnacker possesses a teaching certificate with endorsements in Elementary Education.

16. Ms. Zehnacker commenced her employment with the District on September 11, 1992.

17. Ms. Skawinski commenced employment with the District on about September 1, 1985, as a Business Education Teacher.

18. Prior to her employment with the District, Ms. Skawinski obtained an Instructional Certificate. In May 1976, she obtained endorsements as a Teacher of General Business and as a Teacher of Accounting and Bookkeeping. In October 1976, she obtained an endorsement as a Teacher of Data Processing.

19. In August 1992, Ms. Skawinski obtained an Educational Services Certificate with an endorsement in Student Personnel Services.

20. On May 3, 1994, Ms. Skawinski received a letter from the District, dated April 1994, advising her that her position was being abolished, effective June 30, 1994.

21. For the 1993-94 school year, the District paid Ms. Skawinski according to MA Step 13 on the salary guide. She received a base salary of $48,057 and $700 for longevity pay.

22. By letter, dated January 25, 1996, the District offered Ms. Skawinski a position in the District, effective March 1, 1996.

23. By letter, dated February 27, 1996, Ms. Skawinski declined the District's offer.

In addition to the above, having heard the witnesses and reviewed the Exhibits, I **FIND** the following **FACTS**:

In October 1991, the State Department of Education assumed control of the Paterson School District. In the Spring of 1994, Superintendent, Dr. Laval Wilson (Dr. Wilson), and the Director of Personnel, Dr. John Nolan (Dr. Nolan), determined that a RIF was necessary in the Secondary Business Department because of the declining student enrollment in that Department. Thus, Dr. Wilson and Dr. Nolan reviewed the personnel files of all the teachers in the Business Department in order to comprise a seniority list. The list contained the names of approximately twenty-seven teachers with business and/or related certifications and each teacher's starting date. In reviewing the list, Dr. Nolan determined Ms. Lewis, Ms. Skawinski and Mr. Salviano had the least amount of seniority. Although Mr. Salviano had the least amount of seniority among the three, he also was certified to teach math, grades 8 to 12.

Ms. Lewis is a tenured Business Education Teacher. She taught at Eastside High School. She is certified to teach Comprehensive Business Education and Data Processing from grades 7 to 12. She claims that she is entitled to the positions held by Mr. Salviano and/or Ms. Zehnacker because she has more seniority. It is undisputed that Ms. Lewis has more seniority than Mr. Salviano or Ms. Zehnacker.

Mr. Salviano is a tenured Business Education Teacher. He taught General Business Studies at Kennedy High School. He is certified to teach General Business Studies, Typewriting, Elementary Education and Mathematics. In 1993, he was assigned as an In-School Suspension Teacher. In 1994, he was assigned to head the in-school portion of the Team Approach Center.

The District eliminated Mr. Salviano's position as a Business Education Teacher at the same time it eliminated Ms. Lewis's position. The District rehired Mr. Salviano as a Mathematics Teacher in the Alternative School Program at Eastside High School. He currently holds that position. There is no dispute that Ms. Lewis is not certified to teach mathematics.

Ms. Zehnacker is a certified Elementary Education Teacher and a certified Teacher of the Handicapped. Since 1994, she has been a Computer Lab Technician at School No. 8. She teaches reading and technology, mathematics and technology, word processing, computer hardware and language, science, social studies and general technology to students in grades 4 to 8. There is no dispute that Ms. Lewis is not a certified Elementary Education Teacher and, thus, cannot teach any elementary grades.

Ms. Skawinski is a tenured Business Education Teacher. From September 1992 to November 15, 1992, she was assigned to assist with Freshman scheduling. In May 1992, she received a Masters Degree in Guidance. She then was assigned to the Guidance Department. She described her assignment as "back-up to the Master Scheduler." She worked in this assignment until the District eliminated her position as a Business Education Teacher. Thereafter, Nicholas Bucci (Mr. Bucci) took over that assignment. Ms. Skawinski claims entitlement to the position held by Mr. Bucci, Mr. Salviano, Ms. Zehnacker and/or Anthony De Pasquale or a position in the Alternative Program at Kennedy High School.

Mr. Bucci began working for the District in February 1, 1990. He is a certified Teacher of Business, Teacher of Bookkeeping and Accounting, Teacher of Driver Education, Teacher of the Handicapped and School Business Administrator. From February 1, 1990 to September 1, 1990, Mr. Bucci served as an unassigned Business Education Teacher at Kennedy High School. He accrued no tenure or seniority in this position because, as an unassigned teacher, he essentially functioned as a substitute teacher not having his own schedule of classes. From September 1, 1990 to the present, Mr. Bucci has been a Special Education Teacher at Kennedy High School. From January 1995 to December 1995, he was assigned on a part-time basis to assist the Master Scheduler. Beginning in April 1996, he has assisted the Master Scheduler on a full-time basis.

According to Dr. Nolan and the District's present Director of Personnel, Philomena Pezzano (Mrs. Pezzano), there is no position in the District entitled "Back-up to the Master Scheduler." When the Master Scheduler needs help, the Principal, not the Personnel Department, assigns someone to help. With respect to Ms. Skawinski, enrollment in the Business Department had declined. The Principal tried to save a Business Education Teacher position, so he assigned

Ms. Skawinski to help the Master Scheduler. This was an assignment, not a position, to be performed by teachers who had spare time or who were filling in to help the Master Scheduler. As such, no tenure or seniority rights attached to that assignment.

An In-House Suspension Teacher and an Alternative Program Teacher also were assignments, not positions. No tenure or seniority rights attached to these assignments. In addition, the teachers assigned to the Alternative School Program taught only in areas in which they had certification.

DISCUSSION AND CONCLUSION

To acquire tenure in a teaching position, a teacher must have an appropriate certificate for that position. *Ellicott v. Board of Education,* 251 *N.J. Super.* 342, 348 (App. Div. 1991). The scope of the tenure is limited by the certificate held by the teacher. *Ibid.* A tenured teacher with proper certification can claim seniority rights to a position that is within the tenured teacher's certification. *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362, 364 (1983). Seniority only accrues within the specific subject area in which the tenured teacher is certified and has actually served. *Lichtman,* 93 *N.J* at 366, 368-369; *Capodilupo v. W. Orange Tp. Ed. Bd.*, 218 *N.J. Super.* 510, 515 (App. Div. 1987); *N.J.A.C.* 6:3-5.1.

In this case, Ms. Lewis holds a Business Education Teacher certificate with endorsements in Comprehensive Business Education and Data Processing. She is tenured as a Business Education Teacher. She claims entitlement to the position now held by Mr. Salviano of mathematics teacher in the Alternative School Program at Eastside High School. Mr. Salviano is a Certified Mathematics Teacher. Ms. Lewis is not, nor has she ever served as a Mathematics Teacher. I, therefore, **CONCLUDE**, that Ms. Lewis has no tenure or seniority rights to the position held by Mr. Salviano.

Ms. Lewis also claims entitlement to the position now held by Ms. Zehnacker of teaching reading and technology, mathematics and technology, word processing, computer hardware and language, science, social studies and general technology in an elementary school. Ms. Zehnacker is a certified Elementary Education Teacher. Ms. Lewis is not, nor has she ever served as an

Elementary Education Teacher. I, therefore, **CONCLUDE**, that Ms. Lewis has no tenure or seniority rights to the position held by Ms. Zehnacker.

Ms. Skawinski holds an Instructional Certificate with endorsements as a Teacher of General Business, a Teacher of Accounting and Bookkeeping and a Teacher of Data Processing. She is tenured as a Business Education Teacher. She also holds an Educational Services Certificate with an endorsement in Student Personnel Services. She is tenured as a Business Education Teacher. Ms. Skawinski also claims entitlement to the position held by Mr. Salviano and the position held by Ms. Zehnacker. Ms. Skawinski, however, does not possess a certificate to teach mathematics or elementary education and she never has served in these positions. I, therefore, **CONCLUDE**, that Ms. Skawinski has no tenure or seniority rights to the positions held by Mr. Salviano and Ms. Zehnacker.

Ms. Skawinski also claims entitlement to the assignment held by Mr. Bucci who now assists the Master Scheduler. Ms. Skawinski has tenure and seniority rights only as a Business Education Teacher . She has no tenure or seniority rights to any other position in the District, There also is no such tenure-track position of "Back-up to the Master Scheduler" in the District. It is only an assignment in which teachers serve at the discretion of the Principal.

ORDER

I, therefore, ORDER that the petitions of Ms. Lewis and Ms. Skawinski be and hereby are **DISMISSED WITH PREJUDICE**.

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

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

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

Jan. 30, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

Feb. 7, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioners:

Howard Anderson

Carey Jenkins

Anita Lewis, petitioner

William Molloy

Robert Salviano

Debra Ann Skawinski, petitioner

Cathleen Zehnacker

Marie Zofrea

For Respondent:

John Nolan, Ed.D.

Philomena Pezzano

Exhibits

J-1	Stipulation of Facts
J-2	Stipulations of Facts
J-3	Contract Agreement
L-1	Teacher's Salary guide 1994-95
L-2	Teacher's Salary Guide 1995-96
L-3	Salary Guides for Instructional Assistants IV 1994-97
L-4	Ms. Lewis's Paystub, 6/15/94
L-5	Ms. Lewis's Paystub, 11/15/94
L-6	Ms. Lewis's Paystub 9/15/95
L-7	Ms. Lewis's Bachelor of Science Degree
L-8	Ms. Lewis's Master of Arts Degree
L-9	Letter, dated December 19, 1990, from Joseph T. Atallo to Ms. Lewis

L-10	Position Control List
L-11	Ms. Lewis's Certificate for teacher of Business Education
S-1	Ms. Skawinski's Certificate for Teacher of General Business and Teacher of Bookkeeping and Accounting
S-2	Ms. Skawinski's Paystubs
S-3	Ms. Skawinski's Employment Contract, 1994-1995
S-4	Ms. Skawinski's Employment Contract, 1995-1996
R-1	Seniority List

OAL DKT. NOS. EDU 9743-94 & 9745-94 (CONSOLIDATED)
AGENCY DKT. NOS. 306-7/94 & 313-7/94

ANITA LEWIS AND DEBRA ANN SKAWINSKI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner Skawinski initially objects to the ALJ's statement on page two of the initial decision that "Ms. Lewis and Ms. Skawinski do not challenge the validity of the Board's reduction in force (RIF)." (Initial Decision at p. 2) Rather, Skawinski avers that while she and Petitioner Lewis do not challenge the District's right to effectuate a RIF, they do challenge the manner in which the RIF was carried out. (Skawinski's Exceptions at p. 2) In this instance, both Skawinski and Lewis seek money damages for back pay, inasmuch as Petitioner Skawinski declined to accept a position, to begin March 1, 1996, with the District, and Petitioner Lewis was rehired with the District on March 1, 1996.

Skawinski asserts that the ALJ "***makes numerous factual and legal conclusions which are unsupported by and, in many instances, completely contradicted by the testimony presented at the hearings." (*Id.*) First, contrary to the ALJ's recitation of events, Skawinski notes that the record clearly shows that Salviano had not acquired his math certification as of the date of the RIF, but rather acquired same later, in July of 1994. Moreover, Skawinski observes that

> "[t]he testimony of Salviano further reveals that he was *never riffed*, but continued his employment with the District during the 1994-95 school year, first in the position of in-school-suspension teacher *** and eventually being placed in November of 1994 in the position of math teacher***." (emphasis in text) (*Id.* at p. 3)

Second, Skawinski contends that the ALJ ignored the extensive testimony regarding the duties she performed during the 1992-93 and 1993-94 school years in her role as the back-up to the master scheduler. While the ALJ concludes, based upon testimony by Dr. Nolan and Philomena Pezzano, that Skawinski never held a "position" as a back-up to the master scheduler, but rather an "assignment," Skawinski counters that the testimony of Maria Zofrea, the Master Scheduler, revealed that she was not merely "filling in," but performing essentially the same duties as Zofrea on a full-time basis. (*Id.* at p. 4) Thus, Skawinski reasons that allowing the District to disregard her statutory rights "***by [labeling] the job she performed on a full-time basis for at least two (2) years as an 'assignment' rather than a 'position,' is egregious and in clear violation of the law." (*Id.*)

Third, Skawinski attests that the ALJ disregarded the testimony concerning the positions of Cathleen Zehnacker, William Molloy and Carey Jenkins. (*Id.*) Skawinski argues that these individuals, each having less seniority at the time of the RIF than she, had never seen

job descriptions for their roles and, further, understood that there were no specific certification requirements attached to the performance of said jobs. Skawinski continues,

> [T]he Commissioner has consistently held that a teaching position is not simply defined by the title assigned to that position, but by the endorsement required to hold the position, *N.J.A.C.* 6:11-6.2, as well as the specific duties and responsibilities assigned thereto. *** It has further been held that, where no specific certificate is required, any teaching certificate is appropriate and all tenured teachers can assert tenure and seniority claims to that position. *** These principles of law, when applied to the facts of this case, require a careful and meticulous examination of the positions held by Zehnacker, Molloy and Jenkins, not the cursory review given by the ALJ. To do otherwise frustrates that purpose of this state's tenure laws. (citations omitted) (*Id.* at p. 5)

Finally, Skawinski asserts that the ALJ misapplied the applicable law by concluding that she had no entitlement to the positions held by Robert Salviano and Nicholas Bucci. In maintaining that her tenure and seniority rights were only as a Business Teacher, Skawinski affirms that the ALJ disregarded the line of school law decisions which address a teacher's right to positions which do not have a particular certification requirement. Moreover, Skawinski notes that the ALJ failed to address her entitlement to the positions held by Molloy and Jenkins.

Petitioner Lewis warrants that the initial decision cites neither law nor fact in support of the conclusion that she has no tenure or seniority rights to the position held by Salviano or Zehnacker. However, citing to *Taxman v. Piscataway Board of Education,* 93 *N.J.A.R.* 2d (EDU) 189, Lewis argues that the Commissioner of Education has held previously that there is no specific instructional endorsement required to teach a computer course. (Lewis' Exceptions at p. 2) Rather, a determination as to which individuals should be assigned to teach computer courses are based upon seniority. Here, Lewis contends that she clearly has more

seniority in her area of certification than does Zehnacker. Further, "[u]nlike the situation in *Morgan v. Board of Education of the Township of Wayne, Passaic County*, 1991 *S.L.D.* 122, there is no specialized course work of a technical nature involved in the classes taught in Respondent's district." (*Id.* at pp. 2, 3) Rather, Lewis notes that the computer course taught by Zehnacker is purely an introductory course which may be taught by anyone holding an instructional certificate.

Further, Lewis argues that the ALJ provides no factual or legal support for her conclusion that Zehnacker's job constitutes an assignment rather than a position. Permitting the District to so label any job will allow the District to circumvent tenure laws and defeat the purpose behind those laws. (*Id.* at p. 3)

Upon careful and independent review of the record, which included transcripts from the hearings held on June 10, 1996 and June 27, 1996 at the OAL, the Commissioner determines to reverse the initial decision of the ALJ, for the reasons set forth herein.

Initially, the Commissioner notes that the Board does *not* dispute that Zehnacker has held a "position, " and not merely an assignment, with the District as a teacher in a computer lab, notwithstanding that Ms. Zehnacker testified that she has never seen a job description for her position.[1] Rather, the District argues that the position requires elementary certification, inasmuch as Zehnacker provides instruction to students in grades four through eight. However, the Commissioner rejects the District's contention, noting that the record fairly establishes that Ms. Zehnacker's computer instruction is viewed as a mechanism to learn the various content subjects, and that such instruction is wholly driven by the lesson plans of the classroom

[1] Transcript from June 10, 1996 at p. 95.

elementary teachers.[2] As Petitioners Lewis and Skawinski properly note, *Taxman, supra*, established that a teacher of computers need only possess an instructional certificate; there is no requirement for a specific endorsement. *Taxman, supra* at 191.

Similarly, the District does not contest that Molloy and Jenkins hold "positions" in the District, as opposed to merely fulfilling assignments. While the District asserts, however, that their positions are content-specific and, therefore, require particular endorsements, in the absence of job descriptions for either position,[3] the Commissioner notes there is nothing in the record to belie the impression remaining from testimony that Molloy and Jenkins are common branch instructors in the alternative education program, positions for which Molloy and Jenkins are appropriately certified by virtue of *N.J.A.C.* 6:11-6.1, whereas petitioners are not.

As to the issue of whether Salviano's employment as an in-school suspension (ISS) instructor constituted a "position" rather than an "assignment,"[4] the Commissioner finds that it may appropriately be considered a position within the scope of the entitlement conferred by *N.J.S.A.* 18A:28-12. The term "position," as used in *N.J.S.A.* 18A:28-1 *et seq.*, is defined as "******any office, position or employment.*" (emphasis added) *(N.J.S.A.* 18A:28-1) Further,

> N.J.S.A. 18A:28-12 provides that whenever a teaching staff member is dismissed as the result of a reduction in staff,
>
> > ...such person shall be and remain upon a preferred eligibility list for reemployment whenever a vacancy occurs in a *position* for which such person shall be qualified ...
>
> Reductions in staff are made under authority of N.J.S.A. 18A:28-9, which provides that
>
> > ...nothing in this title ... shall be held to limit the right of any board of education to reduce the number of teaching staff members employed in the district

[2] Transcript from June 10, 1996 at p. 96.
[3] Transcript from June 27, 1996 at pp. 68, 89
[4] Transcript from June 27, 1997 at pp. 142-144.

> whenever, in the judgment of the board, it is advisable to abolish any such position.
>
> The language of the statutes is not ambiguous. A "position" to which a tenured teaching staff may claim entitlement under N.J.S.A. 18A:28-12 upon abolition of the "position" she previously held pursuant to N.J.S.A. 18A:28-9 is one as a teaching staff member.
>
> Teaching staff member is defined by N.J.S.A. 18A:1-1 as ...a member of the professional staff of any district or regional board of education...holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners.... (emphasis in text)
>
> *Marybeth Driscoll v. Board of Education of the West Essex Regional School District, Essex County*, 95 *N.J.A.R.* 2d (EDU) 348, 349.

Accordingly, the issue herein of "assignment" versus "position" turns on the fact that the ISS position represented employment which required a valid and effective certificate, notwithstanding that the District has apparently failed to promulgate this requirement in any consistent or responsible manner. Moreover, the fact that the District has failed to formally establish a "position" within its staffing structure for the ISS job and, apparently, has further failed to create a job description, does not preclude petitioners from asserting claims to these "positions."

As to Nicholas Bucci, the Commissioner notes that he has been a Special Education Teacher at Kennedy High School from September 1, 1990 until the present. (Initial Decision at p. 6) There is nothing in the record to persuade the Commissioner that the part-time assignment Bucci held from January 1995 through December 1995 as assistant to the master scheduler was anything other than a supplemental duty to which he was assigned while

performing as a teacher of special education classes.[5] Moreover, by the time Bucci became the full-time assistant to the master scheduler in April of 1996, petitioners had already been offered employment in the District. Accordingly, even assuming, *arguendo,* that petitioners held the proper certification for master scheduler positions, there can be no successful claim herein to Bucci's role as the assistant to the master scheduler.

Petitioner Lewis asserts she was entitled, subsequent to her being riffed in 1994, to be appointed to the ISS position held by Salviano, or the position held by Zehnacker as computer teacher. Similarly, Petitioner Skawinski asserts she was entitled, subsequent to her being riffed in 1994, to be appointed to the ISS position held by Salviano, the computer position held by Zehnacker, the positions in the alternative education program held by Molloy and Jenkins, and the position as assistant to the master scheduler held by Bucci. Skawinski asserts that, where no specific certificate is required for a position, all tenured teachers can assert tenure and seniority claims to that position. (Skawinski's Post-Hearing Brief at pp. 16-18)

It is clear that, subsequent to the District's reduction in force in May of 1994, there were positions to which Lewis and Skawinski could have been assigned by virtue of their superior tenure and seniority rights as compared to those actually assigned the positions. Viewed independently and not as competing claims, Lewis could have been assigned to either Zehnacker's computer position or Salviano's ISS position. (It is noted, however, that the record is unclear as to whether the ISS position even existed after Salviano was transferred from that position to his math position in November of 1994, so that relief based on this position may be accordingly limited.) Further, it is clear from the record that Skawinski could also have been

[5] This assignment appears to have been made notwithstanding that Bucci lacked educational services certification.

assigned to the positions held by Zehnacker or Salviano;[6] however, she could not rightfully claim any assignment or position held by Bucci, Molloy or Jenkins.

Therefore, for school years 1994-95 and 1995-96, *until March 1, 1996,* Petitioner Skawinski, being the more senior of the two petitioners, is entitled to the difference between what she would have earned in either of the aforementioned positions and what she actually earned in her new job in another district for school years 1995-95 and 1995-96, *until March 1, 1996.* Petitioner Lewis is entitled to the difference in compensation, for that same period, between what she could have earned in either of the noted positions and what she actually earned as a teacher's aide during that period of time, to the extent that the ISS position continued to exist beyond November 1994; if the latter position was abolished at that time, there would be no position remaining after that date to which she could claim entitlement and her relief would be so limited. To the extent Skawinski claims that her compensation should include the sums she would have received as a peer helper/teacher, bedside instructor and summer school teacher, the Commissioner finds that her claim is merely speculative, in that these assignments were considered separate and distinct from her teaching staff positions. Neither the funding for the particular program nor Ms. Skawinski's selection for said program was in any way guaranteed.[7]

Finally, the Commissioner notes, with concern, the number of positions in the District to which staff were not formally appointed, and for which there are apparently no job descriptions to delineate responsibility and set certification requirements. Further, the Commissioner reminds the District that it must assign position titles to teaching staff members which are recognized in the pertinent rules. See *N.J.A.C.* 6:11-3.3(a). If the District determines

[6] With the same time limitation as noted above.
[7] Transcript from June 27, 1996 at pp. 108, 109.

that the use of an unrecognized position title is desirable, or if a previously unrecognized title exists, it must submit a written request for permission to use the proposed title to the County Superintendent of Schools, *prior to* making such appointment. *N.J.A.C.* 6:11-3.3(b).

Accordingly, the initial decision of the ALJ is reversed for the reasons set forth herein. The District is directed to calculate sums due petitioners, consistent with the above-noted parameters. Further, if it has not done so already, the District is directed to establish job positions and titles, as appropriate, for the positions discussed in the instant matter, to produce job descriptions that include certification requirements, *inter alia*, and to submit positions bearing unrecognized titles to the County Superintendent for approval of designation of appropriate certification.[8]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[8] While not material to the determination herein, the Commissioner would clarify the ALJ's statement at p. 6 of the Initial Decision by noting that duly contracted full-time unassigned teachers who are employed for the requisite period of time do, in fact, acquire tenure.

MARCH 24, 1997
DATE OF MAILING MARCH 25, 1997

150-97

EDU #9743-94 and #9745-94 (consolidated)
C # 150-97
SB # 40-97

ANITA LEWIS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-APPELLANT,	:	DECISION
AND	:	
DEBRA ANN SKAWINSKI,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 24, 1997

For the Petitioner-Cross/Appellant, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of Counsel)

For the Petitioner-Respondent, Balk, Oxfeld, Mandell & Cohen (Gail Oxfeld Kanef, Esq., of Counsel)

For the Respondent-Appellant, Purcell, Ries, Shannon, Mulcahy & O'Neill (Joseph F. Skinner, Esq., of Counsel)

10/1/97

The State Board of Education has reviewed the proposed settlement submitted by the State-operated District of Paterson and petitioner Debra Ann Skawinski and finds it to be in accord with the principles expressed in Cardonick v. Board of Education of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. The State Board therefore approves the settlement.[1]

October 1, 1997

Date of mailing OCT 03 1997

[1] We note that the appeal filed by the State-operated District with regard to petitioner Anita Lewis is still pending before us.

150-97

EDU #9743-94 and #9745-94 (consolidated)
C # 150-97
SB # 40-97

ANITA LEWIS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-APPELLANT,	:	DECISION
AND	:	
DEBRA ANN SKAWINSKI,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 24, 1997

Decided by the State Board of Education, October 1, 1997

For the Petitioner-Respondent, Balk, Oxfeld, Mandell & Cohen (Gail Oxfeld Kanef, Esq., of Counsel)

For the Respondent-Appellant, Purcell, Ries, Shannon, Mulcahy & O'Neill (Joseph F. Skinner, Esq., of Counsel)

AUG. 5, 1998

Anita Lewis (hereinafter "petitioner" or "Lewis"), a tenured teaching staff member, filed a petition of appeal with the Commissioner of Education alleging that the State-operated School District of the City of Paterson (hereinafter "State-operated District") had violated her tenure rights following the abolishment of her position as a business education teacher during a reduction in force ("RIF") in May 1994.[1] Petitioner, who does not challenge the validity of that RIF, claimed that the State-operated District had failed to reinstate her to another position for which she was qualified by virtue of seniority pursuant to N.J.S.A. 18A:28-12. Specifically, petitioner, who held an instructional endorsement as a Teacher of Business Education, claimed that she had been entitled to reinstatement as an in-school suspension instructor, which had been held by Robert Salviano until November 1994, or as a teacher of computers, which had been held by Catherine Zehnacker. Petitioner requested back pay for the entire 1994-95 school year and for the 1995-96 school year through March 1, 1996, when she was reinstated to a teaching position.

On January 30, 1997, an Administrative Law Judge ("ALJ") recommended dismissing the petition. The ALJ concluded that the State-operated District had not violated petitioner's tenure or seniority rights, finding that petitioner did not possess the required certification for the positions to which she claimed entitlement.

On March 24, 1997, the Commissioner rejected the ALJ's recommendation. The Commissioner found that Salviano's employment as an in-school suspension teacher

[1] We note that, prior to the hearing in this matter, the Administrative Law Judge consolidated the petition filed by petitioner Lewis with a similar petition filed by Debra Ann Skawinski, another tenured teaching staff member in the district. On October 1, 1997, the State Board approved a proposed settlement resolving the dispute between the State-operated District and Skawinski. Consequently, our decision herein is limited to the petition filed by Anita Lewis, and any references to "petitioner" are intended to refer to Lewis only.

constituted "a 'position' rather than an 'assignment.'" Commissioner's Decision, slip op. at 16. The Commissioner noted that in-school suspension "represented employment which required a valid and effective certificate, notwithstanding that the District has apparently failed to promulgate this requirement in any consistent or responsible manner." Id. at 17. The Commissioner also observed that "a teacher of computers need only possess an instructional certificate; there is no requirement for a specific endorsement." Id. at 16. The Commissioner found that, subsequent to the RIF, there were positions to which petitioner could have been assigned by virtue of her tenure and seniority rights. He concluded that petitioner Lewis was entitled to the difference between what she could have earned in either of those positions during the relevant time frame and what she had actually earned as a teacher's aide during that period. However, the Commissioner added that it was unclear whether the in-school suspension "position" continued to exist after November 1994. Stressing that Skawinski had more seniority than Lewis, the Commissioner noted that if the in-school suspension "position" had been abolished after November 1994, "there would be no position remaining after that date to which [Lewis] could claim entitlement and her relief would be so limited." Id. at 19.[2]

The State-operated District filed the instant appeal to the State Board.

After a careful review of the record, we reverse the decision of the Commissioner with regard to petitioner's entitlement to the in-school suspension assignment and remand this matter for further proceedings in accordance with our decision herein.

[2] The State-operated District asserts in its appeal brief that the in-school suspension assignment remained vacant from November 7, 1994 until December 5, 1994, when it was assigned to a staff member with 30 years seniority in the district.

In David Dowding v. Board of Education of the Township of Monroe, decided by the State Board of Education, December 5, 1990, we rejected the notion that in-school suspension "is necessarily a teaching staff assignment within the position of 'teacher' requiring possession of a valid certificate in order to be qualified to serve in the assignment." Dowding, supra, slip op. at 2-3 (emphasis in original). We stressed in our decision that:

> The cases cited by the Commissioner do not justify a blanket determination that all in-school suspension assignments are instructional. Nor do we find such a blanket determination proper. Whether or not an in-school suspension assignment is a teaching staff assignment requiring an instructional certificate turns upon the specific duties to be performed in that particular assignment, requiring assessment of whether the employment is of such character as to require that the individual assigned thereto hold appropriate certificate in order to perform such functions. See N.J.S.A. 18A:1-1; N.J.A.C. 6:11-3.4.

Id. at 3 (emphasis in original).

In this instance, the Commissioner concluded that the in-school suspension assignment claimed by petitioner was a teaching staff position requiring appropriate certification. However, the Commissioner failed to review the specific duties to be performed in that assignment in order to determine whether they were of such character as to require certification in order to be qualified to perform those functions. See South River Education Association v. Board of Education of the Borough of South River, decided by the State Board of Education, November 4, 1987. Consequently, we find it necessary to remand this matter to the Commissioner for further proceedings in order to determine whether the particular in-school suspension assignment at issue herein was a teaching staff position requiring possession of an appropriate certificate.

If it was not a teaching staff position, then it was not within the scope of entitlement conferred on petitioner by N.J.S.A. 18A:28-12. Driscoll v. Board of Education of the West Essex Regional School District, decided by the State Board of Education, 95 N.J.A.R.2d (EDU) 348.

With respect to the computer course claimed by petitioner, we reject the State-operated District's contention that an endorsement in elementary education was required to teach that course. While we have rejected the broad general principle that the duties attending a course involving computers can never be of such character as to require possession of a particular instructional endorsement, Morgan v. Board of Education of the Township of Wayne, 1991 S.L.D. 2578, we agree with the Commissioner that, on the basis of the facts in the record, the duties of the computer course at issue in this case required only possession of an instructional certificate.

In so doing, however, we reject petitioner's argument that she was necessarily entitled to back pay through March 1996 when she was reinstated to a teaching position. Petitioner does not dispute the fact that Skawinski had greater seniority than she. Consequently, as found by the Commissioner, Skawinski would have been entitled to reinstatement in the position teaching computers. Petitioner's entitlement would therefore have been limited to the in-school suspension assignment, but only if the duties of that assignment were of such character as to require possession of a teaching certificate.

Accordingly, for the reasons stated herein, we set aside the Commissioner's determination that the in-school suspension assignment claimed by petitioner was a teaching staff position requiring possession of an instructional certificate. We remand

this matter to the Commissioner for further proceedings in order to determine whether in-school suspension was a teaching staff position and, if so, whether petitioner had any entitlement thereto after November 1994, as well as for a resultant determination of petitioner's claim in accordance with our decision herein.

August 5, 1998

Date of mailing AUG 0 7 1998

156-97

156-97

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST, BOARD OF EDUCATION OF THE BOROUGH OF AVON-BY-THE SEA, AND BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BELMAR, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board alleged the six respondent Boards violated orders of the Commissioner and New Jersey statutes as to the apportionment of high school pupils. Petitioner demanded an order (1) directing respondents to send pupils to Asbury Park High School until the percentages asserted were reached, (2) directing the Red Bank Regional District Board of Education to cease receiving pupils from the respondents and from Interlaken and Deal, and (3) directing certain payments by respondents to Asbury Park for tuition allegedly lost.

In that petitioner was repeatedly late in supplying discovery requests and filing responsive papers, the ALJ did not extend discovery timelines for petitioner's expert report. ALJ concluded that respondents properly assigned the appropriate percentages of their high school-eligible pupils to Asbury Park High School. Respondents and the parents residing within respondent districts are acting under legislative authority when allowing their children to attend specialized vocational programs offered by Red Bank but not offered at Asbury Park High School, the designated receiving school. The ALJ found that petitioner's allegations were without merit. Accordingly, respondents' motion for summary judgment was granted. Petition was dismissed.

Commissioner concurred with the ALJ's conclusions. Commissioner granted summary judgment and dismissed the Petition of Appeal.

March 27, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DECISION ON MOTION

FOR SUMMARY JUDGMENT

OAL DKT. NO. EDU 6082-96

AGENCY DKT. NO. 146-4/96

BOARD OF EDUCATION OF THE
CITY OF ASBURY PARK,

Petitioner,

v.

BOARD EDUCATION OF THE
RED BANK REGIONAL SCHOOL
DISTRICT, BOARD OF EDUCATION OF
THE BOROUGH OF BRADLEY BEACH,
BOARD OF EDUCATION OF THE
BOROUGH OF BELMAR, BOARD OF
EDUCATION OF THE BOROUGH
OF ALLENHURST, BOARD OF EDUCATION
OF THE BOROUGH OF AVON-BY-THE-SEA,
AND BOARD OF EDUCATION OF
THE BOROUGH OF SOUTH BELMAR,

Respondents.

Kim A. Fellenz, Esq. and **Robin S. Perry,** Esq., for petitioner (Kim A. Fellenz, attorney)

James P. Granello, Esq. and **Robert H. Otten,** Esq., for respondent Red Bank Regional District Board of Education (James P. Granello, attorney and Crowell & Otten, attorneys)

Michael J. Gross, Esq., for respondent Bradley Beach Board of Education

Kenneth B. Fitzsimmons, Esq., for respondent Belmar Board of Education (Sinn, Fitzsimmons, Cantoli, West & Pardes, attorneys)

Sanford D. Brown, Esq., for respondent Allenhurst Board of Education (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Honora O'Brien Kilgallen, Esq., for respondent Avon-By-The-Sea Board of Education (Kramer, Kramer & Kilgallen, attorneys)

John E. Collins, Esq., for respondent South Belmar Board of Education (Carroll & Weiss, attorneys)

Record Closed: January 28, 1997 Decided: February 6, 1997

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

This matter was opened when the Asbury Park Board of Education (Asbury Park) filed a verified petitioner with the Commissioner of Education alleging the six respondent Boards of Education are violating orders of the Commissioner of Education and New Jersey statutes as to apportionment of high school pupils.

Asbury Park demands an order (1) directing the respondents to send pupils to Asbury Park High School until the percentages asserted are reached, (2) directing the Red Bank Regional District Board of Education to cease receiving pupils from the respondents and from Interlaken and Deal, and (3) directing certain payments by the respondents to Asbury Park for tuition allegedly lost.

The respondents' answers generally deny the allegations and raise various defenses. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. After notice, a prehearing conference was held on September 18, 1996. Hearing dates were established in

December 1996 and January and February 1997. Extensive discovery instructions were given. The schedule also provided for procedural and substantive motions. The last date for papers was established as December 10, 1996.

This matter has been beset by procedural problems since the first conference of counsel in September 1996. The respondents have moved for sanctions against the petitioner for unreasonable failure to comply with discovery orders. The petition has been amended in writing and orally. The petitioner has received five separate extensions of time in which to file necessary papers. Scheduled hearing days have been adjourned or converted to oral argument on motions.

The original petition alleged that the respondent districts were, singly and in concert, violating apportionment orders of the Commissioner of Education. The petitioner added an allegation that a performing arts program at Red Bank Regional High School and one at Brookdale Community College related to Asbury Park High School were equivalent. The petitioner then claimed that the vocational courses at Red Bank Regional High School were not approved by the New Jersey Department of Education. Most recently, the petitioner asserts that it should be allowed to explore the intent of parents of pupils residing in school districts that have a sending-receiving relationship with Asbury Park when those parents chose to enroll their children in vocational education programs.

At hearing on December 18, 1996, the petitioner asserted it needed a delay until January 10, 1997 so it could consult an expert. The respondent Red Bank pointed out that in answers to interrogatories dated November 27, 1996, Asbury Park had been informed that the respondent would use two experts. The information required by the discovery rules had been given to Asbury Park six or seven days prior to hearing. The judge ruled that there was no surprise, that the respondent Red Bank had followed discovery rules and that testimony would be taken.

Red Bank produced testimony that showed Red Bank Regional School had begun a performing arts program for gifted and talented pupils in the early 1980's. A successful performing arts program needs a large pupil base. The program was intended to go beyond traditional, single period courses. It is a vocational, preprofessional curriculum in all aspects.

Qualified teachers, proficient in the arts, are employed. Pupils spend between four hundred and six hundred minutes per week in the program.

In creating the program, the district spoke to persons in the arts, to the County Superintendent and visited schools of performing arts. Red Bank received a grant to study the feasibility of a performing arts program. A survey was taken. The survey indicated that Red Bank had the facility and the performing arts program should be located there. All Monmouth and Ocean County districts were so advised.

Since its inception, the program has required that potential pupils audition. The jurors at the auditions are persons not employed by Red Bank Regional. The entire program was submitted to the New Jersey Department of Education and was granted approval.

Changes in statute and code and changes in funding schemes have been common throughout the program's short history. The Local Area Vocational School (LAVS) designation was abolished. However, the New Jersey Department of Education advised Red Bank that it could continue to offer vocational education programs without state aid.

Since its origin, the program has expanded to include piano and vocal curriculums. All courses in the performing arts program carry full high school credit towards graduation as do other vocational education courses. A comprehensive high school, under the Quality Education Act of 1990, *N.J.S.A.* 18A:7D-1 through 37, will no longer receive vocational aid. However, *N.J.S.A.* 18A:54-5, which provides that the Board of Education of any school district or regional school district may establish and maintain vocational schools remains in force and effect. *N.J.S.A.* 18A:54-7 provides:

> All such boards of education shall receive pupils from other districts so far as their facilities will permit and shall be entitled to collect and receive from any sending district for the tuition of such pupils a sum not exceeding the actual cost per pupil, as determined according to the rules prescribed by the commissioner and approved by the state board.

There was further convincing testimony that the auditions required of applicants to the program are part of an educationally sound set of entrance criteria. Most recently, sixty-seven pupils of the one hundred twenty who auditioned were admitted to the program. Sixteen districts from outside the Red Bank Regional area send pupils to the performing arts program. Eleven of these districts are not associated with Asbury Park in any way.

Asbury Park then asserted that it had a performing arts program that was the functional equivalent of the Red Bank program and that pupils from districts with which it has a sending-receiving relationship should be required to send pupils who want a performing arts curriculum to Asbury Park High School. At hearing on December 20, 1996, the respondents presented two expert witnesses whose testimony shows clearly and convincingly that there is no equivalence whatsoever between the programs. These witnesses studied the Red Bank program and the Asbury Park-Brookdale Community College program and could find no parity.

At the conclusion of hearing on December 20, 1996, petitioner was given until Monday, January 6, 1997 to obtain written confirmation as to whether the vocational courses offered by the Red Bank Regional School District are approved courses. It was the understanding of all counsel that if the question were answered in the affirmative, there would be no need for further hearings. The record shows no objection to this.

The Red Bank Regional School District presented a written statement from the Monmouth County Superintendent of Schools that all vocational courses offered by the district are approved by the New Jersey Department of Education. Copies of this letter were forwarded to all counsel of record in early January. On January 6, 1997, Asbury Park moved for an extension of time in which to file an expert report. A telephone conference was convened and I canceled the scheduled January 10, 1997 hearing date and permitted the respondents to file responsive papers by January 15, 1997. Oral argument on the motion was heard on January 27, 1997.

Red Bank argued that its counsel received nine pages of material by telephone facsimile from Asbury Park late on Friday, January 24, 1997. The attorney's telephone facsimile log was submitted and supports this assertion. Red Bank argues that this is one in a long line of late

submissions by the petitioner and that late submissions hamper the ability of the respondents to respond properly. Red Bank filed the present motion on January 10 even though it did not receive necessary materials from Asbury Park until January 8. Red Bank also argues that on December 20, 1996, the petitioner was given the opportunity to go through pupil records so that it might assure itself that pupils attending the performing arts program are properly enrolled in vocational education programs. On December 20, Asbury Park was satisfied that no pupils pertinent to this case were attending Red Bank Regional High School in nonvocational programs. The only open issue was whether Red Bank's courses were approved and that issue has been settled.

In its present motion for summary decision, Red Bank argues that Asbury Park has again asked for extended time to do more discovery. The Uniform Administrative Procedure Rules do not contemplate this. If Asbury Park intended to use an expert witness, it should have arranged for the expert's services before hearing. Asbury Park did not inform the respondents that it wished to employ an expert.

All issues raised have been settled in the respondent's favor. The pupils in question attend approved courses offered in a vocational education program. This is authorized by statute and administrative code. The Quality Education Act (QEA) repealed Local Area Vocational School aid effective July 1, 1990. The Act did nothing to disturb the enabling statutes and, one month after the affective date of the QEA, the related administrative code was readopted without change or comment and is still in effect. The code clearly provides that a district may accept pupils from out of the district provided the local high school or the receiving high school does not offer the program or programs the pupils desire. Asbury Park contacted a Department of Education official who provided two letters and who correctly analyzed the situation. The relationship Red Bank enjoys with the pupils from the corresponding districts is proper.

There is no evidence that the correspondents fail to assign the correct percentage of pupils, according to law, to attend Asbury Park High School. Mere allocation does not act to bar parents from sending their children elsewhere. No legal authority can force pupils to not apply for attendance in a vocational education program. Asbury Park seems to argue that because these pupils attend vocational education programs they should not go on to higher education and, if

they do, that means they really were college preparatory pupils, not vocational education pupils. This seems to defy all logic, especially in consideration of Federal legislation to promote the attendance of vocational education students at institutions of higher education. Asbury Park also raises the question of racial imbalance. However, it can not use that obvious fact to filter pupils out of vocational education programs they are rightfully attending. Parent and pupil intent is irrelevant. Parent choice can not be taken away.

The co-respondent boards of education assign pupils to receiving high schools in accordance with law. Parents and pupils decide where the pupils will actually go to school. And, to be accepted into any vocational program regardless of where offered, the pupil must both apply and be accepted.

Asbury Park offered for the first time on the day of oral argument two certifications. Both are unacceptable. One person was not given enough information to reach an informed opinion and, with incomplete data, criticizes the Red Bank program. There is nothing to indicate that the evaluating person knew the attendance policy, the acceptance policy or anything about the curriculums involved.

Red Bank's motion should be granted. Asbury Park was allowed to amend its petition and go even farther afield. When parity of programs was the issue, the respondents prevailed. The only issues left were not even raised in the original petition. Now, Asbury Park would probe intent..

Asbury Park argued that it used its best efforts and worked diligently to meet all deadlines in this case. It did have to ask for adjournments. To force Asbury Park to go ahead when it is not prepared would be unfair.

Asbury Park did receive the County Superintendent's letter stating that all vocational education courses at Red Bank are approved. Asbury Park then wanted to consult an expert and asked for an adjournment. Delay was not granted. Asbury Park gave two evaluators what it had. One of the certifications provided today is only preliminary. It is intended to show the areas that the expert would explore. All issues need to be aired.

At the hearing on December 20, 1996, Asbury Park did not agree that all of the subject pupils were vocational education pupils. What Asbury Park saw in court indicated that all pupils were vocational education pupils, but Asbury Park wanted to do more.

Racial imbalance is an issue of constitutional dimension and plays a role here. The Legislature did not intend the vocational statutes to be used to avoid Asbury Park High School. Asbury Park High School is a ninety-seven percent minority school. The young people attending the school will be damaged if nonminority pupils are allowed to evade and avoid attendance there. This is an attempt to subvert the many sending-receiving cases on the books.

Large numbers of pupils attending vocational education programs do not go on to higher education. The young people in this case, however, largely do.

Shared time is the Monmouth County norm. Pupils should attend Asbury Park High School for academic work and then another school, usually Monmouth County Vocational Technical High School, for vocational courses. If parents are allowed to circumvent their children's attendance at designated high schools, this will ripple through the whole state and promote racial imbalance. The audition process is a phantom. A balancing of interests is necessary here and there must be expert testimony as to intent.

DETERMINATION

The Red Bank Regional School District's motion, joined in by all respondents, must be granted.

There has been no lack of cooperation. Although there are six respondents, all discovery demands were met. Motions brought by some or all respondents were held in abeyance to allow the petitioner full opportunity to respond. Notwithstanding this accommodation, the petitioner was repeatedly late in supplying discovery requests and filing responsive papers. However, the matter ultimately turns on substantive points, not procedural issues.

First, this case differs from other, recent sending-receiving cases in that the pupils involved here have not simply opted to attend another high school. Rather, under the clear provisions of *N.J.S.A.* 18A:38-15, parents and pupils have decided that the pupils will attend particular, specialized vocational education programs offered neither at the county vocational school nor at Asbury Park High School, the designated receiving school. The New Jersey Constitution requires that the Legislature provide for the maintenance and support of a thorough and efficient system of free public schools. *N.J. Const.*, (1947), Art. VIII, §IV, par. 1. Historically, this has been achieved by the creation of local school districts which have the primary responsibility to provide a thorough and efficient education for the children within their bounds. *West Morris Reg'l Bd. of Ed. v. Sills*, 58 *N.J.* 464 (1971). The Legislature has further provided that a child's attendance at school be compelled. *N.J.S.A.* 18A:38-25. Although instruction is compelled, parents have choices. They have a constitutional right to choose the type and character of education they believed is best suited for their children, be it public or private, secular or sectarian. *Pierce v. Society of Sisters*, 268 *U.S.* 510 (1925).

In the present case, the involved parents and pupils are working under a clear grant of legislative authority. This is quite a different thing from acting in the mere absence of a prohibition. Similarly, the Red Bank Regional District Board of Education is working under the clear provisions of *N.J.S.A.* 18A:54-5 through -7. These statutes give the authority to the board of education of any school district or regional school district to establish and maintain vocational schools. The course or courses of study to be pursued and all changes in those courses shall be approved by the Commissioner, and all such boards shall receive pupils from other districts so far as their facilities will permit and shall be entitled to collect and receive from the sending districts tuition for such pupils at the rate of the actual cost per pupil in the district. The legal basis for the attendance of pupils from the correspondent districts at Red Bank Regional High School is both firm and clear.

The alleged comparability of performing arts program at Red Bank Regional High School and the Asbury Park-Brookdale Community College did not withstand the testimony, completely unrebutted, of two persons expert in the field. At some future time, this may be arguable. Presently, it is untenable.

The audition process is not a chimera. It is part of a set of stringent criteria that plainly applies to all pupils who apply for attendance. In the most recent set of auditions, nearly one-half of the pupils who applied were not accepted. This is hardly a phantom requirement.

Last, lest there be any lingering doubt, I **FIND** and **CONCLUDE** that the co-respondent boards of education in this matter have properly assigned the appropriate percentages of their high school-eligible pupils to Asbury Park High School. Where parents decide actually to send their children is beyond this tribunal's purview under the circumstances presented here.

In summary, this decision **FINDS** each of the allegations raised by the Asbury Park Board of Education to be without merit. There is no longer a justiciable issue before me. Accordingly, the respondents' motion for summary judgment is **GRANTED** and this petition of appeal is **DISMISSED**. It is so **ORDERED**.

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

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

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

6 FEBRUARY 1997
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

Feb. 10, 1997
DATE

Deborah N. Antanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 1997
DATE

Barbara A Hanna
OFFICE OF ADMINISTRATIVE LAW

slf

OAL DKT. NO. EDU 6082-96
AGENCY DKT. NO. 146-4/96

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST, BOARD OF EDUCATION OF THE BOROUGH OF AVON-BY-THE SEA, AND BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BELMAR, MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. Timely reply exceptions were filed by respondent Red Bank Regional Board of Education and by respondent Belmar Board of Education which joined in Red Bank's response. Reply exceptions were submitted by remaining respondents beyond the time period allotted and are, therefore, not addressed herein.

Petitioner excepts at substantial length to the determination of the Administrative Law Judge (ALJ) to dismiss this matter for its failure to comply with discovery timelines contending that extensions of time for discovery are provided for under the Uniform Administrative Procedure Rules and are warranted in this matter. (Petitioner's Exceptions at p. 1) Petitioner then sets forth several factors which, it contends, justified an adjournment of the

respondents' motion for summary decision and an extension of time for discovery, including petitioner's need for time to obtain an expert report as to whether students are legitimately enrolled in vocational education courses and what comparability exists between Red Bank Regional Vocational Programs and Monmouth County Vocational Programs. (*Id.* at pp. 2-6) Petitioner then cites cases to support its contention that extensions to discovery must be granted where petitioner needs to produce an expert report and where material facts exist. Petitioner further contends that this case should not be decided on the inability of petitioner to meet discovery deadlines, averring that "[d]iscovery involving the complicated history of the respondent[s] seeking termination of sending receiving relationships could not be reasonably and intelligibly digested within five days." (*Id.* at p. 11)

Petitioner next takes exception to the ALJ's finding that respondents are sending their students to Red Bank Regional to enroll in programs not offered by Asbury Park High School. Petitioner contends this finding is incorrect in that Asbury Park High School offers a number of vocational programs on a shared-time basis whereby the student attends vocational training at a satellite location during part of the day, and completes a core curriculum at his home district during the remainder of the day. It concludes that these programs have been offered by Asbury Park for many years. (*Id.* at p. 12)

Petitioner additionally takes exception to the finding that respondents are properly completing their student apportionment. It avers,

> The Court's eagerness to endorse the right of parents to send their children to vocational programs outside their resident district and to endorse the procedure of respondent districts in assigning students to Asbury Park High School resulted in the Court's failure to recognize the responsibility of the respondent Boards of Education to honor existing sending receiving relationships.
>
> (Petitioner's Exceptions at p. 14)

In summarizing its point that the responsibility of sending districts exceeds simple apportionment of students to Asbury Park High School, petitioner notes that every school board has a responsibility to ensure that the sending-receiving relationships remain successful. (*Id.* at p. 14) Petitioner lists several examples to demonstrate that through the years respondents have attempted to sever their sending-receiving relationships with Asbury Park, to emphasize that they "have not given-up but continue to demonstrate great ingenuity in their efforts to realize the goal

of termination of the sending-receiving relationships with the petitioner, and are inappropriately using *N.J.S.A.* 18A:38-15 as their present mode of attack." (*Id.* at pp. 16-18)

Petitioner next excepts to the ALJ's finding that the allegations it raised are without merit in that the issue of racial imbalance is of the utmost importance and should be considered by the Commissioner in determining to which school district students should be sent. Petitioner then cites several cases to show that the mandate to integrate schools is most important in this state. See *Board of Education of Englewood Cliffs v. Board of Education of the City of Englewood et al.*, 257 *N.J. Super.* 413 (App. Div. 1992); *Brown v. Board of Education of Little Rock*, 349 *U.S.* 294 (1955).

Lastly, petitioner quotes *Board of Education of the Borough of Belmar v. Board of Education of the City of Asbury Park v. Board of Education of the Borough of Bradley Beach,* 1989 *S.L.D.* 1941, 1954, for the proposition that Red Bank's Motion for Summary Judgment should have been denied in that the Commissioner of Education and State of New Jersey have established a strong public policy to combat "white flight" from racially imbalanced schools. *Belmar* quoting *Branchburg Board of Education v. Somerville Board of Education,* 1977 *S.L.D.* 662, aff'd State Board 1978 *S.L.D.* 993, aff'd 173 *N.J. Super.* 268 (App. Div. 1980). (Petitioner's Exceptions at p. 25)

In reply, respondents Red Bank and Belmar cite *N.J.A.C.* 1:1-10.4(e), which states parties *shall* complete discovery no later than five days before the first scheduled evidentiary hearing and note there is no ability to extend discovery beyond these time limits. They aver that petitioner had ample opportunity to obtain an expert before litigation was started. Respondents next assert that petitioner received five separate extensions of time to file discovery papers and that petitioner was repeatedly late in supplying discovery requests. (Reply Exceptions at pp. 1-2) Respondents report no notice of petitioner's use of the expert was given until after motions were made and evidentiary hearing dates began. (*Id.* at p. 2)

Respondents next cite *N.J.S.A.* 18A:54-20.1 to show that the Asbury Park shared-time program with Monmouth County Vocational-Technical is not open. It requires pupils to apply and to be accepted into the program. Further, they aver that Asbury Park does not have an approved, recognized, vocational high school program as does Red Bank Regional. Also, pupils who want to enroll in vocational programs don't have to enroll in Asbury Park. (Reply Exceptions at p. 2)

Respondents next posture that the ALJ properly concluded that apportionment of pupils does not guarantee attendance at Asbury Park High School. They further agree that parents and pupils have freedom to choose private or public, special vocational programs, as authorized by *N.J.S.A.* 18A:54-7, *N.J.S.A.* 18A:54-20.1 and *N.J.S.A.* 18A:38-15. *(Id.)*

In response to the racial imbalance considerations raised by petitioner, respondents rely on the language of *N.J.S.A.* 18A:54D-2(a), which prohibits job discrimination on the basis of race, to argue that racial makeup is not to be used in obtaining entry into any vocational profession. They contend that sending-receiving cases which concern termination of a sending-receiving relationship are not relevant to this case. (Reply Exceptions at p. 3)

Lastly, respondents point out that summary decision should be granted as a matter of law when material facts are not in dispute. *N.J.A.C.* 1:1-12.5(b). They argue that petitioner attempts to dispute certain facts not material to the ultimate decision. (Reply Exceptions at p. 3)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that respondents are entitled to summary judgment based on applicable law. See *N.J.A.C.* 1:1-10.4(e); *Brill v. Guardian Life Insurance of America,* 142 *N.J.* 520 (1995); and *Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67* (1955). In so ruling, the Commissioner finds that the ALJ sufficiently addressed his reasons for not extending discovery timelines, and, therefore, the ALJ's issuance of summary judgment was appropriate.

The Commissioner is further satisfied with the ALJ's conclusions that respondents and the parents residing within respondent districts are acting under legislative authority, conferred upon them at *N.J.S.A.* 18A:38-15, *N.J.S.A.* 18A:54-5 through -7, when allowing their school children to attend the specialized vocational programs offered by respondent Red Bank.

Accordingly, for the reasons expressed by the ALJ and above, the Commissioner affirms the initial decision of the OAL, hereby entering summary judgment in favor of respondents and dismissing the within Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 27, 1997
Date of Mailing, March 27, 1997

156-97

EDU #6082-96
C # 156-97
SB # 43-97

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE RED BANK REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST, BOARD OF EDUCATION OF THE BOROUGH OF AVON BY THE SEA, BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BELMAR, MONMOUTH COUNTY,

RESPONDENTS-RESPONDENTS

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, March 27, 1997

For the Petitioner-Appellant, Robin S. Perry, Esq. and Kim A. Fellenz, Esq.

For the Respondent-Respondent Board of Education of the Red Bank Regional High School District, Crowell & Otten (Robert H. Otten, Esq., of Counsel) and James P. Granello, Esq.

For the Respondent-Respondent, Board of Education of the Borough of Bradley Beach, Kenney & Gross (Michael J. Gross, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Belmar, Sinn, Fitzsimmons, Cantoli, West & Pardes (Kenneth B. Fitzsimmons, Esq., of Counsel)

9/3/97

For the Respondent-Respondent Board of Education of the Borough of Allenhurst (Cerrato, Dawes, Collins, Saker & Brown (Sanford D. Brown, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Avon By The Sea, Kramer, Kramer & Kilgallen (Honora O'Brien Kilgallen, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of South Belmar, Carroll & Weiss (John E. Collins, Esq., of Counsel)

This matter was initiated by the Board of Education of the City of Asbury Park (hereinafter "Asbury Park"), which filed a petition of appeal with the Commissioner of Education alleging that the respondent boards, sending districts in a sending-receiving relationship with Asbury Park, were violating orders of the Commissioner and statutory provisions under which they were required to apportion high school pupils among their various receiving districts. Asbury Park sought a directive requiring the respondent districts to insure that the percentage of their students apportioned to Asbury Park would actually attend Asbury Park High School and to enjoin the Red Bank Regional High School District (hereinafter "Red Bank Regional") from receiving pupils from the respondent districts, as well as from Interlaken and Deal.

On January 10, 1997, following several days of hearings, Red Bank Regional filed a motion for summary decision, which was joined in by the other respondent districts.

On February 6, 1997, an Administrative Law Judge ("ALJ") recommended granting the motion and dismissing the petition. In arriving at his determination, the ALJ noted that the respondent districts had satisfied all of the discovery demands that had been made on them and that Asbury Park had been repeatedly late in supplying

discovery requests and filing responsive papers. Nonetheless, he concluded that this matter turned on substantive points, rather than procedural issues.

The ALJ found that, in contrast to other sending-receiving cases, the parents and pupils in the respondent districts herein were acting under the express authority of N.J.S.A. 18A:38-15, which allowed pupils to attend a specialized course of study not offered by their designated receiving district, and that Red Bank Regional was acting under the authority provided district boards by N.J.S.A. 18A:54-5 through 18A:54-7 to establish and maintain a vocational program. In so doing, the ALJ rejected Asbury Park's allegation that its performing arts program at Brookdale Community College was equivalent to the program offered by Red Bank Regional. The ALJ found that Asbury Park's contention had not withstood the unrebutted testimony of Red Bank Regional's experts that there was no equivalency between the programs. The ALJ also noted that the audition process required for admission to Red Bank Regional's program was part of a set of stringent criteria and that nearly half of those who had participated in the most recent auditions had not been accepted.

In addition, the ALJ found that the respondent districts had properly assigned the appropriate percentages of their high school-eligible pupils to Asbury Park High School. "Where parents decide actually to send their children," the ALJ stressed, "is beyond this tribunal's purview under the circumstances presented here." Initial Decision, slip op. at 10.

On March 27, 1997, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition.

Asbury Park has filed the instant appeal to the State Board of Education.

After careful consideration of this matter, we affirm the determination of the Commissioner. While the State Board has long considered issues of racial imbalance to be of utmost importance, e.g., Board of Educ. of Englewood Cliffs v. Board of Educ. of the City of Englewood, decided by the State Board of Education, 1990 S.L.D. 1720, aff'd, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S.Ct. 547, 126 L.Ed.2d 449 (1993), we find that Asbury Park has not provided sufficient evidence in support of its allegations to withstand a motion for summary decision. See Brill v. Guardian Life Insurance of America, 142 N.J. 520 (1995).

In this respect, we concur with the ALJ that Asbury Park's contention that its performing arts program is equivalent to Red Bank Regional's program is untenable at this point. Quite simply, after carefully scrutinizing the brief submitted by Asbury Park in support of its appeal, we cannot identify any genuine issues of material fact that would justify extending discovery once again so as to allow Asbury Park the opportunity to now develop a more viable claim on some other basis. Further, while we can appreciate the difficulties experienced by Asbury Park in developing its case, we cannot ignore the fact that it was permitted to amend its petition several times and that it received five separate extensions for filing necessary papers. Moreover, Asbury Park had notice as early as November 27, 1996 that Red Bank Regional would be presenting expert testimony to rebut Asbury Park's contention that its performing arts program was equivalent to the program offered by Red Bank Regional and yet, at hearing on December 18, 1996, requested an additional delay so that it could consult an expert.

It also appears that all parties were in agreement that the only evidentiary question requiring resolution at the conclusion of the hearings on December 20, 1996 was whether the vocational courses offered by Red Bank Regional had been approved by the New Jersey Department of Education. Red Bank Regional subsequently submitted a written statement to the ALJ from the Monmouth County Superintendent of Schools confirming that such courses had, indeed, been approved.

In sum, for the reasons stated herein, as well as those articulated by the ALJ and Commissioner, we affirm the Commissioner's decision granting the respondent boards' motion for summary decision and dismissing the petition.

Wendel E. Daniels opposed.

September 3, 1997

Date of mailing SEP 05 1997

157-97

157-97

CHRISTINE AND ANTHONY SCALA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

March 31, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5539-96

AGENCY DKT. NO. 63-2/96

CHRISTINE AND ANTHONY SCALA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

Christine and Anthony Scala, *pro se*

Thomas Russo, Esq., for respondent

(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: January 24, 1997 Decided: February 11, 1997

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on May 24, 1996, for hearing as a contested case pursuant *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for

9:00 a.m. December 23, 1996 at the OAL 185 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement, indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

2/14/97

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 19 1997

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

dgi

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† ALSO MEMBER OF PA BAR
+ MEMBER OF FL BAR ONLY
° ALSO MEMBER OF PR BAR
¤ ALSO MEMBER OF DC BAR

January 23, 1997

VIA LAWYERS SERVICE

Honorable Margaret Hayden, ALJ
Office of Administrative Law
State of New Jersey
185 Washington Street
Newark, New Jersey 07102-3011

RE: **Scala v. Bloomfield Bd. of Educ.**
Agency Ref. No. 63-2/96; OAL Dkt. No. EDU 5539-96

Dear Judge Hayden:

This office represents the Bloomfield Board of Education, the Respondent-Cross Petitioner in this matter.

Pursuant to the Court's directive, enclosed please find the original of the parties' Settlement Agreement, together with a copy of an ancillary Promissory Note. Based upon previous communications with the Court, it is the parties' understanding that the Court shall issue an Initial Decision, which incorporates the terms of the Settlement Agreement and orders a dismissal the administrative action with prejudice.

The Court's attention to this matter is greatly appreciated.

Respectfully yours,

Thomas Russo

enc.
cc: Mrs. Christina Scala (w/enc., via regular mail)

January 23, 1997
No. 6165

SETTLEMENT AGREEMENT

This Settlement Agreement is executed by and between Mr. and Mrs. Anthony and Christina Scala (hereinafter referred to as "the Scalas") and the Board of Education of the Township of Bloomfield, Essex County, New Jersey (hereinafter referred to as "the Board");

WHEREAS, the Board is a body corporate and politic, duly constituted under N.J.S.A. 18A:11-1 and -2, and is charged with the effective operation of the Bloomfield Township Public School District (hereinafter referred to as "the District"); and

WHEREAS, the Scalas are the natural parents, and legal guardians, of A.S. and C.S., two (2) minor children who attended District schools from 1991 through June, 1995; and

WHEREAS, pursuant to N.J.S.A. 18A:38-1, the Board determined that A.S. and C.S. were ineligible to receive a free public education in the District, during the aforementioned period of attendance; and

WHEREAS, pursuant to N.J.S.A. 18A:38-1, the Board assessed tuition charges against the Scalas in the amount of $ 36,828.00, as a result of their children's aforementioned period of ineligible attendance; and

WHEREAS, pursuant to N.J.S.A. 18A:38-1, Mrs. Christina Scala appealed the aforementioned tuition assessment to the Commissioner of Education in a matter entitled Christina Scala, Petitioner vs. Bd. of Educ. of Bloomfield, Respondent/Third Party Petitioner vs. Anthony Scala, Third Party Respondent, Agency Ref. No. 63-2/96; OAL Dkt. No. EDU 5539-96, wherein the Board filed a Counterclaim (seeking payment of the assessed tuition) and a Third Party Petition of Appeal against Mr. Anthony Scala (seeking to hold him jointly liable for the assessed tuition); and

WHEREAS, the Scalas and the Board have decided to fully and finally resolve and settle any and all claims between them arising out of, or in connection with, the Scala children's aforementioned attendance at District schools, as well as all other claims arising from any of the allegations set forth in the aforementioned administrative proceeding;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the Scalas and the Board agree to the following:

1. The Scalas shall pay to the Board $10,000.00, payable in accordance with the terms and conditions of the Promissory Note in the form attached hereto as Exhibit A and made a part hereof. Upon execution of this Settlement Agreement, the Scalas shall execute and deliver to the Board the original Promissory Note.

2. In exchange for the payment set forth in Paragraph 1 above, the Scalas and the Board agree to simultaneously withdraw their respective pleadings in the aforementioned administrative proceeding. The Scalas and the Board agree to execute all necessary documents for the administrative proceeding to be dismissed, with prejudice and without the award of costs to either party.

3. The Scalas and the Board agree that, to the extent permitted by law, the terms and conditions of this Settlement Agreement, and the terms and conditions of the appended Promissory Note, shall remain confidential. It is understood by the parties that this non-disclosure provision is a material term of the Settlement Agreement.

4. Each party to this Settlement Agreement acknowledges that they have had ample opportunity to consult with competent legal counsel concerning the terms and conditions of this Settlement Agreement and the appended Promissory Note. Each party understands the terms and conditions of this Settlement Agreement and the appended Promissory Note. Each party enters into this Settlement Agreement and the appended Promissory Note of their own volition, without any duress and without any inducement not contained in this document.

5. This Settlement Agreement constitutes the entire agreement and understanding of the Scalas and the Board on the resolution of the within matter.

6. This Settlement Agreement, and the appended Promissory Note, shall be governed by the laws of the State of New Jersey.

12/12/96

Christina Scala

BONNIE A. PHILLIPS
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAY 8, 2001

12/12/96

Anthony Scala

BONNIE A. PHILLIPS

Sworn to, and Subscribed
Before Me, this 13 day of
Dec, 1996

Thomas C. Barton, President
Bloomfield Board of Education

Sworn to, and Subscribed
Before Me, this 21 st day of
January, ~~1996~~ 1997

KATHLEEN M. BROWNING
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 7, 1998

PROMISSORY NOTE

AMOUNT: $10,000.00 DATE: December ___, 1996

FOR VALUE RECEIVED, Mr. and Mrs. Anthony and Christina Scala (hereinafter, "the Makers"), residing at 90 Davenport Avenue, Newark, New Jersey 07107, promise to pay to the Board of Education of the Township of Bloomfield, Essex County (hereinafter, "the Payee"), with its principal offices located at 155 Broad Street, Bloomfield, New Jersey 07003, the total sum of TEN THOUSAND DOLLARS ($10,000.00), payable at the rate of at least ONE-HUNDRED DOLLARS ($100.00) per month, commencing on January 1, 1997.

Payments are to be submitted directly to the office of the Board Secretary on the first day of each month, commencing on January 1, 1997. If the payments are made by check or money order, the check or money order must be made payable to the order of the "Bloomfield Board of Education".

If they are able to do so in any given month, the Makers shall increase the monthly rate of payment to the Payee. It is understood and agreed, however, that any such increased payment shall not excuse or diminish the Makers' obligation to comply with the aforementioned minimum monthly payment requirement, in any future month.

Prepayment of all or any part of the amount due under this Note may be made at any time, without premium or penalty.

The entire unpaid balance of this Note shall become due and payable immediately, without further act or deed, upon the occurrence of any of the following events (each of which shall constitute an "Event of Default"):

(a) The default of the Makers in the payment, when due, of any monthly payment installment, which default shall continue for a period of thirty (30) days after written notice of the default shall have been given to the Makers; or

(b) A proceeding is commenced against the Makers under any bankruptcy or insolvency law and remains undismissed for a period of sixty (60) days; or

(c) The Makers make an assignment for the benefit of creditors, or file a petition in bankruptcy, or are adjudicated insolvent or bankrupt, or petition or apply to any tribunal for any receiver or any trustee of the Makers, or any substantial part of any of their property, or commence any proceeding

relating to the Makers under any readjustment of debt, dissolution or liquidation law or statute of any jurisdiction, whether now or hereafter in effect; or the Makers, by any act, indicate their consent to, approval of or acquiescence in any such proceeding, or to the appointment of any receiver of, or any trustee for the maker, or any substantial part of any of its property; or the Makers suffer any such receivership or trusteeship to continue undischarged for a period of sixty (60) days.

The Makers shall pay or reimburse the Payee for all costs and expenses, including accrued interest, as set forth herein, and reasonable attorneys' fees, incurred by the Payee in collecting any amounts required to be paid under this Note or otherwise enforcing any of the Payee's rights and remedies under this Note, whether before or following an Event of Default. In the event of Default, interest on the unpaid principal balance of this Note shall accrue at the rate of thirteen percent (13%) per annum.

The Makers hereby waive presentment, demand for payment by the Payee or the holder of this Note, protest, and notice of nonpayment, dishonor, or protest of this Note and all other notices and demands, in connection with the delivery, acceptance or performance of this Note.

WARRANT OF ATTORNEY: The Makers hereby authorize and empower any attorney of any court of record, upon the occurrence of any Event of Default, to appear for and confess judgment against the Makers for such sums as shall have become due under this Note, in either case with or without declaration, with costs of suit, without stay of execution and with the greater of five percent (5%) of such sums or $1,000.00 added as a reasonable attorney's fee for collection. The Makers hereby waive the right of inquisition on any real estate levied on, voluntarily condemn the same, authorize the Clerk of the Court to enter upon the Writ of Execution said voluntary condemnation and agree that said real estate may be sold on a Writ of Execution; and also waive and release all relief from any and all appraisement, stay or exemption law of any state now in force or hereafter enacted. The Makers also hereby waive their right to object to and release all procedural errors in such proceedings. If a copy of this Note, verified by affidavit of the Payee, or someone acting on behalf of the Payee, shall have been filed in such action, it shall not be necessary to file the original Notice as a warrant of attorney. The authority to appear for and enter judgment against the Makers shall not be exhausted by the initial exercise thereof, and the same may be exercised from time to time and as often as the Payee shall deem necessary or desirable and this Notice shall be a sufficient warrant.

No delay or failure, on the part of the Payee, in exercising any right, privilege or option under this Note shall operate as a waiver thereof, or of any Event of Default; nor shall any single or partial exercise of any such right, privilege or option preclude any further exercise thereof, or the exercise of any other right, privilege or option.

The Makers expressly acknowledge that they have had ample opportunity to consult with competent legal counsel concerning the terms and conditions of this Note, that they understand and agree to said terms and conditions, and that each of them executes this Note of his/her own free will, in the absence of any duress and without any inducement not contained in this Note.

This Note is made and delivered in the State of New Jersey and shall be governed by, and be interpreted in accordance with, the laws of New Jersey.

12/12/96

Anthony Scala

BONNIE A. PHILLIPS
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAY 8, 2001

12/12/96

Christina Scala

BONNIE A. PHILLIPS
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES

Sworn to and subscribed before me on
this, day of 1996.

12/12/96

OAL DKT. NO. EDU 5539-96
AGENCY DKT. NO. 63-2/96

CHRISTINE AND ANTHONY SCALA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

March 31, 1997, Date of Mailing, March 31, 1997

158-97

158-97

LUIGI PAPARELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

March 31, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5147-95
AGENCY DKT. NO. 59-3/95

LUIGI PAPPARELLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE,
Respondent.

Randi April, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, Attorneys)

Dwayne D. Warren, Esq., for respondent,
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: February 6, 1997 Decided: February 6, 1997

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on May 17, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Feb. 6, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/11/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
Ten James Street
Florham Park, NJ 07932
(201) 301-0001
Attorneys for Respondent,
Board of Education of the
Borough of Roselle

LUIGI PAPARELLA, Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY DOCKET NO. EDU-5147-95 AGENCY DOCKET NO. 59-3/95 CIVIL ACTION **STIPULATION OF SETTLEMENT**

IT IS HEREBY STIPULATED AND AGREED, by and between the firm of Balk Oxfeld Mandell & Cohen, attorneys of record for Petitioner, Luigi Paparella, and Schwartz Simon Edelstein Celso & Kessler, attorneys for Respondent, Board of Education of the Borough of Roselle, that:

1. In consideration of the mutual promises and covenants set forth in this Stipulation of Settlement, and upon the strict condition that the Roselle Board of Education shall faithfully perform the terms and conditions hereof and not be in default thereon, Paparella agrees to accept in full payment of the Debt the sum of Four Thousand and 00/100 Dollars ($4,000.00) (hereinafter referred to as the "Settlement

Amount").

2. The Settlement Amount shall be paid as follows: Within thirty (30) days of the execution of this Agreement, Respondent shall pay to Petitioner the sum of $4,000.00.

3. Payment is to be made by check payable to "Luigi Paparella" and mailed on or before the date to the Law Offices of Balk Oxfeld Mandell & Cohen, located at 50 Commerce Street, Newark, New Jersey, Attention, Randi Doner April, Esq.

4. So long as the aforesaid payment is promptly made, Paparella agrees not to pursue the prosecution of any of his rights in this action.

5. As additional consideration for the above settlement, Petitioner shall, simultaneously with the execution of this Stipulation of Settlement, provide to Respondent's attorney a Stipulation of Dismissal of Petitioner against Respondent, together with a signed General Release of said claim.

6. Once payment has been paid as per this Stipulation, Paparella will provide Respondent with the appropriate Stipulation of Dismissal together with a General Release of said claim.

BALK OXFELD Mandell & Cohen
Attorneys for Petitioner

By: Randi Doner April
Randi Doner April, Esq.

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER
Attorneys for Respondent

By: Dwayne D. Warren
Dwayne D. Warren, Esq.

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
10 James Street
Florham Park, New Jersey 07932
(201) 301-0001
Attorneys for Defendant
Board of Education of the
Borough of Roselle

LUIGI PAPARELLA, Petitioner, vs. BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY DOCKET NO. EDU-5147-95 AGENCY DOCKET NO. 59-3/95 CIVIL ACTION **STIPULATION OF DISMISSAL WITH PREJUDICE AS TO ALL CLAIMS BROUGHT BY PETITIONER AGAINST DEFENDANT**

All claims in the above entitled action brought by Petitioner against Respondent, having been amicably adjusted by and between the aforesaid parties, it is hereby stipulated and agreed that these claims be and are hereby dismissed with prejudice and without costs against any of the aforesaid parties.

Dated: May 20, 1996

BALK OXFELD MANDELL & COHEN
Attorneys for Petitioner
Luigi Paparella

By: Randi Doner April
Randi Doner April, Esq.

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
Attorneys for Respondent
Board of Education of the
Borough of Roselle

By: Dwayne D. Warren
Dwayne D. Warren, Esq.

PREPARED BY:

DWAYNE D. WARREN, ESQ.

RELEASE

THIS RELEASE, dated this 3 day of July, 1996, is given

BY LUIGI PAPARELLA, hereinafter referred to as "I",

TO BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, hereinafter referred to as "You".

1. **RELEASE.** I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

Any and all claims asserted or which could have been asserted by me in an action entitled Luigi Paparella v. Board of Education of the Borough of Roselle, filed in the Office of Administrative Law, Docket No. EDU5147-95.

2. **CONSIDERATION.** In consideration for this Release, I have been paid the sum of $4,000.00. I agree that I will not seek anything further including any other payment from you.

3. **ADMISSION OF LIABILITY.** This Release and the underlying settlement of this matter does not constitute an admission of liability by any party, but is only intended as an amicable resolution of this matter in the best interest of all parties concerned.

4. **WHO IS BOUND.** Both parties are bound by this Release. Anyone who succeeds to our rights and responsibilities, such as our heirs or executors of our estates, is also bound. This Release is made for both parties' benefit and all who succeed to our rights and responsibilities, such as our heirs or the executors of our estates.

5. **SIGNATURES.** We understand and agree to the terms of this Release. If this Release is made by a corporation, its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Monica C. Medina

Luigi Paparella

STATE OF NEW JERSEY)
) SS:
COUNTY OF ESSEX)

I CERTIFY THAT on July 3, 1996, Luigi Paparella personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his/her act and deed.

Pamela Comer April
Notary Public
Attorney at Law
State of New Jersey

OAL DKT. NO. EDU 5147-95
AGENCY DKT. NO. 59-3/95

LUIGI PAPARELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

In that the parties have reached an agreement regarding petitioner's claim that he was entitled to the benefits of *N.J.S.A.* 18A:30-2.1, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

March 31, 1997
Date of Mailing, March 31, 1997

159-97

FRANK ALVES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former Department Chair for Industrial Arts whose position was abolished, claimed entitlement to positions of Director of Special Education, Grades 6-12/Director of Student Services and Coordinator of Technology/School Librarian, alleging they required the same certification he possessed and which were filled by nontenured individuals.

ALJ concluded petitioner was not entitled to the positions he sought as petitioner did not possess the certification needed for those positions (Director of Student Personnel Services, Educational Media Specialist). Petition was dismissed.

Commissioner adopted findings and determination in initial decision, concurring with the ALJ that petitioner was not entitled to either of the positions he sought and dismissing the petition of appeal. However, as it was unclear from the record whether the person currently serving as Director of Special Education/Director of Student Services (Intervenor) possesses the appropriate certification for his position, the Commissioner directed the County Superintendent to inquire into this matter and take such action as he deems necessary.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9789-95

AGENCY DKT. NO. 300-7/95

FRANK ALVES,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,

Respondent.

Robert M. Schwartz, Esq., attorney for petitioner

Mark G. Sullivan, Esq., attorney for respondent (Sullivan & Sullivan, attorneys)

Anthony P. Sciarrillo, Esq., attorney for intervenor Maxwell Riggsbee

Record Closed: January 21, 1997 Decided: February 10, 1997

BEFORE **MARIE P. SIMONELLI, A.L.J.**

STATEMENT OF THE CASE

Respondent, Board of Education of the Township of Mahwah, Bergen County (the Board), abolished the teaching position of petitioner, Frank Alves (Mr. Alves). Mr. Alves does

not challenge the decision to abolish his position. Rather, he claims entitlement, effective July 1, 1995, to positions requiring the same certification he possesses which the Board allegedly filled with non-tenured individuals and back pay and other emoluments of employment. Mr. Alves seeks the position of Director of Special Education, Grades 6-12/Director of Student Services presently held by intervenor, Maxwell Riggsbee (Mr. Riggsbee). He also seeks the position of Librarian/Coordinator of Technology presently held by Ronald Bennett (Mr. Bennett).

PROCEDURAL HISTORY

On July 27, 1995, Mr. Alves filed a Petition of Appeal. The Board filed an Answer on August 16, 1995. The Department of Education transmitted this matter to the Office of Administrative Law on September 7, 1995 for a hearing as a contested case.

On December 1, 1995, the undersigned held a telephone Prehearing Conference and entered a Prehearing Order. Pursuant to the Prehearing Order, by December 31, 1995, the Board was to notify any and all persons who may be affected by the outcome of this matter and advise all such persons of their right to intervene pursuant to *N.J.A.C.* 1:1-16.1. The undersigned also scheduled the hearing for May 1 and 3, 1996.

The parties appeared for the hearing on May 1, 1996. Mr. Riggsbee also appeared at that time and filed a motion to intervene. The undersigned granted that motion. The hearing began on May 1, 1996. Thereafter, the parties notified the undersigned that they were discussing settlement. They requested that the matter be adjourned pending the outcome of the discussion. On October 10, 1996, the parties notified the undersigned that they were unable to reach a settlement. They requested a briefing schedule to submit the remainder of the proof on the papers. The parties filed their Briefs by January 21, 1997, and the record closed on that date.

FACTS

The parties stipulated the following which I **FIND** as **FACTS** in this case:

1. Mr. Alves has been a teaching staff member employed by the Board since July 22, 1968.

2. From 1968 until June 30, 1995, Mr. Alves served as a Department Chair for Industrial Arts. From 1971 to 1976, Mr. Alves also served as the District Vocational Coordinator.

3. Mr. Alves is a tenured supervisor. He holds certificates for Teacher of Industrial Arts (June 1965), Coordinator (July 1970), Supervisor (July 1971), Principal (July 1971) and School Administrator (July 1977). Mr. Alves's employment record is attached as Exhibit A to Exhibit C-1 admitted into evidence on May 1, 1996.

4. Mr. Alves performed such functions as required by the job descriptions for the positions he held.

5. On about May 10, 1995, the Board voted to abolish the position of Department Chair for Industrial Arts. The Board reassigned Mr. Alves to a classroom teaching position, effective September 1, 1995.

6. As of September 1, 1995, the Board employed Mr. Bennett as the Coordinator of Technology/School Librarian and Mr. Riggsbee as the Director of Special Education, Grades 6 to 12/Director of Student Services.

7. Mr. Bennett's appointment as Coordinator of Technology/School Librarian became effective July 1, 1994. Prior thereto, Mr. Bennett held the position of Coordinator of Media Services. Mr. Bennett's employment record is attached as Exhibit A to Exhibit C-1 in evidence.

8 From August 15, 1992 to February 1, 1995, Mr. Riggsbee served as Guidance Chair, Grades 9 to 12, assigned to the High School. Effective February 1, 1995, the Board assigned Mr. Riggsbee as the Director of Special Education, Grades 6

to 12/Director of Student Services. Mr. Riggsbee's employment record is attached as Exhibit A to Exhibit C-1 in evidence.

9. Attached as Exhibit B to Exhibit C-1 in evidence are the job descriptions for Coordinator of Technology/School Librarian, Director of Special Education, Grades 6-12/Director of Student Services, and a generic description of Department Chair.

Having heard the testimony of the witnesses and having reviewed the Exhibits and post-hearing Briefs, I also **FIND** the following **FACTS**:

Mr. Alves claims entitlement to the position of Director of Special Education, Grades 6-12/Director of Student Services. Mr. Riggsbee presently holds that position. Mr. Alves claims entitlement to this position because he testified that, in addition to his position as Department Chair for Industrial Arts, he served a "Special Ed. Chair" at Mahwah High School pursuant to a verbal appointment by the Principal in the fall of 1986. He served in this capacity until June 30, 1994. Mr. Alves also claims that he served as Chair of Resource Room and Supplemental Instruction until June 30, 1994, at which time the Board hired Mr. Riggsbee as the Chair of Resource Room. Mr. Alves testified that he supervised, observed and evaluated resource room teachers and special education teachers at the High School and assisted in budget preparation and the daily needs of supplemental teachers. Mr. Alves claims that, because of his service as "Special Ed. Chair," and because he is tenured and Mr. Riggsbee is not, he has a greater tenure entitlement to the position of Director of Special Education, Grades 6-12/Director of Student Services.

Mr. Alves admitted that the Board never appointed him to the position of "Special Ed. Chair." In fact, the Board's proofs showed that no such position ever existed in the District. The Board's proofs also showed that Allan Van Eck (Mr. Van Eck) served as Coordinator for Student Services during the time Mr. Alves claims to have been serving as "Special Ed. Chair." Mr. Van Eck held this position prior to 1987. In this position, Mr. Van Eck was responsible for and supervised special education at the High School, he was the Chair of the Child Study Team and he supervised the Guidance Department and student activities.

Effective August 15, 1992, the Board appointed Mr. Riggsbee to the Position of Guidance Chair, Grades 9-12. Mr. Riggsbee held this position until February 1, 1995. During his service in this position, Mr. Riggsbee obtained certificates for Student Personnel Services (March 1993) and Supervisor (August 1994). At about the time of Mr. Riggsbee's appointment, the Board appointed Mr. Van Eck as Assistant Principal of another school. The Board then appointed Dr. Hanratty as Director of Special Education, Grades K-12. The Board subsequently created a new position, entitled "Director of Special Education, Grades 6-12/Director of Student Services." The job description for this position requires Director of Student Personnel Services and School Administrator/Supervisor certificates. The Board appointed Mr. Riggsbee to this position on September 1, 1995. In addition to the supervisory responsibilities required by this position, Mr. Riggsbee is responsible for supervising guidance counseling to about 25 students. Mr. Alves does not hold a Director Student Personnel Services certificate, nor has he ever served in this position.

Mr. Alves also claims entitlement to the position of Coordinator of Technology/School Librarian. Mr. Bennett presently holds this position. Mr. Bennett had been employed by the Board since September 1970. He has held the positions of Media Specialist (September 1970 to June 1978), Media Specialist/Coordinator of Libraries (September 1978 to June 1979), High School Librarian, Coordinator of Libraries (September 1979 to June 1981), High School Librarian (September 1981 to June 1982), High School Library Director (September 1982 to June 1984), High School Coordinator of Media Services (September 1984 to June 1987), High School Educational Specialist (September 1987 to June 1988), District Coordinator Media Services (September 1988 to June 1994). Since September 1994, he has served as Coordinator of Technology/Librarian. Mr. Bennett holds certificates for School Librarian (December 1971), Supervisor (December 1978) and Educational Media Specialist (March 1985). The job description for this position requires a Supervisor and an Educational Media Specialist certificate. Mr. Alves does not hold an Educational Media Specialist certificate, nor has he ever served in the position of media services or librarian.

DISCUSSION AND CONCLUSION

To acquire tenure in a teaching position, a teacher must have an appropriate certificate for that position. *Ellicott v. Board of Education,* 251 *N.J. Super.* 342, 348 (App. Div. 1991). The scope of the tenure is limited by the certificate held by the teacher. *Ibid.* A tenured teacher with proper certification can claim seniority rights to a position that is within the tenured teacher's certification. *Lichtman v. Ridgewood Bd. of Ed.*, 93 *N.J.* 362, 364 (1983). Seniority only accrues within the specific subject area in which the tenured teacher is certified and has actually served. *Lichtman,* 93 *N.J* at 366, 368-369; *Capodilupo v. W. Orange Tp. Ed. Bd.*, 218 *N.J. Super.* 510, 515 (App. Div. 1987); *N.J.A.C.* 6:3-5.1.

In this case, Mr. Alves holds certificates for Teacher of Industrial Arts, Coordinator, Supervisor, Principal and School Administrator. He is tenured as a Supervisor. He claims entitlement to the position of Director of Special Education, Grades 6-12/Director of Student Services. According to the job description, that position requires a Director of Student Personnel Services certificate. Mr. Alves does not possess such a certificate. In addition to the job description requirement that Mr. Alves possess such a certificate for that position, *N.J.A.C.* 6:11-11.10 requires an endorsement of Director of Student Personnel Services "for any person who is assigned as a director, administrator or supervisor of guidance and student personnel service of a school system, including the supervision of educational activities in areas related to and within the guidance program." Clearly, Mr. Alves does not meet the requirements of the regulations or the job description for the position of Director of Special Education, Grades 6-12/Director of Student Services.

Mr. Alves also claims entitlement to the position of Coordinator of Technology/School Librarian. That position, however, requires an Educational Media Specialist certificate. Mr. Alves does not possess such a certificates, nor has he ever served as an educational media specialist.

Based upon the foregoing, I **CONCLUDE** that Mr. Alves is not entitled to the positions of Director of Special Education, Grades 6-12/Director of Student Services and Coordinator of Technology/School Librarian.

ORDER

I, therefore, ORDER that the petition of Mr. Alves be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

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

Feb. 10, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

2/18/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 19 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses

For Petitioner:

Frank Alves, petitioner

For Respondent:

Stuart Salkin, Assistant Superintendent

Exhibits

C-1 Stipulation of Facts

OAL DKT. NO. EDU 9789-95
AGENCY DKT. NO. 300-7/95

FRANK ALVES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, including a transcript of the proceedings, and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's replies thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions incorporate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that petitioner, by virtue of his tenure and seniority rights, is entitled to remain employed within respondent's District as either Director of Special Education, Grades 6-12/Director of Student Services or Coordinator of Technology/School Librarian. In his exceptions, petitioner specifically argues that he has greater entitlement than Intervenor Riggsbee (intervenor) to the position of Director of Special Education, Grades 6-12/ Director of Student Services. He notes that although he does not hold the requisite endorsement of Director of Student Personnel Services, neither does intervenor. (Petitioner's Exceptions at p. 3) Further, petitioner asserts that he does hold a School Administrator's Endorsement which, according to *N.J.A.C.* 6:11-9.3(a), qualifies him as a director. He notes intervenor holds a Supervisor's Endorsement.

With respect to qualification, petitioner contends,

> ***Respondent ought to be estopped from now contending that Petitioner cannot serve as a special education supervisor and/or

> director of guidance as he previously served in the special education supervisor capacity for a period of eight years and the Respondent knowingly employed the Intervenor without the requisite certification for the position to which he [has] been appointed. (Petitioner's Exceptions at p. 4)

Petitioner cites case law to emphasize that, "[a] teaching staff member will not be deprived of the legislatively granted status of tenure ***where the board*** has failed in its responsibility to follow State statutes and regulations***."

Petitioner also cites *Herbert v. Middletown Township Board of Education,* 1989 *S.L.D.* 148, aff'd State Board 1990 *S.L.D.* 1759, aff'd N.J. Superior Court Appellate Division May 22, 1991, Dkt. No. A-318-90T1, to support his contention that he has superior entitlement to this position over intervenor in that he has tenure and intervenor does not. He also points to *Galbraith v. Board of Education of Lenape Regional High School,* 1996 *N.J.A.R.* 2d (EDU) 396, decided by the Commissioner January 12, 1996, aff'd State Board June 5, 1996, to aver that his tenure as a supervisor should take precedent because in that case it was found that a supervisor's endorsement authorized Galbraith to supervise any subject matter at any grade level.

Lastly, petitioner again notes he supervised special education teachers and was responsible for formulating the budget for the Special Education Department, which duties are duties assigned to the Director of Special Education position in question. Thus, he asserts he has greater seniority entitlement requiring his appointment to this position.

In reply, the Board avers that in order to prevail in this matter, petitioner must first show an entitlement to the position he seeks. The Board avers petitioner lacks qualification for the position because he lacks the requisite endorsement of Director of Student Personnel Services, and cites *N.J.A.C.* 6:11-11.10 to emphasize that such endorsement,

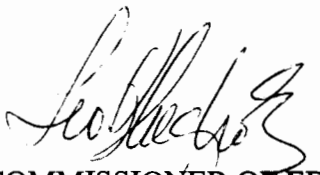
> ***is *required* for any person who is assigned as a director, administrator, or supervisor of guidance and student personnel service of a school system...." (emphasis in text) (Reply Exceptions at pp. 1-2)

Secondly, the Board argues that because the position is not one simply entailing supervision of special education, but also includes a guidance supervisory component for which petitioner is unqualified, petitioner is unqualified for the entire position. (*Id.* at p. 2)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is not entitled to either of the positions he seeks. Initially, the Commissioner notes that petitioner was never appointed to the position of Supervisor of Special Education. Even assuming, *arguendo,* that he did perform such job duties, however, he does not hold the requisite certification for endorsement to claim the position of Director of Special Education, Grades 6-12/Director of Student Services on this basis. Similarly, petitioner does not hold the requisite certification for the position of Coordinator of Technology/School Librarian. The Commissioner notes that the record provides no basis whatsoever to conclude that the Board's certification requirements for the positions at issue are inappropriate.

Accordingly, for the reasons expressed therein and as further explicated above, the Commissioner affirms the initial decision of the OAL and dismisses the within Petition of Appeal. Additionally, in that it is unclear from the record whether Intervenor Riggsbee possesses the appropriate certification for the position to which he is assigned, a circumstance which is not altered by the Board's apparent assignment of a staff member who also lacked the required certificate, the County Superintendent is directed to inquire into this matter and take such action as may be appropriate.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

APRIL 2, 1997
DATE OF MAILING APRIL 2, 1997

159-97

EDU #9789-95
C # 159-97
SB # 44-97

FRANK ALVES,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAY, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 2, 1997

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Sullivan & Sullivan (Mark G. Sullivan, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.[1] We add only that there is no indication in the record that the Board submitted the unrecognized position titles at issue herein to the county superintendent for approval and for a determination of the appropriate certification, as required by N.J.A.C. 6:11-3.3(b). Consequently, we remind the Board of such obligation and, in the event that it has not already done so, we direct the Board to immediately submit a

[1] We note that the instant appeal is limited to the position of Director of Special Education, Grades 6-12/Director of Student Services since petitioner is no longer asserting a tenure claim to the position of Coordinator of Technology/School Librarian. See Brief in Support of Appeal, at 3.

8/26/97

written request for permission to use each of these unrecognized titles to the county superintendent, along with a detailed job description for each title.

August 6, 1997

Date of mailing AUG 0 8 1997

160-97

NANCY MAHONEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 2, 1997

OAL DKT. NO. EDU 8394-96
AGENCY DKT. NO. 348-8/96

NANCY MAHONEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY EDUCATIONAL SERVICES COMMISSION, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 2, 1997
DATE OF MAILING APRIL 2, 1997

161-97

161-97

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

APRIL 2, 1997

OAL DKT. NO. EDU 6594-96
AGENCY DKT. NO. 233-6/96

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

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 2. 1997
DATE OF MAILING APRIL 2, 1997

162-97

162-97

RICHARD HERDEGEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 2, 1997

OAL DKT. NO. EDU 11314-96
AGENCY DKT. NO. 406-9/96

RICHARD HERDEGEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 2, 1997
DATE OF MAILING APRIL 2, 1997

163-97

163-97

MARYANN KNOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 2, 1997

OAL DKT. NO. EDU 08914-96S
AGENCY DKT. NO. 503-10/96

MARYANN KNOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 2, 1997
DATE OF MAILING APRIL 2, 1997

164-97

164-97

RICHARD HOROWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 2, 1997

OAL DKT. NO. EDU 8284-95
AGENCY DKT. NO. 299-7/95

RICHARD HOROWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 2, 1997
DATE OF MAILING APRIL 2, 1997

165-97

165-97

W.M.I. AND A.I., on behalf of minors, M.I. AND M.I.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning relatives of minors, M.I. and M.I., challenged Board's residency determination that they were not entitled to free public education in the District.

ALJ found that petitioners demonstrated that guardianship was transferred to them because the natural parents were experiencing economic and physical hardship. ALJ found that petitioners were the sole support for the minors and that they were domiciled in the District with petitioners. ALJ granted petitioners' request for relief and determined that M.I. and M.I. were entitled to a free and appropriate education within the District.

Commissioner concurred with the ALJ that petitioners satisfied the requirements of *N.J.S.A.* 18A:38-1b(1), thereby establishing that M.I. and M.I. were eligible to attend school in the District. Commissioner ordered District to admit them into its public school system, free of charge, so long as there was no change in petitioners' circumstances that would alter their entitlement.

APRIL 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1747-96

AGENCY DKT. NO. 437-11/95

W.M.I. AND A.I. ON BEHALF
OF MINORS M.I. AND M.I.

Petitioners,

v.

BOARD OF EDUCATION OF
THE CITY OF CLIFTON, PASSAIC
COUNTY

Respondent.

W.M.I. and A.I., *pro se* on behalf of petitioners

Anthony V. D'Elia, Esq., for respondent

Record Closed: January 10, 1997 Decided: February 10, 1997

BEFORE **IRENE JONES**, ALJ:

W.I., the guardian of M.I. and M.I., filed a verified petition with the Commissioner of Education (Commissioner) appealing the determination by the Board of Education of City of Clifton, Passaic County (Board) that M.I. and M.I. be removed from the Clifton School System. Respondent do not dispute the childrens' domicile but questions

whether a special hardship was demonstrated in order to justify their continued enrollment in the Clifton School System.

On February 20, 1996 the Commissioner transmitted the matter to the Office of Administrative Law to be heard as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. A hearing was held on June 24, 1996. The record remained open for the petitioners to submit additional documents. At the request of the undersigned, the respondent provided a copy of the documents on January 10, 1997 at which time the record was closed.

FINDINGS OF FACT

M.I. and M.I. are two minor children, ages 14 and 16, who reside with their guardians, W.M.I. and A.I., in the City of Clifton. The children are the nephews of the guardians. The childrens' natural parents, K.M.K.I. and A.K.I. are natives and residents of Amman, Jordan. In July 1995, the children were sent to live with W.M.I. and custody was given to him on September 5, 1995.

Mrs. I. testified that the childrens' natural father suffers from chronic pain and was forced to stop working two years ago. Further, his illness forced him to give up his home and live with his parents. In addition to the two children in the United States, there are three siblings in Jordan. Confronted with a deteriorating situation, she and her husband brought the two oldest children to live with them in the United States. The natural mother works part-time as a seamstress, however, little work is available in Jordan. Mrs. I. further testified that they do not receive any financial support from the childrens' natural parents. Indeed, the natural parents are supported by the childrens' grandparents.

Further, M.I. and M.I. have continuously resided with them since coming to the United States and have not returned to Jordan. Moreover, the children are claimed as dependents on their U.S. Income Tax Returns.

Dr. Othman reports K.M.K.I, (the natural father) is ill with arthritic and chronic pain in the lower limbs. (J-2). Further, he is unable to work effectively because of chronic pain. (J-2).

The respondent did present a witness and does not contest the testimony or documentary evidence submitted by the petitioners.

ISSUE

Whether the children are entitled to attend school in the Clifton School System.

DISCUSSION AND CONCLUSIONS

The statutory scheme set forth at *N.J.S.A.* 18A:38-1 requires several items of proof to be presented to the school board in addition to the affidavit from the children's natural father. The provision of this information to the Board enables any individual to receive a free and appropriate education.

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child, due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of

> the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child . . . *N.J.S.A.* 18A:38-1(b).

In support of their petitions, the petitioners provided the Board with an affidavit of non-resident parent, their affidavit and a statement from a Dr. Othman (J-1, J-2 J-3). The respondent did not contend that other verifying information as required by the statute was not provided. Thus, it is presumed that all statutorily required documents were provided to the Board.

I **FIND** that the petitioners have demonstrated the guardianship was transferred to them because the natural parents are experiencing economic hardship. Further, I **FIND** that the physical handicap of the natural father was also demonstrated.

I **FIND** and **CONCLUDE** that the guardians are the sole support for the M.I. and M.I. and that they are domiciled in Clifton and will continue to live with the petitioners, W.M.I. and A.I. until their emancipation.

Having found that the natural parents are no longer providing financial support to M.I. and M.I. and it being undisputed that the children are domiciled in the City of Clifton, I herein **GRANT** the petitioners request for relief and that M.I. and M.I. are entitled to a free and appropriate education within the Clifton School System.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

2/10/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

2/19/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

Mrs. A.I.

Exhibit:

J-1 Application for Affidavit Admission
J-2 Statement of Dr. Othman
J-3 Affidavit of non-resident parent(s).

OAL DKT. NO. EDU 1747-96
AGENCY DKT. NO. 437-11/95

W.M.I. AND A.I., on behalf of minors, M.I. AND M.I.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ, and accepts the ALJ's conclusion that petitioners have satisfied the requirements of *N.J.S.A.* 18A:38-1b(1), thereby establishing that M.I. and M.I. are eligible to attend school in respondent's District.

Accordingly, the initial decision of the OAL granting petitioners' appeal to set aside the Board's decision to disenroll their nephews is adopted as the final decision in this matter. The Board is hereby ordered to admit M.I. and M.I. into its public school system, free of charge, so long as there is no change in petitioners' circumstances that would alter their entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 7, 1997
DATE OF MAILING APRIL 7, 1997

166-97

166-97

Y.R.L., on behalf of C.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 3566-96
Agency Dkt. No. 77-3/96

Y.R.L. on behalf of C.J.,
Petitioner,
v.
FORT LEE BOARD OF EDUCATION,
Respondent.

This matter having come before the Office of Administrative Law (OAL) on January 30, 1997, the petitioner seeks a reversal of the decision by respondent, Fort Lee Board of Education (Board), to deny enrollment to C.J. Petitioner failed to appear, and counsel for respondent has moved for Summary Decision. Therefore:

1. Having considered the response of the Board set forth in its Answer for tuition based on the time that C.J. was permitted to attend the Fort Lee Public Schools pending the outcome of this litigation; and

2. Having determined that petitioner received notice of the hearing by the OAL in October 1996 and there being no indication that the notice, mailed by regular mail, did not reach petitioner; and

3. Having determined that the Board's charges remained unchallenged; *See Livingston Bd. of Educ. v. E.J.B.*, OAL Dkt. No. EDU 90017-96 (aff'd), Comm'r of Educ. (Feb. 20, 1996);

It is hereby **ORDERED** that the tuition amount to be paid by petitioner, Y.R.L., shall be $3,085.34 as stated in the Affidavit of Dr. Alan W. Sugarman, Superintendent, dated January 27, 1997.

It is further **ORDERED** that the relief requested by petitioner to reverse the decision of the Board to deny enrollment to C.J. is **DENIED**.

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

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

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

February 10, 1997
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

2/20/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 3566-96
AGENCY DKT. NO. 77-3/96

Y.R.L., on behalf of C.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the ALJ that the Board's Motion for Summary Decision is appropriately granted, inasmuch as petitioner has failed to appear and carry the burden of proving that the Board's decision to deny enrollment to C.J. was improper.

Accordingly, the initial decision of the ALJ is affirmed. Pursuant to *N.J.S.A.* 18A:38-1 *et seq.*, the Commissioner directs that petitioner remit to the Board tuition in the amount of $3,085.34.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 7, 1997
DATE OF MAILING APRIL 7, 1997

168-97

FRED MONAGHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning resident of the District contended the Board secretary violated *N.J.S.A.* 18A:14-12.1 by failing to remove from the ballot the name of a candidate (Cathcart) who submitted a letter of withdrawal of his candidacy in the April 1995 School Board election, but rescinded the letter immediately thereafter. Board moved for summary decision based on three grounds 1) that petitioner lacked standing to bring the suit; 2) that the petition should be dismissed because the relief requested was now moot; 3) that the petition failed to raise any substantial election irregularity which served to contravene the will of the people.

ALJ concluded that the Board was entitled to summary decision. Pursuant to *N.J.S.A.* 18A:14-63.12, only a "defeated candidate" may request the Commissioner to "inquire into alleged violations of statutorily prescribed procedures for school elections***." ALJ found that petitioner, who challenged the membership of the Board, did not run for membership himself and had no legal right to assert this claim on behalf of others who did. Moreover, since no meaningful relief was available (the election took place nearly two years ago), the matter was considered moot. Also, petitioner presented no evidence that Cathcart's votes would otherwise have gone to a defeated candidate in sufficient numbers to overcome the 200-vote margin of victory. Petition was dismissed.

Commissioner modified the initial decision, while affirming the ultimate conclusion that the petition must be dismissed. Commissioner observed that the matter was improperly treated and decided as an election inquiry, pursuant to *N.J.S.A.* 18A:14-63.12, rather than as a petition filed pursuant to *N.J.S.A.* 18A:6-9. Petitioner was not a defeated candidate and filed prior to the school election in April 1995. In that the documents petitioner sought were no longer in the Board's possession, the issue was undoubtedly mooted by the election, and election procedures are no longer under the Commissioner's jurisdiction, the Commissioner determined the matter was properly dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5149-95
AGENCY DKT. NO. 150-4/95

FRED MONAGHAN,
Petitioner,
v.
BOARD OF EDUCATION OF RIDGEFIELD PARK,
Respondent.

Fred Monaghan, *pro se*

Stephen R. Fogarty, Esq., for respondent,
(Fogarty & Hara, attorneys)

Record Closed: January 21, 1997 Decided: February 10, 1997.

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

Statement of the Case

This matter involves an inquiry into alleged violations of statutorily prescribed school election procedures conducted under the authority of *N.J.S.A.* 18A:14-63.12. Basically, petitioner alleges that the school board secretary violated *N.J.S.A.* 18A:14-12.1 by failing to remove from the ballot the name of a candidate who had submitted a letter of withdrawal of his candidacy in the April 1995 school board election. Additionally, petitioner contends that the board secretary violated his rights by refusing to make a public document available for his inspection. In his prayer for relief,

petitioner seeks that the particular candidate's name be removed from the ballot and that he be given a copy of the candidate's letter or withdrawal. Presently this matter comes before the Office of Administrative Law on respondent's motion for summary decision on three grounds: that petitioner lacks standing to bring this suit; (2) that the petition should be dismissed because the relief requested is now moot; and (3) that the petition fails to raise any substantial election irregularity which served to contravene the will of the people. For the reasons which follow, the petition must be dismissed.

Procedural History

On April 13, 1995, petitioner Fred Monaghan ("Monaghan") filed a verified petition with the Commissioner of Education ("Commissioner"). Thereafter, on April 26, 1995, respondent Board of Education of Ridgefield Park ("Board") filed its answer. Meanwhile, on April 18, 1995, the district conducted its annual school election. Subsequently, on May 17, 1995, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing.

Originally, the OAL scheduled a hearing for December 27, 1995, but that hearing was adjourned due to the unavailability of one of the witnesses. Shortly thereafter, on April 4, 1996, the chief administrative law judge consolidated this matter with six other school-election cases solely to resolve a jurisdictional question.[1] By order entered on June 11, 1996, the chief judge ruled that the Commissioner has jurisdiction to hear and determine challenges to school elections conducted in April 1995. Accordingly, the OAL rescheduled the hearing for February 11, 1997.

[1] On March 15, 1996, legislation became effective transferring disputes arising under the school election process from the Commissioner to the Superior Court. *L.* 1995, *c.* 278. Although this legislation applied to the conduct of the April 1996 school election, *Saunders v. Toms River Reg. Sch. Bd. of Educ.*, 289 *N.J. Super.* 225 (App. Div. 1996), it was unclear whether the new legislation also applied to pending disputes involving the April 1995 school election and, therefore, divested the Commissioner of subject matter jurisdiction.

Prior to the hearing date, on December 4, 1996, the Board filed a notice of motion for summary decision, together with a supporting affidavit and brief. Monaghan filed opposing papers on December 11, 1996. In response, Monaghan filed additional opposing papers on January 21, 1997.[2]

Findings of Fact

All of the material facts necessary for disposition of this dispute are set forth in the pleadings and the affidavit submitted by the Board in support of its motion. I **FIND** that the following facts are undisputed:

Fred Monaghan is a resident of the Village of Ridgefield Park, but was not a candidate in the school election held on April 18, 1995. In that election, there were six candidates competing for election to one of three three-year terms on the Board. On or about Friday, March 17, 1995, David Cathcart, one of the candidates, submitted a letter to Board Secretary Ronald Weber, in which he stated his intention to withdraw his candidacy. Before Weber had a chance to act on this request, however, Cathcart faxed a second letter to him on or about Monday, March 20, 1995, wherein Cathcart rescinded his earlier letter of withdrawal.

Ballots for the election were printed on or about April 7, 1995. Cathcart's name appeared on the ballot. Four days later, on April 11, 1995, Monaghan went to the Board offices and inquired whether any of the candidates had withdrawn from the election. By his own admission, Weber told Monaghan that, "No one had withdrawn from the election." According to Weber's affidavit, his reason for responding in this manner was his belief "that the letter of withdrawal submitted by Cathcart was nullified by the subsequent rescission letter[.]" Shortly after that conversation, Weber returned both letters to Cathcart and did not keep any copies.

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[2] As the Board correctly points out, *N.J.A.C.* 1:1-12.2 does not permit an opposing party to file a "reply" to the moving party's reply. Nonetheless, the contents of Monaghan's recent letter were fully considered in reaching this decision.

At the election held on April 18, 1995, the top three candidates were John Malool with 762 votes, Lorraine DiArchangel with 697 votes and Camille Fitzpatrick with 691 votes. Losing candidates were Diane Zanelli with 494 votes, David Cathcart with 491 votes and Robert Binetti with 480 votes. Roughly 200 votes separated the three successful candidates from the three unsuccessful candidates.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board is entitled to summary decision in its favor.

Before considering the procedural aspects of the Board's motion, this decision will address the underlying merits of Monaghan's complaint. *N.J.S.A.* 18A:14-12.1, in effect at the time of the April 1985 election but since repealed, provided that:

> Any candidate may withdraw his name as a candidate for election at the annual school election by filing a notice in writing, signed by him, of his withdrawal with the secretary of the board before the ballot is printed or before 4:00 p.m. of the 46th day before the date of the election, whichever is later, and thereupon the name of such candidate shall be withdrawn by the secretary. The name of such candidate shall not be printed on the ballot. . . .

The literal language provides no guidance on what should happen if a candidate tenders a letter of withdrawal on a Friday and, after the intervening weekend, notifies the board secretary of the rescission of his withdrawal.[3] It does not specifically allow a candidate to retract his withdrawal before printing of the ballot, nor does it specifically prohibit such action. Monaghan interprets the use of the word "shall" in the statute as mandatory, so that the board secretary was required to remove Cathcart's name from the ballot as soon as Cathcart submitted his written notice of withdrawal. Presumably, Monaghan is concerned that the votes cast for Cathcart might otherwise have gone to

[3] Here the withdrawal took place less than forty-six days before the date of the election, but before the ballot was actually printed.

another candidate and, therefore, that the outcome of the election might have been different.

But the word "shall" is not always used in its imperative sense. Ordinarily the word "may" is permissive or directory and the words "must" and "shall" are mandatory. Such terms, however, have been held to be interchangeable whenever necessary to execute the clear intent of the Legislature. *Harvey v. Essex Cty. Bd. of Freeholders*, 30 *N.J.* 381, 392 (1959). While there is a presumption that the word "shall" is used in an imperative and not a directory sense, this presumption is not conclusive and can be overthrown "by something in the character of the legislation or in the context which will justify a different meaning." *Union Terminal Cold Storage Co. v. Spence,* 17 *N.J.* 162, 166 (1954). *See also, No Illegal Points v. Florio*, 264 *N.J. Super.* 318, 329 (App. Div. 1993); *In re Munson - Lied Co.,* 68 *N.J. Super.* 281, 287 (App. Div. 1961). If no public benefit ensues and no private right is insured by according the word "shall" an imperative meaning, it is to be construed as directory rather than mandatory. *Franklin Estates v. Twp. of Edison*, 142 *N.J. Super.* 179, 184 (App. Div. 1976), *aff'd* 73 *N.J.* 462 (1977). Laws for the regulation of elections in respect to the form and contents of ballots, or as to balloting procedure, are directory only, and not mandatory. *In re Wene*, 26 *N.J. Super.* 363, 377 (Law. Div. 1953), *aff'd sub. nom. Wene v. Meyner*, 13 *N.J.* 185 (1953)..

In other contexts, a proposal is nonbinding if the person making the offer rescinds it before the offeree has had an opportunity to accept or act upon it. Generally, in contract law, a contract is not formed until "the essential terms of an agreement have been communicated between the parties and there has been mutual assent to those terms." *Air Master Sales Co. v. Northbridge Park Co-Op, Inc.* 748 *F. Supp.* 1110, 1114 (D.N.J. 1990). Elements of a contract must be present in order to establish the termination of an insurance policy by mutual consent. *Meier v. N.J. Life Ins. Co.*, 101 *N.J.* 597 (1986). "Thus, a mere proposal by the insured to cancel his policy is insufficient unless it is accepted by the company." *Meier*, at 620. *Accord, Knight v. New England Mut. Life Ins. Co.*, 220 *N.J. Super.* 560. 565 (App. Div. 1987), *certif. den.* 110 *N.J.* 184 (1988). As a general rule, a vacancy arises on a school board

"when the resignation of an officer is accepted by the proper authority." *Georgia v. Suruda,* 1654 *N.J. Super.* 439 (Law Div. 1977).

Moreover, the New Jersey Supreme Court has allowed a tenured teacher to withdraw her resignation even after it had already been accepted by a school board. In *Evaul v. Camden Bd. of Educ.*, 35 *N.J.* 244 (1961), a teacher impetuously submitted her resignation after an unpleasant and emotional confrontation with her department head. Unknown to the teacher, the school board happened to have had a special meeting scheduled for later that same day. At its meeting, the board voted to accept her resignation. On the following day, the teacher unsuccessfully sought to rescind her resignation. Declaring that it would be "unduly harsh" for the teacher to lose her employment rights, the Court ordered her reinstatement. Significantly, the Court relied heavily on the fact that "in the interim between the acceptance of her resignation and appellant's prompt attempt to rescind, the school board did not take any action in reliance upon the effectiveness of her release." *Evaul*, at 250. Similarly, in our own case, Cathcart notified the board secretary of his change of heart on the very next business day and before any step had been taken to remove his name from the ballot. It is certainly understandable why Weber might reasonably assume that the purported resignation was no longer effective and that Cathcart was still an active candidate for board membership.

Such approach is fully consistent with the American tradition of letting the voters decide at the polls which of the candidates should represent them. Election laws are to be construed liberally so as to effectuate their purpose; they should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons. *Wene v. Meyner*, 13 *N.J.* 185, 197 (1953); *Kilmurray v. Gilfert*, 10 *N.J.* 435, 440 (1952); Absent some public interest sufficiently strong to permit the conclusion that the Legislature intended strict enforcement, statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice. *Catania v. Haberle*, 123 *N.J.* 438, 433 (1991). *Accord, Kilmurray, supra*; *In re Chirico*, 87 *N.J. Super.* 587, 593 (App. Div. 1965). Statutory provisions designed merely for the information and guidance of

election officials "must be regarded as directory only, and the election will not be defeated by a failure to comply with them, providing that the irregularity has not hindered any who were entitled from exercising the right of suffrage or rendered doubtful the evidence from which the result was to be declared." *Sharrock v. Keansburg*, 15 *N.J. Super.* 11, 19-20 (App. Div. 1951).

Even if Weber were wrong, however, and he lacked the legal authority to preserve Cathcart's candidacy, it does not necessarily follow that Monaghan is entitled to relief. Absent proof of malconduct or fraud, a concluded election will not be overturned for irregularities in the ballot, unless such irregularities have interfered with the full and free expression of the popular will. *In re Hackensack Recall Election*, 31 *N.J.* 592, 595 (1960). It is axiomatic that elections should not lightly be set aside and the will of the electorate defeated by mere irregularities. *In re Mallon*, 232 *N.J. Super.* 249, 268 (App. Div. 1989). A long line of school law decisions has also held that an election should not be overturned unless the petitioner is able to demonstrate that the will of the people has been thwarted. *See, e.g., In re Annual Sch. Election Held in Atlantic City,* 95 *N.J.A.R.* 2d (EDU) 322 (Comm'r April 23, 1995); *In re Annual Sch. Election Held in Newark*, 93 *N.J.A.R.* 2d (EDU) 645 (Comm'r Aug. 19, 1993); *In re Annual Sch. Election Held in Wanaque*, 91 *N.J.A.R.* 2d (EDU) 9 (Sept. 16, 1991); *In re Annual Sch. Election Held in Lacy*, 91 *N.J.A.R.* 2d (EDU) 3 (Sept. 12, 1991).

Monaghan's point is that the outcome of the election might conceivably have been different if those who voted for Cathcart had voted for someone else or, as petitioner put it, if the "dilution of the vote" had been avoided. Nonetheless, Monaghan presents no evidence that Cathcart's votes would otherwise have gone to a defeated candidate in sufficient numbers to overcome the 200-vote margin of victory. "Mere speculation that improved conditions would have afforded a different result is not enough." *Wanaque,* 91 *N.J.A.R.* 2d at 9.

Under somewhat similar circumstances, the Commissioner declined to invalidate a school election merely because a board secretary failed to remove the name of an ineligible candidate from the ballot. *In re Annual Sch. Election Held in Secaucus*, OAL

Dkt. No. EDU 0879-80 (Comm'r April 21, 1980). One of the candidates for the school board ascertained that he might not satisfy the residency requirements. One week before the election, he submitted a letter of withdrawal to the board secretary. However, his name remained on the ballot and he received 161 votes. Another candidate who lost by only eleven votes challenged the results on the theory that he would have won if the ineligible candidate's name had been removed. Denying any relief, the Commissioner stated, "[I]t is abundantly clear that the action of the Board Secretary in not removing [the ineligible candidate's] name from the ballot was not the type of irregularity which would amount to fraud, which would in any way repress the full and free expression of the popular will, and which would requiring the setting aside or voiding of the election." (slip op. at 10). *See also*, *In re Keogh-Dwyer*, 106 *N.J. Super.* 567, 574 (Law Div. 1969), *aff'd* 54 *N.J.* 523 (1969), recognizing the majority rule "that votes cast for a deceased, disqualified or ineligible person, although ineffective to elect such person to office, are not to be treated as void or thrown away, but are to be counted in determining the results of the election as regards the other candidates."

Additionally, the Board urges that the petition should be dismissed as moot. An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, the conflict between the parties has become merely hypothetical. *Black's Law Dictionary* 409 (5th ed. 1979). *In re Conroy*, 190 *N.J. Super.* 453, 458 (App. Div. 1983). *See Oxfeld v. N.J. State Bd. of Educ.*, 68 *N.J.* 301 (1975), where the Court refrained from deciding an educational dispute involving students already graduated from high school. Likewise, the Commissioner follows the judicial example and abstains from deciding cases which subsequent developments have rendered purely academic. *Weehawkin Educ. Ass'n v. Weehawkin Bd. of Educ.*, 1978 *S.L.D.* 924 (Comm'r Nov. 29, 1978); *Polskin v. North Plainfield Bd. of Educ.*, 1968 *S.L.D.* 217 (Comm'r Sept. 17, 1968). At the present time, the Board members elected in the April 1995 election have served the Board for nearly two years. In the meantime, another school election took place in April 1996 and a new election is only two months away. While it is unclear exactly what relief Monaghan is still seeking, it is no longer possible to alter the results or procedures of an election conducted so long ago. Even if, as appears most likely,

Cathcart's two letters were public records which the board secretary ought to have made available for Monaghan's inspection, those letters been returned to their author and are no longer under the Board's control. Accordingly, it would be futile to order the Board to produce documents which are no longer in its possession. If somehow the letters could be retrieved at this late date, they would have no possible impact on the outcome of the 1995 school board election. Since no meaningful relief is currently available, the case must, for all practical purposes, be considered moot.

Lastly, the Board maintains that the petition must be dismissed because Monaghan lacks standing to attack the election results. Historically, New Jersey courts have adopted a generous approach toward recognition of standing in order that aggrieved parties will not be denied easy access to the legal system. *Crescent Park Tenants Ass'n v. Realty Eq. Corp.*, 58 *N.J.* 98 (1971). State administrative agencies are generally more lenient than courts in allowing persons with only a marginal interest to assert a claim. S. *Lefelt, Administrative Law & Practice*, 37 *N.J. Practice Series* § 308 (1988). Nonetheless, there are limits on who may litigate claims before the Department of Education. The Commissioner has consistently refused to hear cases brought by persons who would not be affected by the outcome in a direct and meaningful way. *N.J.A.C.* 6:24-1.1. *Kenwood v. Montclair Bd. of Educ.*, OAL Dkt. EDU 8858-81 (April 23, 1982), *adopted* (Comm'r June 14, 1992).

With respect to challenges to school elections, the relevant statute identifies exactly who is entitled to bring such actions. Specifically, *N.J.S.A.* 18A:14-63.12, as it existed at the time of the election, provided that only a "defeated candidate" may request the Commissioner or his authorized representative to "inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election." If the challenge is to a public question, proposition or referendum, the request for an inquiry must be made by ten qualified voters. Monaghan is challenging the membership of the school board, not the vote on any public question, proposition or referendum. Since he did not

run for board membership himself, Monaghan has no legal right to assert this claim on behalf of others who did.

Order

It is **ORDERED** that the Board's motion for summary decision is granted.

And further **ORDERED** that the petition is dismissed.

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

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

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

Feb. 10, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/19/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 5149-95
AGENCY DKT. NO. 150-4/95

FRED MONAGHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions challenge the ALJ's findings of fact, recounting in great detail the events of April 11, 1995, wherein petitioner requested from the Board a copy of Candidate Cathcart's letter of withdrawal, but did not receive same, and contending, *inter alia*, "[t]here is misleading information, assumptions, and factual information purposely distorted and or omitted by the Respondent ***." (Petitioner's Exceptions at pp. 1, 2)

Further, petitioner objects to the ALJ's use of the analogy of contract formation in an election law case, arguing, *inter alia*, that "***Weber is not an offeree with a choice to accept or reject a proposal or contract. He is a public employee who has either received or did not receive a letter." (Petitioner's Exceptions at p. 7) Petitioner maintains that the receipt of the

letter of withdrawal is sufficient to withdraw the candidate's name. (*Id.* at p. 8) Petitioner further objects to the ALJ's citation to *Evaul v. Camden Bd. of Education*, 35 *N.J.* 244 (1961), inasmuch as candidates for the school board are not employees and the Board does not act upon the candidates' nominating petitions or their withdrawals. (*Id.*)

In response to the ALJ's statement that "[i]t is *** understandable why Weber might reasonably assume that the purported resignation was no longer effective ***" (Initial Decision at p. 6), petitioner argues that such assertion "***is erroneous, misleading, and not supported by the evidence." (Petitioner's Exceptions at p. 9) Moreover, petitioner refutes that his point in bringing this litigation is that "***the outcome of the election might conceivably have been different if those who voted for Cathcart had voted for someone else ***." (Initial Decision at p. 7) Rather, petitioner contends that he brought the within Petition of Appeal because he believed the Board violated *N.J.S.A.* 18A:14-12.1.

Petitioner argues, once again, that this matter is not moot, and challenges the ALJ's conclusion that he did not have the legal right to assert this claim. (Petitioner's Exceptions at p. 11) He agrees that he was not a defeated candidate in the election but, instead, filed the within Petition of Appeal contesting an alleged violation by the Board.

Lastly, petitioner sets forth the relief he is seeking "based on Springer's decision."[1] (*Id.* at p. 12)

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[1] In his exceptions, petitioner requests the following relief: "A) Confirm that Cathcart's letters are public records[;] B) Rightmyer is to admit he had knowledge of the letters when I inquired[;] C) Confirm Boards did not "act upon" election nominating petitions or the subsequent withdrawal[;] D) Confirm and uphold 18A:14-12.1, and further, confirm "shall" is mandatory, not optional[;] E) Upon "*receipt*" the name is withdrawn, should be confirmed and upheld[;] F) With careful consideration and with the best interest for the children, you decide or recommend to the appropriate agency the suspension and or revocation of his N.J. license ***[;] ***." (emphasis in text) (Petitioner's Exceptions at pp. 12, 13)

In reply, the Board first asserts that petitioner lacked standing, pursuant to *N.J.S.A.* 18A:14-63.12, to bring the within matter, since he was not a defeated candidate. (Board's Reply at p. 1)

Next, the Board contends that the within matter is moot. The Board warrants that, although petitioner admits that he is not now seeking to set aside the election, his claims of election irregularities are moot, as they "are 'merely hypothetical.'" (Board's Reply at p. 2, citing *Black's Law Dictionary* 409 (5th ed. 1979). The Board emphasizes that "[t]he Commissioner will not consider 'purely academic' or moot issues." (citation omitted) (Board's Reply at p. 2)

As to the "facts" listed in petitioner's exceptions which he contends were not considered by the ALJ, the Board affirms that

> this begs the question as to why these facts were not brought to the attention of Judge Springer before the initial decision was rendered, if the facts are so important. However, a thorough review of these "facts" indicates that they are either irrelevant to the decision or unsupported, baseless allegations. (*Id.*)

The Board further defends Judge Springer's discussion of contract law in the instant matter where the ALJ found that the pertinent statute, *N.J.S.A.* 18A:14-12.1, provided no direction for the situation where a candidate submits a withdrawal and later rescinds the withdrawal. The Board argues, "Since [the ALJ] could find no direction from the statute which is directly relevant, he considered 'other contexts,' one of them being contract law, for guidance."*** (Board's Reply at p. 3)

The Board additionally notes that the issue of Cathcart's letters as public records is irrelevant, since they have been returned to their author. (*Id.*)

Finally, citing *Madden v. Hagedorn*, 236 *N.J. Super.* 280 (Law. Div. 1989), aff'd 239 *N.J. Super.* 268, the Board argues that "election laws should be liberally construed to allow candidates to appear on the ballot." (Board's Reply at p. 3) Thus, in accordance with public policy, "***Weber reasonably assumed that the purported resignation was nullified by the rescission of that withdrawal." (*Id.* at p. 4)

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the initial decision of the ALJ, while affirming the ultimate conclusion that the within Petition of Appeal must be dismissed.

At the outset, the Commissioner observes that this matter has been improperly treated and decided as an election inquiry, pursuant to *N.J.S.A.* 18A:14-63.12, rather than as a Petition of Appeal filed pursuant to *N.J.S.A.* 18A:6-9. Petitioner herein was *not* a defeated candidate and, indeed, filed his Petition of Appeal on April 13, 1995, *prior* to the school election held on April 18, 1995.[2]

Further, noting petitioner's request for relief as set forth in the Petition of Appeal in the instant matter,[3] the Commissioner concurs with the ALJ that "***it would be futile to order the Board to produce documents which are no longer in its possession." (Initial Decision at p. 9) Additionally, as to petitioner's request that the name of the candidate in question be removed from the ballot pursuant to *N.J.S.A.* 18A:14-12.1, said issue has undoubtedly been mooted by the election. See *Mercer v. Brick Township Board of Education et al.,* 94 *N.J.A.R. 2d*

[2] It is noted that the filing date of April 13, 1995 did not permit this matter to be decided on an emergent basis, since the election was to be held on April 18, 1995, two working days later.

[3] The Petition of Appeal states, in pertinent part, "WHEREFORE, petitioner requests that first, I receive a copy of the letter of withdrawal, and secondly, to avoid dilution of the vote created by the appearance of Candidate A's name on the ballot in violation of 18A:14-12.1, Candidate A's name should be striken [sic] from the ballot, including but not limited to taping over the Candidate A's name and locking the pins on the voting machines, or any other means deemed appropriate by the Commissioner of Education, State of New Jersey." (Petition of Appeal at p. 2)

(EDU) 367, 369, where a petition seeking injunctive relief against the expenditure of public funds for the publication of newsletters by the board of education was dismissed as moot, following the election. "***[A]n action is considered 'moot' when it no longer presents a justiciable controversy because the issues have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Ronald Victoria v. Board of Education of the Township of Woodbridge, Middlesex County*, 1982 *S.L.D.* 1, 5. Moreover, the statute implicated in this issue, is, with the passage of *P.L.* 1995 *c.* 278, removed from the jurisdiction of the Commissioner of Education, see *N.J.S.A.* 19:60-7; said issue is not, therefore, capable of repetition in this forum. However, mootness notwithstanding, the Commissioner endorses the ALJ's analysis of *N.J.S.A.* 18A:14-12.1 found on pages 4 through 8 of the initial decision with respect to a local board secretary's responsibility when a candidate withdraws his/her name and, shortly thereafter, rescinds that withdrawal.

Accordingly, the initial decision of the ALJ is modified, as noted, and the Petition of Appeal in this matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 7, 1997
Date of Mailing, April 7, 1997

170-97

170-97

YVONNE LISA, ANN MOORE, ROBERT PETRILLO, AND REGINA SUKONIK,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	
RESPONDENT,	:	
AND	:	COMMISSIONER OF EDUCATION
ALLEN K. TAYLOR,	:	DECISION
RESPONDENT-INTERVENOR,	:	
AND	:	
STEPHEN BUONO, JAMES BARNES AND MICHAEL LANDON,	:	
RESPONDENTS-INTERVENORS.	:	

SYNOPSIS

Petitioning supervisors claimed entitlement to supervisory titles created during a reorganization and assigned to nontenured teaching staff members.

ALJ concluded that petitioners did not establish entitlement to any of the Supervisor/Teacher positions currently held by nontenured supervisors. Since none of the petitioners herein possessed any of the four subject area endorsements or a guidance endorsement on the Educational Services Certificate, he or she could not perform the teaching duties required in the job descriptions for Supervisor/Teacher. Likewise, petitioners were not entitled to the Assistant Principal positions currently held by nontenured intervenors. Citing recent amendments to the tenure acquisition statute, ALJ emphasized that it is again clear that once a teaching staff member has obtained tenure in any position under a particular certificate, that educator may extend his or her tenure rights to all other positions under that certificate for which she or he holds the appropriate endorsement, with the exception of those positions specifically enumerated in *N.J.S.A.* 18A:28-5; the only way to obtain tenure in a position specifically enumerated in *N.J.S.A.* 18A:28-5, is by fulfilling the criteria specified in that statute or in *N.J.S.A.* 18A:28-6. Thus, the ALJ concluded that petitioners did not establish entitlement to any Assistant Principal position, one of the specifically enumerated positions in *N.J.S.A.* 18A:28-5. Finally, ALJ determined that Petitioner Lisa failed to establish that she had a greater seniority entitlement to the position held by Intervenor Taylor.

Having reviewed the record of this matter, including the transcript of the hearing, and noting the cases cited by the ALJ and by the parties, the Commissioner adopted the findings and determination in initial decision as his own, with clarification. Petition was dismissed.

APRIL 10, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8186-95

AGENCY DKT. NO. #280-7/95

YVONNE LISA, ANN MOORE,

ROBERT PETRILLO, AND

REGINA SUKONIK,

Petitioners,*

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF WASHINGTON,

GLOUCESTER COUNTY,

Respondent,

and

ALLEN K. TAYLOR,

Respondent-Intervenor,

and

STEPHEN BUONO, JAMES BARNES

AND MICHAEL LANDON,

Respondents-Intervenors.

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* The Washington Township Administrators and Supervisors Association, originally named as a petitioner, was deleted as a party at the hearing in the within matter on August 6, 1996, with the agreement of all parties.

Robert M. Schwartz, Esq., for petitioners

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

John F. Hipp, Esq., for respondent-intervenor Taylor

Robert B. Rottkamp, Jr., Esq., for respondents-intervenors Buono, Barnes & Landon (Rottkamp & Flacks, attorneys)

Record Closed: October 11, 1996 Decided: February 21, 1997*

BEFORE M. KATHLEEN DUNCAN, ALJ:

This matter commenced on July 20, 1995, when petitioners, each tenured supervisors in respondent's district, filed a petition of appeal with the Commissioner of Education seeking an order that the Board of Education of the Township of Washington (hereinafter respondent) had violated their tenure rights by assigning non-tenured teaching staff members to supervisory titles created during a reorganization. An answer on behalf of respondent was filed on August 8, 1995, and on August 23, 1995, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F- 1 to -13.

A prehearing conference was conducted on November 2, 1995, at which time the following was identified as the issue for determination at hearing:

> Do petitioners have a tenure entitlement to any supervisory position held by non-tenured or less senior supervisory personnel in respondent's district?

The prehearing order provided that the parties would file cross-motions for summary decision on or before January 10, 1996. A hearing date was scheduled for February 1, 1996, in the event that the matter was not determined on cross-motions for summary decision. Thereafter, however, the

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* Extensions of time for issuing the initial decision were requested and granted pursuant to N.J.S.A. 52:14B-10(c).

parties advised that they had been unable to agree upon a stipulation of facts and they requested additional time to prepare for the hearing.

On February 2, 1996, petitioners filed a motion to amend the petition of appeal to include a claim by petitioners Lisa and Petrillo that they were entitled to other administrative positions requiring an administrator's certificate which were held by non-tenured teaching staff members. The motion was unopposed and was therefore granted. An answer to the amended petition of appeal was filed on behalf of respondent on April 1, 1996. On July 9, 1996, the undersigned entered an order permitting Allen K. Taylor to intervene as a party-respondent. On August 1, 1996, the undersigned entered an order permitting Stephen Buono, James Barnes and Michael Landon to intervene as parties-respondents. Thereafter, answers to the amended petition of appeal were filed by counsel for respondents-intervenors Buono, Barnes and Landon and by counsel for respondent-intervenor Taylor. A hearing was conducted on August 6, 1996, following which the record remained open for the receipt of written submissions. Respondent's post-hearing brief was received on September 23, 1996. Petitioners' initial brief was received on September 24, 1996 (a corrected copy was provided on October 9, 1996). The initial post-hearing written submission on behalf of respondent-intervenor Taylor was received on September 23, 1996, and the post-hearing brief on behalf of respondents-intervenors Buono, Barnes and Landon was received on September 16, 1996. Counsel for respondent-intervenor Taylor filed a reply brief on October 7, 1996. Petitioners' reply brief was received on October 11, 1996, whereupon the record closed.

FINDINGS OF FACT

Prior to the commencement of testimony the parties entered into the following written stipulations:

1. Petitioners **Yvonne Lisa, Ann Moore** and **Robert Petrillo** are currently employed by the Respondent, Washington Township Board of Education, as teaching staff members as defined in N.J.S.A. 18A:1-1.

2. Petitioner, **Regina Sukonik**, was employed as a tenured teaching staff member as defined in N.J.S.A. 18A:1-1 in the Washington Township School District from September, 1985, until her letter of resignation effective September 19, 1995. Ms. Sukonik's employment history is as follows:

November, 1984	Instructional Certificate with endorsement of Teacher of Physical Science issued.
September 1, 1985	Employed as Teacher of Chemistry at Washington Township High School.
June 27, 1989	Employed as Department Chairperson, Science, Orchard Valley-Chestnut Ridge Middle Schools, pending supervisor certificate.
September, 1989	Administrative Certificate with endorsement as Supervisor issued.
1989-1990 School Year	Employed as the Department Chairperson, Science, for the Orchard Valley and Chestnut Ridge Middle Schools. Also employed as a Teacher of Science at Chestnut Ridge.
1990-1991 School Year	Employed as the Department Chairperson, Science, for grades 9-10 at the Washington Township High School, and Teacher of Science at Chestnut Ridge Middle School.
1991-1992 through 1994-1995	Employed as the Department Chairperson, Science, for grades 9-10 at the High School, and Teacher of Science at the High School.
February 15, 1995	Reduction in force for department chairperson positions approved by the Board as part of the 1995-1996 budget.
April 25, 1995	Ms. Sukonik is reassigned to classroom teaching position.
September 5, 1995	Leave of Absence request under Family Leave

Act for 12 weeks to November 28, 1995.

September 19, 1995 Submits letter of resignation.

3. The employment history of **Yvonne Lisa** with the Washington Township School District is as follows:

September 1, 1970-1987	Initially employed as a teacher of Math assigned to the high school.
August 1, 1987-1989	Appointed Department Chairperson, Math, assigned to the high school, grades 10-12 and also served as a teacher of Math.
1989-1990	Department Chairperson, Math, assigned to the high school, grades 9-12 and also served as a teacher of Math.
1990-1995	Department Chairperson, Math, assigned to the high school, grades 9-10 and also served as a teacher of Math.
February 15, 1995	Reduction in force for department chairperson positions approved by the Board as part of the 1995-1996 budget.
April 25, 1995	Board appointed Intervenor Allen Taylor to the 9-12 Supervisor/Teacher Math.
April 26, 1995	Petitioner Lisa was notified that she was being reassigned to a classroom position effective for the 1995-1996 school term.

4. Employment history of **Ann Moore** in Washington Township is as follows:

September 1, 1984-1990	Initially employed as a Teacher of Health/Physical Education.
1990-1995	Department Chair, Physical Education and Health, assigned to the high school, grades 9-10 and also served as teacher of Physical Education and Health.

February 15, 1995	Reduction in force for department chairperson positions approved by the Board as part of the 1995-1996 budget.
April 25, 1995	Board appointed Mary Ann Shivers, who had held the 11-12 Department Chair position for Physical Education and Health to the newly created Supervisor/ Teacher of Physical Education and Health assigned to grades 9-12. Petitioner Moore is reassigned to a classroom teaching position.
April 26, 1995	Petitioner Moore was notified that she was being reassigned to a classroom position effective for the 1995-1996 school term.

5. Employment history of **Robert Petrillo** in Washington Township is as follows:

September 1, 1984-1989	Initially employed as a Teacher of English/Reading and Department Chair, Language Arts and/or English and Reading, grades 7-9.
1989-1990	Department Chair, English, grades 6-8 at Chestnut Ridge and Orchard Valley Middle Schools and also served as a teacher of English assigned to the high school. Petitioner, Petrillo's assignment as Department chair for Reading was removed and assigned to Susan Rosen.
1990-1995	Department Chair, English, 9-10, and also served as a teacher of English assigned to the high school.
February 15, 1995	Reduction in force for department chairperson positions approved by the Board as part of the 1995-1996 budget.
April 25, 1995	Board appointed David Lang, who had held the 11-12, Department Chair position for English, to the newly created Supervisor/Teacher English, grades 9-12. Petitioner Petrillo was reassigned to a classroom teaching position.
April 26, 1995	Petitioner Petrillo was notified that he was being reassigned to a classroom position effective for the 1995-1996 school term.

6. Employment history of **Allen Taylor** in Washington Township is as follows:

December 3, 1979	Initially employed as Curriculum Coordinator, Math/Science/T&E Coordinator.
April 26, 1982	Offered resignation as Math/Science Coordinator. On April 26, 1982 Board accepted resignation.
9/1982-1990	Appointed Math Department Chairperson assigned to grades 7,8,9 middle school. Contract date of appointment was 8/23/82. In 1989-1990 Mr. Taylor was reassigned to grades 6,7,8.
1990-1995	Assigned Math Department Chairperson, assigned to the high school, grades 11-12, and also was assigned as a teacher of Math.
April 26, 1995	Mr. Taylor was assigned to the newly created Supervisor/Teacher Math position assigned to grades 9-12 for the 1995-1996 school term.

7. The NJ certifications (**attached as exhibit A**) held by Regina Sukonik are as follows:

Instructional certificate

Teacher of Physical Science issued November 1984.

Administrative Certificate/Endorsements

Supervisor, issued September 1989

8. The NJ certifications (**attached as exhibit B**) held by Yvonne Lisa are as follows:

Instructional certificate

Teacher of Math, issued, 1970

Administrative Certificate/Endorsements

Supervisor, issued October 1986
Principal/Supervisor, issued October 1988

9. The NJ certifications (**attached as exhibit C**) held by Ann Moore are as follows:

Instructional certificate

Teacher of Health and Physical Education, issued, December 1984.

Administrative Certificate/Endorsements

Supervisor, issued February 1991

10. The NJ certifications (**attached as exhibit D**) held by Robert Petrillo are as follows:

Instructional certificate

Teacher of English, issued, June 1972.
Teacher of Reading, issued, August 1978.

Educational Services Certificate

Reading Specialist, issued June 1980.

Administrative Certificate/Endorsement

Supervisor, issued July 1984.
Principal/Supervisor, issued October 1986.

11. While serving as Department Chairperson, all four petitioners were assigned to teach instructional classes within their respective areas of supervision and their professional certifications. For a period when petitioner Petrillo served as Department Chair/Reading, grades 6-8, he also was assigned as Teacher of English assigned to the high school.

12. Prior to the 1989-1990 school year, the configuration of grades in the Washington Township School District was as follows:

High School	Grades 10-12
Middle School	Grades 7-9
Elementary Schools	Grades K-6

13. For the 1989-1990 school year, two Middle Schools, Chestnut Ridge and Orchard Valley, were opened, resulting in the following change in grade configuration:

High School	Grades 9-12
Middle School	
Chestnut Ridge	Grades 6-8
Orchard Valley	Grades 6-8
Elementary Schools	Grades 1-5
Early Childhood Center	Kindergarten

14. None of the petitioners have served as either principal, vice principal, or assistant principal in the Washington Township School District. Petitioners Petrillo and Lisa both hold administrative certification with a principal's endorsement.

15. Prior to the 1995-1996 school year, the Department Chairpersons were issued two annual contracts, one for teaching and one for the department chair component. Commencing with the 1995-1996 school year, the Department Chairpersons were issued one contract using the title "Teacher/Supervisor", followed by the subject area in which the individual would be supervising and teaching.

16. On February 15, 1995 the Board of Education approved a reduction in force (RIF) for the Department Chairperson positions at the secondary level for the upcoming 1995-1996 school year. The RIF resulted in the elimination of five Department Chair positions. Prior to the RIF, there were two supervisor titles at the secondary level for each of the following core subject areas: English, Math, Science, Social Studies, and Health/Physical Education. One supervisory title was assigned to grades 9-10 and the other was assigned to grades 11-12. The RIF combined the two supervisor titles in each of the aforementioned core subject areas into one supervisor title having responsibilities for grades 9-12.

17. Prior to the 1995-1996 school year, there was a generic job description for "Department Chairperson" that applied to all instructional areas. In addition, there was a separate job description for the title of Special Education Department Chair. A copy of these Department Chairperson job descriptions are attached hereto as **exhibit E.**

18. On May 23, 1995 the Board of Education approved a job description for Supervisor/Teacher of Subject Areas effective for the 1994-1995 school year in the following areas:

Business	Math
Music	Science
Art	Social Studies
English	Computers
Foreign Language	Guidance
Health/Physical Ed.	

19. A copy of the job description of Supervisor/Teacher of Subject Area is attached hereto as **exhibit F.**

20. There also exists job descriptions entitled Supervisor/Teacher of Special Education, Supervisor/Teacher of Technology and Supervisor/Teacher of BSI/Reading. This is attached hereto as **exhibit G.**

21. Mr. Frampton, Mr. Yahnke, Mr. Krotosky and Ms. Miamidian all possess the appropriate NJ certification to perform supervisory duties in New Jersey public schools, i.e., a supervisor endorsement to the Administrative certificate. In addition, these individuals hold the following certifications and endorsements, with citation to N.J.A.C. reference:

Supervisor	**Position**
Robert Frampton	Supervisor/Teacher of Music -

	Holds Teacher of Music endorsement to Instructional certificate- N.J.A.C. 6:11-6.2(a) 1b)
Louis Yahnke	Supervisor/Teacher of Handicapped - Holds Teacher of Handicapped Endorsement to Instructional certificate N.J.A.C. 6:11-6.2(a) 22iii)
Madelyn Miamidian	Supervisor/Teacher of Business - Holds Teacher of Business Endorsement to Instructional certificate N.J.A.C. 6:11-6.2(a) 4)
Paul Krotosky	Supervisor/Guidance - Holds Student Personnel Services Endorsement to an Educational Services certificate N.J.A.C. 6:11-11.11

(Job descriptions are attached hereto as exhibit H)

22. None of the petitioners possess the applicable certificate endorsement to perform the duties associated with the teaching of music, business education and special education, or to serve as a guidance counselor.

23. As of the 1995-1996 school year, the Board employed the following individuals, who were certified and qualified, in the position of Assistant Principal who had not acquired tenure as an Assistant Principal:

James Barnes	**William Dougherty**
Stephen Buono	**Michael Landon**

24. The job description for the position of Assistant Principal is attached hereto as Exhibit I.

The exhibits which were attached to the stipulation of facts as Exhibits A through I have been marked into evidence as Exhibits J-1 through J-9, respectively.

In addition to the foregoing stipulations, the following facts appear from the exhibits marked into evidence and from the testimony of Allen K. Taylor, Yvonne Lisa and Robert W. Kern, respondent's superintendent of schools.

Respondent-intervenor Taylor testified extensively about the nature of his job duties in the position Coordinator of Math/Science. Many of these job duties were similar to those which he later performed as Math Department Chairperson. The position Math/Science Coordinator, however, was a 12-month position and because respondent-intervenor Taylor, for personal reasons, did not wish to work during the summer months of 1982, on April 26, 1982, he submitted his resignation from the position, and the resignation was accepted by respondent on the same date. Although Mr. Taylor continued to function as the Math/Science Coordinator until June 30, 1982, he did not work during July or August. His new contract with respondent for the position Department Chairperson-Math was signed in August 1982 for the 10-month position commencing September 1, 1982.

During the time periods when petitioner Lisa and respondent-intervenor Taylor held the position Department Chairperson-Math, they functioned under the same job description and performed the same duties but were assigned to supervise different grade levels. The grade levels supervised by each of them for any particular year are set forth in the stipulations hereinabove. The job description for the Department Chairperson, J-5 in evidence and R-1 in evidence, requires the holder of the position to possess both an instructional certificate with an endorsement in the subject area of the supervisor's assignment and an administrative certificate with a supervisors endorsement. Although the job description does not specifically so state, in fact each Department Chairperson was required to teach instructional classes within the subject area of supervision. Petitioner Lisa testified that when she was a Department Chairperson in Math she carried a daily teaching load of three classes. Superintendent Kern testified that this established practice of having supervisors close to and in touch with their area of supervision was consistent with his

educational philosophy of having supervisors "keep a foot in the classroom" in order to maintain a high quality of both supervision and teaching.

In or around February 1995 at about the same time respondent was approving a reduction in force for Department Chairperson positions, the County Superintendent advised Mr. Kern that he would not approve the unrecognized job title of Department Chairperson for continued use in the district. Accordingly, the newly developed job description for the position after the reduction in force was entitled Supervisor/Teacher of subject area (J-6 in evidence). This job description also requires the holder of the position to possess an administrative certificate with a supervisor's endorsement as well as an instructional certificate with an endorsement in the subject area of supervision. The new job description specifically provides, inter alia, "Teach a minimum of one class period per day." After the reduction in force and reorganization, commencing in September 1995 four Supervisor/Teacher positions were assigned to non-tenured supervisors. Those four positions are Supervisor/Teacher of music (Robert Frampton), Supervisor/Teacher of business education (Madelyn Miamidian), Supervisor/Teacher of special education (Louis Yahnke), and Supervisor/Teacher of guidance (Paul Krotosky). Superintendent Kern testified as to the current teaching loads of the four non-tenured supervisors/teachers. He also testified that when he became aware of the fact that Mr. Yahnke had not been assigned to teach a special education class in the fall of 1995-96 school year, he ordered that Mr. Yahnke immediately be so assigned; this had been an oversight on the part of the administration at the high school, be explained, since Mr. Yahnke's job description required that he teach at least one class period.

APPLICABLE LAW AND DISCUSSION

Tenure Claims

The law governing resolution of petitioners' claims that they are entitled to the positions Supervisor/Teacher currently held by non-tenured supervisors was recently reviewed in great detail by the Commissioner in Galbraith v. Lenape Regional High School District, 96 N.J.A.R. 2d. (EDU) 396. In that case the Commissioner stated:

> The law is well-settled that a supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level. Moreover, while there is nothing to prevent a local board from establishing additional instructional certification requirements, absent a showing that instructional certification is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights on a preferred eligibility list of supervisors. (Citations omitted) Id. at 406.

The Commissioner determined that petitioner Galbraith, a tenured supervisor, was entitled to the position Supervisor-Social studies/Art/Music over the non-tenured supervisor assigned to that position, notwithstanding the fact that petitioner Galbraith did not possess any of the three specified endorsements: social studies, art or music. Inherent in the Commissioner's decision is the conclusion that the instructional certification requirements imposed by the Board were not necessary to perform the duties of the position at issue. Although the job description issued by the Lenape Regional High School district required an instructional certificate with an endorsement in social studies, art or music for the position, there was no requirement that the holder of the position teach classes in the instructional areas (and in fact since only one of the three endorsements was required, the holder of the position could be uncertified to teach two of the three areas under his or her supervision). Historically, the supervisors in the Lenape Regional High School district did not teach classes. The result in Galbraith, supra, is dependent upon a finding that there were not enough substantial duties for the position based upon the specific duties to be performed to allow the local district to impose the additional requirement of an instructional certificate in the subject area to be supervised. Clearly, dual certification requirements may be imposed by a district for a particular position when dual certification is mandated to permit the holder of the position to perform all of the job duties in the job description.

In the within matter, unlike in Galbraith, supra, each of the Supervisor/Teacher positions in question requires the holder to provide direct instructional services in the subject area to students at least one class period per day. Also unlike the historical practice in Galbraith, the

requirement that supervisors teach at least one class or have direct counselor responsibilities in addition to their supervisory duties has been the established practice in respondent's district. Since none of the petitioners in the within matter possesses any of the four subject area endorsements or a guidance endorsement on the Educational Services Certificate, he or she may not perform the teaching duties required in the job descriptions. Petitioners do not suggest that respondent's determination to require supervisors to deliver direct services in addition to their supervisory duties is arbitrary, capricious or motivated by a desire to circumvent their tenure rights, nor is there any support in the record or in the established case law to support such a contention. See Lightdale v. Union County Regional High School, 96 N.J.A.R. 2d. (EDU) 106, wherein the Commissioner upheld the authority of a local board to require dual certification for supervisors as well as the practice of requiring supervisory staff to perform direct services in addition to their supervisory duties. Petitioners simply argue that the direct teaching duties required are such a small percentage of the total job description that they should not be used to deny petitioners' rights of tenure to positions which are currently held by non-tenured staff members. Petitioners do not directly suggest to whom the one or more teaching periods per day which each of them would be unable to perform should be assigned. As respondent points out in its post-hearing written submission, the implication from the questions asked on cross-examination of Superintendent Kern is that respondent could pay some other teaching staff member an additional stipend for teaching an additional period of classroom instruction. Respondent argues that it should not be required to split a hybrid Supervisor/Teacher position that makes educational and fiscal sense and to spend additional monies for sixth-period stipends, particularly when the purpose of the reduction in force in the supervisory ranks was to reduce costs to the Board. Respondent's argument is persuasive.

For all of the foregoing reasons, I **CONCLUDE** that petitioners have not established entitlement to any of the supervisor/teacher positions currently held by non-tenured supervisors.

The claims of petitioners Lisa and Petrillo that their tenure rights entitle them to assignment to the Assistant Principal positions currently held by the non-tenured intervenors are likewise without merit. Petitioners' claims in this regard are based upon the unpublished

Appellate Division opinion in Nelson v. Oldbridge Township Board of Education, 96 N.J.A.R. 2d. (EDU) 589, wherein the court held that tenure obtained under any one endorsement on an Administrative Certificate entitles an educator to tenure under all endorsements obtained under his or her certificate. The fact that the Nelson decision which was issued on April 29, 1996, was statutorily reversed by an amendment to N.J.S.A. 18A:28-5, effective June 28, 1996, clarifying that tenure in any administrative or supervisory position enumerated in the statute accrues only by employment in that position, eliminates any doubt concerning the law in this area. It is now again clear that once a teaching staff member has obtained tenure in any position under a particular certificate, that educator may extend his or her tenure rights to all other positions under that certificate for which s/he holds the appropriate endorsement, with the exception of those positions specifically enumerated in N.J.S.A. 18A:28-5; the only way to obtain tenure in a position specifically enumerated in N.J.S.A. 18A:28-5, is by fulfilling the criteria specified in that statute or in N.J.S.A. 18A:28-6. See Dennery v. Board of Educ., 131 N.J. 626, 634 (1993); Ellicott v. Board of Educ., 251 N.J. Super. 342, 349 (App. Div. 1991) and cases cited therein. The court in Nelson simply misread, not the holding of Dennery, supra, but rather the Court's description of the holding in Ellicott, supra. See, discussion in Brenner v. Middlesex Township Board of Education, 96 N.J.A.R. 2d. (EDU) 81, 83-84.* Nelson erroneously abandoned the long-standing concept of "separately tenurable" positions; the decision was in effect for less than two months before it was overruled by the Legislature, and furthermore, as an unpublished opinion it would not have constituted precedent or have been binding upon any court, in any event. Rules Governing the Courts of the State of New Jersey, R. 1:36-3. Nelson did not reflect the status of the tenure law in September 1995 when respondent made the teaching staff assignments here in issue, and it does not reflect the law in effect at the time of the within decision. See, Kruvant v. Mayor and Council, Tp. of Cedar Grove, 82 N.J. 435 (1980). For all of these reasons, I **CONCLUDE** that petitioners have not established entitlement to any Assistant Principal position, one of the specifically enumerated positions in N.J.S.A. 18A:28-5.

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* Unfortunately, the June 28, 1996 legislative amendment failed to resolve the issue with respect to the titles director and supervisor. Although the amendment as originally proposed added the positions director and supervisor to the statutory list, committee amendments adopted on June 17, 1996 removed both titles prior to enactment.

Seniority Claims

Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in the employment force is necessary. The source of the concept is in the tenure law; specifically, N.J.S.A. 18A:28-9 and N.J.S.A. 18A:28-10 provide that when positions are abolished for reasons of economy or because of reduction in the number of pupils or because of a change in the administrative supervisory organization of the district, dismissals shall be made on the basis of seniority according to standards established by the Commissioner of Education with the approval of the State Board of Education. N.J.S.A. 18A:28-13 provides:

> The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

Such standards have been promulgated and are set forth in N.J.A.C. 6:3-5.1. The portions of the regulation relevant to petitioner Lisa's claim that she has greater seniority entitlement to the position Supervisor/Teacher of Math currently held by intervenor Taylor, are as follows:

. . .

> (b) Seniority, pursuant to N.J.S.A. 18A:29-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. . . .
>
> . . .
>
> (g) Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties

performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.3.

(h) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his or her seniority in any or all categories in which he or she previously held employment.

. . .

(l) The following shall be deemed to be specific categories, not necessarily numbered in order of precedence.

. . .

10. Supervisor;

i. Each supervisory title shall be a separate category; and

ii. District boards of education shall adopt a job description for each supervisory position which sets forth the qualifications and specific endorsements required for such position

. . .

Since the title "Department Chairperson" is not a recognized title under the State Board of Education rules and since respondent did not obtain permission from the County Superintendent of Schools to use this unrecognized title, the appropriate category for service in that position is determined according to the duties performed. All parties concerned agree that the category of

"Supervisor" is applicable for purposes of the seniority claim of petitioner Lisa against intervenor Taylor. Petitioner Lisa contends that for seniority purposes the appropriate supervisory title which constitutes a separate category is "Supervisor of Math, grades 9-12." She argues that since she held that specific supervisory title for school year 1989-90, all periods of employment for her thereafter when she moved to the separate category "Supervisor of Math, grades 9-10", are credited toward her seniority in the category "Supervisor of Math, 9 through 12," giving her 6 years of seniority in that category as opposed to zero years of seniority for intervenor Taylor who never held the supervisory title "Supervisor of Math, 9 through 12" prior to the 1995-96 school year.

There is simply no support in the regulations or in the case law for petitioner Lisa's contorted interpretation of "category." The statute and the regulations provide that categories are to be identified by the Commissioner on the basis of duties performed. Although broad grade level designations are made in the regulations for some administrative categories, e.g., elementary principal, junior high school principal, high school principal, etc., and the seniority categories of "secondary" and "elementary" carry very specific wording on how various grade levels establish separate seniority categories, no other categories are identified by narrower or specific grade assignments. Conspicuously absent from the supervisor category is any enumeration of grade levels. As pointed out by respondent in its post-hearing brief, adopting petitioner's definition of the supervisor category would result in dozens of separate seniority categories for supervisors in each subject area and would create utter confusion for boards attempting to determine seniority rights to any specific grade level assignment when, as has happened in respondent's district, grade level configurations in any particular building change over the course of a supervisor's career. "The most appropriate, logical reading of the seniority regulations is that the category of supervisor should not be broken down into subsets of subsets based on grade level assignment," * but rather should be reflective of the position title and/or duties. Accordingly, in the present matter, the category at issue is "Supervisor-Math." Although it appears from the evidence that whatever tenure/seniority rights Intervenor-Taylor accrued prior to April 1982 were cut off by his resignation effective June 30, 1982, even without that time accrued prior to the 1982-83 school

* Respondent's brief, p. 21.

year Intervenor Taylor still has more seniority in the category Supervisor-Math (13 years) than Petitioner Lisa (8 years)*

Accordingly, I **CONCLUDE** that Petitioner Lisa has failed to establish that she has greater seniority entitlement to the position currently held by Respondent-Intervenor Taylor.

For all of the foregoing reasons, it is hereby **ORDERED** that the Amended Petition of Appeal is **DISMISSED WITH PREJUDICE** and these proceedings are concluded.

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

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

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* With the possible exception of Intervenor-Taylor's supervisory responsibilities for grade 6 in the 1989-90 school year, all seniority accruals appear to have been in the secondary category, and Respondent-Intervenor is quite right in his observation in his reply brief that if petitioner wished to dispute that conclusion, it was her burden to offer evidence to establish the contrary.

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

Feb. 21, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

2/24/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 25 1997
DATE

Barbara A Harnak
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Joint:

J-1 Certificates of Regina L. Perry (2 pages)

J-2 Certificates of Yvonne E. Lisa (2 pages)

J-3 Certificates of Ann M. Moore (2 pages)

J-4 Certificates of Robert L. Petrillo (5 pages)

J-5 Job description-Department Chairperson

J-6 Job description-Supervisor/Teacher of Subject Area (2 pages)

J-7 Job descriptions-Supervisor/Teacher of Special Education, Supervisor/Teacher of Technology, Supervisor/Teacher BSI/Reading, and Special Education Department Chairperson

J-8 Certificates of Paul Krotosky, Louis Yahnke, Robert Frampton, Jr., and Madelyn Nelson (10 pages)

J-9 Job description - Assistant Principal

For Respondent-Intervenor Taylor:

R-1 Job description - Department Chairperson with notations by Respondent-Intervenor Taylor (3 pages)

WITNESSES

For petitioner:

Yvonne E. Lisa

For respondent:

Robert W. Kern

For respondent-intervenor Taylor:

Allen K. Taylor

OAL DKT. NO. EDU 8186-95
AGENCY DKT. NO. 280-7/95

YVONNE LISA, ANN MOORE, ROBERT PETRILLO, AND REGINA SUKONIK,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	
RESPONDENT,	:	
AND	:	COMMISSIONER OF EDUCATION
ALLEN K. TAYLOR,	:	DECISION
RESPONDENT-INTERVENOR,	:	
AND	:	
STEPHEN BUONO, JAMES BARNES AND MICHAEL LANDON,	:	
RESPONDENTS-INTERVENORS.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto, were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner Lisa renews her contention that she had seniority as a Math Department Chairperson, grades 9-12, which entitled her to be appointed to the Math Department Chairperson position. Petitioner Lisa asserts, once again, that the regulations governing seniority found at

N.J.A.C. 6:3-5.1(l)10 provide that each supervisory title shall be a separate category. Notwithstanding that Judge Duncan rejected her interpretation, Lisa contends that this regulation means that a supervisor of math, for example, having responsibilities for grade levels 7, 8 and 9, is distinct from a math supervisor title having responsibility for grades 9-12. (Petitioners' Exceptions at p. 4) However, Lisa asserts that

> ***Under Judge Duncan's analysis of the seniority rules it was of no consequence that [her] service as a math department chairperson had only been at the high school, nor was it of any consequence *** that [she] had served in the 1989-90 school term in virtually an identical position to which Mr. Taylor was assigned on July 1, 1995. (*Id.*)

Lisa cites to *Walldov v. East Brunswick Board of Education*, 1985 *S.L.D.* 598, and to *Michael Timko and John Mikush v. Bridgewater-Raritan Regional School District*, 1991 *S.L.D.* 967, to advance her proposition that Taylor's middle school supervisory assignment must be considered distinct, for seniority purposes, from the high school category in which she served, beginning on August 1, 1987. (*Id.* at pp. 5-7) Lisa further argues that *Capodilupo v. West Orange Board of Education*, 218 *N.J. Super.* 510 (App. Div. 1987), supports her contention that "grade level assignment has as much bearing on the seniority 'category' of a position as does the subject matter assignment." (*Id.* at p. 8) While the *Capodilupo* seniority distinction was premised on the distinction in the seniority regulations with respect to elementary and secondary teaching assignments, Lisa argues that supervisory positions, as "separate categories" should mean that "a supervisor of math for grades 11-12 is distinct from a supervisor of math, grades 9-12, just as it is distinct from a supervisor at the middle school having responsibility over the same subject area, [and] just as it is distinct from a supervisor having responsibility for a different grade level. (*Id.*)

In reply, the Board contends that the regulations governing seniority support the ALJ's conclusion that Petitioner Lisa has not established a greater seniority entitlement to the position in question. (Board's Reply at pp. 2, 3) The Board reasons that

> ***although broad grade level designations are made in the regulations for some administrative categories, for example, elementary principal, junior high school principal, high school principal, etc., and the seniority categories of "secondary" and "elementary" carry specific wording on how various grade levels establish separate seniority categories, no other categories are identified by narrower or specific grade assignments. *** Since the State Board of Education expressed its intent to differentiate seniority categories according to grade levels in other areas, but did not do so for the category of Supervisor, the only intelligible interpretation of the regulations is that the category of Supervisor is not to be broken down any further than the specific qualifications and endorsements that are relevant to that supervisory title. (*Id.* at pp. 3, 4)

The Board notes that both Petitioner Lisa and Intervenor Taylor served at the secondary level, but that Taylor has served more years at the secondary level than Lisa. In support of its position, the Board cites *MacMillan v. East Brunswick Board of Education*, 1990 *S.L.D.* 1, wherein the ALJ held, and the Commissioner affirmed, that seniority was based on subject area, rather than grade levels. (Board's Reply at p. 4) Additionally, the Board contends that *Walldov, supra,* and *Timko, supra,* "are factually distinguishable, in that the new categories in both *Walldov* and *Timko* included both junior and senior high [assignments], where previously the categories were divided between junior and senior high school." (*Id.* at p. 5) The Board argues that its reorganized categories have not changed, in that they remain high school categories. The Board concludes,

> Petitioner does not dispute that Respondent-Intervenor Taylor served at the high school level (he was Math Department Chairperson in grades 11-12 from 1990-1995). Therefore, since the regulations provide that whenever a person moves from a category, "all periods of employment shall be credited toward his or her seniority in any and all categories in which he or she previously held employment," Mr. Taylor has 13 years of seniority at the high school Math Supervisor position, and Petitioner Lisa has only 8. *N.J.A.C.* 6:3-5.1(h).***

Petitioners Lisa, Petrillo, Moore and Sukonik next renew their contention that they had a greater entitlement to be appointed to the supervisory positions assigned to nontenured staff (Petitioners' Exceptions at p. 9), and cite to *Timko, supra; Herbert v. Middletown Township Board of Education*, 1989 *S.L.D.* 2148, affirmed by the State Board at 1990 *S.L.D.* 1759, affirmed by the N.J. Superior Court, Appellate Division, May 22, 1991, A-318-90T1; *Rogers v. Highland Park Board of Education*, 1990 *S.L.D.* 685, affirmed by the State Board 691; and *Galbraith v. Lenape Regional High School District*, 1996 *N.J.A.R.* 2*d* (EDU) 396, to support their position. (*Id.* at p. 11) Petitioners argue:

> In the *Herbert* case, the job description for the position of Supervisor of Special Services required a Supervisors Endorsement as well as three years experience in special education. Petitioner Herbert had the required supervisor's certificate and he had tenure as a supervisor, but he did not have the required experience in special education. The staff member appointed to the position also had the certification, and had the experience, but was not tenured as a supervisor.
>
> The Commissioner concluded that however important the Board may have thought the experience factor to be, it constituted an invalid attempt to defeat a riffed, tenured employee's claim to the position.
>
> In the Commissioner's Decision in the matter Timko/Mikush, prior to its being remanded by the State Board of Education, the Commissioner stated that "as to the arguments raised about local certification requirements, it must be emphasized that there is nothing to prevent a Board of Ed. from having such requirements but those requirements cannot thwart the tenure rights of a staff member on a preferred eligibility list....." [citations omitted]
>
> In the matter of *Rogers v. Highland Park Board of Ed.*, Supra....the Commissioner expressly held that with the acquisition of tenure as a supervisor, and a subsequent reduction in force which affects the tenured supervisors, the riffed supervisor is entitled to any position held by a nontenured supervisor. [citation omitted] (*Id.* at pp. 11, 12)

Petitioners contend that the only distinguishing factor in *Galbraith, supra,* from the instant matter, is that the Board herein has inserted a minimal teaching component in the supervisory position which

necessitates subject area certification (*id.* at p. 12), but which should not be used to thwart their tenure rights as supervisors. (*Id.* at p. 13)

The Board counters that petitioners "***ignore the fact that in *Galbraith*, the Commissioner's conclusion was based on the fact that the instructional certificate requirements imposed by the Lenape Board were not necessary to perform the duties of the position at issue." (Board's Reply at pp. 6, 7, citing to Initial Decision at p. 14) The Board additionally points out that, in *Galbraith*, contrary to the situation herein, there was no requirement that the holder of the position teach classes in the instructional areas. The Board maintains that it is their "established educational practice" to require supervisors to deliver direct services in addition to serving in their supervisory roles. Moreover, the Board notes that petitioners presented no evidence to demonstrate that such a practice is arbitrary, capricious or motivated by the desire to circumvent tenure rights. (*Id.* at p. 7) Inasmuch as none of the petitioners possesses the proper endorsements, the Board reasons that they have no entitlement to the Supervisor/Teacher positions in question. (*Id.*)

Upon careful and independent review of the record in this matter, which included a transcript of the hearing conducted on August 6, 1996 at the OAL, the Commissioner finds that petitioners' exceptions are not persuasive and, thus, concurs with the findings and conclusions of the ALJ.

Initially, the Commissioner notes that petitioners have raised no objection to the ALJ's conclusion that Petitioners Lisa and Petrillo are not entitled to an Assistant Principal's position, one of the specifically enumerated positions in *N.J.S.A.* 18A:28-5. The Commissioner affirms the ALJ's analysis, and notes that the decision on which petitioners based their claim, *Nelson v. Board of Education of the Township of Old Bridge,* decided by the N.J. Superior Court, Appellate Division, April 29, 1996, A-6441-94T5, was recently reversed by the Supreme Court. In accordance

with Legislative intent and sound educational policy, the Supreme Court therein proclaimed that *N.J.S.A.* 18A:28-5 is to be interpreted as requiring service in the separately enumerated positions before tenure can be acquired in said positions, and that it is to be applied retroactively. (*Nelson v. Board of Education of the Township of Old Bridge*, A-94/95-96, decided March 12, 1997, Slip Opinion at p. 18)

With respect to petitioners' tenure claims, the Commissioner concurs with the ALJ that petitioners have not established an entitlement to any of the Supervisor/Teacher positions currently held by nontenured supervisors. The Board properly established positions as Supervisor/Teacher of various subject areas which were duly approved by the County Superintendent, and which required, *inter alia,* that the Supervisor/Teacher was to teach a minimum of one class period per day in his/her subject area. An instructional certificate with an endorsement in the particular subject area was, therefore, required, As the ALJ aptly notes,

> ***[p]etitioners do not suggest that respondent's determination to require supervisors to deliver direct services in addition to their supervisory duties is arbitrary, capricious or motivated by a desire to circumvent their tenure rights, nor is there any support in the record or in the established case law to support such a contention.
>
> (Initial Decision at p. 15)

To the contrary, Superintendent Kern testified that it was the Board's practice, even prior to establishing the new Supervisor/Teacher positions, to require the Department Chairpersons to hold subject area endorsements in addition to their administrative certification.[1] The job description for the position of Department Chairperson reflects this requirement. (See Exhibit E, J-5.)

Moreover, the cases cited by petitioners do not support their tenure claims. In *Herbert*, supra, contrary to the facts essential to the instant matter, the State Board found that the board therein did not allege that the duties and responsibilities of the controverted assignment were

[1] Transcript from August 6, 1996 at p. 120.

such that instructional certification was necessary; rather, the board merely maintained that the position was unique in that it required "expertise" in the special education field. *Herbert* at 1760, 1761. The State Board specifically noted that a review of the record *did not* provide "any indication that the duties attending the controverted assignment were of such character as to require possession of an instructional certification in special education in addition to certification as a supervisor." *Herbert* at 1761.

Similarly, in *Timko v. Bridgewater Raritan Regional School District,* 94 *N.J.A.R. 2d* EDU 475, 482, 483, 95 *N.J.A.R.* 12, affirmed by State Board on remand, affirmed N.J. Superior Court, Appellate Division, December 14, 1995, A-1810-94T1, the State Board, underscoring its findings and conclusion in *Herbert,* supra, further indicated that the *Timko* record did not enable it to determine the appropriate certification for the controverted positions, since neither job descriptions nor detailed analyses of the duties and responsibilities of the positions were provided. *Timko* at 483. The matter was, therefore, remanded, and there was no final resolution on the issue of whether the Board could properly require instructional certification for the newly created positions.[2]

So are the facts in *Rogers, supra*, distinguishable from the instant matter. There, a tenured supervisor, who held the title Department Chairperson-Social Studies, was riffed. The Board created the position of Cultural and Social Studies Supervisor, a position "which combined the Social Studies Department with foreign language and ESL." *Rogers* at 686. The Board appointed a nontenured supervisor to fill the position, notwithstanding that petitioner held the requisite certification. While the Commissioner affirmed that, indeed, "a supervisory certificate is general, *i.e.* not specific to a subject area," *Rogers at* 689, this case did not raise the issue of a supervisory

[2] Following the remand, Petitioner Timko withdrew his petition, and the Commissioner determined that Petitioner Mikush did not possess the proper supervisory certificate to enable him to claim the position he sought. *Timko, supra,* at 485.

position which encompassed duties requiring a subject area endorsement on an instructional certificate *in addition to general supervisory certification.*

As to the distinguishable facts in *Galbraith, supra*, the Commissioner endorses the ALJ's analysis as contained in the initial decision, and notes that the State Board of Education in affirming the Commissioner's decision, *again,* clarified:

> ***We find no indication in the record that the duties attending the controverted position are of such character as to require possession of an instructional certification in the subject field in addition to certification as a supervisor in order to be authorized by statute and regulation to perform such functions. See *Herbert v. Board of Education of the Township of Middletown*, decided by the State Board August 1, 1990, *aff'd* Docket #A-318-90T1 (App. Div. 1991); *Timko and Mikush v. Board of Education of the Bridgewater-Raritan Regional School District*, decided by the State Board, July 1, 1992, decision on remand by the Commissioner, June 13, 1994, *aff'd* by the State Board November 2, 1994. *Galbraith v. Board of Education of the Lenape Regional High School District, Burlington County*, aff'd State Board, June 5, 1996, Slip Opinion at pp. 1-2.

While an individual acquires *tenure* as a supervisor, without subject area distinction, the seniority regulations establish that seniority is determined according to years of employment in specific categories, *N.J.A.C.* 6:3-5.1(b), and *each supervisory title* shall be a separate category. *N.J.A.C.* 6:3-5.1(l)10. District boards are required to adopt job descriptions for each supervisory position which set forth the qualifications and specific endorsements required for the position. *N.J.A.C.* 6:3-5.1(l)10. In the instant matter, as the ALJ properly noted, "Department Chairperson" was an unrecognized title and, therefore, the holders of that position must be classified according to the duties they performed. *N.J.A.C.* 6:3-5.1(g). The Commissioner concurs with the ALJ that the regulations themselves do not support Petitioner Lisa's view that the category of supervisor must necessarily be broken down by specific grade level assignment, and that each category should be reflective of either the supervisory position title or the duties. (*Id.*)

Here, Petitioner Lisa does not allege that Intervenor Taylor's responsibilities as Math Department Chairperson for grades 7, 8, and 9 and grades 6, 7, and 8 (1982-90) were substantively different from her duties as a supervisor with high school assignments. As the initial decision indicates, but for the separate job description for the title Special Education Department Chair, the Board employed "a generic job description for 'Department Chairperson' that applied to all instructional areas," (Initial Decision at p. 10) and, apparently, to all applicable grade levels. Therefore, the record supports the Board's position that Intervenor Taylor, even excluding the time prior to his 1982 appointment as Math Department Chair has greater seniority than Petitioner Lisa in the Supervisor/Math category. Moreover, to the extent petitioner finds support in *Timko, supra,* and *Walldov, supra,* for her view that varying grade level assignments necessitate separate seniority categories for supervisors, the Commissioner notes that the seniority category determinations in those decisions did not simply rest on grade level distinctions, as Petitioner Lisa asserts, but rather on varied job responsibilities within different grade level assignments.[3]

Accordingly, the Commissioner determines to adopt the initial decision of the ALJ for the reasons expressed therein and amplified above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] However, the Commissioner further notes that, while not an issue herein, to the extent the ALJ's initial decision may be read to support the proposition that supervisory categories do not envision distinctions based on service solely at the elementary level or secondary level, as opposed to service on a K-12 basis, the Commissioner disavows that position.

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EDU #8186-95
C # 170-97
SB # 38-97

YVONNE LISA, ANN MOORE, ROBERT PETRILLO AND REGINA SUKONIK,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

RESPONDENT-RESPONDENT,

AND

ALLEN K. TAYLOR AND STEPHEN BUONO, JAMES BARNES AND MICHAEL LANDON.

RESPONDENTS-INTERVENORS/ RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 10, 1997

For the Petitioners-Appellants, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Capehart & Scatchard (Joseph F. Betley, Esq., of Counsel)

For the Respondent-Intervenor/Respondent Allen K. Taylor, John F. Hipp, Esq.

For the Respondents-Intervenors/Respondents Stephen Buono, James Barnes and Michael Landon, Rottkamp & Flacks (Robert B. Rottkamp, Esq., of Counsel)

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

August 6, 1997

Date of mailing AUG 08 1997

171-97

171-97

M.F., ON BEHALF OF M.A., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF CAPE MAY, CAPE MAY COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning parent appealed Board's determination that her child, M.A., must be tested for tuberculosis. Board contended that in August 1995, the New Jersey State Department of Health required that all students transferring in the 1995-96 school year from another state or from another country to a New Jersey public school be administered the Mantoux intradermal test, pursuant to *N.J.A.C.* 6:29-2.3(a)6.

ALJ denied petitioner's request to exclude her daughter from testing (*N.J.S.A.* 18A:40-18). Exemption would be made where a licensed physician documents a "significant tuberculin reaction and a subsequent negative chest X-ray." Petitioner, however, failed to supply such a report from a licensed physician. Thus, the ALJ ordered petitioner to comply with the regulation concerning tuberculin testing forthwith, *N.J.A.C.* 6:29-2.3, and that failure to do so within ten days of the final order of the Commissioner shall result in the exclusion of M.A. from the public schools of the State. Petition was dismissed.

Upon review of the record and the affidavits of the New Jersey State Department of Health regarding Mantoux testing, the Commissioner concurred with the ALJ that petitioner failed to demonstrate that M.A. should be exempted from the requirement to undergo a Mantoux test, pursuant to *N.J.A.C.* 6:29-2.3(a)6. Commissioner afforded petitioner the opportunity to comply with the regulation and reminded the Board that should petitioner not comply, the Board may exclude M.A. from attending public school in accordance with *N.J.S.A.* 18A:40-18. Additionally, the Board was reminded of its authority under *N.J.S.A.* 18A:38-27 *et seq.* to enforce the requirement that M.A. regularly attend school or receive equivalent instruction elsewhere (*N.J.S.A.* 18A:38-25).

APRIL 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2457-96

AGENCY REF. NO. 73-2/96

M. F., ON BEHALF OF M.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WEST CAPE MAY, CAPE MAY COUNTY,

Respondent.

M. F., on behalf of M.A, petitioner, pro se

Arthur F. Risden, Esq., for respondent, (Archer & Greiner, attorneys)

Record Closed: January 10, 1997 Decided: February 19, 1997

BEFORE **EDGAR R. HOLMES,** ALJ:

The New Jersey Legislature has required local school boards to determine the presence or absence of tuberculosis infection in "any or all pupils in public schools" in accordance with the State Board's rules. N.J.S.A. 18A:40-16. Should a pupil fail to comply with the Board's rules, the pupil may be excluded from school. N.J.S.A. 18A:40-18.

Pursuant to the mandate, the State Board of Education (Board) adopted rules for testing for tuberculosis infection. It adopted the Mantoux intradermal tuberculin test and declared the Mantoux test "shall be the only skin test used to detect evidence of tuberculosis infection in pupils and employees." N.J.A.C. 6:29-2.3(a)1. The Board also provided that the State Department of Health would identify the pupils to be tested by grade, school or circumstance. N.J.A.C. 6:28-2.3(a)2.

In August 1995, the New Jersey Department of Health required that all students transferring in the 1995-1996 school year from another state or from another country to a New Jersey public school be administered the Mantoux intradermal test.

In the fall of 1995, M.A. transferred into the West Cape May Elementary School first grade class from Litchfield, Connecticut. Her mother was notified that M.A. would have to undergo Mantoux testing. Her mother refused to permit the test to be performed and the District Board of Education (BOE) informed her of the exclusion provision in the statute, N.J.S.A. 18A:40-18. M.A.'s mother appealed the issue to the Commissioner and the matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case, pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, the act creating the OAL, N.J.S.A. 52:14F-1 to -13 and the statute conferring jurisdiction in the Commissioner for all controversies and disputes arising under School Law. N.J.S.A. 18A:6-9 The District BOE moved for summary judgment because the facts are not in dispute. The mother asserts that the Regulation is inapplicable to her daughter.

The Regulation permits an exemption where a licensed physician documents a "significant tuberculin reaction and a subsequent negative chest x-ray." N.J.A.C. 6:29-2.3.

Despite numerous continuances for petitioner to supply such a report from a licensed physician she has failed to do so. She has supplied reams of argument why her daughter should be exempt. None of the argument is accompanied by an expert's report such as would be cognizable in this tribunal.

As a result, I **ORDER** that the petitioner's request for relief from the Board's determination that the exclusion rule, N.J.S.A. 18A:40-18, is applicable to petitioner's daughter is **DENIED.**

I **ORDER** that petitioner comply with the regulation concerning tuberculin testing forthwith, N.J.A.C. 6:29-2.3 and that failure to do so within ten days of the FINAL ORDER of the Commissioner shall result in the exclusion of M.A. from the public schools of this State pursuant to the statute.

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

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

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

2/19/97
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

2/25/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 26 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 2457-96
AGENCY DKT. NO. 73-2/96

M.F., ON BEHALF OF M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CAPE MAY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, and taking particular note of the affidavits of the New Jersey State Department of Health regarding Mantoux testing offered by the Board, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate that M.A. should be exempted from the requirement to undergo a Mantoux test, pursuant to *N.J.A.C.* 6:29-2.3(a)6.[1]

Accordingly, the initial decision is adopted for the reasons expressed therein. The Petition of Appeal is hereby dismissed and petitioner is afforded an opportunity to comply,

[1] The New Jersey State Department of Health certifies, in pertinent part, that "N.J.A.C. 6:29-2.3(6) is only applicable where the presence of tuberculosis has already been confirmed through skin testing. It provides for an exemption from future Mantoux testing upon presentation of documentation from a licensed physician showing a significant tuberculosis reaction and a subsequent negative chest X-ray." (Affidavit of New Jersey Department of Health Re: Mantoux Testing, October 11, 1996, at p. 2)

within 10 days of the date of this decision, with the regulation concerning testing for tuberculosis infection. Should petitioner not so comply, the Board may exclude M.A. from attending public school, in accordance with *N.J.S.A.* 18A:40-18. In this regard, petitioner is reminded of her obligation under *N.J.S.A.* 18A:38-25 to ensure that M.A. regularly attends school or receives equivalent instruction elsewhere, and the Board is similarly reminded of its authority under *N.J.S.A.* 18A:38-27 *et seq.* to enforce this requirement, where necessary.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 10, 1997
DATE OF MAILING APRIL 10, 1997

171-97

EDU #2457-96
C # 171-97
SB # 37-97

M.F., on behalf of M.A.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WEST CAPE MAY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 10, 1997

For the Petitioner-Appellant, Meredith G. Flersham, pro se

For the Respondent-Respondent, Archer & Greiner (Arthur F. Risden, Esq., of Counsel)

On April 10, 1997, the Commissioner of Education issued a decision in which he dismissed the petition filed by M.F. (hereinafter "appellant"), in which she sought to have her child, M.A., exempted from the requirement of undergoing a Mantoux intradermal tuberculin test pursuant to N.J.A.C. 6:29-2.3 when she transferred to a district in the State.

On April 21, 1997, appellant, acting pro se, filed a notice of appeal with the State Board.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of her appeal was due on May 12, 1997, 20 days after the appeal was filed. Appellant, however, failed to

7/2/97

file a brief by that date. By letter dated May 15, 1997, the counsel for the State Board notified appellant that no appeal brief had been filed and that this matter was therefore being referred to the Legal Committee of the State Board for consideration of her failure to perfect the appeal. Appellant has still failed to file a brief in support of her appeal, nearly two months after the deadline for such filing and seven weeks after she was notified of her failure to file. Nor did appellant respond to that notice or provide any explanation for her failure to file a brief until this morning when she indicated in a letter to the Legal Committee that she has been busy during this period on divorce proceedings in New York. She also requested additional time to "find, interview and...retain" legal counsel, and asked that her submission be considered as her appeal brief in the event her request for additional time were to be denied.

We conclude that the belated explanation offered by appellant does not, under the circumstances, excuse or justify her failure to file an appeal brief for nearly two months or to request an extension for such filing. Appellant's involvement in unrelated legal proceedings in New York does not in any way excuse her disregard of our filing deadlines or her failure to request an extension. Consequently, while we are mindful of appellant's pro se status, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

July 2, 1997

Date of mailing JUL 08 1997

172-97

172-97

IN THE MATTER OF THE TENURE	:	
HEARING OF RONNIE BRIDGERS,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF PATERSON, PASSAIC	:	DECISION
COUNTY.	:	

APRIL 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5547-96

AGENCY DKT. NO. 152-4/96

IN THE MATTER OF THE TENURE HEARING OF RONNIE BRIDGERS, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

Gregory G. Johnson, Esq., attorney for petitioner

Harold N. Springstead, Esq., attorney for respondent (Springstead & Maurice, attorneys)

Record Closed: February 18, 1997 Decided: February 18, 1997

BEFORE **MARIE P. SIMONELLI, A.L.J.**

Petitioner sought to remove respondent from his tenured position as a custodian on charges of neglect of duty and insubordination.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on May 24, 1996. The OAL scheduled a hearing for May 5, 6 and 7, 1997.

Prior to the scheduled hearing date, the parties agreed to settle this matter. On February 18, 1997, they submitted the attached Stipulation of Settlement, dated August 13, 1996, which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Feb. 18, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

Feb. 27, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

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39 Hudson Street
Hackensack, New Jersey 07601
(201) 487-1414
Attorneys for Respondent

FEB 13 11 35 AM '97

IN THE MATTER OF THE TENURE HEARING OF RONALD BRIDGERS, STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 152-4/96

STIPULATION OF SETTLEMENT

The petitioner, State-Operated School District of the City of Paterson (hereinafter the "District), and the respondent, Ronald Bridgers, residing at 200 17th Avenue, Paterson, New Jersey, hereby stipulates and agrees as follows:

WHEREAS, tenure charges are pending against Mr. Bridgers seeking his termination from employment as a custodian due to allegations of neglect of duty, misbehavior and insubordination; and

WHEREAS, Mr. Bridgers has denied said charges; and

WHEREAS, the State Superintendent of Schools of Paterson determined to subcontract the District's custodial services and abolish all custodial positions in the District, effective, June 30, 1996; and

WHEREAS, respondent's position was among those abolished; and

WHEREAS, said decision to subcontract was made for reasons unrelated to this proceeding, but results in there being no position for respondent to return to if he were to prevail in this case; and

WHEREAS, said decision therefore renders this proceeding moot except for the issue of back salary related to respondent's 120 suspension without pay;

IT IS on this _____ day of _____, 1996; agreed that:

1. The District shall and hereby does withdraw and dismiss its tenure charges against Mr. Bridgers because they are now moot;

2. The District will include Mr. Bridgers and his position in, and as part of, its reduction in force, effective June 30, 1996, thereby terminating Mr. Bridgers' employment in the same manner as that of all other custodians, except as otherwise provided herein;

3. The District will continue Mr. Bridgers' salary, health insurance benefits and pension contributions through August 31, 1996 in compromise of Mr. Bridgers claim regarding his 120 days suspension without pay. Mr. Bridgers agrees not to apply for work with the Paterson School District or any contractor providing custodial services to the District.

4. No further salary, benefits or any other contractual term or condition of employment shall be due or owing to Mr. Bridgers beyond the entitlements specified herein.

5. Mr. Bridgers hereby permanently waives and release any and all claims to back salary and/or any other payment, in return for the District's compliance with this Agreement with the exception of whatever monies he is entitled to statutorily by virtue of a workers compensation claim for injuries he sustained on December 27, 1995. Mr. Bridgers retains the right to enforce the terms of this Agreement.

6. This Agreement is in the public interest since it achieves a reduction in the costs of litigation which would be an unnecessary expenditure under these circumstances.

7. Mr. Bridgers acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

8. The undersigned representatives of the District hereby acknowledge that they have been duly authorized by the District to sign this Agreement and bind the District to its terms.

9. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

10. In the event that the District is prevented from, unable or unwilling to fulfill the terms of this Agreement, for any reasons, the rights of the parties shall return to the status quo prevailing prior to the signing of this Agreement.

11. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of an employee, now or in the future, other than Mr. Bridgers.

12. The parties acknowledge that this Agreement must be approved by the Administrative Law Judge and the Commissioner of Education before it becomes effective. This Agreement shall be null and void if not so approved.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Michelle Gerson
Witness:
Dated: August 13, 1996

Ronnie Bridgers
RONALD BRIDGERS

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Rhelonia Pegram
Witness:
Dated: August 23, 1996

BY Edward Wilds

OAL DKT. NO. EDU 5547-96
AGENCY DKT. NO. 152-4/96

IN THE MATTER OF THE TENURE	:	
HEARING OF RONNIE BRIDGERS,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF PATERSON, PASSAIC	:	DECISION
COUNTY.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 11, 1997
DATE OF MAILING APRIL 11, 1997

173-97

173-97

FRANK A. CAPUTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11617-95

AGENCY REF. NO. 351-8/95

FRANK A. CAPUTO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY.

Wayne J. Oppito, Esq., for petitioner

Mark J. Blunda, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: February 14, 1997 Decided: February 19, 1997

BEFORE **MARYLOUISE LUCCHI-McCLOUD,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 18, 1995 as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties agreed to settle the matter and prepared the attached Stipulation of Settlement.

Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have agreed to the settle the matter as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the settlement be approved. It is further **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision on this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

2/19/97
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

Feb. 27, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

am

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS

A PROFESSIONAL CORPORATION

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WRITER'S DIRECT DIAL NUMBER:

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[◊] ADMITTED IN JURISDICTION (S) OTHER THAN NJ

NOEL D. HUMPHREYS
PATRICIA M. KERINS
DIANE M. LAVENDA
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LAURA E. KORFMANN
BARBARA A. SCHWARTZ
HARRIS C. GOLDBLAT
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CRAIG ECKSTEIN
PETER J. KOZLOWSKI
JONATHAN N. MARCUS
MONICA D. PALESTIS
ANTHONY J. TUTHS
SERENA VISWANATHAN
ELNARDO J. WEBSTER II

PLEASE REPLY TO NEWARK

February 13, 1997

FEB 14 2 PM

The Honorable Marylouise Lucchi-McCloud
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Dover School District and Frank Caputo

Dear Judge Lucchi-McCloud:

Pursuant to previous telephone discussions with counsel for the above referenced parties, enclosed please find original and one copy of fully executed Stipulation of Settlement. The parties hereby request your review and approval.

Respectfully submitted,

Mark J. Blunda

MARK J. BLUNDA

MJB/at
cc: Wayne Oppito, Esq.
Margaret A. Fischer, Superintendent

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent

FEB 14 2 [illegible] 97

FRANK A. CAPUTO,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY REF NO. 351-8/95 OAL DOCKET NO. EDU - 11617-95
Petitioner,	:	
-vs-	:	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION OF TOWN OF DOVER, MORRIS COUNTY,	:	
Respondent.	:	

In consideration of the mutual promises and undertakings contained in this Agreement, Petitioner, Frank A. Caputo, and Respondent, Town of Dover Board of Education ("Board"), hereby agree that the above-captioned matter and any and all other claims, rights and obligations between the undersigned parties shall be resolved as follows:

1. Upon approval of this settlement by the Dover Board of Education and The Commissioner of Education of the State of New Jersey, the administrative action captioned Frank A. Caputo v. Board of Education of the Town of Dover, Morris County, bearing OAL Docket No. EDU-11617-95 and Agency Ref. No. 351-8/95 shall be dismissed with prejudice.

2. Frank A. Caputo hereby waives any and all claims to tenure, seniority and employment in the Dover School District in any position and under any certification. This waiver includes, but is not limited to any and all claims to entitlement to employment in the positions of principal, vice-principal, dean of students, and any and all administrative,

supervisory or teaching positions that currently exist or may at any time in the future exist in the Dover School District

3. Within fifteen (15) days of receipt by the Board of the Commissioner of Education's approval of this settlement, the Board shall issue to Frank A. Caputo, through his attorney, Wayne J. Oppito, Esq., payment in the amount of Ten Thousand ($10,000) Dollars, minus any required Federal and State withholdings, representing full and final satisfaction of all claims against the Respondent Board, its agents and employees. It is agreed that there shall be no other payments to or on behalf of Frank A. Caputo by any party in settlement of this matter, including for attorney's fees and costs.

4. The parties agree that this payment represents the compromise of disputed claims and is not an admission of liability, negligence or wrongdoing by the Respondent or any of its agents, representatives or employees. This settlement was reached by the parties as a business judgment bearing in mind the cost, disruption and uncertainty of litigation.

5. Frank A. Caputo represents that other than the above-captioned matter, he has not filed any charges, complaints, grievances or claims of any kind against The Board of Education of the Town of Dover, Morris County, its agents or employees in any court or administrative agency, and covenants that no such claims shall at any time hereafter be filed.

6. Each party shall be responsible for its own attorneys' fees, costs and expenses incurred in connection with this matter. Frank A. Caputo represents and covenants that the amount set forth in Paragraph 2 constitutes full payment of any such fees, costs and expenses which he has claimed or might have claimed against Respondent.

7. Frank A. Caputo for himself, his heirs, executors, administrators and assigns hereby releases and forever discharges the Board of Education of the Town of Dover, Morris County, its agents, members and employees from all claims, causes of actions, suits, etc., which he now has or ever had from the beginning of the world to the present date including, but not limited to all claims, causes of action, suits, etc., asserted or which could have been asserted by Frank A. Caputo in the above-captioned action. It is the understanding and agreement of the parties that the release provided in this paragraph shall be a General Release in all respects.

8. The parties to this Agreement acknowledge that they have been represented by independent legal counsel of their own choice throughout all of the negotiations that preceded the execution of this Agreement and General Release. The parties acknowledge and represent that they have carefully read and fully understand all of the provisions herein and that they have voluntarily executed same without coercion or duress.

9. This Agreement and General Release constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement and General Release.

10. The parties agree that this Agreement will be construed and governed by the laws of the State of New Jersey, without regard to principles of conflicts of law, and the parties hereby submit to the jurisdiction of the Commissioner of Education and Office of Administrative Law with regard to enforcement of this Agreement.

Date: February 5, 1997

FRANK A. CAPUTO, PETITIONER

DOVER BOARD OF EDUCATION, RESPONDENT

Frank A. Caputo

By: Margaret A. Fischer

OAL DKT. NO. EDU 11617-95
AGENCY DKT. NO. 351-8/95

FRANK A. CAPUTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 11, 1997
DATE OF MAILING APRIL 11, 1997

174-97

174-97

HOWARD SCHOEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, resident and taxpayer of Edison Township, alleged prior to a special bond referendum election held on December 12, 1995, the Board prepared and distributed at taxpayer expense a newsletter exhorting voters to approve the referendum. Additionally, petitioner alleged public funds were expended for a consultant who prepared letters and a phone bank script that were ultimately rejected by the Board as inappropriate for use. Petitioner contended Board violated proscriptions established in *Citizens to Protect Public Funds.*

ALJ concluded that petitioner did not prove that the documents in question violated the proscriptions in *Citizens*. ALJ found that although the general tenor of the newsletter favored an affirmative vote, it did not explicitly urge or exhort voters to vote "yes." Nor was there any indication that it distorted facts. Petition was dismissed.

Commissioner concurred with the conclusion of the ALJ that the Board did not violate the law within the meaning of *Citizens*. Petition was dismissed. The Commissioner, however, cautioned boards to exercise due diligence in establishing the parameters of election-related informational material to be prepared at board expense, whether by staff or specially contracted consultants.

APRIL 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 360-96

AGENCY DKT. NO. 485-12/95

HOWARD SCHOEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,

Respondent.

Howard Schoen, petitioner, *pro se*

Viola S. Lordi, for respondent, (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: February 10, 1997 Decided: February 25, 1997

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is a resident and taxpayer of Edison Township. He alleges that 3 documents prepared by or at the direction of the Board of Education of the Township (Board or respondent) prior to the December 12, 1995 bond referendum election violated the proscriptions established in

Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills, 13 N.J. 172 (1953).

Pursuant to *N.J.S.A.* 18A:6-9, petitioner filed his original petition with the Department of Education on December 26, 1995. On or about January 23, 1996 respondent filed and served an answer and affirmative defenses. On January 30, 1996, the instant matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act.

On April 4, 1996 Chief Judge Barbara A. Harned entered an Order consolidating this case with 6 other cases for the sole purpose of determining whether the enactment of L. 1995, c. 278 removed the subject matter of these 7 cases from the jurisdiction of the Commissioner of Education. On June 11, 1996 Judge Harned ruled that the aforesaid legislation did not remove the Commissioner's jurisdiction.

On August 16, 1996, the petitioner moved to file and serve an amended petition. After a telephone conference held on September 19, 1996, I granted the motion. An amended petition and an answer and affirmative defenses were duly filed thereafter.

On or about December 26, 1996, petitioner filed a motion for summary decision together with a letter memorandum in support thereof. On January 6, 1997, respondent filed a cross-motion for summary decision with a supporting letter memorandum. Reply memoranda were filed thereafter by both petitioner and respondent.

Both parties contend, and I concur, that the essential and material facts in this case are not in dispute and therefore that the case is ripe for summary decision. See, *N.J.A.C.* 1:1-12.5; Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73-75 (1954); and Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995).

FACTS

On December 12, 1995, the Board conducted a bond referendum election wherein the Board sought the approval of the voters for a bond issue in the amount of $23,000,000 to fund classroom additions, capital projects, mechanical modifications, roofing projects, and compliance with regulations promulgated under the Americans With Disabilities Act. In this election the proposed bond issue was defeated.

Prior to the election, the Board retained a consultant (Ron Shapella) to develop informational materials for distribution to the public. The consultant prepared 3 different kinds of materials: (1) a Special Election Report (also referred to as the "newsletter"); (2) 8 draft letters to the editor of local newspapers; and (3) a phone bank script. The Board used public funds to pay for the preparation of these materials. Melindo A. Persi, the Edison Township Superintendent of Schools, reviewed the materials prepared by Shapella before their use and determined that the draft letters and the phone bank script were inappropriate for distribution to the public because they were one-sided in favor of approval of the bond issue. As a result, the draft letters and the phone bank script were not used, but the newsletter was distributed to the public.

PETITIONER'S CONTENTIONS

Petitioner asserts that the newsletter "does not restrict itself to informing voters of facts concerning the bond referendum" and "on the whole. . . is an exhortation to voters to approve the bond referendum." He also alleges that the newsletter "contained no articles or any information which was critical to the referendum and was limited to presenting facts and information in a positive light." He makes the same allegations with respect to the draft letters and the phone bank script. He concludes that the Board's expenditure of public funds on these materials constituted an improper use of public funds, citing Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills, supra. Petitioner also cites several other cases which he alleges support his argument, viz., Schettino v. Ridgefield Board of Education, 93 N.J.A.R. 2d. 224 (EDU); Fenton v. Sullivan, 1991 S.L.D. 677 (Comm'r decision dated April 23, 1991); Burghardt v. Board of Education of the Township of Mahwah, OAL Dkt. No. EDU 10875-93 (Ass't Comm'r

decision dated November 29, 1993); In the matter of the Annual School Election of Old Bridge Township, 94 N.J.A.R. 2d. (EDU) 230; and Enterline v. Board of Education of the Township of Hillsboro, 96 N.J.A.R. 2d. (EDU) 114, 115.

RESPONDENT'S CONTENTIONS

The Board denies petitioner's allegations, asserting that the newsletter sets forth only relevant facts to aid the voters in reaching an informed judgment when voting on the school bond election proposal on December 12, 1995 and pointing out that the draft letters and the phone bank script were disapproved and never utilized and therefore cannot contravene the proscription of the Citizens to Protect case. By way of support for its position, respondent cites, among other cases, In the Matter of the Annual School Election of Borough of Somerdale, OAL DKT. NO. EDU 3921-82, Agency Docket No. 99-4/82A (Comm'r of Educ. September 24, 1982).

DISCUSSION AND ANALYSIS

The newsletter consists of four pages. Page 1 has three articles, the main article (unsigned) dealing with the "need" to upgrade buildings to meet current health and safety regulations and to prepare for increasing numbers of local children who will be attending school. The second article is by the Superintendent of Schools (Melindo A. Persi); it deals with the "priority" item of repairing and refurbishing school facilities and asserts that this cannot be accomplished within the "current operating budget." The third article is entitled "Retooling for Excellence" and notes the "five key areas," with estimated costs, to be addressed by the proposed bond issue.

Page 2 consists of a question and answer column and informational material, including: recent history leading to the referendum, the names of the schools affected, and "dates to remember" (such as dates of public meetings with the superintendent). At the bottom of the page is a box declaring: "YOUR VOTE COUNTS! Your schools need your participation. Come out and vote on December 12!"

Page 3 contains three articles. The first is entitled "Financing" and, among other things, explains the project average tax increase to the taxpayers. The second is a column with 3 questions and answers. The third is a listing of polling places for the December 12 election.

Page 4 consists of a copy of the sample ballot, the return address of the Superintendent's office, and a list of the members of the Board of Education.

The 8 draft letters and the phone bank script clearly and unequivocally urge potential voters to vote "yes" on the referendum, i.e., to approve the bond referendum.

In my opinion, no violation of law has occurred with respect to the draft letters and the phone bank script. The reason, as stated by respondent's counsel, is two-fold: (1) the Board "self-policed" the materials it ordered to be prepared, and (2) the Board declined to use the materials after the superintendent of schools determined that they were too one-sided in favor of the approval of the proposed bond issue. Petitioner asserts that the use of public funds to prepare such materials is improper and/or illegal, but he is unable to cite, nor am I aware of, any authority to that effect.

The use of the newsletter is a much closer question.[1]

In Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills, 13 N.J. 172, the court held that the Parsippany-Troy Hills board of education exceeded its authority by distributing a pamphlet exhorting voters to vote "yes" on a building program, and over-dramatizing the dire consequences of not voting for the program. However, it clearly stated that the board had the power to give voters relevant facts to make informed judgments when voting upon the proposal (Id. at 179). The court went on to say that the board had a duty to formulate the construction program in the first instance (Id. at 180) and further:

[1] There is a great deal to be said for the concurring opinion of Justice Heher in Citizens to Protect, supra. He warned that the majority of the Court might be over-extending itself, pointing out that "censorship is not of the judicial province." 13 N.J. at 183. Nevertheless, it is the majority opinion that must be followed.

> We do not mean that the public body formulating the program is otherwise restrained from advocating and espousing its adoption by the voters. Indeed, as in the instant case, when the program represents the body's judgment of what is required in the effective discharge of its responsibility, it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto. The question we are considering is simply the extent to and manner in which the funds may with justice to the rights of dissenters be expended for espousal of the voters' approval of the body's judgment. Even this the body may do within fair limits. (Id. at 181-182)

I have read and considered the cases cited by counsel. Most of those cited by petitioner are distinguishable from the instant case, the boards of education in those cases rather clearly having crossed the permissible line between a fair presentation and a one-sided, unbalanced one. For example, in Enterline, supra, the newsletter contained graphics which "distorted" the facts "in the apparent hope that one picture is worth a thousand words." In Schettino, supra, the school-funded flyers distributed in a local school board election patently crossed over the line into partisan politics. Those cases - - e.g., Burghardt v. Board of Education of Mahwah and Fenton v. Sullivan, both supra - - which are not readily distinguishable, are, in my opinion, inconsistent with the language and reasoning of the Citizens to Protect case.

On the other hand, I find the Somerdale case, supra, to be persuasive. The newsletter in Somerdale favored an affirmative vote, but it did not ask the voters to vote "yes" on the proposed bond issue. The administrative law judge concluded that the presentation was fair and not violative of any statute. His decision was affirmed by the Commissioner. In my opinion, the Somerdale decision is fully consistent with the language and reasoning of the Supreme Court in Citizens to Protect.

As for the instant matter, although the tenor of the newsletter clearly favored an affirmative vote, it did not explicitly urge or exhort the voters to vote "yes." Nor is there any indication that it distorted the facts or over-dramatized the need for the bond issue. Further, there is no evidence that the views of any dissenters were suppressed or belittled, or even that any organized opposition existed and desired to be heard.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that petitioner has been unable to prove that the documents in question violated the proscriptions established in Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills, supra, and, accordingly, that his petition should be **DISMISSED.** It is so **ORDERED.**

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

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

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

February 25, 1997
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

2/26/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 360-96
AGENCY DKT. NO. 485-12/95

HOWARD SCHOEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4. Intervenor also filed a timely statement indicating that it would rely upon the response of the Board in reply to petitioner's exceptions.

Petitioner's exceptions incorporate arguments advanced before the Administrative Law Judge (ALJ), contending, *inter alia*, that the Board violated the law in preparing draft letters to the editor and a draft phone script relating to a bond referendum. He disagrees with the ALJ's finding that no violation occurred, citing *Enterline, supra*, to support his position that even if an explicit exhortation to vote "yes" for a referendum is absent from a board newsletter, such exhortation can still functionally exist if the publication offers arguments to persuade voters that only one side has merit. (Exceptions at pp. 1-2) Petitioner also disagrees with the ALJ's finding that there was no evidence that any organized opposition existed desiring to be heard. (Exceptions at p. 2) Next, petitioner asserts that the ALJ's interpretation of case law would require opponents to be organized and express notice of dissent with a board in order to secure their rights under *Citizens to Protect Public Funds, supra.* (Exceptions at p. 3)

Petitioner then objects to the ALJ's reliance on *In the Matter of the Annual School Election of Somerdale, supra,* characterizing such reliance as peculiar and again urging that the case be decided pursuant to *Enterline, supra,* as it is the Commissioner's most recent ruling on this type of case. (Petitioner's Exceptions at p. 3)

Lastly, petitioner excepts to the finding that the expense related to preparing the draft documents was not a violation of law because they were not distributed to the public. He cites *Smith v. Dorsey*, 599 *So. 2d* 529 (Miss. 1992) to support his contention that, "the public harm is done upon the improper expenditure being made, and whether the object of the improper expenditure is used or not bears little or no relevance***." (Petitioner's Exceptions at pp. 3-4)

In reply, the Board contends that the initial decision is correct and should be affirmed. It agrees with the ALJ's contention that the Board policed itself when it declined to distribute the draft letters and phone bank script and that it therefore acted appropriately. It avers that petitioner's claim that the Board acted unlawfully and is thereby strictly liable, simply because these materials were purchased with public funds, is unsupported by case law. (Reply Exceptions at pp. 3-4) It distinguishes *Smith, supra,* from the instant case by pointing out that there the board actually used public funds to hold an event and hire campaign workers to promote the passage of a bond referendum, whereas here, the Board's own review procedures prevented the biased message from ever reaching the public. (Reply Exceptions at p. 4)

The Board further urges affirmance of the ALJ's finding that the newsletter in question "complied with the law by setting forth accurate information on foreseeable consequences, both good and bad, that would result if the proposed bond issue were approved." (*Id.* at p. 6)

Upon a careful and independent review, the Commissioner concurs with the conclusion of the ALJ that the Board did not violate the law within the meaning of *Citizens to Protect Public Funds, supra,* for the reasons expressed therein and as further explicated below.

Initially, the Commissioner notes that the language of *Citizens* contemplates that a board will work for passage of its own initiatives but that its ability to spend public funds must be circumscribed by promulgation of materials that are informative and balanced, rather than exhortative and advocative. Wherefore, if there is no evidence that the information provided by a board is deliberately incomplete, inaccurate, or selectively biased, the mere absence of mention

of opposing viewpoint(s) is not sufficient to warrant a finding that the material contravenes *Citizens to Protect Public Funds, supra.*

Thus, with respect to the present case, the Commissioner affirms the finding that the Board's newsletter was not improperly advocative. Such finding, and the basis upon which it is predicated, is made in full consideration of the *Enterline* decision, and the cases before it, noting that the contents of the instant newsletter, as challenged, do not cross the line of impropriety that was evident in that matter. Neither does the Commissioner find it unreasonable that the Board hired a consultant to prepare documents concerning the upcoming referendum. However, in that the Board ultimately was compelled to decline to distribute at least part of the materials, the Commissioner finds that the Board should have been more diligent in seeking to prevent such an occurrence by establishing, at the outset, appropriate parameters for the materials to be prepared.

Further, the Commissioner notes that the record herein is devoid of any indication that the Board actively sought to exclude or minimize opposing views whether organized and expressed by notice, or not. The Commissioner will not, therefore, infer wrongdoing where none is evident.*

Accordingly, for the reasons expressed therein and above, the Commissioner adopts the initial decision of the OAL, and dismisses the instant Petition of Appeal. In so doing, however, he cautions the Edison Board of Education and all other boards, to exercise due diligence in establishing the parameters of informational material to be prepared at board expense, whether by staff or specially contracted consultants.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* In rendering this decision, the Commissioner stresses that he has not ignored his prior determinations, including *Burghardt, supra,* and *Fenton, supra,* which, unlike the ALJ, he does not view as inconsistent with *Citizens, supra.* However, neither does he find that those cases warrant the relief sought by petitioner when applied to this matter.

APRIL 11, 1997
DATE OF MAILING APRIL 11, 1997

176-97

176-97

THE BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
OLGA GONZALES,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought summary decision on certification requirements as they pertain to respondent's alleged wrongful nonrenewal as Basic Skills Instructor for Limited English Proficient Students.

Initially, the ALJ found that there were no genuine issues of material fact in this matter; thus, the matter was ripe for summary judgment. Secondly, the ALJ found that the Board demonstrated that, in accordance with applicable regulations, respondent was required to hold a valid New Jersey instructional certificate in elementary education, as well as an endorsement in bilingual education, in order to hold the position of Basic Skills Instructor for Limited English Proficient Students.

Commissioner adopted findings and determination in initial decision as his own.

April 11, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11361-95

AGENCY DKT. NO. 322-8/95

THE BOARD OF EDUCATION CITY OF PASSAIC, PASSAIC COUNTY,

Petitioner,

v.

OLGA GONZALES,

Respondent.

Robert J. Merryman, Esq., for petitioner
(Carroll & Weiss, attorneys)

Kenneth C. Marano, Esq., for respondent
(Norberto H. Yacono, attorney)

Record Closed: December 2, 1996 Decided: February 19, 1997

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

Petitioner, the Passaic Board of Education, (Petitioner Board or District) moves for summary decision finding that the position of a Basic Skills Instructor (BSI) for Limited English Proficient Students (LEP or BSI/LEP) requires a Bilingual Education Endorsement. The respondent, Olga Gonzales, (respondent or Gonzales) opposes the motion contending that genuine issues of material fact exist.

PROCEDURAL HISTORY

This matter was commenced in the Superior Court of New Jersey, Passaic County when Gonzales filed a complaint against the Board and its superintendent, Beryl Zankel alleging that the defendants engaged in employment discrimination and breach of contract when it dismissed her from her position.[1] In that matter, the Board defended the dismissal on the basis that Gonzales did not hold the appropriate certification for her position. On September 18, 1995 the Honorable Nicholas G. Mandak, A.J.S.C. entered an Order that transferred to the Commissioner of Education, (Commissioner) the issue of the appropriate teacher certification for the position of BSI/ LED.

On August 18, 1995, the Board filed a petition for a declaratory judgment on the certification issue with the Commissioner. On October 5, 1995, the Commissioner transferred the matter to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 15:14F-1 to 13. The matter was assigned to the undersigned on November 13, 1995. A prehearing conference was held on March 12, 1996 and the matter was scheduled for plenary hearing on October 1, 10, and 11. Those dates were adjourned at the request of the respondent and new hearing dates were scheduled.

On October 23, 1996, the Board moved for summary decision. On December 2, 1996 respondent filed a brief in opposition to said motion. A responding brief was filed by the Board on December 5, 1996 at which time the record was closed.

[1] Gonzales is the plaintiff in this Superior Court and the Board and the superintendent are the defendants. In this proceeding she is the respondent and the Board is the petitioner.

FACTS

Based on a review of the record, I **FIND** the following **FACTS**:

Gonzales was employed by the District in November 1986, as a substitute teacher in its Bilingual/English as a Second Language Program (ESL). In December 1986, Gonzales was assigned to a full time bilingual teaching position where she remained until she resigned in November, 1988. In September 1989, Gonzales returned to the District and the parties executed a contract wherein Gonzales was assigned to a bilingual program teaching over-age students at Public School #11. The contract required Gonzales was to hold certifications as a permanent teacher of Spanish and as an elementary school teacher. Additionally, Gonzales was to be eligible to receive an Emergency Bilingual/Bicultural Certificate. (P-3).

Sometime, between April and June, 1990, Gonzales was notified by the District that it was having funding difficulties and thus she would not be hired for the 1990-91 school term. (P-4) (R-1).[2] Subsequently, the District found the necessary funding and was able to re-hire Gonzales. Gonzales was assigned to Public School #9 as a Basic Skills Instructor for Limited English Proficient Students (BSI/LEP). The parties memorialized the assignment in a written contract dated June 29, 1990. The contract provided that Gonzales would have appropriate certifications as a permanent teacher of Spanish and elementary education. Additionally, Gonzales was to maintain her eligibility to receive an emergency bilingual/bicultural certificate.

Prior to the commencement of the 1990-91 school term, two significant changes occurred. Gonzales was reassigned to teach at Public School #8. Further, she was designated as a First grade Bilingual teacher. (P-8). Gonzales voiced her displeasure with the assignment and alleges that she was promised a reassignment.

[2] P-4 refers to the petitioner's certifications attached to their brief in support of motion for summary decision. R-1 refers to the respondent's certification.

On October 23, 1990, the County Superintendent of Schools notified the Chief Administrator of the District that Gonzales did not renew her emergency bilingual certificate for the 1990-91 school term. It was further noted that employment without the proper certificate was prohibited under the terms of *N.J.S.A.* 18A:27-2. Accordingly, it was deemed "imperative" that the Board take immediate action. By letter dated October 31, 1996, the Board advised Gonzales that a personnel matter relating to her employment would be discussed at its November 6, 1990 meeting. By resolution dated 12, 1990, the Board voted to immediately terminate the Gonzales because she failed to renew her emergency bilingual certificate for the 1990-91 school year.

At this juncture, it is important to briefly note that the District has two distinctive basic skills positions. First, there is the basic skills position that teaches basic skills to elementary education students in the English language. This position is strictly limited to the development of basic skills and it requires that an instructor possess an elementary education certification. Since this basic skills class is taught in English only, it is not a part of the District's Bilingual Program.

The second BSI position is aimed at those students who are Limited English Proficient (LED). These students are instructed in their native language and English is a secondary language. Due to its bilingual nature, it is supervised by the District's Bilingual Program. A BSI/LED instructor requires an elementary certification and allegedly requires a bilingual certification also.

DISCUSSION AND CONCLUSIONS

The first issue is whether this matter is ripe for summary disposition. The second issue before this tribunal is whether a bilingual endorsement is needed to teach a basic skills course to LEP students.

N.J.A.C. 1:1-12.5 provides for summary decision when the papers and discovery, together with the affidavits, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. An adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. The standard for adjudicating whether summary decision should be granted was discussed in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), where the New Jersey Supreme Court held that the motion judge, after granting all favorable inferences to be drawn from the facts to the non-movants, is to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict.

> "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." That weighing process requires the court to be guided by the same evidentiary standard of proof- by a preponderance of the evidence or clear and convincing evidence- that would apply at the trial on the merits when deciding whether there exists a "genuine" issue of material fact.

Brill, *supra*, at 533-34; (citations omitted). Finally, when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id., at 540.

I **FIND** and **CONCLUDE** that there are no genuine issues of material fact in this matter. The respondent contends that factual issues exist because the petitioner misrepresented the nature of the school #9 position to her; that her contract with the petitioner is silent on the issue of what position she was to fill at school #9; that petitioner's motive for transferring respondent is questionable given the fact that they knew she would not be able to obtain a bilingual endorsement at such a late date; that she had actually obtained a bilingual endorsement; and that she was actually assigned

to a position that was taught half in English and half in the students' native language.[3] All of these arguments raise salient issues for the Superior Court proceeding. They, however, are not dispositive or germane to the issue before this tribunal. This proceeding is limited to the determination of the required certification to teach basic skills to LEP students.

Turning to the critical issue of the appropriate certification for a BSI/LEP instructor, a brief discussion of the State's Bilingual program (program) is warranted. The program was established when the New Jersey Legislature recognized that large numbers of children in New Jersey school systems come from environments where the primary language is not English. Thus, it was found that English only instruction provides an inadequate education for them. To address this inequity, the Legislature established programs for bilingual education to provide such students with opportunities equal to those whose primary language is English. Pursuant to *N.J.S.A.* 18A:35-15, a bilingual education must be provided to those students who are identified as Limited English proficient (LED). A LED student is one whose native language is other than English and who has sufficient difficulty speaking, reading, writing or understanding the English language as measured by an English Language Proficiency Test. *N.J.A.C.* 6:31-1.1.

To effectuate the Legislative intent of *N.J.S.A.* 18A:35-15, the Department of Education implemented regulations for the provision of a proper bilingual education. *N.J.A.C.* 6:31-1.1 to *N.J.A.C.* 6:31-1.16. The regulations provide a three tier approach for educating LEP students. In elementary school districts where there are at least one, but fewer than ten, LEP students, the district must provide English language services to the students in addition to the regular school program. *N.J.A.C.* 6:31-1.4(a)(1). The class is designed to improve the English language skills of those

[3] It should be noted that such instruction in half English and half the student's native language does not mean that the program is not a bilingual education program. Such programs are designed to "address the use of two languages within the curriculum." N.J.A.C. 6:31-1.5(d)(3). Respondent may be referring to "bilingual part-time component" instruction, in which the student is taught primarily in English, but is given developmental language and math instruction on a daily basis with a certified bilingual teacher. N.J.A.C. 6:31-1.1. As stated, such a program in any event requires the teacher to hold a bilingual endorsement.

children who have limited English proficiency. *N.J.A.C.* 6:31-1.1. Pursuant to *N.J.A.C.* 6:31-1.9(c), a teacher need only hold a valid New Jersey instructional certificate.

In districts where there are more than ten LEP students, the board must establish an English as a Second Language (ESL) program. *N.J.A.C.* 6:31-1.4(b). The ESL program is a daily developmental second language program which teaches aural comprehension, speaking, reading and writing in English using second language teaching techniques and incorporates the cultural aspects of the pupils' experience in their ESL instruction. *N.J.A.C.* 6:31-1.1. The ESL program must include an ESL curriculum, as well as compensatory education, special education, and vocational training programs. *N.J.A.C.* 6:31-1.4(b). In order to teach an ESL class, a teacher must have a valid New Jersey Instructional certificate with an endorsement in English as a Second Language. *N.J.A.C.* 6:31-1.9(b).

The most comprehensive educational program for LEP students is implemented when there are 20 or more LEP students of any one language classification in a school district. *N.J.A.C.* 6:31-1.4(c). This bilingual education program is a:

> full-time program of instruction in all those courses or subjects which a child is required by law or rule to receive, given in the native language of the children of limited English proficiency enrolled in the program and also in English; in the aural comprehension, speaking, reading and writing of the native language of the children of limited English proficiency enrolled in the program ... (as well as in) English; and in the history and culture of the country, territory, or geographic area which is the native land of the parents of children of limited English proficiency enrolled in the program and in the history and culture of the United States. All pupils in bilingual education programs receive English as a second language instruction.
> [*N.J.A.C.* 6:31-1.1.]

In addition to ESL instruction, LEP students in a bilingual education program must also be afforded opportunities for compensatory education, special education,

and vocational training. *N.J.A.C.* 6:31-1.4(b) & (c). A bilingual education program teacher must hold a valid New Jersey instructional certificate with an endorsement for the appropriate grade level and/or content area, as well as an endorsement in bilingual education. *N.J.A.C.* 6:31-1.9(a).

In this matter, I **FIND** that petitioner's school district has a bilingual education program, the third tier of LEP instruction. Further, the petitioner has a Bilingual Education Department. (See Certification of Nicholas Calamusa), Since the district is engaged in the third tier of LEP instruction, any teacher of LEP students must hold an endorsement in bilingual education. *N.J.A.C.* 6:31-1.9(a). I, therefore, **FIND** and **CONCLUDE** that the respondent was required to hold a valid New Jersey instructional certificate in elementary education as well as an endorsement in bilingual education.

Petitioner, avers that a basic skills instructor (BSI) teaches remedial math and reading skills to groups of approximately five students. Since basic skills instruction is a part of the bilingual education program, any teacher of LEP(BSI) classes must have a bilingual education endorsement. *N.J.A.C.* 6:31-1.9(a). I agree with the petitioner that any other finding would contravene public policy. *N.J.A.C.* 6:8-1.1 identifies LEP students as being pupils at risk of failing or dropping out of the public school system. Requiring teachers who would instruct these students to hold a bilingual endorsement, in addition to the certifications normally required of New Jersey teachers, helps to ensure that LEP students will be successfully educated. Further, to afford greater protection to LEP students taking standard classes, while denying it to students in need of remedial education, is clearly incongruent. Students in basic skills classes are even more "at risk" of failure than regular LEP students, and deserve, at a minimum, the same protection provided to their peers.

Because no genuine issue of material fact has been raised in regards to the proper certification necessary to teach basic skills to LEP students, petitioner's motion for summary is hereby **GRANTED**.

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

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

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

2/19/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

2/28/97
DATE

D M Costanzo Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 11361-95
AGENCY DKT. NO. 322-8/95

THE BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
OLGA GONZALES,	:	
RESPONDENT.	:	

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

Upon careful and independent review of the record, the Commissioner finds that the Board's motion for summary decision was properly granted, in that it has demonstrated that, in accordance with applicable regulations, respondent was required to hold a valid New Jersey instructional certificate in elementary education, as well as an endorsement in bilingual education, in order to hold the position of Basic Skills Instructor for Limited English Proficient Students.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.

April 11, 1997
Date of Mailing, April 11, 1997

COMMISSIONER OF EDUCATION

178-97

178-97

TOWNSHIP COUNCIL OF THE TOWNSHIP OF EWING,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWNG, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

APRIL 14, 1997

OAL DKT. NO. EDU 4829-96
AGENCY DKT. NO. 207-6/96

TOWNSHIP COUNCIL OF THE TOWNSHIP OF EWING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWNG, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 14, 1997
DATE SOF MAILING APRIL 14, 1997

179-97

P.D.R. AND C.D.R., on behalf of minor, C.D.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

APRIL 14, 1997

OAL DKT. NO. EDU 4456-96
AGENCY DKT. NO. 122-4/96

P.D.R. AND C.D.R., on behalf of minor, C.D.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 14, 1997
DATE OF MAILING APRIL 14, 1997

180-97

180-97

P.M. and F.M., on behalf of their minor son, F.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

APRIL 14, 1997

OAL DKT. NO. EDU 5027-96
AGENCY DKT. NO. 132-4/96

P.M. and F.M., on behalf of their minor son, F.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 14, 1997
DATE OF MAILING APRIL 14, 1997

182-97

182-97

CAROLYN E. RICKARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 14, 1997

OAL DKT. NO. EDU 2838-96
AGENCY DKT. NO. 115-3/96

CAROLYN E. RICKARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 14, 1997
DATE OF MAILING APRIL 14, 1997

181-97

181-97

DONALD SUTCLIFFE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 14, 1997

OAL DKT. NO. EDU 9840-96
AGENCY DKT. NO. 282-7/96

DONALD SUTCLIFFE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 14, 1997

DATE OF MAILING APRIL 14, 1997

183-97

183-97

CAROL DE LYON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning elementary school teacher alleged that the Board wrongfully reduced her salary in order to reimburse itself for overpayments, due to her being erroneously put on the wrong step of the salary guide for 1994-95. Board contended that petitioner failed in her duty to verify her correct salary and, thus, was equally responsible for the mistake. In its counterclaim, the Board sought restitution of its loss caused by a "mutual mistake of fact."

ALJ concluded that the Board's reduction of petitioner's existing salary for 1995-96 violated the statutory protection of the tenure law. ALJ noted petitioner acted truthfully in all her dealings with the Board. Therefore, the ALJ found that the remedy most faithful to the dual objectives of protecting a teacher's tenure rights and preventing misuse of public funds is to allow a school board to freeze a tenured employee's salary until such time as the corresponding step on the salary guide is reached and the board has recovered any overpayments. ALJ ordered that petitioner's salary remain frozen at $53,464 until a teacher of comparable training and experience would receive that level based on the negotiated salary guide and until the Board recovered all overpayments resulting from her incorrect placement on the guide. Moreover, the Board was ordered to pay petitioner $1,494 to reimburse her for the improper deductions during the 1995-96 school year.

Commissioner accepted in part and modified in part the initial decision of the ALJ. Commissioner concurred that the Board's reduction of petitioner's salary in the 1995-96 school year constituted a reduction in compensation which violated the statutory protection of the tenure law and the Board must reimburse petitioner for the amount of the improper deductions. Commissioner also concurred with the ALJ that where a board has erroneously overpaid a tenured staff member, it could freeze the staff member's salary at the erroneous level until such time as petitioner's salary on the negotiated salary guide equals or surpasses that which she was being paid. (*Markot)* Commissioner, however, declined to direct the Board to maintain its freeze until *all* overpayments are recouped. Because the error resulted from *a mutual mistake,* the Commissioner noted they should share the cost of the mutual error. Board was ordered to freeze petitioner's salary at $53,464 until the Board recouped one half of the total amount representing overpayments to petitioner.

APRIL 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1102-96
AGENCY DKT. NO. 435-11/95

CAROL DeLYON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN,
Respondent.

Nancy Oxfeld, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Robert M. Tosti, Esq., for respondent,
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: October 15, 1996 Decided: February 27, 1997

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

Statement of Facts

This is an appeal by a teacher who alleges that the board of education reduced her salary in violation of her tenure rights. Due to a clerical error, the petitioner Carol DeLyon received a higher salary in 1994-95 than the amount to which she was entitled under the salary guide. At the beginning of the 1995-96 school year, respondent Board of Education of Old Tappan ("Board") sought to rectify the error by restoring petitioner's salary to its appropriate level and demanding reimbursement of the overpayment.

Petitioner maintains that the Board's action constitutes a reduction in compensation prohibited by *N.J.S.A.* 18A:28-5. Further, she contends that the only remedy available to the Board is to freeze her salary at the higher level "until such time as her salary on the negotiated guide surpasses that which she is receiving." The Board argues that petitioner failed in her duty to verify her correct salary and, thus, is equally responsible for the mistake. In its counterclaim, the Board seeks restitution of its loss caused by a "mutual mistake of fact."[1]

Procedural History

On November 8, 1995, petitioner filed her petition with the Commissioner of Education ("Commissioner"). Respondent filed its answer and counterclaim on December 27, 1995. Petitioner filed her answer to the counterclaim on January 16, 1996. Subsequently, on January 10, 1996, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on September 12, 1996. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Most of the relevant facts are undisputed. **I FIND**:

Carol DeLyon has been employed by the Board as an elementary school teacher for many years. Both parties stipulate that Ms. DeLyon was erroneously put on the wrong step of the salary guide for 1994-95. A two-year agreement between the Board and the teachers' collective-negotiating unit incorporated a salary guide with various levels, depending on a particular individual's years of service and academic credentials. On June 20, 1994, the Board adopted a resolution approving the salary

[1]Initially, the Board also suggested that petitioner may be guilty of "deceit." After the hearing, however, the board conceded that there is no evidence that petitioner intentionally misled school officials about her salary status.

guide for 1994-95.[2] Under that guide, Ms. DeLyon should have been placed at Step 15 of the column applicable to teachers with a bachelor degree, which entitled her to an annual salary of $51,970. Instead, she was incorrectly placed on Step 15 for teachers with 15 or more graduate credits, which carried a greater salary of $53,464. As a result of this error, Ms. DeLyon received an extra $1,494 for the 1994-95 academic year.

Clearly the error originated in the district's business office and was not caused by Ms. DeLyon. In particular, Ms. DeLyon never misrepresented her academic attainments or claimed to have earned fifteen graduate credits. Nonetheless, the Board argues that Ms. DeLyon should have caught the error when she was asked to confirm her annual salary. At the beginning of the school year, then superintendent Raymond Albano, since retired, addressed a staff assembly for approximately one hour. Mr. Albano discussed a variety of personnel items, including the importance of signing and returning a salary-verification form.[3] While Ms. DeLyon attended this meeting, she has no specific recollection of this particular topic. She was familiar with the form, however, having routinely signed and returned it in prior years.

On or about September 6, 1994, Ms. DeLyon received a communication from the business office requesting that she "[p]lease confirm the information below concerning your 1994-95 salary and step by signing and returning this memo to your school office by September 13, 1994." Below these instructions appeared the following information:

deLYON, CAROL	BA-15-MAX	$53,464

In compliance with the instructions, Ms. DeLyon signed and returned the form as soon as she received it. Although the reference to "15 MAX" was meant to refer to her graduate credits, the form drafted by the district is ambiguous. Ms. DeLyon interpreted

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[2]The original agreement for 1993-94 had a notation that salaries for 1994-95 would be "developed by April 1, 1994." As it turned out, the salary guide for 1994-95 was not finalized until June 1994.

[3] The record is somewhat vague on whether Mr. Albano impressed upon his audience the purpose of the form as a check against possible error or merely reminded staff members to sign and return the document.

that language to refer to her step on the guide. Indeed, the record supports her understanding that in 1994-95 she was at Step 15, which also happens to be the maximum step for teachers holding a bachelor's degree. Since the district's own instructions asked her to confirm her "salary and step," it was reasonable for her to assume that "15-MAX" designated her step on the guide and not her graduate credits. Not having seen the negotiated salary guide for 1994-95, she had no way of knowing the true salary amount. It never occurred to her that her increase should be only 4%, rather than the 7% reflected in her employer's memorandum, because she did not know the percentage increase in the contract. As she had in past years, she relied on the accuracy of the Board's calculations and signed the document indicating her willingness to accept the salary offer for the upcoming year. Insofar as her state of mind may be legally significant, **I FIND** that Ms. DeLyon honestly answered the inquiry to the best of her knowledge, information and belief. Contrary to the Board's assertion, she was not under any obligation to check the underlying salary guide or consult her labor leaders. Thus, the Board and petitioner were both under the mistaken impression that the salary figure of $53, 464 was correct.

The Board itself did not discover the error until commencement of the next succeeding academic year. By letter dated September 1, 1995, the school business administrator notified Ms. DeLyon of the mistake and advised that her salary for 1995-96 would be reduced to $51,970. In subsequent correspondence dated September 20, 1995, the business administrator gave her the option of reimbursing the 1994-95 overpayment either by "check for $1,494 immediately" or by "payroll deductions totaling $1,494 between now and December 1, 1995." Meanwhile, however, Ms. DeLyon has changed her economic position and is unwilling to authorize any payment from her salary. She has already paid income taxes on her full earnings in 1994 and 1995 and recently incurred extraordinary expenses for a child who started college. Although the Board implemented the salary reduction for 1995-96, it has not attempted to collect the previous year's overpayment. Board counsel has represented that for the current 1996-97 academic year, Ms. DeLyon's salary has been restored to the former amount of $53,464 pending the outcome of this litigation.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's reduction of Ms. DeLyon's existing salary for 1995-96 violates the statutory protection of the tenure law.

N.J.S.A. 18A:28-5 provides that any teacher who has acquired tenure "shall not be dismissed or *reduced in compensation* except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause." (Emphasis added). *N.J.S.A.* 18A:10-6 reiterates that no tenured teaching staff member shall be dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct or other just cause and then only after a hearing to determine the validity of the charges. Related statutory provisions, not pertinent here, authorize school boards to reduce the size of its staff for reasons of economy or efficiency and place any affected employees on a preferred reemployment list. *N.J.S.A.* 18A:28-9 to -14.

A long line of school law decisions has interpreted this reduction-in-compensation language as prohibiting a local board from reducing a tenured employee's salary, unless the board successfully brings tenure charges or the employee is laid off or demoted as the result of a reduction in force. *See, e.g.*, *Kalapos v. Trenton Bd. of Educ.*, 93 *N.J.A.R.* 2d (EDU) 430 (Comm'r June 2, 1993) (overpayment due to clerical error); *Galop v. Hanover Twp. Bd. of Educ.*, 1975 *S.L.D.* 358 (Comm'r May 16) (inadvertent placement on wrong step of salary guide); *Anson v. Bridgeton Bd. of Educ.*, 1972 S.L.D. 638 (Comm'r Dec. 5) (administrative error in placement on salary guide); *Docherty v. West Paterson Bd. of Educ.*, 1967 *S.L.D.* 297 (Comm'r Oct. 23) (miscalculation of graduate credits).

Despite such clear legal precedent, respondent tries to distinguish the present situation on the grounds that the Board never specifically set Ms. DeLyon's salary and that Ms. DeLyon herself contributed to the error by failing to catch the Board's mistake.

Although some of the cases do emphasize the "fixing or establishing" of a particular employee's salary by the board of education, *see Trenton Educ. Ass'n v. Trenton Bd. of Educ.*, 1986 *S.L.D.* 2415, 2434 (Comm'r Oct. 6), not all of the reported decisions turn on such technical analysis. For instance, in *Docherty*, 1967 *S.L.D.* at 298, the school board adopted a resolution fixing teachers' salaries "at the salaries set forth in the 1966-67" and the school superintendent later made a mistake "in evaluating petitioner's credits." Even though the error was apparently attributable to an agent acting for the school board rather than to the board itself, the Commissioner held that the teacher cannot be deprived of a "vested right" to salary. *Docherty* at 300. Similarly, in *Anson*, the Commissioner ruled that teachers acquired vested rights at the time that the board of education "notified each petitioner of his salary for the 1970-71 school year." *Anson*, at 640. In *Rivers v. Mercer Cty. Area Vo-Tech. Schs*, 1984 *S.L.D.* 102 (Comm'r Jan. 17), the Commissioner declared that once a school board, through the signatures of its president and board secretary on the payroll, had fixed and paid petitioner's salary, the board had no authority to reduce it.

When the business administrator notified Ms. DeLyon of the 1994-95 salary, he was only implementing the Board's instructions. Moreover, the Board actually paid her at the higher amount for the entire 1994-95 school year. Indeed, the only action which may have been unauthorized by the Board was the business administrator's unofficial action to reduce her salary in 1995-96 to correct a prior administrative error. *See Stockton v. Trenton Bd. of Educ.*, 210 *N.J. Super.* 150, 157 (App. Div. 1986).

Additionally, the Board argues that it may reduce petitioner's salary because the mistake was due, in part, to her own negligence. Several cases have stated that a school board cannot require reimbursement of monies "paid in error through no fault of the employee," *Kalapos*, 93 *N.J.A.R.* 2d at 432, or due to an error for which the employee was "in no way responsible," *Galop, 1975 S.L.D.* at 364, or for a mistake "not of [the employee's] making." *Anson*, 1972 *S.L.D.* at 640. But this language is mere dicta. Respondent has not cited a single case in which a salary reduction was allowed because of a staff member's participation in the error. Nevertheless, the approach is fully consistent with the concept of tenure. Surely a teacher would be subject to tenure

proceedings for obtaining money by fraud or false pretenses. As noted above, Ms. DeLyon acted truthfully in all her dealings with her employer, and the Board acknowledges that it is unable to prove otherwise.

This does not mean, of course, that a school board is powerless to rectify its obvious mistakes. There is, however, an unfortunate lack of precision about the appropriate remedy available to a district in such circumstances. A few of the cases allow a school board to freeze a staff member's salary until the salary on the negotiated guide reaches the point where his or her salary level surpasses the level erroneously fixed by the board, but preclude a board from separately seeking reimbursement of past overpayments. *Markot v. East Brunswick Bd. of Educ.*, 1988 *S.L.D.* 10 (Comm'r May 9), *rev'd on other grounds*, Dkt. No. 26-88 (St. Bd. Aug. 2, 1989). *Trenton Educ. Ass'n, supra*. *See also, Kalapos*, at 432. According to the Commissioner's reasoning, the proper procedure "is to hold the salary level in place, not to reduce it through deductions." *Markot*, 1988 *S.L.D.* at 11. Hence, the goal "is not to allow the board to recoup every penny erroneously paid out," but to preserve existing salary until the employee's training and experience catches up with his place on the guide. *Id.*

Some of the cases seemingly envision that the excessive salary may continue for only the balance of the current school year or possibly until expiration of a multi-year contract. Illustratively, in *Galop*, the Commissioner did not allow the district to recover the prior overpayment of a staff member placed on the wrong step of the guide for 1973-74, but added that "petitioner has no residual entitlement to such a favored position beyond the end of her 1973-74 contract." *Galop*, at 364. *Accord, Gerity* v. *Woodbridge Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 522 (Comm'r Sept. 12, 1995). Similarly, in *Stockton v. Trenton Bd. of Educ.,* 1987 *S.L.D.* 512, 521 (Comm'r), on remand from the Appellate Division, the Commissioner ruled that a tenured teacher incorrectly placed on the salary guide may not be subject to corrective action "during a given school year." In support of this apparent limitation on tenure rights, the Commissioner cited comments of the State Board in the unpublished decision of *Conti and Cutler v. Bd. of Ed. of Montgomery,* (Comm'r June 10, 1985), *rev'd* (St. Bd. July 2, 1986):

> [A]lthough an affected teacher is entitled to rely on a board's official action establishing his salary for a one year period, he is not entitled under the school laws to benefit further from the board's mistake by maintaining such favored position beyond that one year period. 1987 *S.L.D.* at 522.

None of these cases clearly articulate why a diminution in salary implemented in a subsequent year would not constitute a "reduction in compensation" within the meaning of the tenure statute.

Still other cases contemplate the more expansive remedy of letting a school board freeze future salary payments until the board has fully recovered any losses. For example, in *Cerato v. Newark Bd. of Educ.*, 94 *N.J.A.R.*2d (EDU) 248, 250 (Comm'r Feb. 1, 1994), the Commissioner upheld an administrative law judge's conclusion that a board may freeze a teacher's salary "until it recoups an inadvertent ministerial overpayment[.]" Or, as the Commissioner said in *Trenton Educ. Ass'n*, the real issue is not whether a board should be entitled to reimbursement, "but merely a question of when the money would be repaid." (Emphasis in the original). 1986 *S.L.D.* at 2435.

It would be helpful if the State Board provides some clarification of this confusing area for future guidance. In the meantime, the remedy most faithful to the dual objectives of protecting a teacher's tenure rights and preventing misuse of public funds is to allow a school board to freeze a tenured employee's salary until such time as the corresponding step on the salary guide is reached and the board has recovered any overpayments. If this method is used, the teacher will not suffer any immediate deduction that might be construed as a reduction in compensation. Equally important, the public will eventually be compensated for any salary payments which exceed the teacher's entitlement under the negotiated agreement.

Order

It is **ORDERED** that Ms. DeLyon's annual salary remain frozen at $53,464 until a teacher of comparable training and experience would receive that level based on the negotiated salary guide and until the Board has recovered all overpayments resulting from her incorrect placement on the guide.

And it is further **ORDERED** that the Board pay $1,494 to Ms. DeLyon to reimburse her for improper deductions during the 1995-96 academic year.

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

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

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

Feb. 27, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Feb. 28, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX
List of Witnesses

1. Carol de Lyon, Old Tappan public school district

2. Raymond Albano, former superintendent of schools, Old Tappan public school district

List of Exhibits

No.		Description
J-1	Id.	Copy of memo to instructional staff from James P. Verbist regarding 1992-93 salary, dated September 8, 1992
J-2		Copy of memorandum to instructional staff from James P. Verbist regarding 1993-94 salary, dated September 7, 1993
J-3	(a)	Excerpt from minutes of meeting of the Old Tappan Board of Education held on June 20, 1994
	(b)	Copy of 1994-95 teacher salary guide, approved June 29, 1994
J-4		Copy of letter to instructional staff from Gary J. Grembowiec regarding 1994-95 salary, dated September 6, 1994
J-5		Excerpt from minutes of a meeting of the Old Tappan Board of Education held on June 19, 1995
J-6		Copy of letter to Carol de Lyon from Gary J. Grembowiec, dated September 1, 1995
J-7		Copy of letter to Carol de Lyon from Gary J. Grembowiec, dated September 20 1995

J-8 Copy of letter to Gary J. Grembowiec from Carol J. de Lyon, dated September 20 1995

R-1 Copy of agenda for orientation day general meeting, dated September 1, 1994

OAL DKT. NO. EDU 1102-96
AGENCY DKT. NO. 435-11/95

CAROL DE LYON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Both petitioner and the Board submitted timely exceptions to the initial decision of the Administrative Law Judge (ALJ), in accordance with *N.J.A.C.* 1:1-18.4. To the extent these submissions essentially reiterate arguments raised before the ALJ, they are not recounted herein.

Petitioner asserts that the ALJ's initial decision "turned the law upside down," (Petitioner's Exceptions at p. 2) in that he directed that the Board freeze her salary at $53,464 until such time as she would, by her training and experience, receive that level based on the negotiated salary guide *and* "***until the Board has recovered all overpayments resulting from her incorrect placement on the guide." (Initial Decision at p. 9) Here, petitioner asserts that the law clearly provides that a tenured teaching staff member may not have her salary reduced, having been paid at a salary rate above her place on the salary guide. (Petitioner's Exceptions at p. 2) Reviewing the case law presented to the ALJ in her post-hearing brief, petitioner concludes that

> The decision of the ALJ would hold [her] on the salary guide behind her actual salary for several years in order to allow for recoupment. The Commissioner has allowed recoupment only when there was an agreement between the parties to repay the increment withholding or a change in position, none of which apply herein. (*Id.* at pp. 8, 9)

Thus, petitioner urges the Commissioner to reverse that portion of the initial decision which requires that "after [she] receives money back from the Board of Education, she must then repay that same money to the Board." (*Id.*)

The Board contends that tenure laws need not be implicated in this matter, as the "error was correctable based upon mutual mistake of fact.***" (Board's Exceptions at p. 1) The Board asserts that the mistake was not unilateral, and, once discovered, the remedy of correcting the salary should be permitted under ordinary contract law principles. (*Id.*) Thus, the Board concludes that no payment should be due petitioner and the parties should be allowed to be on "equal footing" as soon as possible. (*Id.*)

Upon careful and independent review of the record in this matter, and having accepted the credibility determinations and findings of the ALJ, the Commissioner determines to accept in part, and modify in part, the initial decision of the ALJ.

First, the Commissioner states his concurrence with the ALJ's conclusion that the Board's reduction of petitioner's salary in the 1995-96 school year constituted a reduction in compensation which violates the statutory protections of tenure law. *N.J.S.A.* 18A:28-5. (Initial Decision at p. 5) Thus, the Board must reimburse petitioner for the amount of the improper deductions.

Second, the Commissioner agrees with the ALJ that there is ample support in case law, under similar circumstances where a Board has erroneously overpaid a tenured staff

member, to freeze the staff member's salary at the erroneous level,[1] until such time as petitioner's salary on the negotiated salary guide equals or surpasses that which she is being paid. However, the Commissioner declines, under the circumstances herein, to direct the local board to maintain its freeze until it "has recovered *all* overpayments resulting from her incorrect placement on the guide" (Initial Decision at p. 9, emphasis added), thus, permitting a dollar-for-dollar recoupment by the Board.

On this issue, the Commissioner finds instructive the State Board's language in *Markot*, 1989 *S.L.D.* 3043, aff'd N.J. Superior Court, Appellate Division, December 24, 1990, A-345-89-T5. In that case, the board discovered its overpayment error approximately one month after it set Markot's salary at the erroneous level and, subsequently, determined to recoup the amounts overpaid by means of deductions from Markot's paycheck. The board and Markot, through a collective bargaining agreement, resolved that Markot's salary would be readjusted to the "erroneous" amount, but frozen at that amount until the overpayment was recouped. The board then reimbursed Markot for the deductions it had made. After settling with Markot, the board and the association negotiated a new salary agreement which would have entitled Markot to receive more than what he was receiving under the terms of his agreement with the board. In August 1988, Markot filed a petition before the Commissioner of Education seeking a determination under the education laws that the board could not maintain the freeze on his salary when it was required to compensate him in accordance with the new collective agreement, as of February 1988, when the salaries of teaching staff members were increased by moving them to the next step on the guide. *Markot* at 3044. In reversing the decision of the Commissioner of Education, the State Board primarily held that "Markot had resolved his controversy through

[1] In the instant matter, $53,464.

grievance procedure and could not then resort to the State Board to interpret the Education Law in his favor." *Markot*, Appellate Division Slip Opinion at p. 6. However, the State Board added,

> While we pass no judgment whether continued payment at the lower amount after February was in violation of the terms of the collective agreement, Petitioner had no entitlement under the education laws to the increase in compensation provided for by that agreement. In this respect, we emphasize that, as amended, the minimum salary provisions of the education laws *do not* entitle teaching staff members receiving more than the minimum salary required by statute to automatic salary increases. *N.J.S.A.* 18A:29-5 *et seq.* In that Petitioner had no entitlement under the education laws to the salary increase provided by the collective agreement and in that his salary payment was not reduced from the amount established by the grievance settlement, continuation of payment at that amount after February 1988 did not constitute a reduction in compensation within the meaning of *N.J.S.A.* 18A:28-5. (emphasis added) *Markot,* 1989 *S.L.D.* 3043 at 3046, 3047, aff'd Appellate Division, December 24, 1990, A-345-89-T5, Slip Opinion at p. 6.

The Appellate Division highlighted the State Board's passage, and agreed. *(Id.)*

Thus, in light of the State's Board's interpretation, as affirmed by the Appellate Division, the Commissioner cannot reject that portion of the initial decision permitting total recoupment by the Board on the grounds that it offends a tenured employee's rights under education law. Rather, the Commissioner finds that, inasmuch as the parties agree that the error resulted from *a mutual mistake*,[2] they should be made to share the cost of the mutual error, however innocent or inadvertent. In this regard, the Commissioner notes that he is not unmindful of the fact that public monies are involved in this matter.

Accordingly, the initial decision of the ALJ is adopted in part and modified in part. The Board is hereby ordered to pay petitioner $1,494 to reimburse her for the improper deductions in the 1995-96 school year, and to continue to freeze petitioner's salary at $53,464,

[2] Petitioner states, "We submit that what occurred was a mutual mistake, innocent on both sides." (Petitioner's Post-hearing Brief at p. 3) Additionally, the Board notes that one of the issues presented herein is whether, "***based on the facts and circumstances of this case, that the mutual mistake of the parties as demonstrated at the hearing, removes this matter from the ordinary application and interpretation of the tenure statutes previously adopted by the Commissioner of Education in similar cases." (Board's Post-hearing Brief at p. 1)

until the Board has recouped one-half of the total amount representing overpayments to petitioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 14, 1997
DATE OF MAILING APRIL 15, 1997

183-97

EDU #1102-96
C # 183-97
SB # 48-97

CAROL DE LYON, :

PETITIONER-CROSS/APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY, : DECISION

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, April 14, 1997

For the Petitioner-Cross/Appellant, Balk, Oxfeld, Mandell & Cohen (Nancy I. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Rand, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

Carol De Lyon (hereinafter "petitioner"), a tenured teaching staff member, filed a petition of appeal with the Commissioner of Education alleging that the Board of Education of the Borough of Old Tappan (hereinafter "Board") had reduced her salary during the 1995-96 school year in violation of her tenure rights. Due to a clerical error, the Board had erroneously placed petitioner on the wrong step of the district's negotiated salary guide for the 1994-95 school year. The petitioner should have been placed on Step 15 of the column applicable to teachers with a bachelor degree, which entitled her to an annual salary of $51,970. Instead, the Board incorrectly placed her on Step 15 for teachers with 15 or more graduate credits, which provided her with a salary

FEB. 2, 2000

of $53,464. Consequently, the petitioner received $1,494 more in 1994-95 than she was entitled to receive under the negotiated guide.

In September 1995, the school business administrator notified petitioner of the error and advised her that her salary for the 1995-96 school year would be reduced to $51,970. In addition, he gave her the option of either reimbursing the Board immediately for the overpayment from 1994-95 – $1,494 – or by having regular deductions taken from her paychecks until the full amount of the overpayment was recouped. The Board made no further attempt to collect the overpayment made in 1994-95 and restored petitioner's salary to $53,464 in 1996-97 pending the outcome of this case.

Petitioner challenged the Board's action, contending that it could freeze her salary at the higher level until the salary guide caught up to that level but was prohibited by the tenure laws from reducing her salary. The Board countered that petitioner had failed to verify her correct salary in 1994-95 and, therefore, was equally responsible for the mistake. It filed a counterclaim seeking restitution of its loss.

On February 27, 1997, an administrative law judge ("ALJ") determined that the Board's action in reducing petitioner's salary in 1995-96 had violated her tenure rights under N.J.S.A. 18A:28-5. The ALJ concluded that:

> the remedy most faithful to the dual objectives of protecting a teacher's tenure rights and preventing misuse of public funds is to allow a school board to freeze a tenured employee's salary until such time as the corresponding step on the salary guide is reached and the board has recovered any overpayments. If this method is used, the teacher will not suffer any immediate deduction that might be construed as a reduction in compensation. Equally important, the public will eventually be compensated for any salary payments which

> exceed the teacher's entitlement under the negotiated agreement.

Initial Decision, slip op. at 8.

The ALJ found that both the Board and the petitioner had been under the mistaken impression that the salary figure of $53,464 in 1994-95 was correct, and he recommended that petitioner's "annual salary remain frozen at $53,464 until a teacher of comparable training and experience would receive that level based on the negotiated salary guide and until the Board has recovered all overpayments resulting from her incorrect placement on the guide." Id. at 9. The ALJ further recommended that the Board pay $1,494 to petitioner to reimburse her for the improper reduction of her salary in 1995-96.

On April 14, 1997, the Commissioner adopted in part and modified in part the ALJ's recommended decision. Initially, the Commissioner concurred with the ALJ's determination that the Board's adjustment of petitioner's salary in the 1995-96 school year constituted a reduction in compensation in violation of her tenure rights. The Commissioner agreed that there was ample support in case law to freeze the petitioner's salary at the erroneous level until such time as her salary on the negotiated salary guide equaled or surpassed that which she was being paid.

However, contrary to the ALJ's recommendation, the Commissioner declined to direct the Board to maintain such a salary freeze until it had recovered the full amount of the overpayment. While acknowledging that the Board's recoupment of the overpayment would not constitute a violation of the education laws, the Commissioner concluded that "inasmuch as the parties agree that the error resulted from a mutual mistake [footnote omitted], they should be made to share the cost of the mutual error,

however innocent or inadvertent." Commissioner's Decision, slip op. at 16 (emphasis in original). He therefore directed the Board to reimburse petitioner in the amount of $1,494 for the improper reduction of her salary in the 1995-96 school year and to continue to freeze her salary at $53,464 until it had recouped one-half of the total amount of the overpayment.

The Board filed the instant appeal to the State Board, and the petitioner filed a cross-appeal.

After a thorough review of the record, we reverse the Commissioner's decision to the extent that it did not permit the Board to recover the full amount of the overpayment. When a district board makes an error in the placement of a tenured staff member on the negotiated salary guide or incorrectly establishes such employee's salary under the terms of that guide, action by the board to freeze the staff member's salary until such time as the overpayment is recouped does not constitute an impermissible reduction in compensation under the tenure laws. E.g., Cerato v. Board of Education of the City of Newark, decided by the Commissioner of Education, 94 N.J.A.R.2d (EDU) 248, aff'd by the State Board of Education, 94 N.J.A.R.2d (EDU) 422; Markot v. Board of Education of the Township of East Brunswick, decided by the State Board of Education, 1989 S.L.D. 3043, aff'd, Docket #A-345-89-T5 (App. Div. 1990). See also Trenton Education Association, et al. v. Board of Education of the City of Trenton, decided by the State Board of Education, December 1, 1999 (district board's recoupment of an overpayment to tenured custodial employees by reducing six bi-weekly paychecks after the board erred in calculating the specific amounts to be included in the custodians' paychecks

based on their established annual salaries did not constitute an impermissible reduction in compensation as contemplated by N.J.S.A. 18A:17-3 and 17-4).

Although the Commissioner in the instant matter has attempted, in essence, to "split the difference," the petitioner had no entitlement under the school laws, implementing regulations or case law to retain any of the moneys paid to her in error. Thus, notwithstanding the fact that the overpayment may have resulted from a mutual mistake, we agree with the ALJ that petitioner's salary should remain frozen until the Board has recovered the full amount of the overpayment resulting from her incorrect placement on the salary guide.

February 2, 2000

Date of mailing FEB 04 2000

184-97

184-97

SUSAN BESHAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured teaching staff member who was riffed and later rehired on a part-time basis, claimed tenure entitlement to a position awarded by the Board to a nontenured individual. Petitioner possessed an instructional certificate with an endorsement for home economics and, subsequent to being riffed, she received a standard instructional certificate with an endorsement as an elementary school teacher. Board moved for summary decision and alleged petitioner filed an untimely petition.

ALJ found that petitioner did fail to file a timely position as she had notice of the Board's action on September 5, 1995, when the principal announced that a new teacher had been hired and assigned to teach the courses claimed by petitioner, but she did not file until January 18, 1996, beyond the 90 days required by rule. Moreover, the ALJ found that summary judgment was appropriate because petitioner's action was time barred and issues regarding petitioner's reemployment rights to teach the new courses did not have to be addressed.

Commissioner reversed the initial decision of the ALJ. Commissioner found that decision on a summary basis was inappropriate. Because petitioner could not have reasonably concluded from the job posting and its attendant certification requirement (K-8 certification) that she may have had a possible claim to the courses at issue, notice could not automatically be reckoned from the date of appointment of the teacher for those courses in question. Commissioner found that the record included insufficient facts and a fundamental factual dispute as to when petitioner knew, or reasonably should have known, about a possible claim so that the timeliness of her petition might be determined. Thus, the Commissioner remanded matter to the OAL and should the ALJ determine that the petition was timely filed, the matter should move directly forward for proceedings on the merits.

APRIL 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 1756-96
AGENCY DKT. NO. 21-1/96

SUSAN BESHAW,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,

Respondent.

Petitioner Susan Beshaw claims tenure entitlement to teach two courses that were assigned to a nontenured employee.

On February 20, 1996, the matter was transferred to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on May 15, 1996. On September 13, 1996, the respondent, the Board of Education of the Borough of Oakland (Board), moved for summary decision. Respondent alleged that petitioner failed to timely file a verified petition pursuant to *N.J.A.C.* 6:24-1.2(c).

FACTS

Petitioner has been employed by the Board as a full-time home economics teacher since 1977. Petitioner is tenured and holds the requisite instructional certificate with an endorsement in home economics. In July 1995, petitioner received an instructional certificate with an elementary endorsement. However, she was never employed and never acquired work experience under that endorsement.

By hand-delivered letter dated April 12, 1995, petitioner was notified that pursuant to a reduction in force (RIF) the Board would recommend that her employment not be renewed for the 1995-96 school year. On May 1, 1995, the Board considered the recommendation at its meeting and voted in favor of nonrenewal of petitioner's employment. At the close of the 1994-95 school year, petitioner underwent knee surgery.

On June 15, 1995, the Board posted notice of summer teaching positions. On July 19, 1995, the Board posted notice of a full-time teaching position to teach "Success for Living," "Keyboarding," "Career Education" and "Study Skills" for the 1995-96 school year. The position required the teacher to possess an instructional certificate with an elementary education endorsement. Petitioner asserted that due to her knee surgery and subsequent incapacity, she never saw either of these postings.

On August 29, 1995, petitioner was offered the position of home economics teacher for one period per day for the 1995-96 school year. Petitioner accepted the offer. In late August, the county school superintendent approved the following new courses for the 1995-96 school year: "Skills for Successful Living," "World of Work," and "Study Skills." The instructor would be required to possess an instructional certificate with an elementary education endorsement. The Oakland Education Association informed petitioner of the new courses. During a faculty meeting on September 5, 1995, the school principal announced that a nontenured teacher had been hired to teach "Skills for Successful Living" and "World of Work."

On January 18, 1996, petitioner filed this action and alleged that the Board violated her tenure rights when it assigned two courses, "Skills for Successful Living" and "World of Work," to a nontenured teacher for the 1995-96 school year. Petitioner contended that these courses fall within her instructional certificate with an endorsement in home economics. Thus, petitioner requested assignment to these courses with back pay.

The Board filed a motion for summary decision on the ground that petitioner's action is untimely.

DISCUSSION

Timeliness of Filing

Petitioner asserted that in late October or early November 1995 she received a copy of the school newsletter which included a review of the two courses. The new courses appeared to be within her qualifications and experience and she believed that she might have a tenure right to teach those courses. Petitioner also asserted that she never received from the vice principal the curricula guides for each class after she had requested copies of the documents. Instead, she received the curricula from the Oakland Education Association on January 4, 1996.

The Board asserted that petitioner requested and was given access to the curricula in mid-August, after she inquired by telephone about the position posted. The Board also asserted that petitioner again requested the curricula in late August, after a meeting with the vice principal, Barbara Ciambra.

The "90-day rule," *N.J.A.C.* 6:24-1.2(c), provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the

> district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

In *Kaprow v. Board of Education of Berkeley*, 131 *N.J.* 572 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board have the authority to establish a time limitation for the resolution of disputes arising under the school laws. The Court also addressed the public policy reasons behind the 90-day rule:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. . . . The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.
>
> [131 *N.J.* at 582; *see also Nissman v. Board of Educ.*, 272 *N.J. Super.* 373, 380 (App. Div.) ("What is important is that the Local Board had the right to know within 90 days whether its action was going to be challenged."), *certif. denied*, 137 *N.J.* 315 (1994).]

N.J.A.C. 6:24-1.2(c) thus represents a fair and necessary requirement for the proper and efficient resolution of disputes arising under school laws. *Kaprow, supra*, 131 *N.J.* at 582.

The 90-day rule requires that a petition be filed within 90 days of the receipt of notice of a final order, ruling or other board action. *N.J.A.C.* 6:24-1.2(c). "Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." *Kaprow, supra*, 131 *N.J.* at 587. Thus, I have carefully considered the timeline of events and the facts to determine if the petition was filed timely in accordance with *N.J.A.C.* 6:24-1.2(c).

On April 18, 1995, petitioner received official notice by letter dated April 12 that her position was recommended for nonrenewal due to the RIF. On May 1, the Board voted not to renew her employment. Thus, petitioner had notice on May 1 of the Board's official action to not renew her contract. Pursuant to its mandate, the school posted notice of the new full-time position on July 19, 1995. Petitioner knew or should have known about the new position when the notice for a full-time teacher was posted

on July 19, 1995. Thus, petitioner can be charged with knowledge and notice as of that date, even though she may not have actually seen the posting. Under these circumstances, the 90 days would have run out on October 17, 1995, and petitioner's action is time barred.

The new courses were officially approved at the end of August 1995. Petitioner contended that she learned of the new courses at this point. Further, on September 5, 1995, the school principal announced at a regular faculty meeting that a nontenured teacher had been hired to teach those courses. Petitioner conceded knowledge of the announcement. Thus, at the very latest, the 90 days began on September 5, 1995, and terminated on December 4, 1995. Under these facts, petitioner's action is time barred.

I have considered the facts in the light most favorable to petitioner. Petitioner asserted that she learned of the courses in August, but she did not know the substance of the subject matter. Further, petitioner denied that she requested the curricula before late November or early December. It was then that she read about the courses in the school newsletter and it appeared that they were within the scope of her qualifications. Petitioner acknowledged that she requested the curricula from the vice principal, but mentioned that she received the information from another source in early January 1996. Under this scenario, petitioner's action would be timely.

I have also considered the Board's assertion that petitioner requested copies of the new course curricula twice in August and was directed to obtain copies from the secretary of the vice principal. An affidavit from the vice principal, from whom the curricula was requested, supports the Board's claim.

The courts have held that under *N.J.A.C.* 6:24-1.2(c) the 90 days begin to run after receipt of notice of some action taken by the board, *e.g.*, a board's action to terminate a position due to an RIF. "[T]he date of an employee's RIF can be the only reasonable date certain on which the employee's rights can be reckoned for future entitlement purposes." *Francey v. Salem Bd. of Educ.*, 286 *N.J. Super.* 354, 361 (App. Div. 1996) (quoting the Acting Commissioner). Here, petitioner maintained that she

received adequate notice that a cause of action existed in January 1996, after she read about the courses in the newsletter in late November and thereafter obtained copies of the curricula. I agree that the 90-day period did not begin in April 1995, when petitioner received notice that the Board recommended that her contract not be renewed. Indeed, petitioner did not know about a potential cause of action until the new positions were posted and a nontenured teacher was hired to teach the courses. When the nontenured teacher was hired, however, petitioner was on notice of the Board's action. "The final order, ruling, or other action by the Local Board occurred when it appointed nontenured persons to positions to which [petitioner] claims tenure rights." *Kaprow, supra*, 131 *N.J.* at 588. The regulation specifically requires that notice or action by the board triggers the running of the 90 days, not action or knowledge on the part of a claimant.

If claims could be filed based on when knowledge accrued to a petitioner, a board would never know when or if a claim might be pursued. The intent of *N.J.A.C.* 6:24-1.2(c) is to offer both repose and security that claims cannot be instituted at any given time. *See Kaprow, supra*, 131 *N.J.* at 582. Some objective event must occur to trigger the limitations period. *Id.* at 587. Accordingly, "the 90 days begin on the date on which the final action of the Local Board took place, . . . not the date on which petitioner claims that a substantive right accrued." *Nissman, supra*, 272 *N.J. Super.* at 381. Here, petitioner cannot claim that her acquisition of knowledge started the 90-day limitations period.

Thus, I **CONCLUDE** that petitioner had notice of the Board's action on September 5, 1995, when the principal announced that a new teacher had been hired and assigned to teach the courses claimed by petitioner. Consequently, I **CONCLUDE** that the 90-day period began on that date and ended on December 4, 1995. I therefore **CONCLUDE** that petitioner failed to file a timely petition pursuant to *N.J.A.C.* 6:24-1.2(c).

Under appropriate circumstances the 90-day rule may be relaxed. *N.J.A.C.* 6:24-1.15 provides as follows:

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

The statute of limitations set forth in *N.J.A.C.* 6:24-1.2(c) is to be strictly applied, *Gordon v. Passaic Board of Educ.*, 1985 *S.L.D.* 1929, *aff'd*, No. A-3294-84T7 (App. Div. May 27), *certif. denied*, 105 *N.J.* 534 (1986); *Elmwood Park Bd. of Educ. v. Farrell*, 95 *N.J.A.R.*2d (EDU) 375, 377, and the 90-day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. *See Kaprow, supra*, 131 *N.J.* at 590 ("Nor do these facts present the exceptional circumstances that compel the Commissioner to waive the ninety-day limitation"); *DeMaio v. New Providence Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 449, 453 ("There are no compelling reasons in the present matter to justify a waiver or relaxation of the 90-day limitations period of N.J.A.C. 6:24-1.2(c)"). The authority to relax or waive the 90-day rule is rarely invoked, and such relaxation is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur. *DeMaio, supra*, 96 *N.J.A.R.*2d (EDU) at 453 (citing *Gordon, supra*, 1985 *S.L.D.* at 1931).

Here, no compelling or exceptional circumstances exist to warrant relaxation or waiver of the 90-day rule. Petitioner had notice on several occasions, from July 19 when the job notice was posted, to August when she learned of the new courses and had the opportunity to review the course curricula, to September 5 when the teacher assigned to those courses was announced. On each of these occasions, petitioner had adequate notice to inform her of a potential cause of action, and she should have pursued the matter if she was uncertain whether she had a claim. Under all three of these dates, petitioner's action is time barred, as the 90-day limitations period ended at the latest on December 4, 1995. Petitioner did not file her petition until January 18, 1996.

I **CONCLUDE** that there are no compelling or exceptional circumstances to warrant a waiver or relaxation of the rules. Therefore, I **CONCLUDE** that petitioner's action is time barred.

Summary Decision

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate:

> if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Summary decision in administrative proceedings parallels summary judgment in the courts. Summary judgment is:

> designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial.
>
> [*Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74 (1954).]

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Ibid.* Thus, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

The New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 539-40 (1995), applied the summary judgment standard employed by the federal courts and held that:

> when deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by *Rule* 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial.

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, supra*, 477 *U.S.* at 249, 106 *S.Ct.* at 2511, 91 *L.Ed.*2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. *Liberty Lobby, supra*, 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.*2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," *Liberty Lobby, supra*, 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed.*2d at 214, the trial court should not hesitate to grant summary judgment.

Under *Brill*, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant the motion must be denied.

In this matter, summary decision is appropriate because petitioner's action is time barred. Even drawing all inferences in favor of petitioner, petitioner's claim was filed beyond the latest date upon which the period of limitations could have expired. Therefore, I **CONCLUDE** that genuine issues of material fact do not exist. Having concluded that the action is time barred, the issues regarding petitioner's reemployment rights to teach the new courses need not be addressed.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED** and petitioner's appeal is **DISMISSED**.

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

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

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

February 24, 1997
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

Feb. 28, 1997
DATE

D M Cantanaitis/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 1756-96
AGENCY DKT. NO. 21-1/96

SUSAN BESHAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner initially takes exception to the Administrative Law Judge's (ALJ) conclusion that September 5, 1995, the date on which she learned that the Board hired a nontenured teacher to teach the courses in question, was the date on which she received "adequate notice." (Petitioner's Exceptions at p. 3) Petitioner asserts that, at the time, "[she] had a right to know and was not aware of the 'existence of facts' sufficient to put her on notice that she was entitled to teach ***" these courses. (*Id.*) It was not until late October or early November, petitioner contends, that she read a copy of the school's newsletter reviewing the two courses, and therein learned that the courses might be within the scope of her qualifications and experience under her Home Economics endorsement, notwithstanding that the Board contended

that she was not qualified for the position since she did not acquire her elementary endorsement until after the date of the reduction in force. (*Id.*) Moreover, petitioner claims that the ALJ's reliance on *Nissman, supra*, in the initial decision is misplaced. Petitioner argues

> ***It is not a matter of conflict between when the final action of the Board took place and when substantive rights accrued but when petitioner received adequate notice that her rights might have been violated. It was only upon examining the curricula for the courses that it became apparent to petitioner that the courses would fall within her qualifications to teach home economics. It was only on January 12, 1996 when petitioner had adequate notice that a post-RIF cause of action existed. At the earliest, petitioner was aware in late October upon reading the school newsletter that the two courses potentially contained curricula within her qualifications to teach with an Instructional Certificate with an endorsement for Home Economics. Even using the late October date rather than the January 12, 1996 date, [the] petition having been filed on or about January 18, 1996 was timely filed. (Petitioner's Exceptions at p. 4)

In the alternative, petitioner contends that the rules should be relaxed in the instant matter. Petitioner underscores that she could not have been aware of the July 19, 1995 posting, since she was physically incapacitated, and while she heard about the course in late August, she did not know who would be teaching them. (*Id.* at p. 5) Even using the September 5, 1995 date, petitioner reasons that "***this would only extend the limitations period by one and one-half months. This short amount of time would cause no hardship to respondent." (*Id.* at p. 6)

Finally, petitioner argues that there exists a genuine issue of material fact which precludes summary decision. (*Id.*) Petitioner contends that the ALJ's decision negates the fact that the vice principal's secretary never gave her a copy of the requested curricula and she, thus, had to obtain them through her Association. She further points out that, notwithstanding the Board's assertion, she did not request the curricula in August, as stated in the initial decision but, rather, at the end of November or early December 1995. (*Id.*; Petitioner's Certification at

paragraph 18) Petitioner, thus, concludes that the ALJ considered the disputed facts and gave more credence to the Board's affidavit than to petitioner's affidavit, which is inappropriate when considering a motion for summary decision. (*Id.* at p. 7) Petitioner argues that if her actions were not time-barred under her set of facts, summary decision on that issue was inappropriate. (*Id.*)

In reply, the Board counters that the post-reduction-in-force cases demonstrate that a petitioner's cause of action and her corresponding obligation to file a petition of appeal, arises at the time she first becomes aware of a newly created position and of the appointment of someone else to that position. (Board's Reply at p. 2) Upon a review of case law, the Board argues that,

> ***in a light most favorable to petitioner, the 90-day limitation period began to run either: on July 19, 1995, when the Board posted the notice of the available position; in mid to late August 1995, when petitioner twice requested copies of the curriculum for the two courses at issue; or as Judge Bari-Brown found, on September 5, 1995, when petitioner admittedly became aware of the courses and of the hiring of a new teacher to teach these courses.*** (*Id.* at pp. 2, 3)

The Board contends that the express language of *N.J.A.C.* 6:24-1.2(c) does not support petitioner's view that the 90-day period does not begin to run until after she became aware of the "existence of facts" sufficient to notify her that she was entitled to teach the courses. (*Id.* at p. 3) Citing *Kaprow*, *supra*, the Board maintains that, to require that there be additional or more specific notice to a petitioner than her admitted knowledge of the new courses and the Board's appointment of a new teacher to teach said courses "'will not further the objectives of the regulatory scheme, and would only defeat the considerations of repose and interfere with the efficient administration of the school laws." (*Id.*, citing *Kaprow* at 589) Moreover, the Board

insists that *Nissman, supra*, is applicable, since that case is consistent with the many school law decisions holding that the 90-day limitations period begins upon notice of a final action of the board of education. The Board concludes that the 90-day period "***did not start, as petitioner suggests, after her subsequent investigation over the next four (4) months revealed further information that confirmed her suspicion that she may have been entitled to teach the two new courses." (*Id.* at p. 4)

As to petitioner's prayer to relax the rules in the alternative, the Board avers that petitioner presents no unusual or compelling circumstances to warrant such relaxation. Here, the Board questions why petitioner, as a teaching staff member, did not know of, and made no inquiry into, the content of the courses at issue when she learned of their existence in late August or early September. (*Id.*) Moreover, the Board points out that petitioner was never prevented from obtaining copies of the curricula for the courses in question. Had she not received them upon her initial request, the Board asks

> 1) why did petitioner not demand in person the curricula at Vice-Principal Ciambra's office; and 2) why did petitioner delay over four (4) months in obtaining copies of the curricula after learning about the new courses and the assignment of the new teacher.
>
> (*Id.* at p. 5)

With respect to the issuance of a summary decision herein, the Board claims that, even if petitioner's allegation as to the timing of her request to the vice principal to obtain the curricula and her subsequent need to obtain them through the Association is correct, this fact is immaterial to the resolution of the timeliness issue since she admittedly learned of the two new courses and of the appointment of the new teacher on September 5, 1995. "What petitioner fails to understand," the Board continues, "is that the 90-day rule was triggered once she learned

about the new courses and the assignment of the new teacher.***" (*Id.* at p. 6) The date on which petitioner requested the curricula or actually received the curricula, according to the Board, is irrelevant to the issue of timeliness. The Board concludes

> ***it is disingenuous for petitioner to assert that the 90-day limitation period did not commence until she received the curricula when she admitted that she waited three (3) months to request copies of same after learning about the courses and the new teacher. The limitations period is in nowise tolled to afford petitioner an opportunity to investigate the facts of her case to determine whether it has merit." (*Id.*)

Upon careful and independent review of the record in this matter, the Commissioner concurs with petitioner that decision on a summary basis was inappropriate. Because petitioner could not have reasonably concluded from the job posting and its attendant certification requirement (K-8 certification) that she may have had a possible claim to the courses at issue, notice cannot automatically be reckoned from the date of appointment of the teacher for those courses in question. Thus, the question becomes when petitioner knew, or reasonably should have known, about a possible claim so that the timeliness of her petition may be determined. In this regard, the record includes insufficient facts and further reveals that there exists a fundamental factual dispute which directly impacts upon the threshold issue of timeliness. Specifically, petitioner and the Board offer contradicting accounts with respect to when petitioner first requested a copy of the curricula for the courses in question, a fact which is crucial to the underlying determination of when petitioner knew, or reasonably should have known, that she had a possible claim to teach the courses in question. See *Metaxas et al. v. Board of Education of the City of Hoboken*, 96 *N.J.A.R. 2d* (EDU) 708, 712. Petitioner certifies that she did not make the request until the end of November or early December 1995.

(Petitioner's Exceptions at p. 6 and Certification at paragraph 18) Whereas, the Board attests that petitioner twice requested copies in mid- to late August 1995. (Board's Reply at pp. 2, 3; Ciambra's Affidavit at paragraphs 2, 3) In that the ALJ rendered neither factual findings nor credibility assessments in this regard, the Commissioner is compelled to return this matter to the OAL for such findings so as to fairly resolve the issue of whether petitioner filed a timely petition in this matter. Should the ALJ determine that the petition was timely filed in accordance with *N.J.A.C.* 6:24-1.2(c), this matter should then move directly forward for proceedings on the merits.

Accordingly, the initial decision of the ALJ is reversed and this matter is remanded to the OAL for proceedings consistent with the above parameters.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 14, 1997
DATE OF MAILING APRIL 15, 1997

184-97

EDU #1756-96
C # 184-97
SB # 50-97

SUSAN BESHAW,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 14, 1997

For the Petitioner-Respondent, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Fogarty & Hara (Stephen R. Fogarty, Esq., of Counsel)

On May 1, 1995, the Board of Education of the Borough of Oakland (hereinafter "Board") voted to abolish the teaching position of Susan Beshaw (hereinafter "petitioner"), a tenured staff member assigned to teach home economics, effective at the end of the 1994-95 school year as the result of a reduction in force ("RIF"). On July 19, 1995, the Board posted notice of a full-time middle school position teaching "Skills for Successful Living," "The World of Work," "Keyboarding" and "Study Skills."[1] The position as posted required "K-8 certification." The County Superintendent subsequently determined in August 1995 that an elementary education endorsement was the

[1] We note that the job posting referred to "Skills for Successful Living" and "The World of Work" as "Success for Living" and "Career Education."

FEB. 4, 1998

appropriate certification for these courses. Affidavit of Lawrence R. Ksanznak, Superintendent of Schools, at 4. Petitioner held only an endorsement in home economics at the time of the RIF.[2] Petitioner acknowledged that she had learned of the job posting in late August 1995, but maintained that she had not been aware of the substance of the courses or whether they were within the scope of her home economics certification until after she had obtained copies of the curricula several months later.

On January 18, 1996, petitioner filed a petition of appeal with the Commissioner of Education alleging that the Board had violated her tenure rights when it assigned "Skills for Successful Living" and "The World of Work" to a non-tenured teacher for the 1995-96 school year. Petitioner alleged that such courses were within the scope of her home economics endorsement. The Board filed a motion for summary decision, arguing that the petition was not filed in a timely manner pursuant to N.J.A.C. 6:24-1.2(c).[3]

On February 24, 1997, an Administrative Law Judge ("ALJ") recommended granting the Board's motion and dismissing the petition. The ALJ concluded that petitioner had notice of a possible claim against the Board on September 5, 1995 when the principal of her school announced at a faculty meeting that a non-tenured teacher had been assigned to teach "Skills for Successful Living" and "The World of Work." The

[2] Although petitioner obtained an elementary education endorsement in July 1995, there is no authority for accrual of additional rights in a tenured position after dismissal therefrom in a RIF. Francey v. Board of Educ. of Salem, decided by the State Board of Education, August 3, 1994, aff'd, 286 N.J. Super. 354 (App. Div. 1996).

[3] N.J.A.C. 6:24-1.2(c) provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

ALJ further found that there were no compelling circumstances that would warrant relaxation of the 90-day rule in this instance. N.J.A.C. 6:24-1.15.

On April 14, 1997, the Commissioner of Education rejected the ALJ's recommendation and remanded this matter to the Office of Administrative Law for further proceedings. The Commissioner found that petitioner could not reasonably have concluded from the job posting that she may have had a claim to the courses at issue and that, as a result, notice could not be reckoned merely from the appointment of a non-tenured individual to teach those courses. The Commissioner found that the record revealed the existence of a fundamental factual dispute which directly impacted upon the timeliness issue, i.e., when petitioner first requested a copy of the curricula for the courses at issue, a fact which he found to be crucial to the underlying determination of when petitioner knew or reasonably should have known that she had a possible claim to teach the courses at issue. Since the ALJ had rendered neither factual findings nor credibility assessments in this regard, the Commissioner remanded this matter to the Office of Administrative Law for further proceedings in order to determine whether petitioner had filed her petition in a timely manner.

The Board filed the instant appeal to the State Board, again arguing that petitioner's claim was time-barred. We agree and, after a thorough review of the record, we reverse the decision of the Commissioner.

In Kaprow v. Board of Education of Berkeley, 131 N.J. 572, 587 (1993), the New Jersey Supreme Court stated:

> When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent

> considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973).] Adequate notice under N.J.A.C. 6:24-1.2 should...effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post-RIF cause of action. See Burd v. New Jersey Tel. Co., 76 N.J. 284, 291, 386 A.2d 1310 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." Borough of Park Ridge v. Salimone, 21 N.J. 28, 48, 120 A.2d 721 (1956).

The final order, ruling or other action by the Board giving rise to petitioner's claim in this case occurred when the Board appointed a non-tenured individual to teach "Skills for Successful Living" and "The World of Work," courses to which petitioner now claims entitlement by virtue of tenure. Petitioner received notice of the Board's action on September 5, 1995, when the principal of the school in which she was employed announced the appointment at a faculty meeting. We find that such notice alerted petitioner to the existence of facts that might equate in law with a cause of action and was sufficient to enable her to pursue a claim, thereby triggering the ninety-day filing period of N.J.A.C. 6:24-1.2.

By virtue of her possession of an instructional certification in home economics, petitioner was authorized to teach:

> home economics in all public schools. Home economics normally includes: Homemaking and consumer education, foods and nutrition, family living and parenthood education, child development and guidance, housing and home furnishings, home management, clothing and textiles, and family health and safety.

N.J.A.C. 6:11-6.2(a)(12).

Given the scope of such authorization, we conclude that the course titles in this instance, "Skills for Successful Living" and "The World of Work,"[4] were broad enough to provide petitioner with notice sufficient to enable her to pursue a possible tenure claim against the Board under her home economics certification. The fact that petitioner did not request or review the curricula for those courses until some time later does not under these circumstances enlarge her time period for filing a petition challenging the Board's action.

Consequently, we agree with the ALJ that petitioner had reason to know of her tenure claim to "Skills for Successful Living" and "The World of Work" by September 5, 1995, when she learned that a non-tenured individual had been assigned to teach those courses. Since petitioner did not file her petition until January 18, 1996, 4½ months later, the petition was untimely. Nor do we find any basis in the record for relaxation of the 90-day rule in this case.

In that the facts in dispute pertain to the date on which petitioner requested copies of the course curricula, which we have found to be immaterial to a determination in this matter, we reverse the decision of the Commissioner, grant the Board's motion for summary decision and dismiss the petition. See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

Attorney exceptions are noted.

February 4, 1998

Date of mailing FEB 06 1998

[4] See supra. note 1.

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IN THE MATTER OF THE TENURE	:	
HEARING OF ALYCE STEWART,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

APRIL 15, 1997

AGENCY DKT. NO. 587-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ALYCE STEWART,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

For the Board, Louis R. Franzese, Esq.

For Respondent, Raymond J. Zeltner, Esq.

This matter having been opened before the Commissioner of Education on December 11, 1996, through certification of tenure charges of unbecoming conduct against a tenured teaching staff member of the State-operated School District of Newark; and

The Commissioner having directed respondent via both certified and regular mail on December 12, 1996, to file an Answer to the tenure charges against her; and

The Commissioner having sent such notice again on January 6, 1997, and on January 29, 1997, via regular and certified mail, and although the certified mail was returned as "moved, left no address," there is no indication that the regular mail was not duly received; and

By letter dated February 6, 1997, and faxed to the Bureau of Controversies and Disputes on February 10, 1997, Raymond J. Zeltner, Esq. advised that he had been retained to represent respondent with respect to this matter; and

On February 11, 1997, Mr. Zeltner's letter was acknowledged by the Director of the Bureau of Controversies and Disputes, who advised him that although his client had been formally served with a copy of the tenure charges filed against her, via federal express, on December 10, 1996, in that Mr. Zeltner's letter indicated that his client had recently moved, the State-operated District was being requested by copy of the February 11, 1997 letter to provide counsel for respondent with another copy of the charges and counsel was accorded 20 days from his receipt of such communication to file an Answer on behalf of his client; and

On March 13, 1997, Mr. Zeltner was advised by certified and regular mail, with a copy of this communication being transmitted to respondent, that an Answer on behalf of his client had not been received and he was directed that such submission be made within ten (10) days of his receipt of this letter or the tenure matter would be decided on a summary basis; and

Respondent and her counsel having failed as of this date to comply with the directive of the Commissioner, notwithstanding receipt of the aforementioned notices, so that each count of the charges against respondent is deemed to be admitted; now therefore

IT IS ORDERED this 15th day of April 1997 that summary judgment shall be granted to the District, and Alyce Stewart shall be dismissed from her tenured position as a teaching staff member in the District's employ as of the date of this order.

IT IS FURTHER ORDERED that, pursuant to *N.J.A.C.* 6:11-3.6, this matter shall be referred to the State Board of Examiners for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

APRIL 15, 1997
DATE OF MAILING APRIL 15, 1997

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186-97

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

APRIL 15, 1997

OAL DKT. NO. EDU 6473-96
AGENCY DKT. NO. 252-6/96

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

The record of this matter and the notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. Such review revealed the matter to have been withdrawn at OAL based on representations to petitioner that there were currently no assistant principals to whose positions she could claim entitlement by tenure or seniority.

However, on March 14, 1997, petitioner moved to reactivate the within matter based on information which came to light subsequent to withdrawal of the petition at OAL, specifically the employment of two nontenured vice principals of whom counsel for neither petitioner nor respondent were aware at the time of the withdrawal. Respondent did not oppose petitioner's request.

Accordingly, in light of these events, the Commissioner declines to approve withdrawal of this matter, which is hereby remanded to the OAL for further proceedings in accordance with *N.J.A.C.* 1:1-1 *et seq.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 15, 1997
DATE OF MAILING APRIL 15, 1997

187-97

187-97

P.V., on behalf of minor child, F.A.,	:	
PETITIONER,	:	
V	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning guardian of F.A. challenged Board's residency determination.

ALJ dismissed petition as petitioner was twice afforded an opportunity to be heard and both times failed to appear. ALJ ordered that tuition be assessed against petitioner for the 1995-96 school year in the amount of $6,422.

Commissioner adopted findings and determination in initial decision and ordered payment of tuition for that period of minor F.A.'s ineligible attendance in the District.

April 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5543-96
(OAL DKT. NO. EDU 12037-95 - Remanded)
AGENCY DKT. NO. 420-10/95

PAOLA VALENCIA, on behalf of minor child, F.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON,
Respondent.

Paola Valencia, *pro se*

Anthony V. D'Elia, Esq., for respondent

Record Closed: February 27, 1997 Decided: February 27, 1997

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

Statement of Facts

This matter was remanded to the Office of Administrative Law (OAL) on May 24, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On December 23, 1996, the OAL notified the parties that a hearing was to be held on January 10, 1997 at 185 Washington Street, Newark, New Jersey 07102. The post office returned the petitioner's notice with a notation indicating "MOVED LEFT NO ADDRESS."

I **FIND** that the notice of hearing was addressed to the petitioner at the address he specified as his and that he has not notified the Department of Education or the OAL of his current address. I **CONCLUDE** that the notice was reasonably calculated to reach the petitioner and afford him the opportunity of a hearing and that the failure of the petitioner to receive notice of this hearing was of his own making.

Therefore, it is for good cause shown **ORDERED** that the relief requested by petitioner is denied.

And further **ORDERED** that tuition is assessed against Paola Valencia for the 1995-96 academic year in the amount of $6,422.

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

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

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

Feb. 27, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 3, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 7 1997
DATE

Barbara A Turner
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NOS. EDU 5543-96 and EDU 12037-95 (ON REMAND)
AGENCY DKT. NO. 420-10/95

P.V., on behalf of minor child, F.A.,	:	
PETITIONER,	:	
V	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that judgment must be entered in favor of respondent in that petitioner was *twice* afforded an opportunity to be heard on the instant matter and both times failed to appear on the scheduled date. In so ruling, the Commissioner notes that in the first instance, petitioner submitted an objection to dismissal of her petition, in May 1996, advising that she had moved and, therefore, did not receive a hearing notice in the mail. As previously noted, petitioner filed no exception or objection in response to the present decision and failed to leave a forwarding address with the OAL as to her new location. Based on these facts, the Commissioner concurs that petitioner has abandoned her appeal of the Board's determination that F.A. was not entitled to a free public education in the District's schools.

Moreover, under the circumstances, the Commissioner finds such conclusion equitable to both parties, observing that petitioner received fair notice, in writing, on several occasions, that she could be charged tuition for F.A.'s education, pursuant to *N.J.S.A.* 18A:38-1, if this matter were decided against her.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL that the instant Petition of Appeal be dismissed and petitioner is hereby assessed tuition in the amount of $6,422 for the period of minor F.A's ineligible attendance in the public schools of the City of Clifton.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 17, 1997
Date of Mailing, April 17, 1997

185-97

C #185-97
SB # 46-97

IN THE MATTER OF THE TENURE :
HEARING OF ALYCE STEWART, STATE-: STATE BOARD OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE : DECISION
CITY OF NEWARK, ESSEX COUNTY. :

Decided by the Commissioner of Education, April 15, 1997

For the Petitioner-Respondent, Murray, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Louis R. Franzese, Esq., of Counsel)

For the Respondent-Appellant, Samuel Manigault, Esq.

On December 11, 1996, the State-operated School District of the City of Newark (hereinafter "State-operated District") certified tenure charges of unbecoming conduct against Alyce Stewart (hereinafter "appellant"), alleging that she had knowingly participated in conduct intended to defraud the State Health Benefits Program by conspiring with Dr. Carl H. Lichtman, a licensed psychologist, to submit false claims for psychological services purportedly rendered. The State-operated District contended that appellant had provided Dr. Lichtman with personal information regarding herself and her dependents which was utilized by Dr. Lichtman to submit fraudulent claims to the insurance carrier for payment for psychological services. The State-operated District further alleged that, in exchange for the provision of such information, appellant had received and accepted a check from Dr. Lichtman in the amount of $3,181 as her

10/1/97

share of the insurance payments received by him for her false claims, and that such conduct "resulted in a theft of and improper payment of public monies."

The statement of evidence with the tenure charges included an affidavit from Dr. Lichtman in which he admitted that between 1986 and 1995, he had been "involved in a scheme to defraud insurance carriers, including the State Health Benefits Program as administered by a third party administrator, by submitting false claims for psychological services purportedly rendered for insureds and/or their dependents." Lichtman Affidavit, at 1. He stated that "[u]pon receipt of payment from the carrier for the alleged treatments, I retained a portion of the amount paid on the false claims, usually seventy-five percent (75%), and gave the insureds a portion of the amount received by me on the false claims, usually twenty-five percent (25%)." Id. at 1-2.

Dr. Lichtman acknowledged that appellant had provided him with information for herself and her dependents necessary to submit false claims, and that he had not treated appellant or her dependents. He then used the information provided by appellant to submit false claims to the State Health Benefits Program and received approximately $12,724 from the insurance carrier. Dr. Lichtman averred that in July 1994, he had "issued a personal check payable to Alyce Stewart totalling approximately $3,181.00, representing approximately twenty-five percent (25%) of the amount I received on the false claims I had submitted for her....I mailed the personal check to Alyce Stewart, and the check was negotiated." Id. at 2.

On December 12, 1996, the Director of the Bureau of Controversies and Disputes ("C & D") acknowledged receipt of those tenure charges from the State-operated District. A copy of that acknowledgment was also sent to appellant. On

January 6, 1997, the Director of C & D notified appellant that she had not filed an answer to those charges.[1] On January 29, 1997, the Director of C & D again notified appellant of her failure to file an answer and advised her that unless she filed an answer within ten days, each count in the petition would be deemed to be admitted. By letter dated February 6, 1997, Raymond J. Zeltner, Esq. advised the Director of C & D that he had been retained to represent appellant and that appellant had not received the notices in a timely manner since they had been sent to her former address. He requested that any further correspondence be directed to his office, and he also provided appellant's new address.

By letter dated February 11, 1997, the Director of C & D acknowledged Mr. Zeltner's letter of February 6 and advised him that the counsel for the State-operated District was being requested to provide Mr. Zeltner with another copy of the tenure charges. He was accorded an additional 20 days from receipt of those charges to file an answer on behalf of appellant. On February 12, 1997, the State-operated District sent another copy of the tenure charges to Mr. Zeltner.

By letter dated March 13, 1997, the Director of C & D notified Mr. Zeltner that he had still failed to file an answer to the charges. Mr. Zeltner was advised that unless an answer was received within ten days, each count of the petition would be deemed to be admitted and the Commissioner of Education would decide the matter on a summary basis. A copy of that letter was also sent to appellant.

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[1] N.J.A.C. 6:24-1.4(a) requires a respondent to file an answer to a petition of appeal within 20 days after receipt of that petition. The answer must "state in short and plain terms the defenses to each claim asserted and shall admit or deny the allegation(s) of the petition." N.J.A.C. 6:24-1.4(b) provides that a respondent "may not generally deny all the allegations, but shall make specific denials which meet the substance of designated allegations or paragraphs of the complaint."

On April 15, 1997, more than a month later, the Commissioner, still having received no answer to the charges, deemed each count to be admitted and directed that summary judgment be rendered in favor of the State-operated District. As a result, he directed that appellant be dismissed from her tenured employment.

On May 13, 1997, Mr. Zeltner filed the instant appeal on behalf of appellant. On August 8, 1997, a substitution of attorney was filed in which Mr. Zeltner withdrew as counsel for appellant and was replaced by Samuel Manigault, Esq. In an affidavit submitted in support of her appeal, appellant avers that during January and February 1997, she "left numerous messages with Mr. Zeltner's secretary requesting that he respond to the Tenure charge"...and "was reassured by his secretary that the matter was being handled." Appellant's Affidavit, at 1. Appellant asserts that "[i]n the latter part of February and early March, I was consistently reassured by Mr. Zeltner, himself, that everything was okay." Id. She adds that "I have a meritorious defense to the allegations set forth in the Tenure charges in that I am innocent of all criminal charges which is the gravamen of the action against me." Id. at 2.

After a careful review of the record, including the affidavit submitted by appellant, we affirm the decision of the Commissioner as clarified herein.

N.J.A.C. 6:24-1.4(e) authorizes the Commissioner to deem each count of a petition to be admitted and to render a decision by way of summary judgment in the event a respondent fails, after sufficient notice, to file an answer to a petition of appeal. In this case, appellant was provided with notice of the charges and an opportunity to respond. When she failed to respond, she was twice notified of such failure and, in accordance with the terms of N.J.A.C. 6:24-1.4(e), advised that unless she filed an

answer within ten days, each count in the petition would be deemed to be admitted. After her counsel advised the Director of C & D of the delay in receipt of those charges, appellant was provided with an additional 20 days in which to file an answer. When no answer was filed after 20 days, both she and her counsel were again provided with notice that if an answer were not filed within 10 days, each count of the charges would be deemed to be admitted and the Commissioner would render a decision on a summary basis.[2]

Under the circumstances, we find that the Commissioner properly decided this matter on a summary basis, and we find no basis in the instant appeal for disturbing that determination. Appellant has not demonstrated that the failure to answer the charges was excusable under the circumstances or shown that she has a meritorious defense to those charges. See Marder v. Realty Constr. Co., 84 N.J. Super. 313, 318 (App. Div. 1964), aff'd, 43 N.J. 508 (1964). We reiterate that appellant, in addition to her counsel, was provided with a copy of the March 13, 1997 letter from the Director of C & D, which advised that the charges against her would be deemed to be admitted unless an answer was filed within ten days. Yet, appellant had still not filed an answer to the charges more than a month later when the Commissioner rendered his decision on April 15. We note in that regard that there is no indication in her affidavit that appellant contacted Mr. Zeltner after receipt of the March 13 letter. Rather, she avers

[2] We note that, although N.J.A.C. 6:24-1.4(e) provides for two consecutive ten-day notices, appellant had been accorded an additional 20 days to answer the charges and then, after she still failed to file an answer, was advised in writing that each count in the petition would be deemed admitted unless she filed an answer within ten days. Such letters clearly provided appellant with adequate notice in conformity with the terms and intent of the regulation.

only that she was reassured by Mr. Zeltner "in the latter part of February and early March" that "everything was okay."

Indeed, appellant has still not responded to those charges. Nor, as a result, has she denied the specific allegations contained therein. The only intimation of a defense provided by appellant is the bald, one-line assertion in her affidavit that she is innocent of the criminal charges arising from the events at issue herein. Given the nature of the tenure charges, the statement of evidence from Dr. Lichtman corroborating and detailing appellant's participation in the scheme, and appellant's continuing failure to file an answer asserting her defenses to each claim and admitting or denying the allegations of the petition, N.J.A.C. 6:24-1.4(a), we find that such a statement by appellant is not sufficient in itself to provide her with a showing of a meritorious defense.

We note, moreover, that appellant's innocence with regard to a particular criminal charge would not necessarily preclude a finding that her actions, if demonstrated, constituted unbecoming conduct. Unbecoming conduct need not constitute a criminal act. In addition, tenure charges require only that the truthfulness of the allegations be established by a preponderance of the credible evidence, unlike a criminal charge in which each element of the crime must be established beyond a reasonable doubt. See In re Polk License Revocation, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) ("In proceedings before an administrative agency...it is only necessary to establish the truth of the charges by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt.").

In this case, our review of the tenure charges certified against appellant by the State-operated District and the statement of evidence in support of those charges indicates that appellant had knowingly and willingly engaged in conduct intended to defraud the State Health Benefits Program by conspiring to submit false medical claims for herself and her dependents. Deeming the charges to be admitted, and noting that appellant has still not denied the specific allegations contained therein, we find that appellant's actions constituted unbecoming conduct and that, under the circumstances, such conduct warranted her dismissal.

Consequently, as clarified herein, we affirm the decision of the Commissioner to dismiss appellant from her tenured employment.

October 1, 1997

Date of mailing OCT 03 1997

188-97

EDU #8116-96S
C # 188-97
SB # 49-97

IN THE MATTER OF THE TENURE	:	
HEARING OF RAMON SANCHEZ, NEW	:	STATE BOARD OF EDUCATION
JERSEY TRAINING SCHOOL FOR BOYS,:		DECISION
NEW JERSEY DEPARTMENT OF	:	
CORRECTIONS.	:	

Decided by the Commissioner of Education, April 17, 1997

For the Petitioner-Respondent, Mary Rubinstein, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Weissman & Minz (Sharra E. Greer, Esq., of Counsel)

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

December 3, 1997

Date of mailing DEC 05 1997

189-97

189-97

RICHARD EIDEN ASSOCIATES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, supplier for the low bidder for the installation of an energy management system for two schools in the District, alleged the Board engaged in unfair and illegal bidding process.

ALJ dismissed petition, finding 1) that petitioner lacked standing to bring this action (a bidder who is not the lowest responsible bidder lacks standing to challenge the award of a contract to another bidder on allegedly illegal specifications) and 2) that the matter was moot.

Commissioner adopted findings and determination in initial decision. Petition was dismissed.

April 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4240-95
AGENCY. NO.: 62-3/95

RICHARD EIDEN ASSOCIATES, INC.,
Petitioner,
v.
FAIR LAWN BOARD OF EDUCATION,
Respondent.

Andrea A. Angera, Jr., Esq., for petitioner
(Angera, Levin & Baltz, attorneys)

Paul H. Green, Esq., for respondent
(Green & Dzwilewski, P.A., attorneys)

Record Closed: December 16, 1996 Decided: February 27, 1997

BEFORE: **JEFFREY A. GERSON**, ALJ

STATEMENT OF CASE

In October 1994, respondent, Fair Lawn Board of Education, advertised a Notice to Bidders for the installation of an energy management system for two schools in the district. The specifications called for two separate bids on two separate contracts. Petitioner was an unsuccessful bidder who subsequently entered into an agreement with the successful bidder to supply certain components for the energy management system to be installed by the low bidder Tech Electric, Inc. (hereinafter TEC).

TEC requested that petitioner supply certain components for the energy management system to be installed by TEC. Petitioner proposed to supply components manufactured primarily by American Auto-Matrix which petitioner contended were equal to the Alerton

equipment specified in the contract. Respondent's engineering consultant, Energy for America, Inc. (hereinafter EFA), advised TEC that its submittal was not approved contending that the architecture of the proposed system was unacceptable. Though Eiden disagreed with EFA's conclusion in a letter sent directly to EFA in February 1995, EFA countered that their only obligation was to deal with the contractor.

TEC, seeking to avoid any further delay, thereafter submitted shop drawings which proposed installation of the specified Alerton components. The project was completed by May 1995.

The petition of Richard Eiden Associates, Inc. was filed with the Commissioner of Education on March 27, 1995. The matter was forwarded to the Office of Administrative Law for resolution on April 26, 1995. No emergency relief of any type was sought by petitioner and the matter was heard on September 12, 1996.

ISSUES

Petitioner contends that EFA's rejection of the proposed substitution of American Auto Matrix equipment for the Alerton equipment was an unreasonable action. Prior to reaching this substantive issue, petitioner would have to successfully overcome the argument that petitioner has no standing to bring this action and that the matter is moot.

THE FACTS

The facts in this matter are not in substantial dispute. Attached hereto are the Joint Stipulation of Facts entered into by the parties. A review of these facts and others that were uncontested reveals the following:

1. Though petitioner participated in the bidding on the contract in question, petitioner was not the low bidder.

2. Petitioner was a supplier for the low bidder (TEC), but not in privity of contract with the respondent.

3. Petitioner was not a tax payer residing or domiciled in the Borough of Fair Lawn.

4. TEC completed the contract in May 1995.

An examination of the petition filed by Eiden reveals the following requests for relief:

(a) the Board immediately suspend the performance of the awarded contract and place it out to bid in compliance with applicable law;

(b) order the use of petitioner's "or equal" specified components in the awarded contract;

(c) that the specification of the awarded and open contract be modified to provide for "or equal" components and provision of the programming services, and

(d) such other relief as the Commissioner deem proper and appropriate.

The first three grounds of requested relief are simply no longer viable. Petitioner had not requested any emergency relief and the contract between the parties (TEC and the Board of Education) has been completed. There is no power either in the OAL or the Commissioner's office to award damages to an aggrieved party. "Absent an expressed grant, administrative agencies do not have the power to exercise or perform a judicial function and may not determine damages, award a person money judgment or promulgate a order requiring a pecuniary reparation or refund". *John S. Slowenski v. the City of Trenton,* 92 *N.J.A.R.* 2d (BRC) 71, 72. Furthermore, although it appears that a citizen and taxpayer may challenge the validity of an award of a contract to a bidder, *Albert F. Ruhel Co. v. Board of Trustees Industrial Ed.*, 85 N.J. Super. 4, 10 (L. Div. 1964), Eiden has not set forth any legal authority that would allow it the remedy of disgorging the profits of the successful bidder, TEC. In fact, Eiden was undoubtedly in privity of contract with TEC and had a remedy it could have pursued in Superior Court but chose not to. It was TEC that was the low bidder, it was TEC that fulfilled the specifications of the contract, and it was TEC that decided they would rather switch than fight when it came to the battle of the specified components.

Though it has been recognized that court fashioned doctrines for the handling of litigation are applicable to administrative proceedings *City of Hackensack v. Winner*, 82 N.J. 1, 29 (1980), it is also well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review. *Anderson v. Sills*, 143 N.J. Super. 432, 437 (Ch. Div. 1976), *citing Oxfeld v. New Jersey State*

Board of Education, 68 N.J. 301, 303-04 (1975); *In re Geraghty*, 68 N.J. 209, 212-13 (1975); *Sente v. Clifton Manor and Municipal Council*, 66 N.J. 204, 206 (1974). It is equally well established that the Commissioner does not decide moot issues. See, *Pinkham v. Board of Ed. of Borough of South River, et. al.* 1974, S.L.D. 1103; *Tedesco v. Board of Ed. of Lodi*, 1955-56 S.L.D. 60, *Oxfeld v. Board of Ed. of Township of South Orange/Maplewood*, 1975, S.L.D. 574.

The court in *Anderson*, set forth the reasons for this doctrine: **First**, for reasons of judicial economy and restraint, courts will not decide cases in which the issues are hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. **Second**, it is the premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interest of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot regardless of the stage to which the litigation has progressed. See also, *2 Am Jour 2d Adm Law, 524 (6th Ed. 1990)*, stating that: "a subsequent event renders a controversy moot where it precludes a court from granting effective relief if any to the aggrieved party."

Consequently, the failure to obtain immediate emergency relief of any type now precludes the exercise of any effective remedy. It would be the height of absurdity to award damages to Eiden from profits that Eiden may have lost when Eiden refused to pursue the exact damages against the exact party in the form of breach of contract action against TEC prior to the completion of the contract.

Since **I FIND** as a matter of law that Eiden's petition requires dismissal on the basis of mootness, it is unnecessary to reach and resolve the outstanding issues. But, it is quite clear that the issue of standing in this matter travels hand in hand with the issue of mootness. Since Eiden was a bidder for the contract in question and did not at the time of his bid dispute the legality of the specifications, he cannot now circumvent that failure by attacking the Board with whom he was not even in privity of contract at any point. A bidder who is not the lowest responsible bidder lacks standing to challenge the award of a contract to another bidder on allegedly illegal specifications. *Watzen v. The City of Atlantic City*, 1, N.J. 272, 276 (1949). Petitioner claimed that he was "harmed" in that EFA rejected his proposed substitution "for

equal" components. EFA's determination that the parts were not "equal" could have been directly challenged by TEC as the low bidder but was not. The harm to Eiden, if any, was inflicted by TEC since it was TEC who waived the argument and completed the contract, apparently with Alerton Components. Thus, in the absence of any harm inflicted by the respondent on Eiden and in the absence of any privity between Eiden and the respondent, there cannot possibly be any legal relief to which Eiden would be entitled against respondent.

CONCLUSION

Since the contract between TEC and the respondent has been fully executed there is no relief that could legally be rewarded to Eiden thus rendering this matter moot. Not only is the matter moot but Eiden had no standing to pursue the petition.

ORDER

It is **ORDERED** that the petition filed by Richard Eiden Associates is hereby **dismissed**.

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

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

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

FEB 27 97
DATE

JEFFREY A. GERSON,
Administrative Law Judge

March 3, 1997
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 7 1997
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 4240-95
AGENCY DKT. NO. 62-3/95

RICHARD EIDEN ASSOCIATES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that petitioner lacks standing to pursue the within matter, and that it is, further, moot for the reasons expressed therein.

Accordingly, the Commissioner affirms the initial decision of the OAL and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 17, 1997
Date of Mailing, April 17, 1997

190-97

C.J., M.J., AND S.C., on behalf of minor child, D.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 11727-95
AGENCY DKT. NO. 393-9/95

CHRISTOPHER JONES,
MARGARET JONES, AND
SHERRY CLOWERS,
Petitioners,

v.

BOARD OF EDUCATION OF THE
SCHOOL DISTRICT OF SOUTH
ORANGE AND MAPLEWOOD,
Respondent.

Frank Askin, Esq., Rutgers Law School, Constitutional Law Clinic, for petitioners

Joanne Butler, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: February 10, 1997 Decided: February 18, 1997

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

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in October 1995 and a plenary hearing was scheduled to commence in May 1996. Thereafter, settlement discussions were initiated and the parties have now reached an amicable resolution of the dispute. A

stipulation of settlement containing the terms and conditions of the agreement reached between the parties and signed by the petitioners and by a representative of the respondent is attached hereto.

Having reviewed the attached stipulation of settlement, **FIND** as follows:

The parties voluntarily have agreed to the settlement as evidenced by the signatures contained on the stipulation.

The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

February 18, 1997
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

3/5/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 7 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

FEB 7

SCHENCK, PRICE, SMITH & KING
Attorneys at Law
10 Washington Street
P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for Respondent South Orange/
Maplewood Board of Education

CHRISTOPHER JONES, MARGARET JONES and SHERRY CLOWERS, Petitioners, v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDUOS-~~1528-95~~N Agency Ref. No. 362-9/95 STIPULATION OF SETTLEMENT
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Counterclaimant, v. CHRISTOPHER JONES, MARGARET JONES and SHERRY CLOWERS, Counterclaim Respondents.	

Petitioners/Counterclaim Respondents Christopher Jones, Margaret Jones and Sherry Clowers and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the

purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, and specifically release the other parties from any claims arising out of or related to these claims.

3. The pupil D.C. will be permitted to continue to attend District schools so long as he satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, et seq. If the District determines in the future that D.C. is in violation of N.J.S.A. 18A:38-1, et seq., the District will notify counsel for Petitioners of the basis for its belief and will not take any action against D.C. until the expiration of ten (10) days from the date of notice to counsel so that the parties may discuss the matter.

4. The Board of Education will provide a letter of explanation to Petitioners Christopher Jones and Margaret Jones, a copy of which is attached hereto.

5. As a result of the foregoing, Petitioners hereby withdraw the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

PETITIONERS

Sherry A. Clowers

Christopher Jones

Margaret Jones

RESPONDENT BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

BY:

F:\APPS\SSOLDATA\WPJLB\188961.1

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NEW JERSEY
525 Academy Street
Maplewood, New Jersey 07040

Dr. Ralph Lieber, Superintendent

201-378-9630
Fax 201-378-8680

November 6, 1996

Mr. and Mrs. Christopher Jones
10 Taranto Court
Maplewood, New Jersey 07040

Re: Jones/Clowers v. South Orange-Maplewood Board of Education, Docket No. EDUOS 11727-95N

Dear Mr. and Mrs. Jones:

We believe it is in the best interests of the parties to resolve the above matter without devotion of further time and expense. Therefore, the Board of Education has determined that it will drop all challenges to Dantae's enrollment in Columbia High School. We should agree that the parties' willingness to resolve this matter does not constitute an admission of liability or wrongdoing on anyone's part. We hope you will accept this letter in furtherance of the settlement of your Petition with the Commissioner of Education.

As a citizen of Maplewood, you are no doubt aware of the Board's deep concern to protect the citizens and taxpayers of both South Orange and Maplewood. As a result, the Board has undertaken a program to ensure that only pupils entitled by law to attend district schools are permitted to enroll. Insofar as the Board's action in denying Dantae's initial enrollment may have caused you or Dantae any inconvenience, kindly accept the Board's apology.

We are pleased to have Dantae as a student at Columbia High School, and look forward to his continued success there.

Sincerely,

Ralph Lieber
Superintendent

RL/blm

BC: Dr. J. Cusack
Joanne Butler, Esq.

NOV - 8 1996

OAL DKT. NO. EDU 11727-95
AGENCY DKT. NO. 393-9/95

C.J., M.J., AND S.C., on behalf of minor child, D.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

April 18, 1997
Date of Mailing, April 18, 1997

191-97

LIBORIO LO RUSSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that his dismissal from employment as a carpenter in the District violated his tenure rights pursuant to *N.J.S.A.* 18A:6-10.

ALJ concluded that the Commissioner did not have subject matter jurisdiction over petitioner's employment as such employment is subject to, and governed by, the provisions of Title 11, the Civil Service Laws. As such, this matter is within the jurisdictional purview of the Department of Personnel, rather than the Commissioner of Education. Summary judgment was granted to the District. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER ON MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 3747-96
AGENCY DKT. NO. 74-2/96

LIBORIO LO RUSSO,
Petitioner
v.
STATE OPERATED SCHOOL DISTRICT
OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Libero D. Marotta, Esq., for Petitioner

Patricia A. Taylor, Esq., for respondent, Jersey City School District

Record Closed: February 18, 1997 Decided: March 3, 1997

BEFORE **ARNOLD SAMUELS,** ALJ:

On March 4, 1996 the petitioner, Liborio LoRusso, filed a verified petition of appeal with the Commissioner of Education, alleging that his dismissal from employment as a carpenter in the State Operated School District of Jersey City

(District) violated his tenure rights pursuant to *N.J.S.A.* 18A:6-10. The petitioner demands that the removal from his position be reversed; that he be granted back pay and that he be given a tenure hearing pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

On April 11, 1996 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

The respondent filed an answer, which, among other things, stated that the petitioner's employment is governed by the Civil Service Act, *N.J.S.A.* 11A:1-1 *et seq.*, (the Act); that the Act had been adopted by the Jersey City School District; that therefore, the School Laws, including *N.J.S.A.* 18A:6-10 *et seq.* did not apply to the petitioner; and that the Commissioner of Education has no jurisdiction to hear or decide this matter.

On December 17, 1996 the respondent filed an application for summary decision, alleging that no disputed material facts exist and that a decision should be rendered in favor of the respondent as a matter of law.

The petitioner filed papers in opposition to the motion on February 18, 1997.

FACTS

After reviewing the papers submitted by both parties, it is clear that the following **FACTS** are undisputed:

Petitioner Liborio LoRusso was employed by the respondent as a carpenter. On March 28, 1995 petitioner was served with a Preliminary Notice of Disciplinary Action, Form CS-31A. This notice was prepared on a Department of Civil Service(Department of Personnel) form and charged the respondent with violations of Civil Service rules

that are contained in *N.J.A.C.* 4A:2-2.3 *et seq.* The listed specifications include insubordination and conduct unbecoming an employee in the public service.

A departmental disciplinary hearing was convened on November 14, 1995, after multiple adjournments had been granted to the petitioner. Neither the petitioner or his attorney appeared on November 14, 1995.

After an *ex parte* presentation of evidence, the hearing officer found that the petitioner's actions constituted conduct unbecoming an employee in the public service and insubordination. Sufficient cause was found to terminate him from his position, effective December 4, 1995.

A Final Notice of Disciplinary Action, on a Department of Civil Service (Department of Personnel) CS-31B form, was thereafter served on the petitioner. The notice indicated that the charges were sustained and that he was removed from his position, effective December 4, 1995.

By letter dated December 22, 1995 petitioner filed a request to appeal the above determination to the Merit System Board, in the Department of Personnel.

On or about February 28, 1996 the petitioner filed the instant petition of appeal contesting his termination before the Commissioner of Education.

The respondent did not file "tenure charges" against the petitioner, nor was a hearing held pursuant to *N.J.S.A.* 18A:6-10. The respondent had acted against the petitioner under the Civil Service Laws, *N.J.S.A.* 11A:1-1 *et seq.* and it did not submit the matter to the jurisdiction of the Commissioner of Education as a controversy and dispute under the school laws, pursuant to *N.J.S.A.* 18A:6-9 *et seq.*

LEGAL DISCUSSION AND ANALYSIS

A summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b).

A summary judgment proceeding is designed to allow the judge to quickly and inexpensively dispose of any case which does not present any genuine issue of material fact requiring disposition at a hearing. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). The role of the judge in such a motion is to determine whether there is a genuine issue of material fact, but not to decide the issue if such an issue exists. *Judson* at 73. In addition, "an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is genuine issue which can only be determined in an evidentiary hearing. If the adverse party does not respond, a summary decision, if appropriate, shall be issued." *N.J.A.C.* 1:1-12.5(b).

Reliance on argument in a brief and the bare allegations of the complaint, unsupported by fact and merely stating bare conclusions, are insufficient under our rules to create a fact issue. More is required than mere denials without supporting affidavits or proofs. See *Borough of Franklin Lakes v. Mutzberg* 226 *N.J. Super* 46, 57 (*App. Div.* 1988).

The administrative regulation referred to above governing summary decision is essentially the same as the New Jersey Court Rule that provides for summary judgment. See *R.*4:46-2. The New Jersey Supreme Court recently modified and clarified the analysis required when considering a motion for summary decision/judgment. In *Robin Brill v. The Guardian Life Insurance Co.* 142 *N.J.* 520 (1995), the court adopted the summary judgment standard currently utilized by the Federal courts. The court stated:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Brill, supra* at 540.

In applying this analysis, the Appellate Division stated that this new standard "requires a judge ruling on a summary judgment motion to engage in a weighing process to find out if a genuine issue of material fact exists, a process essentially the same as that of a directed verdict." *Kelly v. Bally's Grand, Inc.* 285 *N.J. Super* 422, 435 (*App. Div.* 1995) (citing *Brill,* 142 *N.J. Super* 529-30, 533, 536-37).

The sole issue presented by the respondent in its application for summary decision is whether the petitioner's removal from employment is governed by the School Laws under Title 18A, within the jurisdiction of the Commissioner of Education or, in the alternative, whether it is a question of Civil Service Law, within the jurisdiction of the Department of Personnel.

In removing the petitioner from his position, the respondent acted in accordance with Department of Personnel (Civil Service) procedures, utilizing Civil Service forms designed to be served on permanent employees; and Civil Service (Department of Personnel) disciplinary hearing procedures were followed. Of considerable interest is the fact that the petitioner filed a timely appeal of that action with the Merit System Board. Two months later the petitioner also filed the instant petition of appeal with the Commissioner of Education.

In his opposing papers, the petitioner argues that he was a tenured employee of the school district, and was entitled to a tenure hearing pursuant to *N.J.S.A.* 18A:6-10. However, he does not present any evidential materials to demonstrate that he was tenured. Respondent then proceeds to argue about the manner in which the Civil

Service disciplinary hearing was held on November 14, 1995. He asserts that the charges of insubordination and conduct unbecoming an employee in the public service (civil service charges under *N.J.A.C.* 4A:2-2.3(a)) were unsupported by detailed specifications. He also faults the fact that the departmental hearing was conducted on an *ex parte* basis, when neither he or his attorney appeared.

The petitioner then shifts back from his complaints about the departmental hearing to the original assertion that, as a tenured employee, he was entitled to procedures in accordance with *N.J.S.A.* 18A:6-10.

After presenting the foregoing argument, the petitioner does not assert that any genuine issues of material fact exist. No evidential materials, affidavits or other matter were presented in an attempt to indicate that there is or may be a genuine issue of fact that can only be determined in an evidentiary hearing. The petitioner does not deny that he was a permanent Civil Service employee, protected under Title 11A. Nevertheless, he also desires the protection of a tenured employee under the School Laws.

In this case, it is obvious that there are no disputed material facts. The matter is therefore appropriate for determination by way of summary decision.

The authority cited by the district in support of its argument that the Commissioner of Education does not have jurisdiction over the petitioner's employment, because his employment is subject to and governed by the provisions of Title 11, the Civil Service Laws, is accurate. *N.J.S.A.* 18A:11-1 provides:

> The Board shall . . . make, amend and repeal rules, not inconsistent with this title or with the rules of the State Board . . . for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the revised statutes.

More specifically, *N.J.S.A.* 18A:28-2 provides that no person in the classified service pursuant to Title 11 shall be affected by the provisions of the Education Law concerning tenure.

In *Newark Attendance Counselors Association v. Board of Education*, 2 *N.J.A.R.* 346 (1979), the Commissioner of Education dismissed a layoff appeal by school attendance officers, holding that the petitioners were classified Civil Service employees subject to competitive appointments.

This concept was repeated by the Commissioner of Education in *Mary Ellen Anderson v. State-Operated School District of Jersey City*, OAL DKT. NO. EDU 7006-94 (Feb. 28, 1995) *aff'd Comm'r of Educ.* (Apr. 10, 1995). There, the Commissioner of Education affirmed that whatever employment rights the petitioner, a clerk/secretary in the Jersey City School District, might have possessed existed pursuant to Civil Service Laws, *N.J.S.A.* Title 11, rather than the Education Laws. Consequently, the Commissioner of Education acknowledged that he lacked subject matter jurisdiction over the dispute.

See also, *Valerie D. Harp v. Board of Education of the City of Newark*, OAL DKT. 10918-93 (July 6, 1994).

It is **CONCLUDED** that the holdings in the above cases apply similarly to the instant matter, and the respondent is entitled to summary decision.

ORDER

It is therefore **ORDERED** that summary decision is **GRANTED** to the respondent. The instant appeal before the Commissioner of Education is **DISMISSED** for lack of jurisdiction.

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

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

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

March 3, 1997
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

3/7/97
DATE

DNH.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 3747-96
AGENCY DKT. NO. 74-2/96

LIBORIO LO RUSSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that whatever employment rights the within petitioner may possess exist pursuant to civil service law, *N.J.S.A.* Title 11, rather than under education law. As such, the Commissioner of Education lacks subject matter jurisdiction over the instant matter.

Accordingly, summary decision is hereby granted to the Board and the within Petition of Appeal is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1997
DATE OF MAILING APRIL 18, 1997

192-97

192-97

M.L.F., on behalf of minor, S.L.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11883-96
AGENCY DKT. NO. 484-10/96

M.L.F. ON BEHALF OF MINOR S.L.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Respondent.

Mary L. Fuller, petitioner, pro se

James T. Hundley, Esq., for respondent (Hundley & Parry, attorneys)

Record Closed: March 5, 1997 Decided: March 6, 1997

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 23, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 6, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/7/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 10 1997
DATE

Barbara A Hermel
OFFICE OF ADMINISTRATIVE LAW

cc

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

STIPULATION OF SETTLEMENT

OAL DKT. NO. EDU 11883-96

AGENCY DKT. NO. 484-10/96

M.L.F. ON BEHALF OF
MINOR S.L.T.,

Petitioner,

v.

BOARD OF EDUCATION
OF THE TOWNSHIP OF NEPTUNE,
MONMOUTH COUNTY,

Respondent.

The parties agree that petitioner Mary L. Fuller is the legal guardian of S.L.T., that petitioner is domiciled in respondent's district and that S.L.T. is entitled to attend the public schools in respondent's district free of charge. Petitioner hereby agrees to withdraw her request for a hearing and respondent agrees that it will not pursue any action for tuition.

Mary L. Fuller, Petitioner
Pro Se

James T. Hundley, Esquire
for Respondent

DATED: March 5, 1997

OAL DKT. NO. EDU 11883-96
AGENCY DKT. NO. 484-10/96

M.L.F., on behalf of minor, S.L.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 18, 1997
DATE OF MAILING APRIL 18, 1997

193-97

N.C., on behalf of minor child, I.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 11882-96

AGENCY DKT. NO. 563-11/96

N.C. ON BEHALF OF MINOR CHILD, I.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Respondent.

Elizabeth Szabo, Esq., for petitioner (Somerset Sussex Legal Services, attorneys)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: February 11, 1997 Decided: March 4, 1997

BEFORE **BARBARA A. HARNED**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 23, 1996, for a hearing pursuant to N.J.S.A. 52:14F-1 to -13.

The parties now seek to have the matter withdrawn and dismissed with prejudice (see attached Order of Dismissal With Prejudice). Based on this representation, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED with PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/4/97
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

March 6, 1997
DATE

DVCentanaitis/lp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 07 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

FEB 11 10 12 AM '97

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SOMERSET SUSSEX LEGAL SERVICES
By: Elizabeth Szabo, Esq.
Attorney for Nitcemines Candelario
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

NITCEMINES CANDELARIO, custodian, on behalf of IVAN AYALA	:	EDUC AGENCY DKT NO. 563-11/96
Petitioner	:	
vs	:	
SOMERVILLE SCHOOL DISTRICT,	:	ORDER OF DISMISSAL WITH PREJUDICE
Respondent	:	

This matter having been opened to the Court on application of Somerset Sussex Legal Services, attorneys for petitioner, and McDonald, Rogers & Rizzolo, attorneys for respondent, and it appearing that Nitcemines Candelario has relocated outside of the District of Somerville with the minor, Ivan Ayala, and the Somerville School District having represented that it shall not seek reimbursement of education costs for the education provided to Ivan Ayala prior to his relocation, and the parties having resolved the matter, and for good cause shown:

It is on this 14 day of February 1997

ORDERED that the petition of Nitcemines Candelario, on behalf of Ivan Ayala be and hereby is dismissed with prejudice.

Hon. Barbara A. Harned, ALJ

We hereby consent to the entry and form of the within Dismissal with Prejudice.

McDonald, Rogers & Rizzolo
attorneys for respondent

Michael J. Rogers, Esq.

Somerset Sussex Legal Services
Attorneys for petitioner

Elizabeth Szabo, Esq.

OAL DKT. NO. EDU 11882-96
AGENCY DKT. NO. 563-11/96

N.C., on behalf of minor child, I.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the initial decision of the Office of Administrative Law, and the Order of Dismissal with Prejudice have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner approves the terms of the Order of Dismissal with Prejudice, noting that the parties have agreed to such terms.

Accordingly, the Commissioner adopts the initial decision of the Administrative Law Judge and the matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1997
DATE OF MAILING APRIL 18, 1997

194-97

194-97

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8987-96

AGENCY DKT. NO. 434-9/96

C.H. ON BEHALF OF
MINOR CHILD, M.H.,

Petitioner,

v.

BOARD OF EDUCATION
OF THE BOROUGH OF
SOMERVILLE, SOMERSET
COUNTY,

Respondent.

Diane K. Smith, Esq., for petitioner (Somerset-Sussex Legal Services, attorney)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: February 24, 1997 Decided: February 28, 1997

BEFORE **JOHN R. TASSINI,** ALJ:

STATEMENT OF THE CASE

C.H. claimed that, pursuant to N.J.S.A. 18A:38-1, M.H. should be admitted to the school system operated by the respondent Board of Education of Somerville (BOE). As shown in the attached "Stipulation of Dismissal," the case has been settled.

PROCEDURAL HISTORY

The Department of Education transmitted the petition and answer to the Office of Administrative Law where on October 30, 1996, the matter was filed as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. After conferences, the case was settled and, on February 24, 1997, the Stipulation of Dismissal was filed.

FINDINGS OF FACT AND CONCLUSION OF LAW

1. C.H. and M.H. are domiciled and resident in the school district and M.H. may attend the BOE's schools free of charge. N.J.S.A. 18A:38-1.

2. The parties have voluntarily entered into the settlement agreement.

3. The agreement disposes of all issues in controversy and is consistent with the law. N.J.S.A. 18A:38-1, N.J.A.C. 1:1-19.1.

ORDER

I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

2/28/97
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3/5/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 06 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

SOMERSET SUSSEX LEGAL SERVICES
By: Diane K. Smith, Esq.
Attorney for Petitioner
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET # EDUOS 08987-96S
AGENCY REF. # 434-9/96

C.H. on behalf of M.H.,	:	
Petitioner	:	
vs	:	
SOMERVILLE SCHOOL DISTRICT,	:	STIPULATION OF DISMISSAL
Respondent	:	

This matter being opened to the Office of Administrative Law by Somerset Sussex Legal Services, attorneys for petitioner, C.H. on behalf of M.H., upon notice to McDonald, Rogers & Rizzolo, Esqs., attorneys for the Board of Education of the District of Somerville, and it appearing that the respondent has acknowledged that M.H. is a resident of Somerville and has registered her in the schools of the District of Somerville and it further appearing that M.H. is attending the schools of the District of Somerville, and for good cause shown;

1. The parties acknowledge that M.H. is a resident of the District of Somerville and entitled to a tuition-free education in the schools of the District of Somerville.

2. The petitioner hereby withdraws her request for a hearing in this matter.

DATED: February 18, 1997

SOMERSET SUSSEX LEGAL SERVICES
Attorneys for Petitioner

By: _____
Diane K. Smith, Esq.

McDONALD, ROGERS & RIZZOLO
Attorneys for Respondent

By: _____
Michael J. Rogers, Esq.

OAL DKT. NO. EDU 8987-96
AGENCY DKT. NO. 434-9/96

C.H., on behalf of minor child, M.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 18, 1997
DATE OF MAILING APRIL 18, 1997

195-97

SUSAN DORFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher sought restoration of two sick leave days that she contended were due to work-related illness.

ALJ concluded that the two days absences were the result of personal injuries caused by accidents arising out of and in the course of petitioner's employment, and that the two days absences, charged to petitioner's sick leave, should be restored to petitioner pursuant to *N.J.S.A.* 18A:30-2.1. Moreover, citing *Hern* Appellate Division decision, ALJ found that where no claim was filed for workers' compensation benefits and where such a claim would be dismissed if filed, there was no valid reason to require petitioner to engage in the futile gesture of pursuing a workers' compensation claim. Thus, in this case, the Commissioner had original exclusive jurisdiction to decide the sick leave claim under *N.J.S.A.* 18A:30-2.1.

Citing *Hern* (where the Appellate Division has offered guidance on a particular issue, the Commissioner will not ignore such guidance, notwithstanding that it may be found in an unpublished decision), the Commissioner adopted the findings and determination in the initial decision as his own. Commissioner ordered the restoration of petitioner's sick leave.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7649-94

AGENCY DKT. NO. 287-7/94

SUSAN DORFMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

Michael B. Berman, Esq., for petitioner (Collins & Berman, attorneys)

James T. Hundley, Esq., for respondent (Hundley & Parry, attorneys)

Record Closed: October 21, 1996 Decided: March 6, 1997

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks to have two days absences charged to her sick leave restored pursuant to *N.J.S.A.* 18A:30-2.1 based on her contention that these absences were the result of personal injuries caused by accidents arising out of and in the course of her employment. Petitioner's petition of appeal was filed with the Commissioner of Education on July 14, 1994, and the matter

was transmitted to the Office of Administrative Law (OAL) on August 9, 1994, for hearing as a contested case. It should be noted that a motion for summary decision by petitioner was also transmitted with petitioner's petition of appeal. On July 29, 1994, respondent filed an answer together with a cross-motion for summary decision.

The matter was assigned to the undersigned administrative law judge (ALJ) on September 19, 1994, and a telephone prehearing conference was scheduled for October 27, 1994. The scheduled prehearing conference was adjourned and rescheduled for December 8, 1994, because of a court conflict of attorney for respondent. On December 8, 1994, the prehearing conference was converted to a status conference at which time it was concluded that petitioner's summary decision motion and respondent's cross-motion for summary decision should be decided prior to any further proceedings in this matter. Accordingly, by an Order entered on December 21, 1994, petitioner's motion for summary decision was granted in part and respondent's motion for summary decision was denied. In this Order it was determined that the Commissioner of Education has jurisdiction to decide whether an employee is entitled to the benefit of *N.J.S.A.* 18A:30-2.1 without the necessity of the employee first filing a Worker's Compensation claim. It was further ordered that petitioner's motion for summary decision was denied in part and that a hearing must be held in order to determine whether petitioner's absence was the result of a personal injury caused by an accident arising out of and in the course of her employment.

A telephone prehearing conference was then scheduled for February 2, 1995. On that date it was determined that a prehearing conference would be dispensed with, and this matter was scheduled for hearing to commence on July 10, 1995. At that time the parties believed that certain grievance arbitration proceedings may have the result of resolving the issues in this matter. When these grievance procedures were not successful in resolving the matter, the hearing was held on July 10 and 11, 1995. At the conclusion of the testimony on these two days, the matter was continued in order to afford petitioner the opportunity to seek to enforce a subpoena served on a medical witness petitioner intended to call.

By letter dated July 27, 1995, attorney for petitioner indicated that because the medical witness who had been subpoenaed would be a hostile witness, petitioner requested the opportunity to be examined by an evaluating physician. Attorney for respondent had no objection

to this and, accordingly, no new hearing date was scheduled at that time. On November 29, 1995, attorney for petitioner supplied the report of an examining physician and requested that this report be accepted into evidence. In response to this, attorney for respondent requested the opportunity to have petitioner examined by an independent psychiatric expert and made arrangements for such examination.

When no information concerning the status of this matter was forthcoming from counsel, a Letter Order was entered on March 11, 1996, ordering counsel to report the status of this matter within ten days and providing that in the absence of such a report the record would be closed. By letter of March 15, 1996, attorney for respondent indicated that petitioner was examined by a medical expert on March 8, 1996, and respondent was awaiting a report. This report was provided on March 28, 1996. Both counsel agreed to the submission of the two medical reports in evidence without the necessity of formal proof for consideration in this matter.

Counsel then requested an opportunity to file written closing arguments, and upon the submission of these closing arguments, the record in this matter was closed on October 21, 1996. As a result of the entry of two Orders of Extension, the time within which an Initial Decision was to be provided was extended until March 6, 1997.

FACTUAL DISCUSSION

The issue to be determined in this matter is whether petitioner's two days absences following an incident which occurred on April 13, 1994, was the result of personal injuries caused by an accident arising out of and in the course of her employment. Petitioner was paid her full salary for the two days she was absent from her teaching duties. These absences were charged against petitioner's accumulated sick leave. Petitioner did not file any action with the Division of Worker's Compensation as a result of the April 13, 1994 incident.

It is undisputed that petitioner is employed by the Board of Education of the Township of Neptune as a special education teacher assigned to Neptune High School. At the time of the incident which occurred on April 13, 1994, she had been employed for twelve years. It is also undisputed that on that date, Dr. Morgan was the principal of Neptune High School.

Petitioner testified that on April 13, 1994, she was sitting in the hall when a security guard came up to her and asked her to go to Dr. Morgan's office because he would like to see her. She then sought a building representative of the local education association, and indicated she would not go into Dr. Morgan's office alone because of previous incidents. She then located Mr. Bogan, a building representative, who accompanied her into Dr. Morgan's office. While on the way, Dr. Morgan stopped petitioner and asked where she was, to which she responded that she was getting a building representative. Dr. Morgan responded that he would like to see her in his office alone, but she indicated she wanted to have a representative with her. He then said "No. You're coming into my office alone" to which petitioner responded that she was not. Dr. Morgan then responded that if she did not come into his office alone she would need a representative. Petitioner then asked what the meeting was about, to which Dr. Morgan responded that she would find out when she came into his office alone. Petitioner then indicated she would not come into his office alone. Dr. Morgan then walked away and Mr. Bogan asked her if she was going to Dr. Morgan's office, to which she responded she would not go alone.

Petitioner testified that she then walked into the office of Ms. Abrams, who is a guidance counselor and another building representative. She sat down and told Ms. Abrams what happened. While she was talking to Ms. Abrams, Dr. Morgan opened the door, went into petitioner's face and said "What are you doing? Where are you supposed to be?" Petitioner responded that she was on hall duty but that she was telling Ms. Abrams what happened. Dr. Morgan then responded "Oh yeah. Well, I want you to go there right now." Petitioner responded that she is upset right now, to which Dr. Morgan, still in her face, responded, "Well, woopty-doopty-doo." Petitioner indicated she looked at Dr. Morgan and could not believe what he said and she said "Woopty-doopty-doo?" to which Dr. Morgan screamed back in her face "Yeah, woopty-doopty-doo." Petitioner indicated that Dr. Morgan was approximately three or four inches from her face.

Petitioner indicated that she had never heard anyone talk like that and she became very upset. Dr. Morgan then stormed out of the office, and slammed the door. Mr. Lampinen, a Vice Principal, then came into the office to try to calm her down and the school nurse was called. The school nurse took petitioner's blood pressure, and it was sky high. Approximately eight to ten

minutes later, Dr. Morgan returned and he spoke to petitioner very nicely. He asked if she was upset and indicated there was no reason to be upset, and he just wanted to tell her about her year-end evaluation. She indicated that never in thirteen years has an evaluation been handled by anyone other than the chairman of the department. He indicated all she had to do was sign her year-end evaluation and there was nothing wrong. Following this, Dr. Bogan took petitioner to see Dr. Crawford and she told the doctor what happened. The doctor told her that she was really upset and that she should avoid precipitating events and come back on Monday.

Petitioner indicated that on that same day there was a meeting scheduled with the Superintendent and approximately twenty teachers who have had incidents involving Dr. Morgan.

Petitioner testified that her blood pressure is perfect, and is normally 110 over 70 or 110 over 80. On that day, her blood pressure went up to 140 over 110 or 140 over 120, and she had a headache that lasted for days. Her blood pressure was still very high the next day and two days later when she went to see another doctor. That doctor indicated that her blood pressure was abnormally high.

Petitioner indicated that when Dr. Morgan first addressed her, her own mental state was calm. She indicated that Dr. Morgan denied her representation and threatened her by telling her that if she did not go into his office alone, she would need representation. She indicated that when she went to talk to Ms. Abrams she was in tears. She then saw the school nurse who is Jean Mitchell. She indicated that Dr. Bogan took her to the school physician who is Dr. Crawford of Pro Health. Dr. Crawford advised her not to go back to teaching for two days, to avoid Dr. Morgan on Thursday and Friday and then come back to school on Monday. Petitioner identified a note given to her by Dr. Crawford on April 13, 1994 (P-1) indicating that she should return to work on April 18, 1994. The report indicates a diagnosis of anxiety disorder and a treatment of avoidance of precipitating events. Petitioner then returned to work on April 18, 1994.

Petitioner testified that she has had a second job teaching exercise classes at Monmouth College. It is a stretch and tone, low impact class and she indicated that it was relaxing and less stressful than her normal job. She taught that class on April 14 and 15, 1994.

Petitioner testified to other prior incidents involving her and Dr. Morgan. On January 14, 1994, there was a fight between two girls outside of her classroom. After petitioner broke up the fight, her back and neck was bothering her and she went to the nurse's office and the nurse suggested that she go home and see a doctor. She taught the next class but then at the end of the day she got coverage and was walking down the hall when Dr. Morgan began screaming and pointing at her to get into his office now. She indicated that Dr. Morgan is about six foot five inches tall and three hundred pounds and he was standing over her. He then asked if she hurt herself to which she responded that she hurt her lower back and neck. She could see that he was very mad and steaming, and he was frightening to see. One of his secretaries places an accident report on his desk, and he took his hand an swung the paper on the floor. The secretary picked it up and Dr. Morgan said "Okay, I'm done talking to you" and she started walking out of his office. She indicated that when he was speaking to her he was placing his finger in her face, his facial expression was like a monster and he was talking extremely loudly. She indicated that Dr. Morgan was scary and out of control. Petitioner indicated that she was in shock as a result of this meeting and afterwards she became nauseated.

Petitioner then testified to an incident on January 25, 1994. Petitioner indicated that after her return to work following the fight she had to make copies. After making copies she returned to her class and Dr. Morgan and Mr. Lampinen were outside of her room and Dr. Morgan told her to come with him. While they were walking down the hall, Dr. Morgan advised petitioner that she was in big trouble and needed a representative for the meeting. When they sat down, petitioner explained that she was making copies of an exam because the copy machine had been broken down. While she was stating this she glanced at someone else whereupon Dr. Morgan started pointing and screaming at her, "When I talk to you, you look at me. You don't look at anyone else. You look at me. I'm the principal. I'm the principal." Petitioner then stated that she did not mean to look at anyone else to which Dr. Morgan responded "You just remember, I'm the principal." Petitioner then finished giving her explanation and Dr. Morgan dismissed her. The next day, Dr. Morgan spoke to petitioner in the hall and said that the incident of the day before was going to be forgotten.

Petitioner testified to another incident on February 18, 1994, concerning her work-related injury. Petitioner, Lucille Alfano, Michael Berman, Esq., and Dr. Morgan attended the meeting and Dr. Morgan began questioning petitioner about the injury and asking if she still taught aerobics after school, to which she responded yes. At that point, Dr. Morgan got so mad that he threw everyone out of the office saying "Everybody get out of here. Get out of here now." She indicated that Dr. Morgan was waving his arms like a scary person and was screaming at the top of his lungs. He was banging on the desk waving his arms and he lost all control of himself.

Petitioner testified to another incident on February 22, 1994. She indicated that the beginning of that school year the teachers requested that she teach an exercise class, but it was never approved. As a result, she put up a note in the teachers' room indicating that there would be no aerobics class because it was rejected. On February 22, petitioner got a note in her mailbox from Dr. Morgan asking why she has a letter in the teachers' room saying she will not have aerobics. following this, on March 1, 1994, there was an incident at the mailbox. She walking into the office to see if she had any mail and Dr. Morgan was standing there. She walked by and Dr. Morgan yelled to her "Ms. Dorfman? Do you walk by me and not say hello?" She then said hello. Following this, Dr. Morgan would frequently pass by her in the hallway and put his face into hers and say hello with a kind of smirk. His face was about three inches from hers. He went out of his way to do this every time he saw her in the hallway.

Petitioner indicated that these prior incidents were in her mind when she was called to Dr. Morgan's office on April 13, 1994. Petitioner also indicated that because of this background and because of the incidents with approximately twenty other teachers, she felt that she had to attend the meeting of April 13, 1994.

On cross-examination, petitioner indicated that when the security guard informed her of the meeting, she asked what it was about, and the security guard shrugged his shoulders. About two or three minutes later she crossed the hall to Dr. Morgan's office and peeked in, and he was not there. It was when petitioner indicated she would not come in alone that Dr. Morgan became angry. When Dr. Morgan insisted that she go in alone, she responded that she would not without a representative. She indicated that this whole conversation took place in five minutes. It was when Dr. Morgan told her to go back to her regular duty and she indicated that she was upset that

Dr. Morgan said "Woopty-doopty-doo." She did not go back to hall duty at that point. When petitioner was seen by the school nurse office, she had a headache and felt sick and nauseous. She was also surprised and shocked. She saw Dr. Crawford within one-half hour to one hour after this incident.

Petitioner testified that she attended the meeting at the Board of Education office from approximately 2:15 until 4:00 p.m. During the meeting she had a headache and was distressed. Petitioner admitted that on the same day she taught two classes at Monmouth College at 5:15 p.m. and 6:30 p.m.. It is her normal practice to perform exercises and because Dr. Crawford's note indicated no restrictions, she taught the classes. She actually exercised with her students and indicated that the earlier class is a relaxation-type of classe and reduces stress. She also taught the second class starting at 6:30 p.m., which is a stretch or low-impact class. She did not go to school at Neptune High School to teach on April 14 or 15, 1994. On April 15, she went to an eye doctor, Dr. Jsaistis. She had no problems with her blood pressure before this incident.

On cross-examination, petitioner admitted that she provided a written statement to the Superintendent setting forth the incidents of January 14, 1994, January 25, 1994, March 1 and 2, 1994. However, in this statement dated July 16, 1994, the April 13, 1994, incident is not mentioned. She also indicated that it was also not mentioned in a sworn statement which she gave and which was transcribed on July 26, 1994.

Petitioner then testified that her blood pressure was elevated not after the incident on April 13, 1994, but after the incident on January 4, 1994. She indicated her blood pressure went up after the fight incident because that is when Dr. Morgan started on her. She also corrected her prior testimony by indicating that she saw Dr. Jsaistis on January 6 or 7, 1994 and not in April, 1994.

Petitioner admitted that nowhere in her statement of September 26, 1994 did she indicate that Dr. Morgan pointed his finger at her on January 4, 1994. Petitioner indicated that the transcript is basically accurate. She stated that Dr. Morgan started acted bizarre and peculiar toward her after she returned from her back injury.

Petitioner indicated that before the April 13, 1994 incident she felt fine. She admitted that in the transcribed statement she gave on July 26, 1994, she described her state as livid, and that she said, "I never heard of a building principal say woopty doopty do before." In the transcript she also said that she stated to Dr. Morgan, "I can't believe you are talking to me like this (gesturing)" and that she would not send her child to this school. She also admitted that she saw only Dr. Crawford after the incident of April 13 and she did not se Dr. Jsaistis after that.

Petitioner testified that after the January incident she was prescribed a muscle relaxant, which she took for eleven days until it ran out., but she was not taking any medication on April 13, 1994.

Constance Jean Liotti, a secretary in the computer room and for guidance, testified that her office is physically located in the vicinity of the offices of Dr. Morgan office and Joyce Abrams. On April 13, 1994, she saw Dr. Morgan in hallway and he was angry. He was walking in a fast and rough manner and his face was unhappy and his eyes were wide. She then walked into the guidance office and into Joyce Abrams' office and she observed petitioner very upset and crying. They then closed the doors so that the students would not hear anything whereupon Dr. Morgan came back into the guidance office, opened the door and started yelling at petitioner "I want you in my office." He then started to yell at her louder and she was crying. She stated that Dr. Morgan was yelling at petitioner and was right on top of her. She then sent someone to get the school nurse. Dr. Morgan then yelled at petitioner that she had to go back and teach and petitioner responded that she was very upset. Dr. Morgan then left the room, slammed the door and walked out. He was furious. At that point the school nurse came into the office and she left. She indicated that Dr. Morgan was screaming at petitioner for four minutes. The guidance office is very small and that as soon as someone comes in they are right over the chair that petitioner was sitting in. She indicated that she recalls no other unusual phrases stated on that day.

Joyce M. Abrams testified that she is employed by respondent as a high school guidance counselor. She was a guidance counselor on April 13, 1994. On that day, petitioner came into her office and asked if she would be able to join her at a meeting with Dr. Morgan as an association representative. Petitioner seemed very alarmed, fearful and concerned. Ms. Abrams

indicated that because Dr. Jim Bogan had accompanied petitioner on previous occasions that it would be appropriate for him to go. She subsequently saw petitioner and Dr. Bogan walk toward Dr. Morgan and she observed that Dr. Morgan was glaring and impatient. She then heard petitioner subsequently state "I won't go in." with her voice raised. A short time later petitioner returned to Ms. Abrams' office and she totally lost her composure. She was upset, shaking from head to toe and was sobbing and Ms. Abrams thought that petitioner was going to pass out. She tried to calm petitioner down when Dr. Morgan barged into her office and verbally attacked petitioner. He stated "If you don't get into my office now then get where you belong." Petitioner indicated she could not go to hall duty because she is upset, to which Dr. Morgan responded woopty-doopty-doo for you, woopty-do, pointing at petitioner with his finger in her face. He was yelling and very aggressive and threatening.

Ms. Abrams testified that the school nurse was then called. Petitioner's legs and arms were shaking and she was very distraught. The nurse took her blood pressure and with that there was a knock on the door and Dr. Morgan entered to room. at this point, the tears started coming down petitioner's eyes and she was agitated again. Dr. Morgan said that if she had needed a representative with her that he would have had one there. He also indicated that he wanted to see her about an end of year evaluation and he was calling her in because it was a good one. Dr. Morgan had quieted his voice and was not threatening. Following this, Dr. Bogan brought petitioner to the school physician for treatment.

On cross-examination Ms. Abrams indicated that when petitioner first came into her office she looked alarmed, worried and apprehensive. She indicated that when Dr. Morgan returned to the office, petitioner completely lost her composure. She was sobbing and crying, her arms and legs were dangling and shaking, and her shoes were making noise on the floor because of the shaking. She indicated that an employee is entitled to a representative if the employee feels threaten or is uncomfortable. She also indicated that she has never had a security guard summon her and has never had an evaluation given by any one other than a department head.

Rita Smith testified that she is a secretary in the guidance office. On April 13, 1994 petitioner came into the guidance office and she was hysterical and upset. This is after she observed Dr. Morgan looking down at petitioner and motioning for her to go into his office and

petitioner asking why he wanted to see her. Dr. Morgan was getting more heated and disturbed. Petitioner was just asking in a normal voice why, while Dr. Morgan's voice was intimidating and harassing. After petitioner came into the office, subsequently, Dr. Morgan also came in, opened the door, stuck his head in and said some things and then said "Woopty-do." She indicated that Dr. Morgan wanted petitioner to come into his office and he was getting her upset again.

Dr. James Bogan testified that he is a guidance counselor at the Neptune High School. On April 13, 1995, he met with petitioner to represent her in an administrative matter. He did not know what the matter was about. He started to walk with petitioner to a meeting with Dr. Morgan. Petitioner was uneasy and frightened. Dr. Morgan appeared and he was very irritated and agitated about something. Dr. Morgan instructed petitioner to go into his office now. She responded that she wanted a representative, in response to which he indicated that if she does not go into his office alone she will need a representative. Dr. Morgan was threatening, menacing, loud and belligerent. Petitioner then broke down in tears saying that she wanted a representative and Dr. Morgan insisted that she did not need a representative. Petitioner was extraordinarily and visibly upset. She was crying and when Dr. Morgan walked away Dr. Bogan lead her back to Ms. Abrams office. She was very frightened and nervous and indicated she did not want to meet with Dr. Morgan without someone being present. When they got into Ms. Abrams office, they closed the door and tried to make petitioner feel comfortable. Dr. Morgan abruptly walked in the door and looked down at petitioner and indicated that if she was not going to come to his office, she had to report back for duty. Petitioner responded that she cannot because she was too upset, to which Dr. Morgan responded, "Well woopty-do." Petitioner then asked what are you saying, why are you saying this me, following which petitioner became hysterical. Dr. Morgan then left. While they were attempting to console her, Dr. Morgan returned by knocking and coming in. His tone changed and soften, became more normal and he said he only wanted to give her her evaluation which was was very good.

Dr. Bogan indicated that when Dr. Morgan came into Ms. Abrams office the forst time, he was loud, intimidating, threatening and trying to get control. His face was in petitioner's face and his finger was approximately three or four inches from her face. Petitioner lost control of the words she said and became hysterical, but she never reacted to Dr. Morgan in a belligerent or responsive mode. Thirty to forty-five minutes later, Ms. Mitchell, the school nurse, suggested

that petitioner go to Pro Health because of her condition. He indicated that the principal absolutely never gives a year end evaluation.

On cross-examination, Dr. Bogan indicated that Dr. Morgan is a pugnacious individual. He is tall and imposing, and when he is angry the volume of his voice increases in intensity. He indicated that petitioner did not act in any insubordinate way.

Dr. Bogan also testified to a January 25, 1994 meeting. On that occasion, Dr. Morgan wanted to know where petitioner was and petitioner looked at Dr. Bogan and answered the question. Dr. Morgan then interrupted her in a nasty, hostile and vicious way, and said "Ms. Dorfman, I am the principal, look at me when you answer the question." He demeanor on that occasion was angry and threatening.

Jean Mitchell testified that she is a school nurse a Neptune High School. On April 13, 1994, she was called to Joyce Abrams office and petitioner and Joyce Abrams were present. Petitioner was visibly and extremely upset, was crying, and was shaking and bent over. She talked to petitioner and took her blood pressure. As a result of her examination, petitioner's blood pressure was 140 over 90. Petitioner advised her that her normal blood pressure was 110 over 70. Thus, there was a significant difference. In addition she was suffering from a headache, queasiness, nausea and tremor in her arms and legs. After she was in the office, Dr. Morgan came in and spoke again to petitioner. As a result, petitioner cried more and harder.

Ms. Mitchell identified an Accident Investigation Report that she prepared and was typed by a secretary (P-4). She felt that petitioner should go to Pro Health because of her elevated blood pressure, headache, queasiness, nausea, tremors and symptoms of anxiety. Petitioner was not physically capable of driving because of her condition.

The attorneys for the respective parties submitted into evidence the reports of certain medical experts. Petitioner supplied the report of Edward Dengrove, M.D, dated November 21, 1995 (P-5). Dr. Dengrove concluded that petitioner suffers from an anxiety reaction with features of depression resulting from the trauma of the harassment and the back and neck injuries. He

expressed the opinion that petitioner is partially disabled due to this neuropsychiatric condition resulting from the above harassment and physical complaints.

Respondent submitted the report of Morris Reby, M.D., dated March 26, 1996 (R-8). Dr. Reby indicated that the crux of the matter lies in the fact that petitioner was hypersensitive to Dr. Morgan's request and felt threaten when he requested that she come into his office without a union representative. After a brief discussion, a shouting match ensued and petitioner ultimately wound-up with the school physician who diagnosed acute anxiety disorder and told her to take a couple of days off, which petitioner did. Petitioner also, very wisely, saw the benefits of defusing the situation in this manner and at the same time she went about doing things to reduce her own anxieties. Dr. Reby notes that Dr. Crawford prescribed no medications. Dr. Reby opined that this situation was a display of emotions which certainly was not an accident, but a clash of personalities. He indicated that these sick days served to reduce the tensions and at the same time petitioner was able to reduce her anxieties. He indicated that he does not consider the days off as compensation days because this was a conflict of personalities.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:30-2.1 provides additional sick leave beyond annual and accumulated sick leave for employees who are absent from work as a result of a personal injury caused by an accident arising out of and in the course of their employment. In *Theodore v. Dover Bd. of Ed.*, 183 *N.J. Super.* 407, 415 (App. Div. 1982), it was held that the phrase "accident arising out of or in the course of his employment" as used in *N.J.S.A.* 18A:30-2.1 is intended to have the same meaning as it does in the context of the Worker's Compensation Act. The issue whether petitioner suffered an "accident" within the meaning of the statute appears not to be disputed. The term "accident" has traditionally been construed to include all work-related episodes and events resulting in injury and all unexpected injuries, whether or not unusual strain or exertion was involved and whether or not there was a direct impact. *Theodore, supra.* However, it must also be established that the injury arose out of or in the course of employment and was caused by the work-related episode. See, *Porter v. Elizabeth Bd. of Educ.*, 281 *N.J. Super.* 13, 18-19 (App. Div. 1995). Respondent argues that petitioner's injury was caused by and resulted from her own hypersensitivity and, therefore, did not arise out of or in the course of her employment.

Before addressing the merits of the case, a preliminary and previously addressed issue must be dealt with. Respondent argues that in order for petitioner to be entitled to restoration of her sick leave, she must obtain a determination by the Division of Workers' Compensation that she suffered a compensable injury entitling her to workers' compensation benefits, citing *Forgash v. Lower Camden County School,* 208 *N.J. Super.* 461, 466-467 (App. Div. 1985). It points out that in that case the Appellate Division indicated that *N.J.S.A.* 18A:30-2.1 contemplates a prior determination of a compensable injury by the workers' compensation court before consideration by the Commissioner of the eligibility of the injured employee for the additional benefits provided by the statute. Respondent also relies on *Amos v. Bd. of Educ., Boro of Red Bank,* State Board, Feb. 3, 1988; *Tompkins v. Bd. of Ed. of Hamilton,* 11 *N.J.A.R.* 520 (1987); and *Verneret v. Bd. of Educ., City of Elizabeth,* 95 *N.J.A.R.* 2d. (EDU) 134, in support of its contention that the Commissioner should refrain from exercising its jurisdiction pending a determination by the Division of Workers' Compensation.

In support of her position, petitioner relies upon *Hern v. Board of Education of the City of Union City, Hudson County,* Superior Court, Appellate Division, Dkt. No. A-339-91T3, (decided Oct. 23, 1992). In that unreported decision, the Appellate Division held that where no claim has been filed for workers' compensation benefits and where such a claim would be dismissed if filed, there is no valid reason to require a petitioner to engage in the futile gesture of pursuing a workers' compensation claim. The Appellate Division held that in such a case, the Commissioner has original exclusive jurisdiction to decide a sick leave claim under *N.J.S.A.* 18A:30-2.1.

In the Order Granting Partial Summary Decision in this matter, I reviewed both the *Forgash* case and the *Hern* case, and I indicated that when the Appellate Division decided *Forgash*, its concern was to harmonize *N.J.S.A.* 18A:30-2.1 and the Worker's Compensation Act so as to avoid any conflict in their implementation. In circumstances where a workers' compensation claim has not been filed, the provisions of *N.J.S.A.* 18A:30-2.1 are not suspended, but remain in full force and effect and give certain rights to any employees of a school district. Where an employee has not filed a worker's compensation claim but seeks to assert rights under this statutory provision, and a dispute arises as to whether the employee's absence is the result of

a personal injury caused by an accident arising out of and in the course of his or her employment, this issue clearly must be decided by the Commissioner of Education. It was on that basis that I concluded that the Commissioner has jurisdiction to hear and decide this issue. I do not intend to revisit that issue at this point in the case

Petitioner seeks to have the two days absence charged not against her sick leave, but as and in accordance with *N.J.S.A.* 18A:30-2.1. In support of her position, she relies upon the report of respondent's authorized treating physician dated April 13, 1994 (P-1) having a diagnosis of anxiety disorder, a treatment of avoidance of precipitating events, and a return to work date of April 18, 1994. In addition, petitioner relies upon respondent's Accident Investigation Report (P-4), which was prepared by the school nurse, indicating that on April 13, 1994, petitioner became emotionally distraught and was crying after having been summoned to the principal's office from her duty and being given no reason for the meeting. This report indicates that petitioner experienced elevated blood pressure, headache, nausea and nervousness, and tremors of arms and legs. Finally, petitioner relies on the report of a medical expert, Edward Dengrove, M.D, dated November 21, 1995 (P-5). Dr. Dengrove concluded that petitioner suffers from an anxiety reaction with features of depression resulting from the trauma of the harassment and the back and neck injuries. Dr. Dengrove expressed the opinion that petitioner is partially disabled due to this neuropsychiatric condition resulting from the above harassment and physical complaints.

Respondent argues that petitioner's anxiety was purely personal to her and arose from her own hypersensitivity, citing the report of Dr. Reby (R-8). It points out that petitioner's own actions in returning to the Superintendent's office for a meeting on the same day as the incident, and her teaching exercise classes at Monmouth College on that same day and for the two days she was on sick leave reinforce the conclusion that her anxiety was purely personal and not the result of her employment.

I **FIND** that the report of Dr. Dengrove, which was accepted into evidence without objection, is the opinion of a medical expert, and expresses the opinion that petitioner's illness of an anxiety reaction with features of depression resulted from the trauma of the principal's harassment of petitioner. I **FIND** that petitioner's employment was, at the very least, a contributing cause of the injury. See, *Coleman v. Cycle Transformer Corp.*, 105 *N.J.* 285, 290

(1986). I **FIND** that the April 13, 1994 report of Dr. Crawford, the school physician (P-1), who was the authorized to treat petitioner and did so, diagnosed petitioner as having an anxiety disorder, and recommended a treatment of avoidance of precipitating events. This report recommended a return to work date of April 18, 1994. I **FIND** that these two reports raise the clear inference that petitioner's anxiety reaction or disorder was caused by the incident on April 13, 1994, involving Dr. Morgan.

I specifically reject the argument of respondent that petitioner's anxiety was purely personal to her and arose from her own hypersensitivity. It was not disputed that Dr. Morgan engaged in a prior series of incidents which led to petitioner's anxiety when she was asked to report to his office on April 13, 1994. Neither was it disputed that Dr. Morgan impliedly threatened petitioner with discipline if she did not come into his office alone without any association representative. Finally, it would be beyond logic and human experience to conclude that petitioner did not suffer an anxiety disorder or reaction when her building principal, a 6 foot 5 inch tall 300-pound man, stood over her three or four inches away from her face, screaming at her. It would require a person of monumental insensitivity not to be affected by such bizarre and intimidating behavior directed toward him or her.

Based upon the report of Dr. Crawford who was petitioner's treating physician, and the report of Dr. Dengrove, I **FIND** that it was Dr. Morgan's bullying, outrageous, discourteous and unprofessional conduct which caused the anxiety reaction of petitioner requiring her to be out of work for two days. Therefore, I **CONCLUDE** that the two days absences on April 14 and 15, 1994, were the result of personal injuries caused by accidents arising out of and in the course of petitioner's employment, and that the two days absences on April 14 and 15, 1994, charged to petitioner's sick leave, should be restored to petitioner pursuant to *N.J.S.A.* 18A:30-2.1.

DECISION AND ORDER

Based on the foregoing conclusion that the absences were the result of personal injuries caused by accidents arising out of and in the course of petitioner's employment, it is hereby

ORDERED that the two days absences on April 14 and 15, 1994, charged to petitioner's sick leave, shall be restored to petitioner pursuant to *N.J.S.A.* 18A:30-2.1.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 6, 1997
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

3/7/97
DATE

DNJA
DEPARTMENT OF EDUCATION

MAR 10 1997
DATE

Mailed to Parties:

Barbara A Harnal
OFFICE OF ADMINISTRATIVE LAW

ml

APPENDIX

WITNESSES

For petitioner:

Susan Dorfman
Constance Jean Liotti
Joyce M. Abrams
Rita Smith
James Bogan
Jean Mitchell

For respondent:

None

EXHIBITS

For petitioner:

P-1 Pro Health doctor's note of S. Crawford, M.D., dated April 13, 1994

P-3 Handwritten drawing of office layout

P-4 Accident investigation report

P-5 Report of Edward Dengrove, M.D., dated November 21, 1995

P-6 Attorney for petitioner letter brief

For respondent:

R-6 Teacher Evaluation form, dated March 18, 1994

R-8 Report of Morris Reby, M.D., dated March 26, 1996

R-9 Legal memorandum of attorney for respondent

R-10 Reply letter brief of attorney for respondent

OAL DKT. NO. EDU 7649-94
AGENCY DKT. NO. 287-7/94

SUSAN DORFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, including transcripts of the proceedings at the Office of Administrative Law (OAL), and the initial decision of the OAL have been reviewed. Respondent's exceptions were timely filed pursuant *N.J.A.C.* 1:1-18.4.*

Respondent contends that the Administrative Law Judge's (ALJ) determination in this matter is incorrect in that pursuant to *Forgash, supra*, a prior determination of a compensable injury by the Workers' Compensation Court is required before the Commissioner can determine if an employee is eligible for the additional benefits provided by *N.J.S.A.* 18A:30-2.1 (Exceptions at p. 3) Respondent objects to the ALJ's reliance upon *Hern, supra*, an unpublished Appellate Division decision contrary to the holding in a public opinion, *Forgash,* in reaching his decision. Respondent notes that the language of New Jersey Court Rule 1:36-3 says that "no unpublished opinion shall constitute precedent or be binding upon any court." (Exceptions at p. 4) Further, respondent avers that to follow the unpublished *Hern* opinion would result in the Commissioner conducting a workers' compensation hearing complete with medical documentation and testimony. Such a result, he avers, would be contrary to the specific

* Reply Exceptions were filed beyond the prescribed timeframe set forth in regulation and are, therefore, not considered herein.

language of the Appellate Division in *Forgash,* which held that a proceeding pursuant to *N.J.S.A.* 18A:30-2.1 "may not be supplant to *(sic)* the function of the Compensation Court." (Exceptions at p. 4)

Upon a careful and independent review, the Commissioner concurs with the conclusions of the ALJ, specifically, the Commissioner finds it appropriate, in this circumstance, to be guided by the Appellate Division's reasoning in *Hern, supra,* which would not require petitioner to file a workers' compensation claim wherein that claim, on the basis of the length of sick leave involved, would clearly be dismissed. To do so, as noted in *Hern*, would force petitioner to engage in the futile gesture of pursuing a workers' compensation claim that would not satisfy the minimum seven-day waiting period required by *N.J.S.A.* 34:15-14. Consequently, the Commissioner agrees that, based on the circumstances herein, he has exclusive jurisdiction to decide the sick leave claim under *N.J.S.A.* 18:30-2.1.

In response to respondent's objections to the Commissioner's use of *Hern, supra*, the Commissioner notes that, where the Appellate Division has offered guidance on a particular issue, the Commissioner will not ignore such guidance, notwithstanding that it may be found in an unpublished decision.

Lastly, the Commissioner adopts the ALJ's finding that petitioner's two days of absence, on April 14 and 15, 1994, charged to petitioner's sick leave, should be restored to petitioner pursuant to *N.J.S.A.* 18A:30-2.1 based on the totality of this record.

Accordingly, for the reasons expressed therein, as amplified above, the Commissioner affirms the initial decision of the OAL, ordering restoration of petitioner's sick leave.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

196-97

196-97

M.D., on behalf of E.D.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged the grade received by E.D. on a research paper. Board had agreed with E.D.'s teacher that he had plagiarized and, thus, deserved a low grade on his paper. Petitioner contended Board's action was arbitrary, capricious and unreasonable.

ALJ found that petitioner did not prove by a preponderance of credible evidence that the Board's action was improper. A board of education has broad discretionary authority and its actions are presumed to be lawful and in good faith unless petitioner proves otherwise. ALJ dismissed petition, finding that E.D.'s plagiarism was not of such severity that it required a zero, but that after revision, the Board was not unreasonable in giving him a 55. Moreover, the grade of a classified student was not relevant to E.D.'s claim.

Having reviewed the Board's policies and established definitions regarding plagiarism and the appropriate crediting of encyclopedias for research reports, the Commissioner adopted the findings and determination of the ALJ as his own.

APRIL 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8395-96

AGENCY DKT. NO. #331-8/96

M.D., ON BEHALF OF E.D.,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF WALL,

Respondent.

Joseph T. Duchak, Esq., for petitioner

Douglas J. Kovats, Esq., for respondent (Kenney & Gross, attorneys)

Record Closed: February 13, 1997 Decided: March 4, 1997

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner E.D., a student in the high school operated by the Wall Township Board of Education (BOE), submitted a research paper and his teacher determined that, contrary to her instruction, he failed to credit sources for information in the paper. That is, the teacher determined that E.D. had plagiarized and she gave him a low grade on the paper. The BOE considered the matter and agreed with the teacher.

E.D. denies that he plagiarized; he contends that the BOE's actions were arbitrary, capricious and unreasonable; and he demands that the grade be raised.

The BOE submits that E.D. did plagiarize; that E.D. has not proven that the BOE acted unlawfully, etc.; and that E.D.'s claim must be dismissed.

PROCEDURAL HISTORY

The BOE (as detailed below) considered and affirmed the determination of its teacher and Curriculum Committee. On August 9, 1996, the petition was filed and, on August 29, 1996, the answer was filed with the New Jersey Department of Education's Bureau of Controversies and Disputes. N.J.S.A. 18A:6-9. The Bureau transmitted the papers to the Office of Administrative Law (OAL) where, on September 19, 1996, the matter was filed as a contested case. N.J.S.A. 52:14B-2(b). On November 18, 1996, the case was the subject of a telephone conference. On January 13 and 21, 1997, the case was heard in the OAL Trenton (Hamilton Township). Thereafter, I invited memoranda relative to the relevance of another student's grade on the research paper, and the record was closed with receipt of the last memorandum.

FINDINGS OF FACT

Consistent with the usual practice, at the start of the 1995-96 school year, copies of the BOE's high school's rules were distributed to all students; the rules were discussed by school officials and the students; and the students were instructed to take the rules home to their parents. For the 1995-96 school year, the rules stated, under the section heading "CHEATING," "Any student found cheating will be disciplined as follows: Zero grade, Parent Notified, incident recorded. Plagiarism, depending upon its severity, will result in a grade ranging from 0-65." R-7.

During the 1995-96 school year, in the BOE's high school, Robin Knutelsky, who was appropriately educated and certified, taught "College English." E.D., a sophomore, was one of about twenty-five students in Mrs. Knutelsky's class. The overall grade for Mrs. Knutelsky's

class was determined as follows: 33% for classroom performance and quizzes; 67% for five major assignments.

In early January 1996, Mrs. Knutelsky instructed her students that they were required to write and submit research papers comparing Shakespeare's Macbeth to a historical figure; the historical figure would be chosen from a list provided by Mrs. Knutelsky; and the paper's theme would be a version of Lord Acton's principle "Power tends to corrupt and absolute power corrupts absolutely." P-1. From the list E.D. chose Nikita Khrushchev. Mrs. Knutelsky read about the people chosen by her students and she helped them select "outside sources" (reference materials) for their papers. Mrs. Knutelsky provided to each student a book entitled Writing Research Papers and a two-page document entitled "Research Paper, College English III, Requirements." P-2; R-4.

Writing Research Papers stated:

> **Avoiding Plagiarism**
>
> One of the purposes of using a Working Bibliography and note cards is to help you avoid plagiarism. **Plagiarism** is the act of intentionally or unintentionally treating work done by someone else as though it were your own. In most schools, including high schools and universities, plagiarism is considered a serious offense and can result in severe penalties such as failing grades, loss of course credit, or even expulsion.
>
> Given the seriousness of plagiarism, it is important to know exactly what it is and what you can do to avoid it. Here is a simple test to determine whether something is plagiarized: Ask yourself, Is this information, idea, or statement common knowledge? If the answer is no, then ask yourself, Did this information, idea, or statement come from a source outside myself, or did it come from my own experience or as a result of my own creative activity? If the information, idea, or statement is not common knowledge, and if it came from an outside source, then you must credit that source. Failure to do so constitutes plagiarism.
>
> [P-2 at 39-40 (emphasis added).]

The last two sentences quoted above were restated in the margin on the same page. *Id.* at 40. The forms for credit of outside sources included a credit for "An article in an encyclopedia or other alphabetically organized reference work." *Id.* at 88.

Mrs. Knutelsky's "Research Paper, College English III, Requirements" stated, "Any form of plagiarism will result in a zero for a grade for the paper." R-4.

In class, Mrs. Knutelsky reviewed Writing Research Papers and she instructed her students that its instructions and forms for credit of outside sources should be followed in the preparation of their papers. Mrs. Knutelsky explained to her students that "common knowledge" (which would not require such credit) was information known to the "average person." Mrs. Knutelsky discussed with her students how to credit an encyclopedia (although she instructed them that only one encyclopedia should be used and it should not be a primary reference source.) P-2. To assure that her students were familiar with Writing Research Papers, Mrs. Knutelsky gave a quiz on it.

E.D. testified that Mrs. Knutelsky instructed her students that information from an encyclopedia would be considered "common knowledge" which did not need to be credited. However, E.D.'s testimony in that regard conflicts with the clear directions set forth in Writing Research Papers and was contradicted by Mrs. Knutelsky's testimony. *Ibid.* The credibility of testimony depends upon the demeanor of a witness, but also must be logical and consistent with all other credible evidence. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). I found incredible E.D.'s testimony that Mrs. Knutelsky instructed her students not to credit an encyclopedia.

Mrs. Knutelsky instructed her students that they could submit drafts of their papers for her review and advice, so that thereafter they could make corrections, etc., before the mid-February submission of the final version of the papers (which would be graded). E.D. did not take advantage of this opportunity, i.e., he submitted his paper without such a review.

E.D. titled his paper "The Corruption of Macbeth and Khruschev [sic] Through Absolute Power." In the first seven pages of the paper E.D. summarized the events in Macbeth, summarized events in Khrushchev's years as premier of the Soviet Union, explained "the downfall

of Macbeth," and compared Macbeth's and Khrushchev's "rise to power, their maintainment of power and their fall from power." The eighth page of E.D.'s paper was a list of six "Works Cited" (which did not include an encyclopedia). The last four pages of E.D.'s paper consisted of an outline relating to Macbeth and Khrushchev in three parts, "I. Rise to Power"; "II. Maintaining Power"; and "III. Fall from Power." J-1.

E.D.'s paper included much information, but only when he used a quotation did he credit an outside source. J-1; P-2. In most instances, E.D. provided names, dates, places and events without attribution to publications. J-1. For example, E.D. wrote the following:

> Unlike Macbeth, who gains absolute power as king through murder and conspiracy, Khruschev chose to gain his political status through promises of a new era of Soviet prosperity. In fact, Khruschev publicly denounced the Macbeth-like executions and overall reign of terror of the Stalin era. Instead of trying to gain power through fear and intimidation, Khruschev promised to place a new emphasis on Soviet industry and agriculture. This new emphasis on industry and a renewed interest in consumer goods, Khruschev boasted, would help the Soviet Union to become a more economically sound nation, a nation he believed could possibly surpass the U.S. economically by 1970.
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> . . . .
>
> Unlike Macbeth, Khruschev had a positive influence and began his quest to maintain power over the Soviet Union, by trying to deliver on some of the promises he made. His emphasis on the poor and middle class factions of the Soviet Union could be felt in the many programs he tried to start at the beginning of his power. One particularly important program was a house-building program which provided decent affordable housing for the poor. Another promise he tried to deliver on, was his promise of a new emphasis on Soviet agriculture and industry. Khruschev took major strides in the area of increasing agriculture, when in the late 50's, he had 70,000,000 acres of land in Siberia cleared for the sole purpose of growing wheat and grain. Khruschev was also interested in increasing trade between both Socialist and capitalist nations.
>
> Like Macbeth, Khruschev too encountered some difficulties in maintaining power. For example in June of 1957, Khruschev almost became the victim of an overthrow by the pro-Stalin members of the Communist party. They felt that Khruschev's

denouncement of the Stalin era could also be viewed as a denouncement of the basic Communist principles, and the catalyst for the recent revolutions in Eastern European Communist nations, such as Poland and Hungary. Khruschev was able to keep his position through an appeal to the Communist Party Central Committee. Khruschev used this little uprising as an opportunity to dismiss anyone from power he considered an opponent or threat, similar to the way Macbeth eliminates anyone viewed as a possible problem or threat, similar to the way Macbeth eliminates anyone viewed as a possible problem through execution. The most important of these was Khruschev's dismissal of Georgy Zhukov from "Minister of Defense." Following the incident, Khruschev would attempt to strengthen his power over the Soviet Union, by appointing himself to the position of Soviet Premier.

As Soviet Premier, Khruschev had taken the final step in achieving absolute power. Now he had enough power in the Soviet government to uphold his own personal agenda without opposition. This though is where absolute power, began to corrupt Khruschev. He was no longer concerned with upholding his promises of creating a superior Soviet Union, but was now more interested in living out his own personal fantasy of creating the most powerful array of nuclear weaponry in the world. Instead of capitalizing on the recent achievements of the Soviet Space program, Sputnik, and fostering its growth and development, Khruschev used Sputnik only as a means "to create the illusion that the Soviets had the power to dominate the world" (Beschloss, 381).

Probably the biggest mistake Khruschev made while in power was his decision to further Russian involvement in revolutionary Cuba. Khruschev's interest in Cuba was two-fold. On the surface, it seemed that he would use Cuba merely as a means of creating a strong Communist ally in Central America and furthering the cause of Socialism. Khruschev's main agenda though, was to rid Cuba of U.S. efforts against the Communist revolution and to fulfill his own secret power fantasies of creating a bitter conflict between the U.S. and the Soviet Union.

With this the Cuban Missile Crisis began in 1962. As a means of attempting to eliminate U.S. involvement in Cuba, Khruschev began to deploy Soviet nuclear missiles in Cuba and threatened to send Soviet troops to fight along side the revolution. Kennedy took a strong stance against any nuclear armaments being installed less than 100 miles from the United States. In retaliation, he sent naval forces to the waters around Cuba and threatened to board Russian ships in order to stop the Soviet buildup. Khruschev finally had the classic power struggle with the U.S. he had so long

> desired, but now the world was closer to a nuclear holocaust than ever before and Khruschev backed down in fear that he would have to go toe to toe with the U.S., revealing the inferiority of Soviet nuclear power.
>
> . . . .
>
> Like Macbeth, Khruschev's corrupt methods would eventually pave the way for his downfall. Overtime, it became apparent that Khruschev was unable to deliver on his promises in full, and had become more concerned with his own personal agenda, than the betterment of the Soviet Union. His own personal fantasy of creating the most powerful nuclear army in the world, lost him the support of the military, which favored more conventional means. He "exploited Soviet Space successes and local opportunities, like Cuba, to bolster his claims that the Soviet economy would surpass the United States by 1970" (Beschloss, 381). His hopeful ideas of improving the Soviet economy and the overall status of Soviet life in general, helped to gain him support, but it was just as easily lost when the members of the Communist Party saw he had not succeeded in following through. Another problem with Khruschev was his overwhelming hatred of the United States. Instead of trying to foster a good relationship between both nations, Khruschev looked to create a bitter rivalry between the two.
>
> Like Macbeth, Khruschev would ultimately be removed from power by people he once trusted and considered allies. Unbeknownst to him, his colleagues had been plotting his removal for months. Khruschev could not believe the people he considered friends were plotting against him. His colleagues believed that Khruschev's main problem was "that he was never able to fully drive out of his mind the fanatical idea that the ends justify the means" (Burlatsky, 275). Ultimately, Khruschev was stripped of all of his political power on October 14, 1964. In his last address to the Communist party, Khruschev admitted to some wrong doing, but he felt that if his colleagues had seen problems they should have told him instead of keeping their hypocritical silence.
>
> [*Id.* at 2-7.]

The "average person" may be educated sufficiently to know some of the information E.D. included in his paper. However, it is highly improbable (and no evidence has been offered to show) that the "average person" would know much of the information E.D. recited in his paper, such as the following: "Khruschev boasted [that an emphasis on Soviet industry and an interest in

consumer goods] would help the Soviet Union to become a more economically sound nation, a nation he believed could possibly surpass the U.S. economically by 1970." "[I]n June of 1957, Khruschev almost became the victim of an overthrow by the pro-Stalin members of the Communist party." Khruschev dismissed "Georgy Zhukov from 'Minister of Defense.'" "Khruschev was stripped of all of his political power on October 14, 1964." J-1. This information obviously came "from a source outside" of E.D. P-2 at 40. Consequently, pursuant to the clear directions set forth in Writing Research Papers, such a "source" (even an encyclopedia) should have been credited. P-2.

Given the above circumstances, E.D. had no realistic intent to pass off the information in his paper as his "own experience" or the result of his "own creative activity." P-2 at 40. E.D. just failed to follow the clear directions provided by Writing Research Papers and Mrs. Knutelsky, and he unintentionally failed to credit the outside sources from which he obtained the information. P-2; R-4. Nonetheless, this constituted a form of "plagiarism," as defined in Writing Research Papers, and subjected E.D. to a "zero for a grade." P-2; R-4.

On E.D.'s paper, Mrs. Knutelsky corrected grammatical errors and, in numerous places, she wrote in the margins comments such as "quote to back this up," "documentation," "documentation needed," and "quote?" J-1. On the paper's first page she wrote and circled "NG" (no grade) and "Turn in note cards please." To the back of E.D.'s paper she attached her "Research Paper Evaluation Sheet," an outline with space for comments and six criteria with possible percentages adding up to 100% for the grade of the paper. The criteria were: (1) Overview of Paper (20%); (2) Technical Parts, References (10%); (3) Technical Parts, Citations (10%); (4) Written Presentation (40%); (5) Research, Quality (10%); and (6) Research, Quantity (10%). On E.D.'s evaluation sheet, Mrs. Knutelsky entered comments for each of the criteria, but she did not total the percentages assessed for them. J-1a.

In late February, in class, Mrs. Knutelsky returned the papers to her students. Three students received "NG." Mrs. Knutelsky did not announce the names of students who received "NG," but she announced that "NG" resulted from plagiarism; she announced that, within twenty-four hours of receipt of the papers, any student with an "NG" notation should meet with her; and she announced that students with "NG" could revise and resubmit the paper for one-half the grade

that would have been given in the absence of plagiarism. E.D. leaped from his seat, flashed his paper at Mrs. Knutelsky, and stated, "There's no grade on this paper." Mrs. Knutelsky repeatedly ordered E.D. to sit down, but he refused to do so. Instead, he pressed on, asking, "What did I get?" Mrs. Knutelsky looked quickly at the evaluation sheet attached to E.D.'s paper. Seeing no total, but seeing that for "Written Presentation" she had assessed 30% out of a possible 40%, she hastily (and mistakenly) estimated a total grade and said "90. Now sit down!" J-1a.

E.D. spoke to his parents about his paper's "NG" and M.D., his mother, contacted Mrs. Knutelsky and Thomas Winters, E.D.'s guidance counselor, and a conference with school officials was arranged.

In the meanwhile, Mrs. Knutelsky reviewed and made changes on the evaluation sheet attached to E.D.'s paper. She "whited-out" some extraneous comments. Relative to (3) Technical Parts, Citations, she partially whited-out the "5" initially entered, but the "5" was left readable. Relative to (5) Research, Quality, she whited-out the initial percentage entered (which could have been no higher than 10), so that the initial percentage was unreadable, and substituted an "8." Given these circumstances, initially, E.D.'s paper would have received the following percentages: (1) Overview of Paper (10%); (2) Technical Parts, References (8%); (3) Technical Parts, Citations (5%); (4) Written Presentation (30%); (5) Research, Quality, as high as 10%; and (6) Research, Quantity (8%), for a total grade as high as 71. J-1a. With (5) Research, Quality, changed to "8%," the total grade is 69. Complicating things further, on the evaluation sheet Mrs. Knutelsky had initially entered "69" as the total grade, but she whited-out that grade and, over it, entered "70" as the total grade. (From the paper's other side, "69" is readable.) J-1a.

The day after the return of the papers, after class, Mrs. Knutelsky stated to E.D. that she had "goofed" and that his grade on the paper was really a "70" and not a "90." E.D. told her that he did not want to talk further about the matter without his parents present and the conversation ended.

A few days after the return of the paper, the conference was convened with E.D., M.D., Mrs. Knutelsky, and Joanne Cherefko, the high school principal, attending. Seeing the white-outs, substituted percentages, etc., on the "Research Paper Evaluation Sheet," M.D. suspected

that Mrs. Knutelsky had wrongfully reduced E.D.'s grade from the "90" mentioned in class to the "70" then appearing. J-1a. The conference was then aborted.

A few days after the aborted conference, M.D. spoke with Mr. Winters and Ms. Cherefko and they advised her (M.D.) that E.D. could revise and resubmit his paper and attain a grade as high as 55.

In March 1996, J.D., E.D.'s father, and M.D. met with Eileen J. Smith-Stevens, Ed.D., superintendent of the BOE's school system. M.D. submitted to the school system an essay entitled "In Defense of [E.]," wherein she set forth contentions such as the following: E.D.'s descriptions of Khrushchev's actions were "factual statements . . . available in encyclopedias and other books on Khrushchev," and, consequently, "[d]ocumentation is optional" and there was "no evidence of plagiarism in his paper." P-4.

By letter dated March 18, 1996, Dr. Smith-Stevens notified J.D. and M.D. of the following: Dr. Smith-Stevens and several English and social studies teachers in the school system reviewed the research paper requirements and E.D.'s paper. Dr. Smith-Stevens determined that the research paper requirements were clear and the teachers independently determined that in E.D.'s discussion of Khrushchev's actions, citations were necessary. E.D. would be permitted to rewrite his paper, inserting the citations, and, if he did so within one week of receipt of the letter, he could receive a "55 rather than the zero called for in [the BOE's] policy." E.D. would be permitted to transfer to another English class (for the balance of the 1995-96 school year). R-1.

Consistent with Dr. Smith-Stevens's letter, E.D. revised and resubmitted his paper. Mrs. Knutelsky reviewed it and, relative to information in the paper about Khrushchev, (again) requested credit from outside sources. J.D. and M.D. then forwarded to Dr. Smith-Stevens their letter dated March 25, 1996, with attached copies of articles from encyclopedias, etc., in support of their contention that information appearing in encyclopedia entries is "common knowledge" which need not be credited. P-3. Mrs. Knutelsky rejected J.D.'s and M.D.'s contentions; E.D. revised and resubmitted his paper; and, ultimately, Mrs. Knutelsky gave E.D.'s paper a 55 (the highest grade possible within the guidelines set by Dr. Smith-Stevens's March 18, 1996 letter). R-12. (The two other students who initially received "NG" on their papers also revised and

resubmitted their papers. One received a 55 and the other, a classified student, because Mrs. Knutelsky believed that his individualized education program (IEP) required "accommodation," received a 78. See in this regard N.J.A.C. 6:28-2.8, -3.5, -3.6, -4.8.)

J.D. and M.D. remained dissatisfied and, by letter dated April 25, 1996, they appealed to Jack Hahn, secretary of the BOE, for a hearing before the BOE on issues including the following: "The academic question of plagiarism, the reversal of grades, the lack of due process in public schools, and a teacher's arbitrary and capricious grading." They also represented that, if no hearing was granted, they might file a petition with the Commissioner of the Department of Education. P-6.

By letter dated June 10, 1996, the BOE's attorney notified J.D. and M.D. of the following: On June 18, 1996, the BOE's Curriculum Committee would meet to consider their request to the BOE. The Curriculum Committee would forward to the BOE a report on the matter. The BOE could then "affirm the administration's decision, reverse the decision, [or] ask for additional information," etc. R-3.

By letter dated June 12, 1996, J.D. and M.D. wrote to Patricia Smith, then president of the BOE, and reiterated their contentions. They wrote, e.g., "In our educational experiences as a teacher and lawyer, information contained in encyclopedias is common knowledge and unless copied verbatim reference to that information does not constitute plagiarism." P-5.

After receipt of the Curriculum Committee's report, the BOE affirmed the 55 grade.

Mrs. Knutelsky recorded the 55 grade for E.D.'s paper and E.D. received a passing grade for the class.

CONCLUSIONS OF LAW

A board of education has broad discretionary authority and its actions are presumed to be lawful and in good faith. Schinck v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960); Quinlan v. North Bergen Bd. of Educ., 73 N.J. Super. 40, 46 (App. Div. 1962).

Consistent with the above principles, an action of a board of education which is within its discretionary power will not be upset unless the person challenging that action proves that it was arbitrary, without rational basis and/or the result of wrongful motive. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960).

The determination of the grade for a student in a board of education's school system is action within the board's discretion, and a student challenging that grade bears the burden of proof, by the preponderance (greater weight) of the competent and credible evidence, that such action was arbitrary, capricious and/or unreasonable. J.M. v. Hunterdon Cent. Regional High Sch. Dist., 96 N.J.A.R.2d (EDU) 415.

The facts here are summarized as follows: The school system notified its students, including E.D., that "Plagiarism, depending upon its severity, [would] result in a grade ranging from 0-65." R-7. E.D.'s teacher notified her class, including E.D., that "Any form of plagiarism [would] result in a zero for a grade for the paper" they were to submit. R-4. By way of Writing Research Papers and classroom instruction, E.D.'s teacher instructed her class, including E.D., that "If the information, idea, or statement [in a research paper] is not common knowledge, and if it came from an outside source, then you must credit that source. Failure to do so constitutes plagiarism" and that an encyclopedia was such an "outside source," for which a form for credit was provided. P-2 at 40, 88. Much of the information recited in E.D.'s paper came "from a source outside" of him, but contrary to the above instructions, he failed to credit its sources. P-2. E.D.'s failure to credit was obvious, and E.D. had no realistic intent to pass off the information as his "own experience" or the result of his "own creative activity." P-2. E.D. just failed to follow instructions. However, the school system has a duty to instruct its students that "plagiarism is considered a serious offense," even if unintentional. P-2 at 39. Therefore, while E.D.'s plagiarism was not of such severity that it required a zero, and while he was rightfully allowed an opportunity to revise and resubmit his paper, the BOE has not been proven unreasonable, etc., in its determination that his grade should be 55.

A classified student who also was determined to have engaged in plagiarism was allowed to revise and resubmit his paper and was allowed a 78 grade, and E.D., who is not classified,

contends that (if it is concluded that he engaged in plagiarism) he should also receive a 78. (If E.D. succeeds in this contention, reasonably, the grade of the third student who engaged in plagiarism, who was not classified, who revised his paper and received a 55, would also have to be raised to 78.)

The raising of the classified student's grade to a 78 may have been the result of proper application of his IEP – in which case E.D. and the classified student would not be similarly situated, and E.D. has cited no law requiring that, in such circumstances, his grade should be raised above what it otherwise should be. The raising of the classified student's grade may also have been the result of mistaken application of his IEP – in which case also the mistake would not justify the raising of E.D.'s grade above what it otherwise should be. I do not see that the classified student's grade is relevant to E.D.'s claim.

ORDER

Consistent with the above, I **DISMISS WITH PREJUDICE** E.D.'s petition and claims.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 4, 1997
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

March 6, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 07 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Joint:

J-1	Research paper
J-1a	Research Paper Evaluation Sheet

Petitioners':

P-1	Thesis Statement with handwritten notes
P-2	Writing Research Papers (McDougal Littell Inc. 1994)
P-3	Letter from M.D. & J.D., March 25, 1996, with copies of encyclopedia articles
P-4	"In Defense of [E.]," by M.D., March 11, 1996
P-5	Letter from M.D. & J.D., June 12, 1996
P-6	Letter from M.D. & J.D., April 25, 1996

Respondent's:

R-1	Letter from Wall Township Public Schools (Eileen Smith-Stevens, Ed.D., superintendent), March 18, 1996
R-2	Letter from BOE attorney (Elizabeth M. Farley), June 24, 1996
R-3	Letter from BOE attorney (Elizabeth M. Farley), June 10, 1996
R-4	Research Paper, College English III, Requirements, Mrs. Knutelsky, acknowledgment by E.D., January 11, 1996
R-5	Copies of research paper; Research Paper Evaluation Sheet; Research Paper, College English III, Requirements, Mrs. Knutelsky, acknowledgment by E.D., January 11, 1996
R-6	Copies of Research Paper Evaluation Sheet and two pages of research paper
R-7	Wall High School folder with rules
R-8ID	Letter from teacher, November 7, 1996
R-9ID	Evidence of Plagiarism in Paper, by principal
R-10ID	Research on Plagiarism and General Information Manual
R-11ID	Writing Research Papers (McDougal Littell Inc. 1994), with teacher's quiz notes
R-12	Daily Class Register, used by teacher for English 1995-96

R-13 BOE policy 5145.6, "Student Grievances"

R-14 BOE policy 5131, "School Discipline"

R-15 Letter from Wall Township Public Schools (Eileen Smith-Stevens, Ed.D., superintendent), April 18, 1996

OAL DKT. NO. EDU 8395-96
AGENCY DKT. NO. 331-8/96

M.D., on behalf of E.D.,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

The record of this matter, including transcripts of the proceedings, and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner contests that the Administrative Law Judge (ALJ) had a preconceived notion from the outset of the instant case as to how this matter would end in that he denied petitioner the opportunity to present an expert to testify that the statements in E.D.'s paper represented common knowledge statements about Khrushchev. (Exceptions at p. 1) She asserts that the average person cannot be a reliable guide for judging plagiarism since

> [t]he average man on the street probably does not know who the current Secretary of Defense or Secretary of State is, and yet, this information is common, public knowledge. (*Id.*)

Petitioner then recasts the argument, previously presented before the ALJ, that most of the information contained in encyclopedias and in several reference books represents common or general information about a topic and, thus, information taken therefrom does not constitute plagiarism. (*Id.*)

Petitioner also asserts that the ALJ misunderstood the difference between a *Works Cited* page and a *Bibliography,* noting only the former was required by E.D. and his classmates, in that a Works Cited page would not require all information obtained in research. (Exceptions at p. 2)

Petitioner next avers that in his finding of facts, the ALJ glossed over the teacher's mistakes which she reiterates in detail. (*Id.* at pp. 3-4) In that these arguments were fully and fairly considered before the ALJ, they will not be presented herein.

Lastly, petitioner cites concerns over the grade boost given to student K.B, one of the other two students that failed to correctly cite information in the research paper, granted because K.B. was classified. (*Id.* at p. 4) Petitioner alleges this boost was wrongful since the teacher did not know what K.B.'s classification was, nor did she consult the student's individualized education plan (IEP) before giving him a grade boost. Without the presentation of an IEP to the Judge, petitioner queries as to how the teacher can be certain an IEP exists and, if so, whether it requires a grade boost. If it does not call for a grade boost, petitioner asserts, the teacher acted arbitrarily and capriciously. Moreover, she contends, the same grade boost should have been given to both K.M. and E.D. in the interest of fundamental fairness. (*Id.* at p. 4)

Upon a careful and independent review, the Commissioner affirms the determination of the ALJ finding that neither the teacher, nor the Board, acted in an arbitrary, capricious, or unreasonable manner in reviewing this matter. In so ruling, it must be noted that petitioner's contentions regarding the validity of the substantive content of the teacher's instructions to E.D. and the other students regarding citations on the subject term paper do not reach to the issue on review herein. Rather, the Commissioner's focus is upon the propriety of the Board's review of this matter within the context of the District's (and the teacher's) established definitions and policies regarding plagiarism and appropriate crediting of encyclopedias for research reports. * Consequently, the Commissioner finds no impropriety with regard to the grade given to E.D. and further agrees with the ALJ that the handling of K.B.'s grade is irrelevant hereto.

Accordingly, the Commissioner affirms the initial decision of the OAL and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Petitioner's remedy on this issue, if she believes the District's views to be in error or not consistent with the currently prevailing parameters for the crediting of research materials, is to work through the Board in order to effectuate appropriate policy and curricular changes.

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197-97

GRACE CARAVELLO DOBSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

April 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7335-96
AGENCY DKT. NO. 200-5/96

GRACE CARAVELLO DOBSON,

Petitioner,

v.

TOWN OF MONTCLAIR BOARD OF EDUCATION,

Respondent.

Grace Caravello Dobson, *pro se*

Brenda C. Liss, Esq., and
Steven B. Hoskins, Esq., for respondent
(McCarter & English, attorneys)

Record Closed: February 26, 1997 Decided: March 7, 1997

BEFORE **DIANA C. SUKOVICH,** ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

Grace Caravello Dobson (Dobson) filed a petition with the State Department of Education (Department) on May 31, 1996, seeking refund of a payment made to the Town of Montclair Board of Education (respondent). Respondent filed an answer on June 27, 1996. The Department transmitted the matter to the Office of Administrative

Law (OAL) on July 9, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Thirteen other petitions, all seeking the same relief, were also filed with the Department. The Department transmitted all those matters to the OAL, and all the cases, including the matter pertaining to Dobson, were consolidated.

An in-person conference was conducted, and subsequent to additional communications, the cases were placed on the inactive list, pending the issuance of a decision by the State Board of Education (State Board) in the case of *Herron v. Montclair Bd. of Educ.* (OAL Dkt. No. 7286-94) (*Herron*).

Petitioners, including Dobson, contested the authority of respondent to charge tuition for a pre-school program offered during the 1994-95 academic year. Petitioners had paid the tuition and requested that the Commissioner of the Department (Commissioner) order refunds. On December 4, 1996, the State Board issued a decision in the *Herron* case, affirming a decision of the Commissioner that respondent was not authorized to charge tuition and rejecting a request by respondent that such ruling be given prospective application only.

By letter dated January 8, 1997, respondent's counsel advised this judge that, on approximately December 23, 1996, respondent sent checks to all petitioners, giving refunds in the full amounts. Counsel requested that all pending matters be withdrawn or dismissed with prejudice as moot.

By letter dated December 19, 1996, this judge advised petitioners, including Dobson, that the parties could file executed stipulations of settlement, which would be addressed in initial decisions, or letters withdrawing their petitions.

Most of the petitioners subsequently filed withdrawal letters. Subsequent to additional communications with the other parties, this judge, by letter dated February

19, 1997, communicated with several petitioners, including Dobson, advising that if written responses were not received within seven days, I would issue decisions dismissing the petitions. All of the remaining petitioners, except Dobson, thereafter filed withdrawal letters. No communications were received from Dobson pertinent to the February 19, 1997 letter, and the record pertinent to her case is deemed to be closed February 26, 1997.

CONCLUSION AND ORDER

Dobson does not dispute that respondent issued a refund to her of the tuition in question. Her petition is therefore moot. In addition, even if not moot, she has, at this point, failed to prosecute the matter, apparently, without good cause. I am therefore persuaded that her petition should be dismissed with prejudice.

I hereby **CONCLUDE**, and so **ORDER**, that the petition filed by Dobson with the Department on May 31, 1996 be and is hereby **DISMISSED** with prejudice.

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

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

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

3/7/97
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/10/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

OAL DKT. NO. EDU 7335-96
AGENCY DKT. NO. 200-5/96

GRACE CARAVELLO DOBSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner affirms the determination of the Administrative Law Judge (ALJ) to dismiss the instant matter for the reasons expressed therein.

Accordingly, the Commissioner adopts the initial decision of the ALJ and the matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 21, 1997
Date of Mailing, April 22, 1997

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198-97

BUENA REGIONAL SUPPORTIVE STAFF ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUENA, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Association contested Board's determination to recoup staff overpayments.

Citing *Sklute*, the ALJ concluded that inasmuch as petitioners herein were not tenured, the Board's recoupment of its overpayments did not reduce any compensation protected by the tenure laws and, as such, was entirely appropriate. ALJ granted the Board's motion for summary decision and dismissed the petition.

Commissioner adopted findings and determination in initial decision as his own.

April 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6592-96

AGENCY DKT. NO. 189-5/96

BUENA REGIONAL SUPPORTIVE STAFF ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUENA, ATLANTIC COUNTY,

Respondent.

Ned Rogovoy, Esq., for petitioner (Waltman, Reilly & Rogovoy, attorneys)

Michael D. Capizola, Esq., for respondent (Capizola, Fineman & Lapham, attorneys)

Record Closed: February 25, 1997 Decided: March 6, 1997

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Buena Regional Supportive Staff Association (Association)contests the determination by the Board of Education of the Borough of Buena (Board) to recoup overpayments erroneously made by it to certain of its staff members. The matter was transmitted

to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was held on October 31, 1996, at, which. among other things, the parties agreed to cross-move for Summary Decision pursuant to N.J.A.C. 1:1-12.5.

ISSUE

The sole issue for determination by this tribunal is whether the Board may recoup monies erroneously paid to staff members?

STIPULATION OF FACTS

The parties stipulate to the following:

1. Respondent Board is a regional school district comprised of the Borough of Buena and Buena Vista Township in Atlantic County.

2. Several employees of the Board were overpaid as follows:

Carol Valenti - Part-time Kindergarten assistant	$55.10
Maureen Rakoci - Part-time Kindergarten assistant	$56.21
Victoria Bell - Part-time Kindergarten assistant	$48.78
Judy Torres - Cafeteria	$37.12
Maryann Rada - Cafeteria	$55.68
Edna Mallory - Custodian	$149.81
Rosemary Lisi - Part-time Kindergarten assistant	$106.89
Pearl Mattei - Part time Kindergarten assistant	$33.44
Rosa Francheschi - Playground assistant	$14.56
Margie Roskens-DeSantis - Cafeteria	$45.81
Maryanne Banta - Cafeteria	$51.98
Juan Andujar - Security	$294.06
Lisa Scarani - Part-time Kindergarten assistant	$80.88
Willa Goode- Part-time Kindergarten assistant	$49.49
Susan Plummer - Part-time Kindergarten assistant	$21.32
Donna Perna - Ten-month secretary	$231.00
Gary Molnar - Custodian	$397.72

3. The overpaid employees are members of the Association. This organization is the petitioner in this matter.

4. The overpayments commenced on or about December 22, 1995, when retroactive pay was distributed to the Supportive Staff employees. It continued for three regular payroll distributions, until February 2, 1996.

5. After realizing its mistake, the Board drafted a memorandum informing the employees of the overpayment and giving them a choice as to how it should be refunded. This memorandum was distributed on or around February 27, 1996.

6. Petitioner filed this petition of appeal on May 24, 1996.

7. The Board has recouped the overpayments through voluntary and involuntary salary adjustments.

8. None of the overpaid employees have tenure status with respect to their employment with the Board.

ARGUMENTS OF THE PARTIES

The Board's Position

STATEMENT OF FACTS & PROCEDURAL HISTORY

Respondent Buena Regional School District (Board) is a regional school district comprised of the Borough of Buena and Buena Vista Township in Atlantic County. Beginning on or about December 22, 1995, several Support Staff employees of the Board were mistakenly overpaid. None of the overpaid employees have tenure status with respect to their employment with the Board. The overpayments continued for approximately three payroll periods, ending on February 2, 1996.

Upon realizing its mistake, the Board drafted and distributed a memorandum informing the overpaid employees of the mistake, and giving them a choice as to how the money should be refunded. Several of the employees voluntarily agreed to return the overpaid funds to the Board.

As of this date, the Board has recouped all overpayments through voluntary and involuntary salary adjustments. See, Stipulation of Facts.

The overpaid employees are members of the Buena Regional Supportive Staff Association (Association). On May 24, 1996, a Petition of Appeal was filed by the Association on behalf of the overpaid employees, seeking to have these funds, originally paid to those employees by mistake, paid back to them.

On or about July 11, 1996, the Board filed an Answer to the Petition which admitted that overpayments had been made, but denied that the affected employees had any legal right to retain public moneys erroneously paid to them. A pre-hearing conference was held before the Honorable Lillard E. Law, A.L.J., at which time the parties agreed that the matter would be submitted for determination with a Stipulation of Facts and cross-motions for summary decision.

LEGAL ARGUMENT

Point I

SUMMARY JUDGMENT IS AN APPROPRIATE REMEDY WHERE NO GENUINE ISSUE EXISTS WITH RESPECT TO A MATERIAL FACT CHALLENGED

Pursuant to N.J.A.C. 1:1-12.5, a summary decision may be rendered if "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law". N.J.A.C. 1:1-12.5(b) (1990). Thus, in order to survive a motion for summary decision, the opposing party must set forth specific facts indicating that a genuine issue of material fact exists, which can only be resolved through an evidentiary hearing. Id. In this case, the parties have stipulated to the facts and agreed to present the matter for determination on cross-motion for summary decision. Based upon the uncontested and stipulated facts, there exists no genuine issue of material fact that the Board's employees in question are not entitled to the overpaid

funds. Therefore respondent is entitled to summary decision in its favor, and a dismissal of all claims made by petitioner in this matter.

Point II

THE MONIES PAID TO THE BOARD'S EMPLOYEES WERE PUBLIC FUNDS TO WHICH THE EMPLOYEES HAVE NO LEGAL CLAIM AND, AS SUCH, THE BOARD HAD NOT ONLY THE RIGHT BUT THE RESPONSIBILITY TO CORRECT ITS ERROR AND RECOUP THE OVERPAID FUNDS.

The issues giving rise to the instant petition were recently addressed by the Commissioner in Sklute v. Board of Education of the City of Trenton, 96 N.J.A.R. 2d (EDU) 264 (1995). In Sklute, several employees challenged the school board's recoupment of overpaid salaries. although the employees were full-time tenured secretaries, they also worked part-time as non-tenured secretaries for the Adult Evening School. Id. at 265. The overpayments at issue were made specifically with regard to earnings for these part-time, non-tenured positions. In addition, the board recouped the overpaid funds from future earnings attributed to the same part-time employment positions. Id. The employees filed a petition with the Commissioner, claiming that recoupment was an impermissible reduction in their salary as tenured employees in violation of N.J.S.A. 18A:17-2, which prohibits a reduction in compensation for tenured employees.

In rendering an initial decision, the Administrative Law Judge ("ALJ") in Sklute stressed that both the overpayments and recoupments were made specifically with regard to earnings for the part-time, non-tenured positions. Sklute, 96 N.J.A.R. 2d (EDU) at 266. Therefore, the ALJ held that the petitioner's reliance on N.J.S.A. 18A:17-2 and related case law was misplaced since there was no reduction in tenured compensation. Id. (Emphasis added) The ALJ further concluded that the board's actions in recouping the erroneous payments were justified, stating:

> The general rule is that a payment of money under a mistake of fact may be recovered, provided that such recovery will not prejudice the payee. This rule is grounded upon considerations of equity and fair dealing. It is considered unjust enrichment to permit a recipient to retain money paid because of a mistake, unless the circumstances

> are such that it would be inequitable to require its return. This is so notwithstanding that the mistake is unilateral and a consequence of the payor's negligence, or that the payee acted in good faith. Great American Ins. Co. v. Yellen, 58 N.J. Super. 240 (App. Div. 1959); Winslow, Cohu & Stetson, Inc. v. Skowronek, 136 N.J. Super. 97, 104 (Law Div. 1975). In the present matter, the monies paid by mistake were public monies to which petitioners had no lawful claim. Respondent had not only the right but the responsibility to correct its error and recoup the monies. Sklute, supra, at 266.

When the Sklute petition was presented to the Commissioner, he adopted the ALJ decision, holding that recoupment by the board was "entirely appropriate". Id. at 267.

The circumstances giving rise to the instant petition are virtually identical to those addressed by the commissioner in Sklute. Several Board employees were mistakenly overpaid in their salary. All of these employees are non-tenured. Upon realizing this mistake, the Board immediately notified the employees and thereafter recouped the overpaid funds through both voluntary and involuntary salary adjustments. As the Commissioner held in Sklute, the Board had not only the right but the responsibility to recoup the overpaid funds.

Moreover, all of the moneys have already been recouped by the Board. To require the Board to now return to these employees public funds to which they had no legal claim in the first place flies in the very face of the decision in Sklute. These employees have no right to take advantage of a mistake of fact at the expense of the School District and the taxpayers who support that district. Accordingly, the Board's actions in recouping these funds were "entirely appropriate" and this petition is completely without merit.

The employees in question had no legal claim to these mistakenly paid funds. The Board had an obligation to recover these funds, and acted within its authority when it recouped the money through voluntary and involuntary salary adjustments. Accordingly, the Board is entitled to summary judgment, dismissing the petition.

Point III

THOSE EMPLOYEES WHO AGREED TO VOLUNTARILY RETURN THE OVERPAYMENTS TO THE BOARD ARE ALSO PRECLUDED FROM NOW SEEKING REIMBURSEMENT OF THESE FUNDS, PURSUANT TO THE DOCTRINES OF WAIVER AND EQUITABLE ESTOPPEL.

In the instant petition, a number of the employees agreed to voluntarily return the overpaid funds to the Board. By their actions in voluntarily returning these moneys, these employees are also precluded from claiming any right to the overpaid funds at issue by the doctrines of waiver and equitable estoppel. Accordingly, these doctrines serve as additional legal bases to grant summary judgment in favor of the Board and against these particular employees.

Waiver has been defined by New Jersey courts as "the voluntary relinquishment of a known right evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be based". Country Chevrolet v. North Brunswick Planning Board, 190 N.J. Super. 376, 380 (App. Div. 1983). It is an election by a party to give up something of value or to forego some advantage which the party might have demanded or insisted upon. Although as set forth in Point II above none of the employees in this case had any legal right to retain the mistakenly paid funds, certainly those that voluntarily returned the funds upon being notified of the error should not now be allowed to complain. In agreeing to voluntarily return the overpayments to the Board, these employees waived their right to file this petition and their claims must be dismissed.

These same employees are also barred from seeking reimbursement of the funds by the doctrine of equitable estoppel. Equitable estoppel has been defined as:

> [t]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against

> another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse.

Carson v. Masters, Mates & Pilots Pension Plan Trust 90 N.J. 334 (1979). The doctrine is intended to prevent a party's disavowal of prior conduct if such repudiation would frustrate the demands of justice and good conscience. Id. at 339. Moreover, it is not necessary to show any fraudulent intent of the party to be estopped. Chrisomalis v. Chrisomalis, 260 N.J. Super. 50, 55 (App. Div. 1992). Rather, estoppel is properly invoked where "conduct, either express or implied, . . . reasonably misleads another to its prejudice so that a repudiation of such conduct would be unjust in the eyes of the law". Dambro v. Union City Park Commission, 130 N.J. Super. 450, 457 (Law Div. 1974).

The funds were returned to the school district voluntarily by these employees and have been utilized in accordance with the district's budget plans. As such, it would be unjust to allow these employees to now assert a claim to these funds when they have already voluntarily returned them. Accordingly, they are estopped from making this claim.

Pursuant to the doctrines of waiver and equitable estoppel, those employees who voluntarily returned the overpaid funds to the Board are precluded from now seeking reimbursement of this money. Respondent is therefore entitled to a summary decision, dismissing all claims asserted by those employees who voluntarily agreed to return the overpaid funds to the Board.

Point IV

NONE OF THESE EMPLOYEES SHOULD BE ALLOWED TO UNJUSTLY ENRICH THEMSELVES AT THE EXPENSE OF THE SCHOOL DISTRICT.

In this case all of the funds paid were recouped through both voluntary and involuntary salary adjustments. As stated in Point II, supra, none of these employees have a valid legal claim to these funds. Those that chose to voluntarily return the funds certainly have no right to complain as demonstrated in Point III, supra. Those that did not voluntarily return the money, however, similarly have no right to complain. As our courts have recognized "(g)enerally, one

who receives a benefit which it is unjust for him to retain ought to make restitution or pay the value of the benefit to the party entitled thereto." Flemming v. Ronson Corp., 107 N.J. Super. 311, 316 (Law Div. 1969) affirmed 114 N.J. Super. 221 (App. Div. 1971). To have allowed these employees to keep these mistakenly paid public funds would have unjustly enriched these employees at the expense of the taxpayers of the School District. These employees themselves had a legal obligation to return these funds. Therefore, their petition is completely without merit. The Board properly recouped these funds and none of the employees involved in this petition are entitled to any of these funds.

The facts in this case are virtually indistinguishable from the facts in Sklute v. Board of Education of the City of Trenton, 96 N.J.A.R. 2d (EDU) 264 (1995). As the Commissioner held in that case the employees had no legal right to retain public funds mistakenly paid to them. The Board was not only entitled to recoup these funds but had a public obligation to do so. The petition filed on behalf of these employees is completely without merit. The Board is entitled as a matter of law to summary judgment. The petition must be dismissed.

The Association's Position

LEGAL ARGUMENT

THE BOARD OF EDUCATION SHOULD NOT BE ABLE TO RECOUP OVERPAYMENTS TO CONTRACTUAL EMPLOYEES FOR REGULAR SERVICE

In Trenton Education Association v. Board of Education of the City of Trenton, 1986 S.L.D. 2415, 2436, The Board of Education was not able to recoup overpayments made to teachers since the recoupment would be considered to be a deduction compensation and violative of the tenure law, N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10. In Barbara Sklute, et al v. Board of Education of the City of Trenton, Mercer County, 1995, 96 N.J.A.R. 2d (EDU 264) the Commissioner allowed the Respondent, Board of Education, to recoup overpayments to secretaries who were overpaid in an optional adult evening high school program or at their part-time evening position.

While the employees and petitioners herein are not tenured employees, they are under contract and the pay relates to their expected full-time employment as opposed to the secretaries in Sklute who were performing an extra job on a part-time evening basis. The Association, therefore, argues that the Sklute decision, supra., does not distinguish the Trenton, supra. case from the employees in the case at bar, rather Sklute stands for the proposition that employees when working a part-time job at another position not covered by contract are not protected by the Collective Bargaining contract provisions, nor the State law applicable to those positions and, therefore, not entitled to the protection of reduction in regular employment compensation.

The Supportive Staff personnel herein, having a right to rely upon the Board's calculation of regular salary, and receiving a deminimus overpayment, should not be penalized for the mistakes in calculation of salary made by the Board. Since the amounts of overpayment were not substantial sums, the employees had every reason to believe that those sums were the newly calculated and proper salary amounts based on the effective date of the new Collective Bargaining Agreement. The overpayment was caught quickly by all concerned and as the reasoning in Galop v. Board of Education of the Township of Hanover, 1975 S.L.D. 358 and Trenton, supra, specifies, the Board should not be able to recoup overpayments. Certainly the Sklute, supra, case can be distinguished for the reason that the overpayment was for a part-time evening position which was not the position covered in the collective Bargaining Agreement.

Therefore, the Board should not be entitled to recoup the monies paid in salary by mistake to the Supportive Staff employees. For that reason if there has been recoupment the employees should be reimbursed in the amount specified in the Stipulation of Facts.

The Board's Reply

LEGAL ARGUMENT

THE BOARD HAD NOT ONLY THE RIGHT BUT THE RESPONSIBILITY TO RECOUP ALL OVERPAID FUNDS FROM THE NON-TENURED EMPLOYEES.

In Sklute, supra. 96 N.J.A.R. 2d (EDU) 264 (1995), the Commissioner of Education adopted the initial decision of the Administrative Law Judge, holding that Respondent Trenton Board of Education properly recouped overpayments made to several non-tenured employees. Significantly, in rendering the initial decision, the ALJ expressly distinguished prior case law involving overpayments to tenured employees, including the two cases principally relied upon by petitioner in the present matter. The ALJ reasoned as follows:

> The holding in [Gallop v. Board of Education of the Township of Hanover, 1975 S.L.D. 358] and [Trenton Education Association v. Board of Education of the City of Trenton, 1986 S.L.D. 2415, 2436] and subsequent cases is grounded upon tenure rights contained in N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 which guaranty individuals who have attained tenure that they will not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. Sklute, supra, at 266.

Thus, the ALJ concluded that, since the respondent Board of Education did not reduce any compensation protected by the tenure laws, the board had "not only the right but the responsibility to correct its error and recoup the monies". Id. Furthermore, in adopting the ALJ's decision, the Commissioner stated that the ALJ properly found that the recoupment of the overpaid funds did not reduce compensation protected by the tenure laws and, as such, was entirely appropriate. Id. at 267.

With regard to the present petition, there is no dispute that the overpaid employees held non-tenure positions. Accordingly petitioner's reliance upon the holdings in Trenton, supra, and Gallop, supra is misplaced. As recognized by the ALJ and Commissioner in Sklute, the holdings

in Gallop and Trenton were grounded upon tenure rights, and are inapplicable to the facts of the present petition. In contrast, the circumstances giving rise to the present petition are virtually indistinguishable from those issues addressed in Sklute. Therefore, as the Commissioner held in Sklute, the overpaid employees have no right to the overpaid funds, and the Board has not only the right but the responsibility to recoup the money. See, Sklute, supra, at 266.

The facts of the present petition are, therefore, virtually identical to the circumstances addressed by the Commissioner in Sklute, supra.. Therefore, pursuant to the Commissioner's holding in Sklute, the Board had not only the right but the responsibility to recoup the overpaid funds. The petition filed on behalf of the overpaid employees must fail as a matter of law.

DISCUSSION AND CONCLUSION

I **FIND** and **DETERMINE** that the instant matter is ripe for summary decision pursuant to N.J.A.C. 1:1-12.5 2d, the criteria as set forth by our Supreme Court in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 1954).

The Honorable M. Kathleen Duncan's comprehensive analysis of the law with respect to the issue raised in the instant matter in Sklute, supra., demonstrates that whether or not a board of education may rescind over payments made to employees rests with the tenure status of the employees. She states in Sklute at 266 that:

> The holding in Galop and Trenton Education Association and subsequent cases is grounded upon tenure rights contained in N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 which guarantee individuals who have attained tenure that they will not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:17.2 contains a similar provision for school employees who have acquired tenure in a secretarial or clerical position . . . .

It is undisputed that none of the members of the Association have acquired a tenure status with the Board. However, a close review of the stipulation of facts reveals that some of the employees are tenure eligible, i.e., ten-month secretary and custodian. Notwithstanding, Judge Duncan continues to state the rule with respect to the recovery of over payments as follows:

> The general rule is that a payment of money under a mistake of fact may be recovered, provided that such recovery will not prejudice the payee. This rule is grounded upon considerations of equity and fair dealing. It is considered unjust enrichment to permit a recipient to retain money paid because of a mistake, unless the circumstances are such that it would be inequitable to require its return. This is so notwithstanding that the mistake is unilateral and a consequence of the payor's negligence, or that the payee acted in good faith. Great American Ins. Co. v. Yellen, 58 N.J. Super. 240 (App. Div. 1959); Winslow, Cohu & Stetson, Inc. v. Skowronek, 136 N.J. Super. 97, 104 (Law Div. 1975). In the present matter, the monies paid by mistake were public monies to which petitioners had no lawful claim. Respondent had not only the right but the responsibility to correct its error and recoup the monies. Sklute at 266.

Judge Duncan's analysis is supported by the Commissioner where he said in Galop at 365, that:

> The Commissioner is further constrained to state that, while relatively small sums, as herein, may be decided in keeping with those precedents established in past school law decisions, he will in no way support any errors which might conceivably bestow unearned salary benefits of windfall proportions or in such amounts as to threaten the thorough and efficient operations of a local school district. (citation omitted)

I **CONCLUDE**, therefore, that under the facts and circumstances of the instant matter, the Board's actions are entirely appropriate and that it shall recover those monies paid to members of the Association due to a mistake and error buy the Board.

Accordingly, petitioner's motion for summary decision is **DENIED**. Respondent's motion for summary decision affirming its actions and dismissing the within matter is hereby **GRANTED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6 March 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/10/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 1 1 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 6592-96
AGENCY DKT. NO. 189-5/96

BUENA REGIONAL SUPPORTIVE STAFF ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF BUENA, ATLANTIC COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that, pursuant to *Sklute*, *supra*, inasmuch as the within petitioners do not have tenure rights in their respective positions, the Board's recoupment of its overpayments did not reduce any compensation protected by the tenure laws and, thus, was entirely appropriate.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly stated therein. Summary decision is hereby granted to the Board and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 21, 1997
Date of Mailing, April 22, 1997

199-97

DOROTHY A. BOVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former Computer Operations Coordinator/Office Manager, alleged that the Board violated her tenure rights when it reappointed her to a secretarial position at a lower salary.

ALJ concluded that petitioner demonstrated by a preponderance of credible evidence that her duties as child study team secretary continued unabated the entire time she was employed by the Board and that notwithstanding the title change to Computer Operations Coordinator/Office Manager, she never left her secretarial position, functions were just added. Therefore, the Board could not reduce her salary without violating her tenure rights pursuant to *N.J.S.A.* 18A:17-2. ALJ concluded that her salary must be restored to the level she had prior to the reduction, together with back pay.

Commissioner adopted findings and determination in initial decision as his own and directed appropriate reimbursement.

April 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11723-95

AGENCY DKT. NO. 380-9/95

DOROTHY A. BOVE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,

Respondent.

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

Louis R. Franzese, Esq., for respondent
(Radin, Tischman Epstein & Gross, attorneys)

Record Closed: December 3, 1996 Decided: March 6, 1997

BEFORE **IRENE JONES**, ALJ:

Petitioner, Dorothy Bove (Bove) alleges that the respondent Frankford Board of Education (Board) violated her tenure rights when it reassigned her to a secretarial position at a lower salary. The respondent denies the allegation and asserts that Bove

did not have tenure rights in her position as a computer operations coordinator and office manager.

This matter was commenced when the petitioner filed a verified petition with the Commissioner of Education (Commissioner). On October 24, 1995, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. A prehearing conference was held before the undersigned on March 4, 1996. Plenary hearings were held on October 17, 1996 and the post hearings submissions were filed on December 3, 1996 at which time the record was closed. On January 17, 1997, the undersigned requested an Order of Extension by which to file the Initial Decision. By Order dated January 28, 1997, the Commissioner extended the time until March 3, 1997.

STIPULATED FACTS

1. Petitioner, Dorothy A. Bove has been employed by the respondent, from September 1, 1979 to the present. (Exhibit J-1).

2. On August 13, 1979, the Board appointed Bove to the position of Child Study Team Secretary. (Exhibit J-2) Bove signed a contract of employment with the Board, for the position of Secretary/Clerk at an annual salary of $4,608, effective September 1, 1979 through June 30, 1980, (Exhibit J-3).

3. On April 14, 1980, the Board reviewed Bove's appointment and recommended that Bove be reappointed to a secretarial/clerical position. (Exhibit J-4) Bove signed a contract of employment with the Board, for the position of Secretary/Clerk at an annual salary of $5,000. effective September 1, 1980 through June 30, 1981, (Exhibit J-5) She was assigned to the Child Study Team Office.

4. On April 13, 1981, the Board appointed Bove to a secretarial position. (Exhibit J-6.) Bove signed a contract of employment with the Board, effective September 1, 1981 through June 30, 1982, for the position of Secretary/Clerk-CST at an annual salary of $7,150. (Exhibit J-7). She was assigned to the Child Study Team Office. (CST).

5. On April 26, 1982, the Board reappointed Bove to a secretarial/clerical position. (Exhibit J-8). Bove signed a contract of employment with the Board for the position of Secretary/Clerk-CST at an annual salary of $7,758, effective September 1, 1982 through June 30, 1983 (Exhibit J-9). She was assigned to the Child Study Team Office.

6. On April 18, 1983, the Board appointed Bove to a secretarial/clerical position of employment for the 1983-84 school year. (Exhibit J-10). Bove signed a contract of employment with the Board for the position of Secretary/Clerk-CST at an annual salary of $8,340, effective September 1, 1983 through June 30, 1984, (Exhibit J-11). She was assigned to the Child Study Team Office.

7. On April 9, 1984, the Board appointed Bove as Child Study Team Secretary. (Exhibit J-12). Bove signed a contract with the Board, for the position of Secretary/Clerk-CST at an annual salary of $10,000, effective September 1, 1984 through June 30, 1985, (Exhibit J-13). She was assigned to the Child Study Team Office.

8. On April 22, 1985, the Board appointed Bove as CST Secretary. (Exhibit J-14). Bove signed a contract of employment with the Board, effective September 1, 1985 through June 30, 1986, for the position of Secretary/Clerk-CST at an annual salary of $10,800. (Exhibit J-15). She was assigned to the Child Study Team Office.

9. On April 21, 1986, the Board appointed Bove as CST Secretary. (Exhibit J-16).

10. On September 8, 1986, the Board adopted a resolution approving Bove's 1986-87 salary as $15,500.

11. Bove signed a contract of employment wit the Board, effective September 1, 1986 through June 30, 1987 for the position of Computer Operations Coordinator/Office Manager at an annual salary of $15,500. (Exhibit J-18).

12. On April 13, 1987, the Board approved the salary and directed the issuance of a contract to Bove as Office Manager. (Exhibit J-19). Bove signed a contract of employment with the Board, effective September 1, 1987 through June 30, 1988 for the position of Computer Operations Coordinator/Office Manager at an annual salary of $18,500. (Exhibit J-20).

13. On April 11, 1988, the Board approved the contract for Bove as Office Manager. (Exhibit J-21). Bove signed a contract of employment with the Board, effective September 1, 1988 through June 30, 1989 for the position of Computer Operations Coordinator/Office Manager at an annual salary of $20,350. (Exhibit J-22).

14. On April 24, 1989, the Board approved rehiring Bove as Office Manager. (Exhibit J-23). On December 18, 1989, the Board approved Bove's salary for 1989-90. (Exhibit J-24). Bove signed a contract of employment with the Board, effective September 1, 1989 through June 30, 1990 for the position of Computer Operations Coordinator/Office Manager at an annual salary of $22,751. (Exhibit J-25).

15. On May 13, 1991, the Board approved Bove's salary as Office Manager. (Exhibit J-26). Bove signed a contract of employment with the Board, effective September 1, 1990 through June 30, 1991 for the position of Computer Operations Coordinator/Office Manger at an annual salary of $25,026. (Exhibit J-27).

16. Bove signed a contract of employment with the Board, effective September 1, 1991 through June 30, 1992 for the position of Computer Operations Coordinator/Office Manager at an annual salary of $27,529. (Exhibit J-28).

17. Bove signed a contract of employment with the Board, effective September 1, 1992 through June 30, 1993 for the position of Computer Operations Coordinator/Office Manager at an annual salary of $29,250. (Exhibit J-29).

18. Bove signed a contract of employment with the Board, effective September 1, 1993 through June 30, 1994 for the position of Computer Operations Coordinator/Office Manager at an annual salary of $31,078. (Exhibit J-30).

19. On May 23, 1994, the Board approved the hiring of Bove as Office Manager. (Exhibit J-31). Bove signed a contract of employment with the Board, effective September 1, 1994 through June 30, 1995, for the position of Office Manager at an annual salary of $33,020. (Exhibit J-32).

20. On May 22, 1995, the Board discussed the elimination of the Office Manager/computer operations coordinator position. (Exhibit J-33).

21. On June 26, 1995, the Board adopted a resolution eliminating the Office Manager/Computer Operations Coordinator position. At the same meeting, the Board created the position of Technology & Network Supervisor/Site Technician. (Exhibit J-34).

22. By letter dated July 5, 1995, Bove was offered a twelve (12) month secretarial position at an annual salary of $22,981. (Exhibit J-35). Bove declined a twelve (12) month position of employment and accepted a ten (10) month secretarial position of employment.

23. Effective September 1, 1995, Bove was employed as a Secretary at an annual salary of $19,206.

24. Bove signed a contract of employment with the Board, effective September 1, 1995 through June 30, 1996, for the position of Secretary Child Study Team at an

annual salary of $19,206. (Exhibit J-36). On April 19, 1996, her salary was retroactively adjusted to $20,021 per year.

25. The job description for Technology & Network Administrator/Site Technician is attached hereto as Exhibit J-38.

26. The job description for Computer Operations Coordinator/Office Manager is attached hereto as Exhibit J-38.

27. The job description for Special Services Secretary is attached hereto as Exhibit J-39.

28. Bove's annual evaluations are set forth in exhibits J-40 to J-56.

TESTIMONY

Bove testified that her duties as CST secretary were fairly constant over the years. Her workload increased when the CST increased its personnel and became a full time program. Changes in technology over the course of her tenure also impacted her work. For example, when she was first hired as a CST secretary the IEP's were prepared on a typewriter. Subsequently, the District purchased Apple Computers and the IEP'S were processed on the computer. The Apple computers were replaced by IBM computers. In addition to her secretarial duties for the CST, Bove was responsible for administering the California Basic Skills tests (CBST) to the entire High Point Regional School District. She set up and installed the CBST, as well as scanning and scoring and printing the test results.

When she became the Coordinator in September, 1986, her duties increased. In addition to functioning as CST secretary she was required to install computers and train staff on using the computers. Simultaneously, the CST personnel increased and several CST employees became full time employees. As Office Manager she was

required to type reports for the CST and to perform secretarial tasks. Bove noted that she did minimal computer training, keyboarding and computer installation. Further. she did not perform all the tasks on J-38, such as, assisting the Principal with the scheduling of each new school year.

Marigordon Starett Kuehm (Kuehm), the former Director of the Child Study Team testified that she was employed by the District from 1978 to 1995. She noted how the CST went from basically a part time operation to a full time program. A CST secretary must type State and Federal reports and IEP's that contain technical language, among other duties. As the demands of the CST increased based on changes in both state and federal laws, the use of computers also increased. Bove had the most knowledge of computers and thus she was relied upon for all matters that related to the computers. She was Bove's supervisor and prepared annual evaluations on her job performance as CST secretary.

Kuehm admitted that increased workload required that the District hire a clerical assistant to assist the CST. The District used a federal grant to fund the clerical position. The assistant's primary duties were filing, typing and some computer work.

DISCUSSION FINDINGS AND CONCLUSIONS

The parties agree that Bove acquired tenure as a secretary. Therefore, she cannot be dismissed or suspended or reduced in compensation except for neglect, misbehavior or other offense, and then only in the manner prescribed by the Tenure Employees Hearing Law, *N.J.S.A.* 18A:17-2; *N.J.S.A.* 18A:6-10 *et seq.*

At issue is whether the respondent violated the petitioner's tenure rights when it reassigned her to a secretarial position at a lower salary.

The petitioner disputes that her tenure status was affected by the Board's creation and assignment of the job title Coordinator of Computer Operations. Petitioner

asserts that titles for positions are not the deciding factor for tenure. Further, one cannot lose tenure protections as long as one continue within their area of tenure. *Quinlan v. Bd. of Ed. Township of North Bergen*, 1959-60 *S.L.D.* 113, 114, *rev'd. on other grounds, State Board of Education*, 1960-61 *S.L.D.* 243, *aff'd.* 73 *N.J. Super* 40 (App. Div. 1962).

Here, the evidence is clear and conclusive that throughout her employment Bove worked as the CST Secretary. Additional responsibilities were constantly added to petitioner's duties as CST secretary throughout her history of service. Further, the creation of the title Coordinator of Computer Operations did not substantially alter Bove's duties as she was already doing these things as a secretary. Moreover, Bove was only evaluated as a secretary. Thus, no matter what the Board may have chosen to call her position, Bove continuously worked as a secretary where her duties continued unabated throughout her employment. *Lange v. Bd. of Ed., of Borough of Audubon*, 25 *N.J. Super.* 83, 88 (*App. Div.* 1953). The Board is using nomenclature as the deciding factor in its attempt to deprive Bove of tenure. However, job titles or other nomenclature may not be the determining factor for tenure because of the mischief that would be played by local boards of education. *Berardi v. Bd. of Ed., School District of South Orange and Maplewood*, 95 *N.J.A.R.2d* (EDU) 239.

The respondent contends that Bove voluntarily left her tenured position of Secretary for the non-tenurable position of Computer Operations/Coordinator office Manager ("Coordinator"). When the Coordinator position was abolished the Board could lawfully place her in her current position. *N.J.S.A.* 18A:6-10.; *Kigerl v. Bd. of Ed. of the Borough of South Plainfield*, 1981 *S.L.D.* 889, 892. Petitioner has not alleged that the Board's decision to abolish the position of Coordinator was done in bad faith. Bove was transferred to her old position of Secretary at a lower rate of pay than what she had been earning as Coordinator. When a person whose position is lawfully abolished (and) is reassigned or transfers or is transferred to another position with a lower salary structure, a reduction in salary does not occur for purposes of *N.J.S.A.* 18A:17-2; *Booth v. Board of Education of the City of Salem*, 1980 *S.L.D*____.; *Casey v. Board of Ed. of the Township of Cinnaminson*, 95 *N.J.A.R.2d* 585.

After a careful review of the entire record, I **FIND** that Bove was hired as a CST secretary by the District in 1979 and throughout her employment with the District she has continued to function as CST secretary. (J-1 and J-2).

Exhibit J-38 sets for Bove's duties as Coordinator Computer Operations. It reveals that Bove was generally required to have a thorough knowledge of secretarial practices and procedures as well a thorough knowledge of computers. (J-38). The job goal was to act in the capacity of secretary and office manager. Further, Bove was to accept responsibility and take initiative to go beyond her assigned duties.

As computer operations coordinator, Bove was to oversee all computer operations in use in the District. Thus, she was responsible for the operation and evaluation of all new and existing computer software at the schools. She was to complete or distribute keyboarding tasks to aid the Superintendent, the Principal, Vice Principal and the Child Study Team. Additionally, Bove was required to develop a data base management systems for the operation of school records.

Notably, Bove was still responsible for the production of all Individual Education Programs (IEP's) for special need students.[1] Further, she was required to produce all reports/correspondence for the CST Director, the school Social Worker, the School Psychologist, the Learning Consultant and the Director of the Gifted and Talented Program.

As Office Manager, Bove was required to distribute keyboarding and other clerical tasks to appropriate clerical/computer personnel as directed by the Administration. In this capacity Bove was to perform all clerical tasks for the CST members with the exception of scheduling appointments and contacting parents. (J-38). Bove reported to the Administration and the CST Director .(J-38).

[1] An Individualized Educational Program (IEP) is an educational report prepared for a Special Education student and is mandatory pursuant to 20 USCA. § 1401-1461; N.J.S.A. 18A:46-8. It generally consists of test scores, the student's classification, and a specific educational program to address a student's educational deficiencies. It can be quite voluminous consisting of each teacher's individual assessment, psychological reports among other reports. It is generally prepared by the child study team(CST). A CST is generally comprised of five members.

Exhibits J-40 through J-56 are Bove's annual evaluation reports. From 1984 to 1986, Bove was evaluated as a CST secretary. The 1988 evaluation reflects a title change to Office Manager. In 1989 the title is changed to office manager/CST Secretary. This title remained constant from 1989 to 1995. The majority of the evaluations were prepared by Kuehm who evaluated her as the CST secretary.

Bove's current title as Special Services Secretary are detailed and delineated in J-39. In this position, Bove is required to act in the capacity of secretary, clerk typist and have thorough knowledge of secretarial practices and procedures. She reports to the CST Team Director and Administration. Bove's duties are to file, type, copy maintain "specialist reports" for the CST. Her annual evaluations are prepared by the Administration.

I am persuaded that Bove's current position requires that she perform the same tasks that she has always performed. Her primary duties are to perform secretarial duties for the CST. The deletion of "IEP" reports and the substitution of "specialist reports" in the current job description is nothing but a ruse to change her duties. Indeed, a "specialist report" is nothing other than the IEP reports of the consultants whom comprise the child study team that form the IEP. In *Hansen v. Bd. of Ed. of the Maywood School District*, 1989 *S.L.D.* 2106,2111 it was held that employment should be reviewed in light of the actual duties performed. In *Quinlan v Board of Education of the Township of North Bergen*, 1959-60 *S.L.D.* 113, 114, rev'd on other grounds State Board of Education, 1960-61 *S.L.D.* 243, aff'd. 73 *N.J. Super.* 40 (*App. Div.* 1962) it was held that the Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights be subterfuge and evasion. The duties performed rather than the tittle of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor. In deciding whether the petitioner therein was a clerk or an attendance officer, the petitioner was required to show that her duties were preponderantly those of a clerk.

I **CONCLUDE** that Bove has demonstrated by a preponderance of the credible evidence that her duties as CST secretary continued unabated and that she never left her position notwithstanding the title change. I am persuaded by the evidence that Bove's duties a Coordinator were incidental to her position as CST secretary. J-38 standing alone is replete with references to her duties as CST secretary notwithstanding that it describes three different positions, i.e., CST secretary, computer operations coordinator/ office manager. The one constant responsibility in each position was that she perform the duties and functions of secretary to the child study team. As noted by the petitioner, tenure is a legislative status, not a contractual status. *Phelps v. St. Bd. of Ed.*, 115 *N.J.L.* 310 (Sup. Ct. 1935, *aff'd* 116 *N.J.L.* 412 (*E & A* 1936), *aff'd.* 300 *U.S.* 319, 57 *S.Ct.* 483 (1937). Consequently, tenure laws take precedence over the terms of a contract and no contract can nullify the express words of the tenure statute. *Silvestris v. Bd. of Ed., Bayonne,* 1959-60 *S.L.D.* 184, 192.

The respondent reduced Bove's salary by $12,999, a 39% reduction, for the 1995-96 school year. Further, Bove's work day increase by one hour per day. Since I have concluded that Bove's duties did not change, I **FIND** that the respondent's action in reducing her compensation is contrary to the state's tenure laws. As a tenured employee Bove cannot be dismissed or reduced in compensation without tenure charges and a hearing. *N.J.S.A.* 18A:17-2; *N.J.S.A.* 18A:6-10 *et seq.*; *In re Fulcomer*, 93 *N.J. Super.* 404 (*App. Div.* 1967). It is not disputed that the Board could abolish Bove's position as Coordinator. Further, it is not disputed that the Board could reassign her, however I **FIND** that the Board could not reduce Bove's salary without violating *N.J.S.A.* 18A:17-2 and its express prohibition against reductions in compensation.

Therefore, I **FIND** and **CONCLUDE** that Bove' salary must be restored to the level she had prior to the reduction, or $33,020. For the 1995-96 school year, Bove is entitled to back pay in the amount of $12,999. For the 1996-97 school year, she is entitled to an award of back pay based on the difference between the required salary rate of $33,020 and the rate of pay actually received ($20,923) until her full salary is

properly restored. I further **FIND** that Bove is entitled to back pay for the reduction from $178 to $100 per day for her summer pay rate.

I do not find however, that the imposition of prejudgment interest is warranted herein. Petitioner failed to prove that the Board acted in bad faith when it transferred her to the current position.

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

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

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

3/6/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

3/10/97
DATE

DN4
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

For Petitioner:

Dorothy Bove

Marigordon Kuehm

For Respondent:

Harry Tachovsky

Exhibits:

J-1 Employment Record
J-2 Minutes dated August 13, 1979
J-3 Employment Contract
J-4 Minutes dated April 14, 1980
J-5 Employment Contract
J-6 Minutes dated April 13, 1981
J-7 Employment Contract
J-8 Minutes dated April 26, 1982
J-9 Employment Contract
J-10 Minutes dated April 18, 1983
J-11 Employment Contract
J-12 Minutes dated April 9, 1984
J-13 Employment Contract
J-14 Minutes April 22, 1985
J-15 Employment Contract

J-16 Minutes dated April 21, 1986

J-17 Minutes dated September 8, 1986

J-18 Employment Contract

J-19 Minutes dated April 13, 1987

J-20 Employment Contract

J-21 Minutes dated April 11, 1988

J-22 Employment Contract

J-23 Minutes April 24, 1989

J-24 Minutes dated December 18, 1989

J-25 Employment Contract

J-26 Minutes dated May 13, 1991

J-27 Employment Contract

J-28 Employment Contract

J-29 Employment Contract

J-30 Employment Contract

J-31 Minutes dated May 23, 1994

J-32 Employment Contract

J-33 Minutes dated May 22, 1995

J-34 Minutes dated June 26, 1995

J-35 Letter dated July 5, 1995

J-36 Employment Contract

J-37 Job Description - Technology & Network Supervisor/Site Technician

J-38 Job Description - Computer Operations Coordinator/Office Manager

J-39 Job Description - Special Services Secretary

J-40 Evaluation Report dated April 5, 1984

J-41 Evaluation Report dated May 21, 1985

J-42 Evaluation Report dated May 13, 1986

J-43 Evaluation Report dated June 10, 1988

J-44 Evaluation Report dated May 11, 1989

J-45 Evaluation Report dated December 7, 1989

J-46 Evaluation Report dated May 21, 1990

J-47 Evaluation Report dated November 12, 1990

J-48 Evaluation Report dated April 2, 1991

J-49 Evaluation Report dated December 9, 1991

J-50 Evaluation Report dated April 28, 1992

J-51 Evaluation Report dated October 28, 1992

J-52 Evaluation Report dated April 28, 1993

J-53 Evaluation Report dated October 18, 1993

J-54 Evaluation Report dated May 31, 1994

J-55 Evaluation Report dated November 2, 1994

J-56 Evaluation Report dated May 16, 1995

R-1 Agreement dated 4/96

R-2 Letter dated 6/21/95

R-3 Letter dated 2/6/95

OAL DKT. NO. EDU 11723-95
AGENCY DKT. NO. 380-9/95

DOROTHY A. BOVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both exceptions and the reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

The Board objects to the Administrative Law Judge's (ALJ) conclusion that it violated petitioner's tenure rights by reducing her salary upon the elimination of the position of Computer Operations Coordinator/Office Manager, essentially contending that the ALJ arrived at her conclusions without reference to the testimony of Harry Tachovksy, Superintendent of Schools, who affirmed the "drastically dissimilar job descriptions for each position" and the added duties attendant to the role of Computer Operations Coordinator/Office Manager. (Board's Exceptions at p. 2) Instead, the Board argues, the ALJ focused on petitioner's testimony, indicating that, in her role as Computer Operations Coordinator/Office Manager, she performed many of the functions of a secretary. The Board asserts,

> ***As Mr. Tachovsky pointed out during his testimony, Ms. Bove was given a substantial pay increase because of her numerous

> *additional* duties. Simply because Bove, as a Coordinator/Office Manager, performed some of the tasks of a Secretary does not mean that all of her responsibilities remained the same. The testimony of Mr. Tachovsky reflects that there was a substantial change in job duties and that each position was not within the same tenurable category.***" (emphasis in text) (*Id.*)

In reply, petitioner maintains her position that a change in title accompanied by additional job duties does not remove the protections of tenure. (Petitioner's Reply at p. 1) Petitioner asserts that the evidence in this matter "abundantly established" that she performed the duties of a secretary, while holding the job title Computer Operations Coordinator/Office Manager. Petitioner further contests,

> The Board errs in its assertion that the Superintendent pointed out that [she] received a "substantial pay increase" because of her numerous additional responsibilities. The record establishes that the salary increase in question occurred many years before the Superintendent was ever employed by the Board. Consequently, his unfounded speculation is of no weight whatsoever. As the petitioner credibly stated, she and several other non-certificated employees received substantial raises because of their experience and/or education. This occurred which she performed secretarial duties. (*Id.* at pp. 1, 2)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioner has proven by a preponderance of credible evidence that her duties as the secretary to the Child Study Team (CST) office "***continued unabated and that she never left that position notwithstanding the title change.***" (Initial Decision at p. 11) As noted by the ALJ, the job description for the position of Coordinator of Computer Operations/Office Manager "[i]s replete with references to her duties as CST Secretary ***" (*id.*) and her performance evaluations for the period she held the title Coordinator of Computer Operations/Office Manager evidence that she was consistently evaluated as the Child Study Team Secretary and Office Manager. (*Id.* at p. 10) The record, therefore, supports the

conclusion that, notwithstanding the addition of duties to her secretarial responsibilities, and the corresponding pay increases, petitioner continued to hold her position as the secretary to the CST, and any additional functions she was required to perform did not substantially alter the duties she performed as the secretary to the CST. (*Id.* at p. 8) Thus, the Board's action in reducing her salary was violative of her tenure rights pursuant to *N.J.S.A.* 18A:17-2. *

To the extent the Board raises exceptions regarding the testimony offered at the hearing in this matter, the Commissioner notes that the record before him does not include a transcript of the hearing at the OAL. Challenges to the factual findings rendered by the ALJ cannot be accepted or rejected by the Commissioner without a review of those portions of the record which are relevant to the exceptions. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). Moreover, it was the Board's responsibility, in that it asserted these exceptions, to supply the Commissioner with relevant portions of the transcript. *Morrison* at 158. Without pertinent transcript citations, the Commissioner defers to the factual findings and credibility determinations reached by the ALJ who was in a position to hear and adjudge the credibility of the witnesses. See *Parker v. Dornbierer*, 140 *N.J. Super.* 185, 188 (App. Div. 1976). In that the ALJ's findings are well grounded in the record before the Commissioner, he finds no cause to challenge either her findings or her conclusions.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The Board is hereby directed to reimburse petitioner as so stated by the initial decision at pages 11 and 12.

IT IS SO ORDERED.

Leo Klagholz
COMMISSIONER OF EDUCATION

April 22, 1997
Date of Mailing, April 22, 1997

* The parties agree that petitioner acquired tenure as a secretary. (Initial Decision at p. 7)

200-97

200-97

NORMA I. ALMODOVAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8738-96

AGENCY DKT. NO. 336-8/96

NORMA I. ALMODOVAR,

Petitioner,

v.

CAMDEN CITY BOARD OF EDUCATION,

Respondent.

Michael C. Damm, Esq.,for petitioner (Selikoff & Cohen, attorneys)

Karen A. Murray, Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: March 4, 1997 Decided: March 5, 1997

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 15, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared an Order for Dismissal on Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 5, 1997
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

3/10/97
DATE

DEPARTMENT OF EDUCATION

MAR 11 1997
DATE

Mailed to Parties:
Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

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STATE OF N.J.
OFFICE OF ADM. LAW
MAR 4 9 51 AM '97

FEB 24 1997

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(609) 778-6055
Attorneys for Petitioner

NORMA I. ALMODOVAR,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	
v.	OAL Docket No. EDUOR 08738-96S Agency Ref No. 336-8/96
CAMDEN CITY BOARD OF EDUCATION,	
Respondent.	**ORDER FOR DISMISSAL ON SETTLEMENT**

THIS MATTER being opened to the Office of Administrative Law by Selikoff & Cohen, P.A., Michael C. Damm, Esquire, attorneys for Petitioner Norma Almodovar, and Murray, Murray & Corrigan, Karen A. Murray, Esquire, appearing on behalf of the Respondent Camden City Board of Education, and the parties having reached an agreement so as to conclude this matter, the terms of which are that the Respondent Camden City Board of Education will return to the Petitioner Norma Almodovar the nine (9) sick days which were originally charged to her as a result of absences incurred in connection with an incident occurring on May 16, 1996, with the understanding that her absences during those days shall be considered as workers' compensation days for which the Petitioner was entitled to workers' compensation wage loss benefits; and,

whereas this settlement resolves all issues between the parties;

IT IS on this 5th day of March, 1997

ORDERED that inasmuch as the parties have voluntarily agreed to settle this matter pursuant to the terms as set forth above, and having fully agreed to those terms as represented by counsel in a telephone conference call of January 13, 1997, and as further evidenced by the signature of their respective counsel as contained on this Order, and inasmuch as this settlement fully disposes of all issues in controversy and is consistent with the law, the settlement as set forth herein is approved, and it is ordered that the parties comply with the settlement terms and that these proceedings be dismissed.

ROBERT S. MILLER, A.L.J.

I agree to the form and content of the within Order.

MURRAY, MURRAY & CORRIGAN
Counsel for Respondent
Camden City Board of Education

KAREN A. MURRAY

SELIKOFF & COHEN, P.A.
Counsel for Petitioner
Norma Almodovar

MICHAEL C. DAMM

F:\WPDOCS\PUBLIC\MIKE\WC\ALMODOVA\ORDER

OAL DKT. NO. EDU 8738-96
AGENCY DKT. NO. 336-8/96

NORMA I. ALMODOVAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 23, 1997
DATE OF MAILING APRIL 23, 1997

201-97

A.R., on behalf of minor children, N.R. and M.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9842-96
AGENCY NO. 400-9/96

A. R. ON BEHALF OF MINORS N.R. AND M.R.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent.

Elizabeth Athos, Esq., for petitioner (Hudson County Legal Services)

Kenneth R. Hampton, Esq., for respondent

Record Closed: February 28, 1997 Decided: March 4, 1997

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

This matter was transmitted to the Office of Administrative Law as a contested case on October 2, 1996 and involves a challenge by the petitioners to the respondent Board's determination to deny N.R. and M.R. free attendance at the district's public schools. A status conference was conducted by the undersigned administrative law judge in January 1997 and it was anticipated that cross-motions for summary decision would be filed.

However, as a result of continued discussions between the parties an amicable resolution of the dispute has been reached. A consent order containing the terms of the agreement signed by counsel, has been submitted to the undersigned and is attached hereto.

I have reviewed the terms and conditions of the settlement as set forth in the consent order and **FIND** as follows:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by the signatures of counsel which appear on the document submitted to me.

2. The settlement as set forth fully disposes of all issues in controversy and is consistent with law.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. If the Commissioner does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended,

this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

March 4, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

3-12-97
DATE

DAF
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/mh

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HUDSON COUNTY LEGAL SERVICES CORP.
BY: Elizabeth Athos, Esq.
574 NEWARK AVENUE
JERSEY CITY, NEW JERSEY 07306
(201) 792-6363 - FAX (201) 798-8780
ATTORNEYS FOR PETITIONER

ANA RAMOS, on behalf of minors N.R. and M.R.,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
PETITIONER,	:	OAL DOCKET NO.: EDU 9842-96
vs.	:	
BAYONNE BOARD OF EDUCATION,	:	CONSENT ORDER
RESPONDENT.	:	

This matter having come before the Office of Administrative Law on the Petition and Amended Petition filed by Ana Ramos on behalf of her minor sisters, N.R. and M.R., against the Bayonne Board of Education; Elizabeth Athos, Esq., Hudson County Legal Services Corp., appearing for petitioner and Kenneth R. Hampton, Esq., appearing for respondent. The parties having agreed that, based on information submitted to the Bayonne Board of Education after this matter was commenced, N.R. and M.R. moved to Bayonne due to family and economic hardship and not solely to obtain a free public education in the district of Bayonne; and the parties having further agreed to entry of the terms below; and for good cause shown:

HUDSON COUNTY
LEGAL SERVICES CORPORATION
574 NEWARK AVENUE
JERSEY CITY, N.J. 07306-2377

It is on this 4th day of March, 1997;

ORDERED that N.R. and M.R. are entitled to a free, public education in the district of Bayonne pursuant to N.J.S.A. 18A:38-1(b), as of the start of the 1996-1997 school year; and

ORDERED that there shall be no tuition, costs, or attorneys fees assessed against either party in this matter.

Hon. Stephen G. Weiss, A.L.J.

We hereby consent to the form and entry of this Order.

Elizabeth Athos

Hudson County Legal Services Corp.
By: Elizabeth Athos, Esq.
Attorneys for Petitioner

Dated: 2/27/97

Board Counsel
Kenneth R. Hampton, Esq.
Attorney for Respondent

Dated: 2/27/97

HUDSON COUNTY
LEGAL SERVICES CORPORATION
574 NEWARK AVENUE
JERSEY CITY, N.J. 07306-2377

OAL DKT. NO. EDU 9842-96
AGENCY DKT. NO. 400-9/96

A.R., on behalf of minor children, N.R. and M.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 24, 1997
DATE OF MAILING APRIL 24, 1997

202-97

202-97

MARY COOPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10203-96S

AGENCY DKT. NO. 423-9/96

MARY COOPER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Karen A. Murray, Esq., for respondent (Murray, Murray and Corrigan, attorneys)

Record Closed: February 21, 1997 Decided: March 11, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a Petition of Appeal to the Commissioner of the Department of Education filed by petitioner, dated September 17, 1996, alleging that the respondent Board violated her tenure and seniority rights in failing to appoint her to the position of computer teacher. The matter was transmitted to the Office of Administrative Law on November 14, 1996,

by the Department of Education, Bureau of Controversies and Disputes, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 11, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

3-12-97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

SETTLEMENT AGREEMENT

RECEIVED
FEB 21 2 05 PM '97
STATE OF N.J.
OFFICE OF

This Agreement, made and entered into this _____ day of _____, 1996, by and between **MARY A. COOPER** (hereinafter referred to as "Cooper") and the **CAMDEN BOARD OF EDUCATION** (hereinafter the "Board") to resolve amicably the dispute between the parties relating to Mary A. Cooper v. Camden Board of Education, Docket No.: EDU-10203-96S.

For the mutual covenants and considerations set forth below, the employee and the Board do hereby agree as follows:

1. The Board agrees to pay Cooper the gross wages of Two Thousand Forty-Seven Dollars and Eighty Cents ($2,047.80), subject to standard and ordinary deductions. The net amount will be Nine Hundred and Thirty Three Dollars and Sixty-Three cents ($933.63).

2. The Board agrees to credit Cooper with seniority credit retroactive to September 1, 1996. Cooper shall retain all previously accrued seniority credit.

3. Cooper should be entitled to all benefits, which include sick leave, pension credit and personal days, retroactive to September 1, 1996 and any previously accrued, but not compensated benefits, to which she would be entitled pursuant to statute or the collective bargaining agreement.

4. Cooper agrees to pay her share of the pension contribution for any retroactive pension credit and shall not be liable for the Board's share. The Board will contribute the employer's share as determined by the State.

5. Cooper agrees to withdraw her Petition of Appeal, with prejudice.

6. Cooper agrees that she has voluntarily and without coercion entered into the Agreement.

7. Cooper waives her right to file any claims in any forum regarding any of the issues involved in the matter.

8. This Settiement Agreement resolves all claims between the parties arising from the reduction in force at issue in this case.

9. This Agreement contains all of the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

IN WITNESS WHEREOF, the parties have signed, sealed, delivered and acknowledged this Agreement.

CAMDEN BOARD OF EDUCATION

By: Karen Murray
Karen A. Murray, Esq.

Date: 2/19/97

FOR MARY A. COOPER,

Richard Friedman, Esq.

Date: 2/10/97

Mary A. Cooper

Mary A. Cooper

Date: 2/4/97

OAL DKT. NO. EDU 10203-96
AGENCY DKT. NO. 423-9/96

MARY COOPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

APRIL 24, 1997
DATE OF MAILING APRIL 24, 1997

203-97

203-97

H.S.L., on behalf of minor child, C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 24, 1997

OAL DKT. NO. EDU 11288-96
AGENCY DKT. NO. 428-9/96

H.S.L., on behalf of minor child, C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed. The Deputy Commissioner notes, in response to the Board's observation that the matter of tuition for the time of C.M.'s attendance remains unresolved that, while such matter cannot be resolved as part of the within proceedings, as the Board did not file a Counterclaim for tuition as part of its Answer in this matter, the Board is not precluded from advancing a claim for tuition in a separate Petition of Appeal.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 24, 1997
DATE OF MAILING APRIL 24, 1997

204-97

204-97

DR. MARYANN C. PEIFLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 24, 1997

OAL DKT. NO. EDU 11220-96
AGENCY DKT. NO. 453-9/96

DR. MARYANN C. PEIFLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 24, 1997
DATE OF MAILING APRIL 24, 1997

205-97

205-97

DYNPHNA AGOS-CAMUSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 24, 1997

OAL DKT. NO. EDU 6764-96
AGENCY DKT. NO. 272-7/96

DYNPHNA AGOS-CAMUSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 24, 1997
DATE OF MAILING APRIL 24, 1997

208-97

208-97

CLAUDE DOAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

APRIL 14, 1997

OAL DKT. NO. EDU 8104-95
AGENCY DKT. NO. 274-7/95

CLAUDE DOAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 24, 1997
DATE OF MAILING APRIL 24, 1997

221-97

221-97

IN THE MATTER OF THE TENURE :

HEARING OF THERESA LUCARELLI, : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE : DECISION

BOROUGH OF BRIELLE, MONMOUTH :

COUNTY, :

_____:

SYNOPSIS

Board certified tenure charges of unbecoming conduct against respondent, elementary physical education teacher with 23 years of service, for allegedly threatening the Superintendent of Schools in a series of written communications. Respondent did enter into a Pretrial Intervention Program (PTI) and following its completion, her indictment was dismissed.

ALJ concluded that the Board met its burden of proof, by a preponderance of credible evidence that its charge of unbecoming conduct was true and such behavior warranted respondent's dismissal as of August 29, 1995, the date of her suspension. Moreover, the ALJ concluded that respondent's motion to compel the Board to pay respondent, pursuant to *N.J.S.A.* 18A:6-14 was moot.

Commissioner adopted in part and modified in part the initial decision of the ALJ. Commissioner concurred with the ALJ that the Board demonstrated by a preponderance of credible and unrebutted evidence that respondent was guilty of unbecoming conduct. Citing *In re Sammons*, the Commissioner found respondent's actions in writing the memoranda to the superintendent to be so egregious as to prohibit excuse, particularly in light of the standard to which teachers are held. Commissioner found dismissal was warranted. Commissioner, however, did order the Board to compensate respondent for the time frame from the 121st day of that portion of her suspension attributable to N.J.S.A. 18A:6-14, until the date of his decision since respondent completed PTI and, thus, had resumed her status as a suspended employee. Commissioner directed matter to be forwarded to the State Board of Examiners for further appropriate action.

APRIL 28, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10413-95

AGENCY DKT. NO. 354-8/95

IN THE MATTER OF THE TENURE HEARING OF THERESA LUCARELLI, BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY

Peter Kalac, Esq., for the charging Board of Education (Kalac, Newman, Lavender & Campbell, attorneys)

Arnold Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: March 5, 1997 Decided: March 10, 1997

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Borough of Brielle (Board) certified tenure charges to the Commissioner of Education (Commissioner) alleging that respondent, Theresa Lucarelli, had committed acts of unbecoming conduct of a teaching staff member, pursuant to *N.J.S.A.* 18A:6-10 to -25. The Board seeks to remove respondent from her tenured position. Respondent denies the allegations and seeks to be reinstated to her former teaching position.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on November 18, 20 and 21, 1996, at the Trenton OAL, Mercerville, New Jersey. The parties requested and were granted leave to submit post-hearing briefs of law. The last submission was filed before this tribunal on March 5, 1997, which constitutes the close of the hearing record.

BACKGROUND FACTS

In or about the spring of 1995, respondent forwarded to the Superintendent of Schools four written communications, the purpose of which was to force the Superintendent to have the Board offer a tenured year contract to a colleague of respondent, whom the Superintendent had not recommended for re-employment.

On June 7, 1995, the Board directed that the four communications in question be forwarded to the Monmouth County Prosecutor's Office.

On August 9, 1995, a member of the Board, Charles Kavanagh, filed with the Board Secretary a charge of conduct unbecoming a teaching staff member against respondent predicated on the four written communications, together with a Statement of Evidence under oath.

On August 10, 1995, the charge of unbecoming conduct was served on respondent. During the fifteen-day statutory period afforded her, respondent elected not to respond to the charge of conduct unbecoming a teaching staff member.

On August 29, 1995, the charge of unbecoming was certified to the Commissioner of Education. On the same day, respondent was served with a copy of the charge and the Certificate of Determination, which advised respondent she was suspended without pay.

On October 2, 1995, respondent, based on the four communications she had forwarded to the Superintendent, was indicted by a Monmouth County Grant Jury on one count of criminal coercion, *N.J.S.A.* 2C:13-5a(2) and (3).

On October 24, 1995, an Answer to the charge of conduct unbecoming was filed by respondent wherein she denied that she had threatened the Superintendent of Schools.

On November 20, 1995, the Board filed a Notice of Motion for Summary Decision in the within matter. No responding papers have ever been filed by respondent to the Motion for Summary Decision.

On December 20, 1995, the Board passed a Resolution, and thereafter notified counsel for respondent that it was continuing respondent's suspension without pay based on the fact that she was indicted subsequent to the time the charge of unbecoming conduct was filed, pursuant to the provisions of *N.J.S.A.* 18A:6-8.3.

On January 16, 1996, Board attorney Kalac had a conference telephone call from Administrative Law Judge (ALJ) M. Kathleen Duncan, along with counsel for respondent, and hearing dates for the tenure hearing matter were scheduled for April 29, 30 and May 1, 1996.

Respondent, subsequent to her indictment for criminal coercion, made application to the Monmouth County Prosecutor's Office for admission to a Pre-Trial Intervention Program (PTI).

On February 23, 1996, Board attorney Kalac received a letter from the Honorable M. Kathleen Duncan who advised that she was recusing herself from the instant tenure matter inasmuch as she had handled the Velasquez matter, which was another matter from the same school district with certain related facts to the instant matter.

On February 29, 1996, counsel for respondent advised, by letter to Judge Duncan, that he was then "ready, willing and able to proceed in the defense of the tenure charges pending herein" and requested that Judge Duncan advise the parties of the judge who would be replacing her in

this matter that the originally scheduled date of April 29, 30 and May 1, 1996, should be kept in place.

Subsequently, the parties were advised that the undersigned would replace Judge Duncan in the instant tenure matter.

On April 17, 1996, a conference call was placed to respective counsel by the undersigned to discuss the within matter, and on April 18, 1996, a Prehearing Order was executed. New hearing dates on the tenure hearing charges were scheduled for the week of November 18, 1996 through and including November 22, 1996.

Subsequently, the Board's attorney propounded a Motion for Summary Decision and oral argument was heard by the undersigned on June 18, 1996. Having heard the parties respective legal arguments, this tribunal denied the Board's motion and ordered that the matter proceed to a plenary hearing on the established dates.

On an oral motion propounded by the Board and opposed by respondent, an order of sequestration was issued for all witnesses to these proceedings.

THE CHARGE

The single charge to the Commissioner against respondent alleging conduct unbecoming a teaching staff member was brought by then President of the Board, Charles T. Kavanagh. The specification of the charge, dated August 9, 1995, states as follows:

> In a series of written communications sent to the Superintendent of Schools, three of which were dated May 9, 16 and 17, 1995, and a fourth undated, but received by the Superintendent of Schools on May 15, 1995, Theresa Lucarelli threatened the Superintendent of Schools that in the event he did not use his influence to persuade the Board of Education to "reinstate" a certain non-tenured teacher who did not receive an offer of contract for the 1995-96 school year, then and in that event, Theresa Lucarelli would provide the police with information, in her possession, that would establish that the Superintendent of Schools was a drug user. (P-1)

SUMMARY OF THE TESTIMONIAL AND DOCUMENTARY EVIDENCE

Former Board President Kavanagh and former Superintendent of Schools, Gerard Russoniello, testified on behalf of the Board. Mr. Russoniello testified that he had recommended to the Board that Mr. Angelo Velasquez not be awarded a teaching contract for the 1995-96 school year. He was in receipt of a handwritten note from respondent, dated May 9, 1995, which stated as follows:

> Mr. Russoniello,
>
> I need to inform you that a member of the board has breached confidentiality.
>
> I have been made aware of the fact that there is another teacher on your "hit" list. I am also aware of the teacher you are targeting. I am aware that there is not much that can be done legally to protect this person's job.
>
> Please consider this decision, if it has already been decided!
>
> We are trying to maintain our professionalism, but if another teacher is hurt, who knows what the consequences will be. Those kinds of things can get personal. I would hate to see this happen.
>
> Terry Lucarelli (P-10)

Mr. Russoniello asserted that the letter was placed in his school mailbox. Subsequently, on Monday, May 15, 1995, a second handwritten letter was delivered to the school mailbox and date stamped by the Board's School Business Administrator. The letter to the Superintendent stated:

> Gerard,
>
> I strongly urge you to use your influence and persuade the Board to reinstate Angelo [Velasquez].
>
> I will give you until Wednesday to give me some indication that this is so.

> I heard your speech at DARE - what do you think Officer McWilliams, the 5th grade parents and the rest of the Brielle community would think if they knew what I know.
>
> I have already contacted a friend of mine who is a Board attorney. I did not mention any names yet.
>
> I told you that if you "hurt" a teacher - this would get dirty.
>
> Don't take this lightly! The information that I have you know is true. I have proof. Please don't make me use it.
>
> Terry (P-11)

Mr. Russoniello testified that on the afternoon of Tuesday, May 16, 1995, sometime after 3:00 p.m., a handwritten note from respondent was placed in his school mailbox. The handwritten note states as follows:

> Clarification of events that occurred May 16 -
>
> 1. Teachers picketed for Mr. Velasquez - only
>
> 2. Mrs. L. & Mr. R. had a conversation concerning her letter and the anonymous, harassing phone calls she received - 2 last evening and 1 this morning.
>
> 3. Both agreed to back off and not proceed with any actions towards each other.
>
> What proof do I have that you will not proceed and force the situation so that innocent people do not get hurt?
>
> I will not hand over to the police any information that may be used against you - including the phone numbers - time and dates of the phone calls -
>
> You will assure your friends that this situation is over and I will inform my person.
>
> Someone overheard J.S. telling someone that you said that "you won and I backed down" -
>
> I don't think anyone won - but if you need to say it - that's fine -

> Perhaps you should discuss confidentiality again with her and the Board.
>
> I was also told that someone heard at a game last night that J.S. is behind the whole Angelo situation and she is pushing you to make sure he doesn't get rehired.
>
> I think we need to talk about a gag order on all sides. (P-12)

Mr. Russoniello denies he had a meeting with respondent on May 15, 1995. He testified, moreover, that on May 17, 1995, he received an unsigned handwritten letter, dated May 17, which stated as follows:

> I received phone call #4 this morning around 7:10 - anonymous - raspy voice.
>
> Stated:
>
> > "This is an insurance policy if anything is said tonight about you Boss by anyone - you will pay the consequences."
>
> I don't know how many people you felt it necessary to send my letter to beside Kalac, Oppito, Kavanagh. I also know you showed it to Judith Sorkowitz. I guess you decided not to keep your side of the bargain since I received another call.
>
> I contacted an attorney - since you are accusing me of extortion if I reveal your drug use, which I told you I wouldn't because I don't want you to implicate John & Robin. I need to tell you that because this evil person has information that only you or someone you told would have that making terroristic threats over the phone is a federal offense. I did not reveal anything to anyone - so it has to be someone who either is displaying displaced loyalty or fears implication. (P-13)

Mr. Russoniello testified that the Board held its meeting on Wednesday, May 17, 1995, and did not award Angelo Velasquez a teaching contract for the 1995-96 school year which would have granted Mr. Velasquez a tenure status in the school district. He further asserted that

after he had received all four letters from respondent, he made copies for the Board members and the Board attorney. The copies were made and distributed before June 5, 1995.

Mr. Russoniello testified that subsequent to his receipt of the letters from respondent, a number of things occurred in the school. A petition was circulated among the school's pupils to have the Board reinstate Mr. Velasquez. The parents of a second grade pupil became upset because of the circulation of the petition.

Kindergarten pupils were given ribbons to wear by a teaching staff member. The wearing of the ribbons was to show support for Mr. Velasquez. Some parents were upset and questioned Mr. Russoniello as to why the pupils were wearing the ribbons.

Posters were placed in the school's corridor and in classrooms which stated, among other things, "Bring back Mr. V." The materials used for the posters were from the schools' art room, under the direction of a long-term substitute teacher.

On Thursday, May 18 or Friday, May 19, 1995, the seventh and eighth grade pupils staged a "sit down" in the school's corridor during regular instruction time. There were approximately fifty pupils involved in the "sit down." A classroom teacher instructed the pupils to return to their respective classrooms before Superintendent Russoniello arrived on the scene.

Mr. Russoniello admitted he only investigated the source of the poster materials and did not investigate the origins of the petition or the ribbons worn in support of Mr. Velasquez. He contended, moreover, that the notes addressed to him from respondent constituted a threat, with which he did not comply. Nor did he change his recommendation to the Board to not offer Mr. Velasquez a teaching contract for the 1995-96 school year. He asserted that respondent's threat that "this would get dirty" (P-11) was a threat fulfilled when the controversy flowed over into the classroom and involved the children of the school.

Former Board President Kavanagh testified, among other things, that sometime in May 1995, on a date not specified, he had a conversation with Superintendent Russoniello concerning the series of communications from respondent to Russoniello. The Board thereafter invited

respondent to appear before a committee of the Board on June 5, 1995, to discuss the communications. Respondent did not appear before the Board's committee, where the Board's attorney was in attendance. The Board then directed its attorney to contact the Monmouth County Prosecutor with respect to the communications from respondent to the Superintendent. The Board attorney complied with the Board's directive.

Mr. Kavanagh asserted that, as president of the Board, he filed the tenure charge of conduct unbecoming a teaching staff member against respondent. The charge was prepared for Kavanagh by its attorney. Mr. Kavanagh also signed the sworn Statement of Evidence in support of the charge. He asserted that respondent was the president of the Brielle Education Association at some point in time, and in that capacity, Kavanagh had met with respondent as a member and representative of the Board. Kavanagh asserted that respondent would appear before the Board as an advocate in teacher personnel matters, *i.e.*, grievances, etc. Kavanagh asserted he signed the Statement of Evidence to the charge because he believed it was the responsibility of the Board president to do so.

On August 28, 1995, the Board certified its charge against respondent to the Commissioner and suspended her from her teaching duties without pay.

Mr. Kavanagh testified that subsequent to the four letters from respondent to the Superintendent and forwarded to the Monmouth County Prosecutor, respondent was indicted by a Monmouth County Grand Jury on October 5, 1995. The indictment states as follows:

> FIRST COUNT
> CRIMINAL COERCION - FOURTH DEGREE CRIME
>
> The Grand Jurors of the State of New Jersey, for the County of Monmouth, upon their oaths present that THERESA LUCARELLI, on or about divers dates between May 9, 1995 and May 17, 1995, in or about the Borough of Brielle, County of Monmouth, and within the jurisdiction of this Court, did commit the crime of criminal coercion in that, with purpose unlawfully to restrict Gerard Russoniello's freedom of action to engage or refrain from engaging in conduct, she threatened to accuse Gerard Russoniello of an offense and/or to expose a secret which would tend to subject Gerard Russoniello to hatred, contempt or ridicule,

> or to impair his credit or business repute, contrary to the provisions of N.J.S.A. 2C:13-5a(2) and/or (3), and against the peace of this State, the Government, and dignity of the same. (P-9)

On December 20, 1995, by recorded roll call vote, the Board continued respondent's suspension without pay as a consequence of her indictment, pursuant to *N.J.S.A.* 18A:6-8.3.

Subsequently, on February 8, 1996, respondent was entered into the PTI, with an order to serve seventy-five hours of community service and pay all monies totaling $125 at the rate of $12.50 per month for ten months. Respondent's PTI was successfully completed on February 8, 1997.

Respondent testified on her own behalf together with fourteen other witnesses who testified about her good character, among other things. The witnesses, other than respondent, represented present and former teaching colleagues, former students and parents of pupils taught by respondent. The witnesses testified that respondent is an excellent and outstanding teacher who has been an advocate for children and members of the teachers' union. She has worked with handicapped children with their physical therapy, dealt with children's concerns about drugs and alcohol abuse and was instrumental in getting a grant of $10,000, with the assistance of the school's vice principal, for a comprehensive drug curriculum for grades kindergarten through eight. The curriculum required a three-day in-service program involving all staff members, including custodial and cafeteria workers. She participated in class trips, worked playground duty and was the cheerleader adviser, among other activities.

Some of those who testified on respondent's behalf knew of the charge filed against her by the Board. However, none of the witnesses testified as to the content or the substance of the charge nor the letters authored by respondent which formed the basis of the charge to the Commissioner.

Respondent testified on her own behalf asserting, among other things, that she has been an elementary physical education teacher for twenty-four years, twenty-three of which have been served with the Brielle Board. She has held an office in the local teachers' association since she

acquired a tenure status with the Board and became its president in May 1988. It was not revealed when her term as president ended, however, the present president is Harry Nicholas Aronis, who testified on respondent's behalf. She asserted that the 1994-95 school yearbook was dedicated to her by the pupils of the school.

Respondent testified she first became aware of the charge against her on June 28, 1995, subsequent to the close of the 1994-95 school year. On that date, she was in receipt of a letter from the Board's Business Administrator/Board Secretary advising her to appear before a committee of the Board on July 11, 1995, to be interviewed concerning the four written communications she forwarded to the Superintendent. She contradicted her former testimony and stated she was absolutely not aware of any charges being brought against her at the time she received the letter from the Business Administrator/Board Secretary dated June 28, 1995.

In any event, on June 30, 1995, respondent addressed a handwritten letter to the Business Administrator/Board Secretary in response to the June 28, 1995 letter. In her letter, respondent asked for information, among other things, concerning which Board members and others would be present at the interview, how many witnesses would be allowed to be called and, could respondent waive her right to privacy and have a public meeting. She also noted that the Superintendent had neglected to include two other communications which she asserted were very important, *i.e.*, a memo dated May 12 and a memo dated May 15, 1996.

Subsequently, respondent testified, she was in receipt of a letter dated July 5, 1995, from the Board's attorney in response to her letter of June 30, 1995. The Board's attorney advised respondent, among other things, that the meeting was not a hearing but, rather, an interview as permitted by statute. She was also advised that the meeting was not intended to be a public hearing and that she may have one person present to advise and represent her. Respondent did not attend this interview meeting with the Board.

Respondent testified that upon the receipt of the Board attorney's letter dated July 5, 1995, she was not aware she was being charged with any offense by the Board, *i.e.*, unbecoming conduct of a teaching staff member. Nor was she told she was the subject of any disciplinary action by the Board. Respondent testified she learned of the charge of unbecoming conduct

against her by way of a letter, dated August 9, 1995, over the signature of the Business Administrator/Board Secretary.

Respondent offered her Annual Performance Reports into evidence (R-9) which demonstrate satisfactory performance throughout her teaching career. During her twenty-four years with the Board, she has had only one unsatisfactory evaluation and that was in June 1995 under the criterion of "Implements district's goals and objectives" (R-9). In all other respects, her evaluations were satisfactory.

FINDINGS OF FACT

Based upon all of the testimony and documents adduced at the hearing and having given fair weight thereto, I **FIND** the testimony to be credible and worthy of belief. *In re Perrone*, 5 *N.J.* 514, 522 (1950). Accordingly, I hereby adopt, by reference, all of the above as my **FINDINGS OF FACT** in this matter.

I **FIND**, therefore, that the Board has demonstrated, by a preponderance of the credible and unrebutted evidence, that the charge of unbecoming conduct of a teaching staff member brought against respondent Theresa Lucarelli is true, in fact.

ARGUMENTS OF THE PARTIES

THE BOARD'S POSITION

The facts, as set forth by the Board in its brief will not be repeated here.

LAW

Point I

WHETHER THERESA LUCARELLI'S ACTIONS, THROUGH A SERIES OF WRITTEN COMMUNICATIONS TO THE BOARD'S SUPERINTENDENT OF SCHOOLS, CONSTITUTES THREATS, AND THEREFORE, CONDUCT UNBECOMING A TEACHING STAFF MEMBER.

The foregoing is the initial issue identified in the Prehearing Order. The issue of whether Lucarelli's writing and delivering the four communications in question amounts to conduct unbecoming a teaching staff member needs little by way of argument. The writings speak for themselves.

Can the following be interpreted as other than threats?

> . . . who knows what the consequences will be. These kinds of things can get personal. I would hate to see this happen. (P-10 in evidence)
>
> * * * *
>
> I strongly urge you to use your influence and persuade the Board to reinstate Angelo.
>
> * * * *
>
> I told you that if you "hurt" a teacher -- this would get dirty. Don't take this lightly! The information that I have you know it's true. I have proof. Please don't make me use it. (P-11 in evidence)

The unrebutted testimony of the Superintendent was that the foregoing was contained in certain communications which were authored by Lucarelli and placed in his mailbox by her in May 1995.

It should not go unnoted that following delivery of the four communications in question, the Board offered Lucarelli two opportunities to meet with a committee of its members to explain, defend, or in some way justify her actions. She declined.

Lucarelli also had a fifteen-day opportunity to respond to the charge filed against her. She declined.

Finally, Lucarelli had the opportunity to explain, defend, or otherwise justify what she had done when she testified at her tenure hearing. Again, she declined.

The conclusion is inescapable. Lucarelli has conceded that her conduct was conduct unbecoming a teaching staff member. Lucarelli's defense, based on her own testimony and that of the witnesses she produced, is directly solely to the penalty which must follow from her unbecoming conduct. This will be addressed in Point II, *infra*.

Point II

IF THE CHARGES ARE TRUE, THE APPROPRIATE PENALTY IS THE ONLY ISSUE TO BE REVIEWED.

This essentially is the second issue identified in the Prehearing Order. The charges against Lucarelli are obviously true -- they stand unrebutted in the record. The appropriateness of the penalty is the only matter at issue.

Lucarelli, in order to avoid the imposition of an appropriate penalty, produced an array of character witnesses, which included parents of students, former students, friends and colleagues. All testified to the better angels of her nature. It was also stipulated that Lucarelli was capable of producing some thirty-five additional character witnesses, all of whom would have essentially replicated the testimony of those witnesses who did appear.

Lucarelli testified, first to the twenty-four years she had been a teacher, then to her evaluations, which she claims were superior, and finally to her love of children.

The question that naturally evolves from all of this self-serving and cumulative testimony of adulation is whether it is sufficient to justify not severing the tenure of Lucarelli. It is respectfully submitted that it is not. Neither the number of character witnesses she presented nor the volume of testimony produced can, in view of Lucarelli's egregious conduct, justify a penalty less than the severing of her tenure.

The conduct in which Lucarelli engaged exceeded the bounds of anything that can be characterized as appropriate or acceptable. This case does not involve a single act of poor judgment. On the contrary, Lucarelli, with calculated forethought, on four separate occasions, penned four separate communications to the Superintendent of Schools, the content of which establish, beyond cavil, premeditated coercion. Lucarelli's actions were a direct attempt to rend the very fabric of the statute which governs employment practices in the public school.

The pertinent statute, *N.J.S.A.* 18A:27-4.1[1] provides that:

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
>
> a. a board of education shall appoint, transfer or remove a certified or non-certified officer or employee only upon the recommendation of the chief school administrator. . . .

Lucarelli, by employing coercion, attempted to substitute her personal judgment for that of the Superintendent in what is perhaps the latter's most important statutory function -- the recommending of personnel for employment in the public schools.

The hubris involved in Lucarelli's coercive behavior is exceeded only by her request to be returned to her elementary teaching position while still serving the probationary time imposed as a condition of her Pre-Trial Intervention program. The latter she applied for and was accepted into

[1] *N.J.S.A.* 18A:27-4.1 became law on June 19, 1995. For history of this legislation, see *N.J.A.C.* 6:8-4.8(a)5i, and *Rotondo v. Carlstadt-East Rutherford High School District*, 276 *N.J. Super.* 36 (1994).

following her indictment on a charge of criminal coercion (*N.J.S.A.* 2C:13-5a(2)(3); P-9 in evidence).

It is true, as stipulated by the parties, that Lucarelli's Pre-Trial Intervention probation will conclude on February 8, 1997. Provided that she is deemed to have successfully completed the program, her indictment for criminal coercion will then be dismissed. What should not be missed on this point, however, is the State Board of Education's view of teachers entering PTI programs. In *Pawlak v. Board of Education of Hopatcong*, 1988 *S.L.D.* 154, the State Board cites, with approval, the case of *Lindes v. Sutter, et al.*, 621 F. Supp. 1197, 1201-2 (1985):

> In this regard, we emphasize that regardless of petitioner's arguments to the contrary, dismissal of charges as a result of participation in the PTI does not imply innocence, but generally implied guilt with amenability to rehabilitation. See *Pawlak, supra*, at footnote 2, p. 156.

Similarly, in the case of *Gus Siciliano v. Board of Education of the Camden County Vocational-Technical School*, 93 *N.J.A.R.* 2d (EDU) 94, the Acting Commissioner of Education concurred with the decision of the ALJ. The latter had written:

> To be "cleared" of tenure charges, the Commissioner must determine that the teacher . . . did not commit conduct unbecoming a teacher, or did not commit other conduct which would constitute "just cause" for dismissal or reduction in compensation. *N.J.S.A.* 18A:6-10.
>
> The dismissal of a criminal indictment as a result of entering PTI is not a determination that the individual was not guilty of the conduct complained of; only that the matter was "adjusted." *R.* 3:28(c)(1). See *Siciliano, supra,* at p. 95.

It is respectfully submitted that in New Jersey, teachers are subject to higher standards of behavior than individuals in other employment. In this regard, the Commissioner of Education, in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Blackhorse Pike Regional,* 1972 *S.L.D.* 302, at p. 321, wrote:

> Of equal concern to the Commissioner is the situation where the teacher, who should set the good example, assumes that some higher right justifies activities which are inimical to the public interest and which are designed to impede the orderly process of public education. The Commissioner recognizes the desires on the part of public school employees to secure the greatest remuneration and the widest possible benefits in return for their services. He is constrained to remind the teachers of this State, however, that they are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.

This concept of teachers being held to higher standards has been a continuing refrain in tenure hearing cases before the Commissioner of Education. In *In the matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville,* 1973 *S.L.D.* 157, at p. 163, the Commissioner wrote:

> The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, *inter alia*, a consistently intense dedication to civility and respect for people as human beings.

See also *In the Matter of the Tenure Hearing of Kenneth Henderek, School District of the Township of East Brunswick*, 94 *N.J.A.R.* 2d (EDU) 268, where *Beam, supra,* is cited with approval.

In *In the Matter of the Tenure Hearing of Ernesto Tordo, School District of the Township of Jackson,* 1974 *S.L.D.* 97, at pp. 98-99, the Commissioner of Education further expounded on the concept of public trust which teachers are required to maintain, to wit:

> Teachers are public employees who hold positions demanding public trust, and in such positions, they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils.

> Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher.

It is anticipated that Lucarelli will contend that despite her attempt to coerce her Superintendent, her prior record should cause a lessening of the penalty. It is respectfully submitted that the egregious nature of Lucarelli's conduct requires that her teaching position be forfeited.

In *Willingboro Board of Education v. Lott*, 93 *N.J.A.R.* 2d (EDU) 516, the tenured teacher also advances her prior record in an attempt to ameliorate her penalty. Therein we find the following:

> Lott engaged in an activity which constituted unbecoming conduct for a public school teacher. The undisputed record demonstrates that during her 11 years as a teacher of art in the Willingboro district she was praised for her work and her commitment. The record contains no blemishes; on the contrary it contains many positives. That Lott was a very find teacher cannot be doubted from this record. . . . She felt that "she had a lot to offer." [at p. 520]

Notwithstanding this teacher's otherwise laudable record, she was dismissed. The facts in *Lott* are essentially on all fours with the case herein. Lucarelli also engaged in conduct unbecoming a public school teacher. The undisputed record demonstrates that she also was praised for her work and commitment. Her record, prior to May 1995, contained no blemishes, and on the contrary, contained many positives. Finally, and most assuredly, Lucarelli, based on her testimony and that of her character witnesses, feel she also has "a lot to offer." However, in the final analysis, Lucarelli's unexplained egregious behavior cries out for the same penalty as in *Lott* -- the severing of her tenure. Why? For the reasons that follow.

Initially, Lucarelli deported herself in such a manner as to directly attempt to brazenly interfere with the Superintendent's statutory obligation to render his recommendation for the appointment of staff. She did this, unabashedly through four written communications which, on their face, cannot be characterized as anything short of coercion. These facts are unrebutted in

the record. That being the case, it is respectfully submitted that the finder of fact herein, when considering the penalty for Lucarelli's conduct, must examine Lucarelli's conduct and attitude subsequent to her letter-writing incidents of May 1995. This is what is known about that conduct and attitude:

* She failed to accept either of two dates to appear before a committee of the Board to explain or justify her conduct.

* She elected not to respond to the charges filed against her within the fifteen-day period allotted by statute.

* Her filed Answer to the charge claims she did not coerce the Superintendent.

* Her testimony did not address her letter-writing of May 1995, but rather her work record prior to that time.

At no time subsequent to Lucarelli's delivery to the Superintendent of the four communications in question did she acknowledge that, perhaps, what she had done was a mistake. On the contrary, had she not been prevented at trial, she would have attempted to actually justify her actions by contending they were within the realm of her duties as President of the local teacher's association. (T3, 5, 2-14; 12, 7-9).

To think that this teacher is still of the opinion that her attempt to directly interfere with the statutory duties of the Superintendent and the hiring practices of a school district is justified, should be a matter of grave concern to those who have the authority to decide on her continuing as a teaching staff member.

Since Lucarelli obviously is of the opinion that her actions were justified, then those actions require a close examination: In her first communication to the Superintendent [P-10 in evidence], Lucarelli shamelessly tells her superior that if does not reconsider a personnel decision he has made, the result can "get personal." This threat, in and of itself, should be sufficient to sever her tenure.

The second communication [P-11 in evidence] intensifies the pressure being applied to the Superintendent. If the Superintendent did not use his influence on his employer, the Board, then Lucarelli threatened that the result would not only be personal; by would "get dirty," as well. The Superintendent was further advised by Lucarelli that if her demand was not met, she was prepared to use against him information that she possessed, and that he should not take this additional threat "lightly."

At this point, one must pause and simply ask --- if Lucarelli had such damning "proof" against the Superintendent, of whatever it may consist, why had she not taken it to the proper authorities rather than use it against the Superintendent in form of a Damoclean sword. Can there by any question but that the cumulative impact of these first two communications requires Lucarelli's tenure be severed?

By the time that Lucarelli sends her third and fourth epistles [P-12 and P-13 in evidence], it is apparent that she realizes that the Superintendent is not about to be coerced and that he has done the proper thing in handing her earlier correspondence over to the Board attorneys and the Board President. This is evidenced by what she wrote in the May 18, 1995 letter (P-13 in evidence), to wit "I don't know how many people you felt it necessary to send my letter to beside Kalack (sic), Oppitto (sic), and Kavanagh." The first two surnames identified are the Board attorneys and the last the Board President.

At this juncture in her correspondence, Lucarelli obviously realizes that the coercion gambit has failed and that she might be guilty of extortion. She now begins to retreat and seeks legal advice. She wrote "I contacted an attorney -- since you are accusing me of extortion if I reveal your drug use, which I told you I wouldn't because I don't want you to implicate John & Robin" (P-13 in evidence).

What can be made of these writings by Lucarelli? Has she not, through her own pen, exposed herself as one who is unfit to be continued as a teacher?

Can the Commissioner of Education actually send back to an elementary classroom setting a teacher who purports to know that her Superintendent is a drug user, but is willing to conceal

that information for fear that her revealing it would eventually implicate outside third parties? It should be noted that there was not a shred of evidence in this case from which it might even be suggested that the Superintendent was a drug user.

Has Lucarelli demonstrated, through her behavior, that she possesses the character traits the Commissioner of Education has repeatedly referenced as needed by those who choose teaching as a profession, to wit, individuals who exercise self-restraint, controlled behavior, set the good example, have an intense dedication to civility, respect people as human beings, and who must comport themselves as models for young minds to emulate? See *Beam, supra,* and *Sammons, supra.*

To ask that question is to answer it firmly in the negative.

Based on the foregoing analysis of the law and facts, it is respectfully submitted that Lucarelli's tenure be severed and that her employment as a teacher be terminated.

RESPONDENT'S POSITION

Point I

THERESA LUCARELLI DID NOT ENGAGE IN UNBECOMING CONDUCT

The Board's case relies and depends upon three bases:

1. The testimony of Charles Kavanagh;
2. The testimony of Gerard Russoniello; and
3. Exhibits P-10 through P-13 in evidence (the four written communications).

Kavanagh, the president of the Board, testified generally about that process of administratively charging Theresa Lucarelli. He also executed the statement of evidence under oath (P-2 in evidence), which was provided to the Commissioner in support of the tenure charges.

The Board relies upon paragraph 6 of that affidavit exclusively for proof of its case against Theresa Lucarelli, *i.e.*, that Exhibits P-10 through P-13 "threatened the superintendent of schools in the event he did not use his influence to persuade the Board of Education to reinstate Angel Velasquez. Theresa Lucarelli would expose the superintendent as a drug user by providing the policed with certain information she claimed to possess." However, Kavanagh was never told by Russoniello that Russoniello felt threatened or coerced by the memoranda.[2] Kavanagh could not tell us with any specificity whatsoever about any discussions he had with Russoniello. In fact, Kavanagh's first discussion with Russoniello about the four communications most likely occurred serendipitously:

> Q. Mr. Kavanagh, when did you first speak to Gerard Russoniello with regard to the four written communications from Theresa Lucarelli?
>
> A. In May and early -- in mid-May.
>
> Q. Where did that conversation take place?
>
> A. Initially, in his office.
>
> Q. Who called whom?
>
> A. I'm not sure that it was a matter of calling or that I was there for a specific meeting, one of the board committee meetings.
>
> Q. Is it likely that you just happened to be there with regards to one of the board committee meetings that you just described?
>
> A. It's likely.
>
> (T1:29, 18-25 to T1:30, 1-6)

[2] Russoniello, a witness for the Board, never testified that he felt threatened. In fact, as will be shown *infra*, his testimony related to his unsupported beliefs that there was some link between the letters and certain activities by the students.

The fortuity and casualness of the event belies the notion of any perceived threat by Russoniello; Kavanagh is incompetent to testify as to the quality of the letter so we must look to Russoniello's testimony. However, there was *no testimony whatsoever* by Russoniello that he had any concern with regard to the so-called threats within the memoranda. Russoniello only testified as to his receipt of Exhibits P-10 through P-13 and that he made copies for the Board (Transcript of November 20, 1996, T2:16, 6-9).

His entire direct examination consisted of baseless speculation in an attempt to link Exhibits P-10 through P-13 with occurrences "that effected the classroom after Mr. Velasquez did not receive a reappointment?"[3] (T2:17, 19-23). Russoniello told us during his direct examination that:

1. Petitions were circulated among students (T2:18). However, the Board did not introduce any copy of a petition nor description of the contents of any petition. We can assume for the purposes of this case that there were no petitions, however, *arguendo*, even if there were, there is nothing to link them to Theresa Lucarelli; for Russoniello on cross-examination told us that he conducted no investigation as to the origin of the phantom petitions (T2:27, 11-15).

2. Ribbons were given to students by a teacher (T2:18, 10-18). The teacher was never identified. Russoniello did not know what the significance of the ribbons were, assuming there were ribbons,[4] other than to speculate without any basis as to his assumptions as to the

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[3] Mr. Velasquez was a teacher who had not been recommended for reappointment by Russoniello and was a member of the union of which Theresa Lucarelli was the president. This attempt by Russoniello to hold Mrs. Lucarelli responsible for the "disruptions" is at worst a recent fabrication, or at best, inconsistent with his annual performance evaluation of Mrs. Lucarelli dated June 24, 1995, which only had one "unsatisfactory" and that related to implementation of the District's goals and objectives. There was no other negative comment by the Superintendent (R-9 in evidence). So much for the argument that Russoniello felt threatened. There was no indication whatsoever in the Superintendent's year-end evaluation that Mrs. Lucarelli was to be subject to any discipline (T3:24, 13-19).

[4] Russoniello's direct testimony simply was hearsay within hearsay. He said he received a telephone call from parents about ribbons and petitions (T2:18, 5-18).

meaning of the symbol (T2:18, 21-24). On cross-examination, Russoniello admitted that he conducted no investigation to determine what in fact was happening, if anything (T2;28, 17-21).

3. Signs and placards were being posted in the schools (T2:18, 14-15). Not a single poster or placard was produced for this hearing, not only do they not exist as evidence, but once again, Russoniello did virtually nothing about this so-called event. On cross-examination, he identified a substitute teacher as having provided the art materials:

> Q. Did you discipline Mrs. Danback?
>
> A. No. I just asked her how the kids got a hold of art materials.
>
> Q. And that was the end of it?
>
> A. Yes.

These three non-events comprise the entire substantive case of the Board against Theresa Lucarelli. The Board did not present an iota of competent evidence to link Theresa Lucarelli to these "disruptions." The Board attorney, upon demand for an offer of proof as to the relevance of the so-called incidents to the charges (T2:19, 17, 18) responded:

> MR. KALAC: Those documents speak for themselves, and I believe when the Court has an opportunity to read them critically you will see that those documents in fact constitute a threat. They constitute a threat in the event the superintendent did not succumb to the will of the author of those documents, which was to reconsider his decision on the reappointment of a staff member. This superintendent was not cowed by those threats. He did not change his mind on the recommendation and the board accepted his recommendation. The letter clearly says that in the event you don't use your influence with the board things will occur, things will get dirty. (T20:3-16);

and in addition,

> MR. KALAC: That this never spilled over into the classroom. So we now have a threat. If you don't do something this will get dirty.

> The threat to the superintendent is not fulfilled by the superintendent succumbing to the will of the person making the threat. And, in fact, things did spill over into the classroom and did in fact get dirty. What we have here is the threat being fulfilled, Your Honor.
>
> Now perhaps Mr. Mellk will develop evidence to indicate that --
>
> MR. MELLK: Your Honor, I would suggest -- respectfully request that if --
>
> THE COURT: Mr. Mellk, allow him to present his argument and you'll be able to respond. Please. Thank you.
>
> MR. KALAC: Perhaps there will be testimony here that there was some perspicacious kindergarten student who decided to have all of his classmates wear ribbons. I don't know. But right now what I'm saying is there was a threat made and the threat is being fulfilled. And for that reason I think all of this is relevant, Your Honor, because it was the refusal to offer Velasquez a tenure year contract that in fact triggered the letters that are now marked for identification. (T2:20, 16 to T2:21, 16).

Unfortunately for the Board, this theory of their case remained the fanciful nonsense that it clearly was. Never was there a link made to Theresa Lucarelli; never was there any evidence offered whatsoever of Theresa Lucarelli being involved with the so-called "dirty" activities, which we now know only occurred within the imagination of the charging party.

After this unintentional admission by the Board that it has no case against Theresa Lucarelli, it went one step further, in an attempt to nail down its non-case and had Russoniello testify concerning a sit-down in school. No testimony was elicited linking Theresa Lucarelli to the sit-down. Exhibits P-10 through P-13 were only given to Russoniello, no one else. The distribution by Theresa Lucarelli was one-to-one and private.[5]

Although the Board's theory of its case is that Theresa Lucarelli's "threats" in Exhibits P-10 through P-13 were carried out by the children through petitions, ribbon wearing, poster

[5] See, e.g., R-1 in evidence.

painting and a sit-down, it speculates without any proofs whatsoever that Angelo Velasquez, the non-renewed teacher, was the catalyst for these threatening events (Board's Brief, pp. 3-4). Russoniello was asked specifically about Velasquez in his direct testimony; an attempt by the Board to relate Velasquez's non-renewal to Exhibits P-10 through P-13 and thereby to the "disruptions."

When Theresa Lucarelli attempted to testify on direct examination as to her involvement with Velasquez's employment status as a result of the Board's having raised that issue in its case, the ALJ refused to allow her that opportunity by ruling:

> THE COURT: Whether or not she was the president or the secretary of the association is not relevant, in my judgment. And that objection is sustained.
>
> Move forward. (T3:12, 7-10)

This foreclosed Theresa Lucarelli from explaining and defending her actions on behalf of a member of her union. Since it was the Board who raised that as the rationale for her having "threatened" the superintendent, Mrs. Lucarelli was denied her rights to due process and fundamental fairness.[6] *N.J.S.A.* 34:13A-5.3 of course provides for the right to public employees to have their union representatives meet and threat with the public employer concerning the terms and conditions of employment for such employees, *i.e.*, Velasquez. Although this tribunal precluded Mrs. Lucarelli from testifying in that regard, one need simply review R-2 in evidence which supports the fact that Mrs. Lucarelli had been acting as the representative of her union members as provided by law. Accordingly, the issue of the context of the communications has to be considered within the context of the Board's having raised it, *i.e.*, a labor issue. As such, it is important to note:

> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that

[6] The ALJ also found *ipse dixit*, without allowing any testimony on the subject by Theresa Lucarelli, that the letters "were not, in any sense, an expression of representing anyone but herself" (T3:7, 22-23).

> criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.
>
> *Black Horse Pike Reg. Bd. of Ed.*, P.E.R.C. No. 82-19, 7 *N.J.P.E.R.* 502 (¶12223 1981).

It has long been held, both as a matter of Federal and New Jersey Labor Law, that a wide latitude in terms of offensive speech and conduct must be allowed in the context of grievance proceedings and that "it has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace." *Crown Central Petroleum Corp.*, 74 *L.R.R.M.* 2885, 2860; *Hamilton Twp. Bd. of Ed. and Hamilton Twp. Ed. Assn.*, 5 *N.J.P.E.R.* 115 (¶10068, 1979). Furthermore, the fact of the delay by the Board in bringing charges against Theresa Lucarelli was probably motivated by hostility to her associational activity.[7] See *Middletown Twp. Bd. of Ed. and Middletown Twp. Ed. Assn.*, 22 *N.J.P.E.R.* 31 (¶27016, 1995), (*aff'd* App. Div., Docket No. A-2999-95T1, December 19, 1996, unreported).

Since the Board failed to present any proofs of disruptive conduct by Theresa Lucarelli at the hearing, it reiterates in its post-hearing brief, the history of the criminal charges brought against Theresa Lucarelli.[8] This is clearly intended to prejudice these proceedings. There has been no conviction. PTI participation is not proof of wrongdoing. The Board must prove its case independently. In fact, the Rules Governing the Courts of New Jersey explicitly preclude the use of PTI participation in any civil proceeding against the participant. *R.* 3:28(c)(5); see also Guideline 5; and *R.* 1:38(f).

The Board's harping on the criminal charges brought against Theresa Lucarelli at both the hearing and in its post-trial brief is interesting. It exposes the Board's lack of proof as to any disruptive behavior on the part of Theresa Lucarelli. Kavanagh, over respondent's objection, was

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[7] The question of the Board's processing of this matter is dealt with *supra.*

[8] The Board was allowed to introduce that testimony at the hearing over respondent's objection (T1:6, 21 - T1:7).

permitted to testify as to the criminal proceedings instigated by the Board and its attorney, however, apparently unanticipated by the Board in its attempt to taint impermissibility Theresa Lucarelli, it exposed is duplicity and bad faith toward her. Exhibit R-3, a letter from the Board attorney to the County Prosecutor, made Theresa Lucarelli the target of a criminal investigation.[9] The letter dated June 7, 1995, states:

> This office represents the Brielle Board of Education.
>
> I am enclosing herewith four handwritten communications received by the Superintendent of Schools of Brielle which were authored by a teacher in the Brielle school system named Theresa Lucarelli. These communications were received by the Superintendent shortly after the Board accepted his recommendation not to rehire, for the 1995-1996 school year, a colleague of Ms. Lucarelli. Ms. Lucarelli is a Physical Education teacher in the district.
>
> In view of the seriousness of the matter involved, the Board of Education intends to have a committee comprised of its members interview the author of the correspondence. In order to avoid any possible disruption with the school program, the interview will not occur until after the present school year concludes. Inasmuch as a reasonable advance notice time must be provided the teacher prior to the interview, it is expected that the interview will not occur until the first or second week of July. (R-3 in evidence)

This was done without any notice to Theresa Lucarelli. Yet while knowing that it had secretly made Theresa Lucarelli the subject of a criminal investigation, the Board nevertheless proceeded to request her "explanation" as to those exact same matters. This letter predates by three weeks the June 28, 1995 letter to Mrs. Lucarelli from the Business Administrator/Board Secretary which stated:

> Pursuant to the provisions of N.J.S.A. 18A:25-7, I have been directed by the Board to advise you that you are to appear before a committee of the Board on July 11, 1995 at 7:30 p.m. at the Brielle Elementary School, Library Conference Room, to be interviewed concerning your four written communications to the Superintendent

[9] The tribunal ruled that the criminal proceedings can be considered as a matter of fact. T1:26 - T1:28, 2.

> during the month of May 1995, copies of which are attached. You will be interviewed regarding the contents of the four attachments.
>
> In the event the aforementioned date is not convenient, the committee has scheduled July 18, 1995 as an alternate date for your interview, to be conducted at the same time and place.
>
> Inasmuch as your actions in this matter could adversely affect the continuation of your employment, salary, or salary increments, you are entitled to have a person of your own choosing present to advise and represent you during the interview. (R-5 in evidence)

The Board's reckless and callous indifference to Lucarelli's constitutional rights requires this tribunal's consideration in evaluating the charges, particularly when the issues are so obvious.[10] If this were not so, then the Board would have at least forbore its attempts to interrogate Theresa Lucarelli in these circumstances.

The offensive and hypocritical actions by the Board in setting up Theresa Lucarelli secretly for a criminal investigation by the County Prosecutor while at the same time attempting to elicit from her possibly incriminating statements contrary to the Fifth Amendment to the Federal Constitution was done for no other reason but to "get" the activist present of the teachers' union. For if the Board were pure in this matter, it would have advised Mrs. Lucarelli of its commencement of a criminal investigation against her before attempting to "interview" her about those very same events. Fortunately, the Federal Congress has provided mechanisms and remedies for persons who are aggrieved by such a callous disregard for their civil rights. See *e.g.*, 42 *U.S.C.* §1983. one need only note R-6 in evidence, Lucarelli's June 30, 1995 response to Lozinski's June 28 letter, to understand how devilish the Board was. The coda to this duplicity is R-7 in evidence, which in its purported description of the "interview" which the Board was requesting, omits informing her that there may be significant Fifth Amendment concerns which she should consider.

[10] There is no question but that the Board perceived itself to be in a political fight with the union concerning the status of a popular teacher, Velasquez.

For the foregoing reasons, it is respectfully submitted that the Board has failed to prove by a preponderance of the credible evidence that Theresa Lucarelli had engaged in unbecoming conduct. The Board only managed to prove its malice and bad faith towards Theresa Lucarelli.

Mrs. Lucarelli's twenty-three year history of exemplary performance in both her teaching and extracurricular activities require that she be returned to her employment as a physical education teacher with all benefits, emoluments and back pay to the date of her suspension.

DISCUSSION AND CONCLUSIONS

It is undisputed that respondent has been a satisfactory teaching staff member in the Board's employ for 23 years. In fact, the record demonstrates that she has made significant contributions to the children of the school district during her tenure. However, her past accomplishments and contributions do not excuse nor diminish her unbecoming conduct towards her immediate supervisor.

Notwithstanding that respondent has successfully completed her PTI commitment and obligations, the fact remains that she is alleged to have committed and indictable offense against her Superintendent of Schools; *i.e.*, criminal coercion, *N.J.S.A.* 2C:13-5. As the Honorable Edgar R. Holmes, ALJ, observed in *Siciliano, supra.*:

> The dismissal of a criminal incident as a result of entering PTI is not a determination that the individual was not guilty of the conduct complained of; only that the matter was "adjusted." *R.* 3:28(c)(1). A note to *R.*3:28 pints out that "A defendant's consideration for admission (to PTI) must be measured according to his/her amenability to correction, responsiveness to rehabilitation and the nature of the offense." In other words PTI is only applicable if the criminal defendant committed some illicit conduct, otherwise he or she would not need correction or rehabilitation. *Id. at* 95.

The United States District Court, District of New Jersey held in *Lindes v. Sutter,* 621 *F. Supp.* 1197 (D.C.N.J. 1985) at 1201 that:

> Although neither the Third Circuit nor the New Jersey appellate courts have dealt with the issue of whether successful completion of PTI constitutes a termination favorable to the accused for purposes of bringing a lawsuit for malicious prosecutions, this Court is persuaded by the (1) reasonings of those courts which have addressed the issue and (2) the polices behind the very existence of the PTI program that disposition of a case through *N.J.S.A.* 2C:43-12 and 13 *is not* a termination favorable to the accused ...

The Court continued to state in *Lindes v. Sutter* that:

> ... In *Thomas v. N.J. Institute of Technology*, 178 *N.J. Super.* at 62, 427 A. *3d.* 1142, the Superior Court held that "acceptance in PTI, even where the program is successfully completed, cannot be regarded as the equivalent of a judgment of acquittal or an otherwise favorable termination of the criminal proceeding."

Thus the Commissioner is not only permitted but, rather, obligated to view the elements underlying the charge, notwithstanding respondent's successful completion of PTI.

As set forth hereinbefore in the **FINDINGS OF FACT,** this tribunal determined that the Board proved, by a preponderance of the credible and unrebutted evidence, that the charge of unbecoming conduct against respondent is true in fact. Respondent did not defend against the Board's charge nor did she rebut its evidence in support of the charge. The Board's evidence clearly demonstrates that respondent attempted to intimidate and coerce the Superintendent and cause him to violate his statutory duty to change his recommendation to the Board for a non-tenured employee. Such an action would have granted tenure status to an individual who the Superintendent did not consider worthy of status.

One may tolerate expression of differences in philosophy, policies and principles in professional matters. Such expressions may, and often do, become heated and unorderly when people take opposing positions. In the professional setting, moreover, the expression of differing position is tolerated. What is not tolerated, however, is personal attacks, threats or intimidation to the opposing view. Such behavior does not comport with the Commissioner's admonition that

teaching staff members are required to exhibit "self-restraint and controlled behavior." *Sammons, supra.* at 321. That is precisely the case here.

In her failure to rebut the Board's evidence against her, which are her own writings, respondent now attempts to claim this to be a labor law case. She now claims to be asserting her rights under the Federal and New Jersey Labor Laws to protect a member of her union. As this tribunal observed at the hearing, respondent's writings to the Superintendent made no reference, nor is there any indicia of a labor dispute. Nor is there any reference to a grievance, complaint or alleged violation of the negotiated agreement between the Board and the union. It is observed that respondent's written correspondence to the Superintendent is not on union letterhead to suggest she was representing Mr. Velasquez under the aegis of the union. In fact, there is no mention in her correspondence that she is representing the will and/or the direction of the union membership or that she had been authorized to do so. Rather, respondent's correspondence with the Superintendent was a handwritten personal attack where she threatened to expose the Superintendent to the police (and, presumably, the public) with unsubstantiated allegation of illegal drug use. Respondent's actions cannot be excused as "offensive speech and conduct ... in the context of grievance proceedings." (Respondent's Brief at page 8.) Rather, as the Grand Jury determined, it was criminal coercion.

Respondent argues that her actions did not cause the disruptions of the school program or educational process. While there may be little direct evidence of respondent's involvement, there is sufficient circumstantial evidence that her behavior toward the Superintendent contributed to the disruptions. The promotion of a pupil "sit down" during regular classroom time cannot be condoned when, as here, the school administration and the Board were performing their statutory duty with respect to teaching staff personnel. It is the Superintendent's obligation to recommend teaching staff personnel for contract renewal or tenure to the Board. It is then the Board's duty to either accept or reject the Superintendent's recommendation. *Zimmerman v. Board of Education of the City of Newark,* 38 *N.J.* 65 (1962). The other disruptive pupil conduct, *i.e.*, wearing of ribbons and posters placed in the schoolhouse, cannot be attributed to a spontaneous response by children of a tender age. Rather, these disruptive activities required planning and execution by adults. Here, there was a lacking of "self-restraint and controlled behavior" of respondent and other teaching staff members. *Sammons, supra.* at 321.

I **CONCLUDE,** therefore, that the Board has met its burden of proof, by a preponderance of the reliable and credible evidence, that its charge of respondent's unbecoming conduct is true in fact.

I **CONCLUDE** that under the facts and circumstances of respondent's unbecoming conduct, such behavior warrants her dismissal.

Accordingly, I **CONCLUDE** that respondent's dismissal from her tenured teaching position is effective as of the date of her suspension, August 29, 1995.

POST HEARING MOTION

Respondent new seeks an Order to Compel the Board to pay her salary subsequent to the completion of her PTI and in accordance with *N.J.S.A.* 18A:6-14. Respondent sets forth the following legal argument:

> THE FULL SALARY OF THERESA LUCARELLI MUST BE PAID BY THE BOARD OF EDUCATION OF IN ACCORDANCE WITH *N.J.S.A.* 18A:6-14.
>
> *N.J.S.A.* 18A:6-14 provides:
>
> Upon certification of any charge to the Commissioner, the Board may suspend the person against whom such charge is made, with or without pay, but, *if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.* Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the Board of Education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during

> such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as to the time of such suspension. (emphasis supplied.)

There is no question but that the Legislature mandated this requirement in order to benefit those persons subjected to payless suspension if the charges were not resolved within four months. The only exception to this command is if there is any delay "granted at the request" of the subject. Since there has been no delay at the request of Mrs. Lucarelli, her pay should have commenced on the 121st day of her suspension without pay. That would have occurred on or about December 28, 1995. However, the Brielle Board resolved on or about that time to continue Mrs. Lucarelli's suspension without pay pursuant to *N.J.S.A.* 18A:8.3. That statute provides:

> Any employee or officer of a Board of Education in this State who is suspended from his employment, office or position, *other than by reason of indictment,* pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the Board of Education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement. (emphasis supplied)

It is obvious that this amendment supplementing chapter 6 of Title 18A was enacted in order to address the question of suspension of an indicted employee as being an exception to the 120-day rule. Notwithstanding that assumption, the operation of this supplement to Mrs. Lucarelli is now moot. There is no indictment therefore, there is no basis for the application of the exception addressed by the amendment. All that remains is the resolution of the tenure charges, thus, placing Mrs. Lucarelli in the *status quo ante* her indictment, *i.e.,* suspension pursuant to *N.J.S.A.* 18A:6-14. That being the case, Mrs. Lucarelli is entitled at the very least to her pay from the dated of the eradication of her indictment, February 8, 1997, through such time as there is determination by the Commissioner of Education. The Board's refusal to pay Mrs. Lucarelli is arbitrary and unreasonable. Although this appears to be a case of first impression, the

Commission has held that "fundamental fairness" comes into play in these circumstances. *cf. Beaty v. Newton Bd. of Ed.*, 1991 *S.L.D.* (Comm. June 25, 1991). Fundamental fairness requires the restoration of Mrs. Lucarelli's pay because there have been no findings against her of wrongdoing; such findings await the Commissioner's determination in due course. Mrs. Lucarelli has the right to equal protection of *N.J.S.A.* 18A:6-14 in the circumstances.

For the foregoing reasons the Board of Education of the Borough of Brielle should be directed and compelled to commence payment of full salary, benefits and emoluments effective February 8, 1997, at the latest or December 27, 1996, at the earliest.

The Board opposes respondent's motion and sets forth the following argument:

Respondent's motion which seeks to restore Lucarelli to the public payroll and the letter memorandum in support of same are without legal foundation. Further, it constitutes a complete reversal of respondent's prior position taken at the time the Board sought, by way of Motion, to expedite this proceeding. Lucarelli cannot have it both ways.

First, with regard to Lucarelli's reversal of position. The Board heretofore sought an early decision in this matter. On May 20, 1996, it filed with the Court a Notice of Motion seeking an expedited hearing on its Motion for Summary Decision, or in the alternative, on the single tenure charge filed against Lucarelli.

It should be noted that an Answer to that single charge had been filed on October 24, 1995. Although Lucarelli had been indicted twenty-two days prior to her filing of an Answer in these disciplinary proceedings, the Answer did not invoke the doctrine of *Ott v. Board of Education of Hamilton Township,* 160 *N.J. Super.* 333 (App. Div. 1978). Additionally, Lucarelli did not file any opposing papers to the aforementioned Motion which was argued via telephone on June 18, 1996. Lucarelli's position on the Motion, however, was set out in the Order on Motion for Summary Decision entered by this Court on June 26, 1996. That position reads *in extenso:*

> Respondent invokes the doctrine set down in *Ott, supra.*, an does not expect to be placed on the Board's salary rolls subsequent to the expiration of the 120 day period, as provided by *N.J.S.A.* 18A:25-6 (sic). In fact, respondent is not presently on the Board's payroll and agrees to remain off the payroll pending the disposition of these disciplinary proceedings. It is understood, that in the event respondent is cleared of the herein tenure charges, she will be entitled to reinstatement with full back pay and benefits. (p.5).

In view of the foregoing position, it is difficult to comprehend Lucarelli's present argument of "fundamental fairness" predicated on *Beatty v. Board of Education of Newton,* 1991 *S.L.D.* 1001, a case clearly distinguishable from the matter herein. A litigant seeking "fundamental fairness" cannot be permitted, in June 1996, when responding to a Motion to expedite her hearing on a tenure charge, to agree to remain off the payroll pending the disposition of the charge, and in February 1997, while the charge is still pending a decision, argue that she is entitled to be placed back on the payroll immediately, and in addition, to be paid retroactively from either December 27, 1996 or February 8, 1997.

Fundamental fairness, within the context of the present case, supports a decision on this application in favor of the Board of Education. If Lucarelli is owed any salary, and certainly the Board argues she is not, the payment of same should not be made unless the respondent achieves a favorable judgment on these disciplinary proceedings.

Now to Lucarelli's argument predicated on the provisions of *N.J.S.A.* 18A:6-14 and *N.J.S.A.* 18A:6-8.3. Based on the language in the foregoing statutes, it is Lucarelli's contention that she should be placed back on the public payroll and paid retroactively from either "February 8, 1997 at the latest, or December 27, 1996 at the earliest." This position is clearly unsustainable based on the existing case law and the facts in this case.

The delay in this case in proceeding to a hearing was occasioned not by the Board, but by Lucarelli. She was charged with conduct unbecoming a teacher on August 29, 1995 and suspended without pay. Thus, the 120 day clock provided for in *N.J.S.A.* 18A:6-14 began to run on August 29, 1995. Lucarelli was subsequently indicted on October 2, 1995, and on December

20, 1995, less than 120 days following her initial suspension, the Board took formal action to continue that suspension without pay pursuant to the provisions of *N.J.S.A.* 18A:6-8.3 *See, Slattery v. Board of Education of Ramapo-Indian Hills Regional High School District*, 237 *N.J. Super.* 424 (App. Div. 1989).

This action by the Board effectively tolled the 120 day clock of *N.J.S.A.* 18A:6-14. There is no time limitation contained in *N.J.S.A.* 18A:6-8.3 for returning a suspended teacher to the public payroll. The title of the latter statute makes it abundantly clear that it is an exception to the reinstitution of salary payments when the suspension, without pay, is occasioned by reason of a teacher's indictment. Accordingly, as of December 20, 1995, when the Board continued Lucarelli's suspension pursuant to *N.J.S.A.* 18A:6-8. because of her indictment, there was no statutorily directed timeline for returning her to the public payroll.

Lucarelli, following her indictment, invoked, as noted above, the doctrine of *Ott, supra.*, and thus caused the hearing of this matter to be further delayed until November 18, 1996. On the later date, Lucarelli decided to go forward with the hearing, despite the fact that her indictment was still extant. She had, in February of 1996, entered into a Pretrial Intervention Program [hereinafter "PTI program"], but as of November 18, 1996, she had not completed the requirements of same.

The requirements of the PTI program were completed by Lucarelli on February 8, 1997 and purportedly the indictment has been dismissed. Accordingly, Lucarelli now argues, inasmuch as the indictment is no longer extant, "... there is no basis for the application" of *N.J.S.A.* 18A:6-8.3.

This argument, of course, cannot be reconciled with the case law. In the State Board decision, *Pawlak v. Board of Education of the Borough of Hopatcong,* 1988 *S.L.D.* 154, the following was written:

> We likewise find petitioner's claim for back pay for the period of the suspension pursuant to *N.J.S.A.* 18A:6-8.3 to be without merit. That statute makes no provision of back pay regardless of the disposition of the criminal indictment, and we find no basis under

> the educational laws upon which he would be entitled to back pay in these circumstances. (at 156).

There, as in the matter before this Court, the indictment was disposed of through the completion of the PTI program. The employee sought back salary for the period of suspension without pay. The suspension, as here, was pursuant to the provisions of *N.J.S.A.* 18A:6-8.3. This conclusion by the State Board is dispositive of Lucarelli's argument regarding her entitlement to back pay.

And now a further look at *Beatty, supra.* Lucarelli in the memorandum supporting her Motion, relies on this case for the general equitable principle of "fundamental fairness." As noted above, this case is distinguishable from the case at bar. In *Beatty, supra.*, the teacher was indicted, suspended without pay pursuant to *N.J.S.A.* 18A:6-8.3, proceeded to trial, and was acquitted of all criminal charges. He then sought salary reimbursement for the period he was suspended pursuant to the foregoing statute. In awarding the back pay, the Commissioner wrote:

> At the present time, petitioner has not been guilty of any wrongdoing and the indictment upon which the suspension is based has been disposed of in his favor; therefore, it is concluded that as a matter of equity, back pay is awarded under the circumstances ...

These facts are not the facts in the case before this Court. There has been no trial on the indictment; there has been no determination of guilt or innocence of Lucarelli on the charge for which she was indicted. As noted above, Lucarelli's indictment was disposed of through the operation of the PTI program. This, of course, is significantly different from being absolved of guilty by a jury.

This distinction has not been lost on the State Board of Education, which, in *Pawlak, supra.*, cited with approval *Lindes v. Sutter, et al,* 621 *F. Supp.* 1197, 1201-2 (1985):

> In this regard, we emphasize that regardless of petitioner's arguments to the contrary, dismissal of charges as a result of participation in the PTI does not imply innocence, but generally

> implies guilty with amenability to rehabilitation." *Pawlak, supra.* at footnote 2, p. 156.

See also, *Siciliano v. Board of Education of the Camden County Vocational-Technical School,* 93 *N.J.A.R. 2d.* (EDU) 94; *Thomas v. New Jersey Inst. of Technology,* 178 *N.J. Super.* 60 (Law Div. 1981).

Based on the foregoing, it is respectfully submitted that Lucarelli is not entitled to back pay. Further, petitioner submits that when a teacher is suspended without pay pursuant to an indictment as provided in *N.J.S.A.* 18A:6-8.3, or a suspension is continued without pay following an indictment, as occurred here, any decision regarding back pay or placing the teacher back on the public payroll must await a decision on the indictment by a jury or the final determination of the underlying tenure charge by the Commissioner of Education.

CONCLUSIONS

This tribunal has concluded and determined that respondent should be terminated from her tenured position, effective the date of her suspension, August 29, 1995. I **CONCLUDE,** therefore, that respondent's Motion to Compel the Board to Pay Respondent, pursuant to *N.J.S.A.* 18A:6-14 is now moot. As the Commissioner has held in prior decisions, he is constrained to decide moot issues. *In Carolyn Henry v. Board of Education of the City of Wildwood, Cape May County,* 1975 *S.L.D.* 1, the Commissioner reiterated his position where he said:

> It has been well established that the Commissioner does not decide moot issues. See *Sharon Ann Pinkham v. Board of Education of the Borough of South River et al., Middlesex County,* 1974, *S.L.D.* 1103; *Patrick E. Tedesco v. Board of Education of Lodi, Bergen County,* 1955-56, *S.L.D.* 69; *R. McAllister v. Board of Education of the Borough of Lawnside, Camden County, et al.,* 1951-52 *S.L.D.* 39; *Robert M. Rodgers v. Board of Education of the City of Orange, Essex County,* 1956-57 *S.L.D.* 50; *In Moss Estate, Inc. v. Metal and Thermit Corporation,* 73 *N.J. Super.* 56, 67 (Chan. Div. 1962), the Court said:

> ****It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and to decide only concrete contested issues conclusively affecting adversary parties in interest. *Borchard, Declaratory Judgments* (2*d. ed.* 1941), pp. 34-35.**** *Id.* at p.3.

ORDER

It is therefore, **ORDERED** that respondent be and is hereby terminated from her tenured teaching position, effective August 29, 1995.

Accordingly, there is no necessity for this tribunal to rule on respondent's motion. The respondent's Motion is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10 March 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3-12-97
DATE

DNF
DEPARTMENT OF EDUCATION

MAR 13 1997
DATE

Mailed to Parties:

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

ml

WITNESSES

For the Board:

Charles Kavanagh

Gerard Russoniello

For respondent:

Linda Englert

Frances Miceli

Patricia Rothman

Harry Aronis

Jane Lightbody

Frances A. Dolch

Robin Monica

Kathleen D'Agostino

Carol Noe

Edward Mitchel

Kimberly Zilia

Steven Morgan

Francs Mitchall

Theresa A. Lucarelli

Offer of Proof of:

Paul Christopher

John Shutman

Thirty-five other witnesses on respondent's behalf

EXHIBITS

For the Board:

P-1 Sworn statement to Roseann L. Lozinski, Board Secretary, August 9, 1996

P-2 Statement of Evidence

P-3 Letter to Lucarelli from Lozinski

P-4 Certificate of Determination

P-5 Letter with enclosures to Lucarelli from Lozinski, August 29, 1995

P-6 Letter to Commissioner of Education, August 28, 1995, from Lozinski

P-7 Certification, Minutes of Board Executive Session, December 20, 1995

P-8 Answer to Complaint

P-9 Indictment and Pretrial Order

P-10 Handwritten letter to Russoniello, May 9, 1995

P-11 Handwritten letter to Russoniello, May 15, 1995

P-12 Clarification of Events

P-13 Handwritten letter, May 17, 1995

For respondent:

R-1 Clarification of events, May 12, 1995 (ID Only)

R-2 Clarification of events, May 12, 1995 (ID Only)

R-3 Letter, June 7, 1995, to John Keys from Peter Kalac

R-4 Dedication

R-5 Letter, June 28, 1995, to Lucarelli from Lozinski

R-6 Handwritten letter, June 30, 1995, to Lozinski from Lucarelli

R-7 Letter, July 5, 1995, to Lucarelli from Kalac's office

R-8 Letter, August 9, 1995, to Lucarelli from Lozinski

R-9 Lucarelli personnel file

OAL DKT. NO. EDU 10413-95
AGENCY DKT. NO. 354-8/95

IN THE MATTER OF THE TENURE	:	
HEARING OF THERESA LUCARELLI,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
BOROUGH OF BRIELLE, MONMOUTH	:	
COUNTY,	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both respondent's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent first excepts to the Administrative Law Judge's (ALJ) finding that there exists sufficient circumstantial evidence that she contributed to certain disruptions in the school, as noted in the initial decision. (Respondent's Exceptions at p. 2) Respondent asserts that, other than the testimony provided by Superintendent Russoniello, "[t]here was not a scintilla of evidence presented by the [Board] which would allow an inference or finding that [she] was involved in the so-called 'disruptions.'" (*Id.* at p. 3) In reply, the Board reasons that, based on the language in respondent's correspondence to the superintendent, viewed together with the superintendent's refusal "to succumb to the threats," and the behavior of the students which followed the Board's acceptance of the superintendent's recommendation not to offer Mr. Velasquez a tenure-year contract, the ALJ's conclusion that respondent contributed to the

disruption was "***a proper inference that comports with a common sense approach to the facts." (Board's Reply at p. 3)

Respondent next excepts to the ALJ's factual finding that she did not cooperate with the Board. Instead, respondent maintains that she was never invited to the Board's meeting on June 5, 1995, and she did not learn until June 28, 1995 of the Board's request to appear before a committee scheduled to meet on July 11, 1995. (Respondent's Exceptions at pp. 4, 5) While the Board concedes that it did not invite respondent to its meeting of June 5, 1995, it maintains that respondent failed to cooperate, in that she did not appear on July 11, 1995. (Board's Reply at p. 3)

Respondent further contends that the ALJ erred in refusing to allow her to testify about the circumstances surrounding her writing the memoranda. (Respondent's Exceptions at p. 5) Here, respondent claims that her counsel informed the tribunal that, "***in issue was [her] history as a teacher as well as her seven past years as president of the education association which required substantial and significant contact with Superintendent Russoniello***." (*Id.* at p. 6) Respondent also contends that the tribunal was informed that the memoranda would be viewed within the context of labor-management relations, as opposed to being viewed in the abstract. (*Id.*) That the ALJ refused to allow her to testify about her activities as the leader of the teacher's union, vis-à-vis her membership, foreclosed her from explaining and defending her actions on behalf of a member of her union. (*Id.*) The Board, however, reminds respondent that, according to the ALJ's Prehearing Order, the issue to be decided by that tribunal was

> Whether Theresa Lucarelli's actions, through a series of written communications to the Board's Superintendent of Schools, constitute threats, and therefore, conduct unbecoming a teaching staff member. (Board's Reply at p. 4, citing Prehearing Order)

Thus, the Board insists that the fact that respondent happens to be the president of her local union provides her with no special privilege under *N.J.S.A.* 18A:6-10. The Board, therefore, reasons that the ALJ correctly precluded respondent from testifying about her duties as president of the local union. (*Id.*) Moreover, the Board finds respondent's written communications to be anything but abstract. The Board avers, "***Written threats that forewarn a superior that unless he succumbs to the writer's demands he can expect the situation to become 'personal' and 'dirty' have, in a linguistic sense, more concreteness than the Hoover Dam." (*Id.*)

Respondent next asserts that the ALJ erred in concluding that the criminal coercion for which she had been indicted and subsequently diverted through a Pre-Trial Intervention Program (PTI) is material fact of her unbecoming conduct. (Respondent's Exceptions at p. 8) Here respondent argues that while there is nothing to prevent the Board from proving, independently of PTI, her underlying behavior as constituting unbecoming conduct, it was improper for the ALJ to use her participation in PTI as a fact against her. The Board, respondent urges, must prove its case independently of PTI. (*Id.* at p. 9) Here, the Board counters that the ALJ did not use respondent's PTI participation as a fact against her and the ALJ, "***in the clearest of terms, separated the PTI and its implications from the underlying charge of conduct unbecoming a teacher." (Board's Reply at p. 5) The Board points to that portion of the initial decision where the ALJ clearly states that the Commissioner is obligated to view "***the elements underlying the charge, notwithstanding respondent's successful completion of PTI." (*Id.*, citing the Initial Decision at pp. 30 and 31)

Respondent further asserts that, given her contributions to the District over the past 23 years, and the fact that the Board, notwithstanding its knowledge of her memoranda to

the superintendent, allowed her to continue teaching the remainder of the 1994-95 academic year, thus, signifying that her presence could not be disruptive, the recommendation that she be dismissed from her tenured position, effective August 29, 1995, for a single incident is too harsh. (Respondent's Exceptions at pp. 10, 11) However, the Board finds respondent's "single incident" argument to be "inexplicable." (Board's Reply at p. 6) Instead, the Board avers, "Four letters of threat written on four separate days, although dealing with a single issue, cannot be characterized as a single incident." (*Id.*) The Board reasons

> The respondent's written threats to her Superintendent were clearly sufficiently flagrant to establish her unfitness to continue in her teaching position. The respondent here attempted to rend the very fabric of the statute which governs employment practices in the public schools. *N.J.S.A.* 18A:27-4.1. Had she been successful in her attempt, she would have managed to substitute her judgment for that of the Superintendent in determining whether a non-tenured teacher should have received tenure. (*Id.*)

Finally, respondent asserts that the ALJ erred in concluding that her motion to compel the Board to pay her pursuant to *N.J.S.A.* 18A:6-14 is moot. (Respondent's Exceptions at p. 11) For the reasons essentially set forth in her brief in support of her motion, respondent argues she has a right to be paid her salary "***from February 8, 1997 through at least such time as the Commissioner renders his decision." (*Id.* at p. 13) The Board refutes her contention, maintaining its position that, ***inter alia***, respondent is not due recommencement of her salary since she was suspended under *N.J.S.A.* 18A:6-8.3 which does not provide timelines for returning respondent to the payroll, that the dismissal of the indictment does not bring back into operation *N.J.S.A.* 18A:6-14, and that respondent agreed to remain off the public payroll until such time as there was a disposition on the disciplinary proceedings. (Board's Reply at pp. 6, 7) The Board concludes, "***When a tenured teacher is suspended without pay by reason of indictment, the

120-day clock of *N.J.S.A.* 18A:6-14 is tolled until such time as there is a final disposition of the disciplinary charge filed against the teacher." (*Id.* at p. 7)

Upon careful and independent review of the record in this matter, which included transcripts of the hearing conducted at the OAL November 18, 20 and 21, 1996, the Commissioner determines to adopt in part, and modify in part, the initial decision of the ALJ.

THE TENURE CHARGE

The Commissioner concurs with the ALJ that the Board has demonstrated by a preponderance of credible and unrebutted evidence that respondent is guilty of conduct unbecoming a teaching staff member. (Initial Decision at p. 12) Contrary to respondent's assertion, the Commissioner finds that the ALJ properly weighed the facts underlying respondent's charge of criminal coercion, and did not use her participation in PTI as a fact against her.

The Commissioner finds it noteworthy that, while respondent disputes that the memoranda she served upon the superintendent constituted threats and, further, contests the fact of her participation in subsequent events which served to disrupt the school, she never denies the fact of the memoranda themselves. In this regard, the Commissioner finds that the memoranda, by their very language, demanded particular action of the superintendent and predicted negative consequences if he did not so comply; thus, these memoranda constituted threats to the superintendent. That an action may be characterized as a "threat" turns not on the actual consequences of that action, but on the actor's declaration of intent to cause harm.[1] Therefore, whether the superintendent actually felt threatened by these messages, or whether these writings

[1] See *Black's Law Dictionary*, Fifth Edition.

in any way contributed to the ensuing disturbances in the District is immaterial. The writings evidence, in and of themselves, improper conduct. Accordingly, to the extent the initial decision places significance on the apparent link between respondent's written messages and the disruptive events which later took place in the District, the Commissioner disavows the importance of said link to the outcome of the instant matter.

Additionally, the Commissioner concurs with the Board that, in accordance with the Prehearing Order issued by the ALJ on April 18, 1996, the sole issues to be determined in this proceeding were:

> 1. Whether respondent's actions, through a series of written communications to the Board's Superintendent of Schools constitutes threats and, therefore, conduct unbecoming a teaching staff member?
> 2. If the charges are true in fact, what penalty is appropriate?
>
> (Prehearing Order at p. 1)

Consequently, the Commissioner does not find the ALJ's ruling which precluded respondent's testimony concerning the position she held in her local association to be erroneous. Moreover, respondent's broad assertion that the ALJ refused her testimony "***about the circumstances surrounding her writing the memoranda" (Respondent's Exceptions at p. 5) simply does not comport with the record in this matter.[2]

---

[2] The following is excerpted from the transcript of the hearing held on November 21, 1996 at pp. 10-12:

(At line 17) THE COURT: I wish to get to the truth of the matter, Mr. Mellk. I have -- I have an objection before me at this juncture that the present line of testimony is -- is not relevant. And I tend to agree. So --

MR. MELLK: So -- just so we're clear -- you are ruling that I am not allowed to inquire of Mrs. Lucarelli, with regard to the circumstances surrounding the communications issue.

THE COURT: No. I didn't order that. I said that I am sustaining the objection with regard to what her position is with respect to the association.

MR. MELLK: Just so that I'm clear and the record clear.

* * *

MR. MELLK: If Mrs. Lucarelli is going to testify and has the right to testify about the circumstances surrounding and the --

THE COURT: She may.

MR. MELLK: -- the circumstances surrounding it is the question of what it was that she was doing and whom she was representing at the time. That is a circumstance. I can't see how she can test --

THE PENALTY

The Commissioner concurs with the ALJ's conclusion that, notwithstanding respondent's apparently unblemished record in the employ of the Board, her actions in writing the memoranda to the superintendent are so egregious as to prohibit excuse, particularly in light of the standard to which teachers are held. See *In re Sammons, supra,* at 321. For the reasons advanced by both the Board and the ALJ in the initial decision, the Commissioner finds that respondent's dismissal is warranted.

RESPONDENT'S MOTION

As noted in the initial decision, respondent seeks an order compelling the Board to pay her salary subsequent to her completion of PTI on February 8, 1997. In accordance with the above discussion, yet contrary to the findings of the ALJ, the Commissioner determines that respondent's motion is not moot, as the date of her dismissal is not August 29, 1995, but the date the decision herein is issued. The Commissioner further finds that, under these circumstances, while respondent is not entitled to her back pay for the period of time in which she was suspended by reason of her indictment under *N.J.S.A.* 18A:6-8.3, See *Siciliano, supra,* at 96; *Pawlak, supra,* affirmed N.J. Superior Court, Appellate Division, July 12, 1989, A-5083-87T2, she was entitled, upon the completion of PTI on February 8, 1997, to resume her status as a suspended employee pursuant to *N.J.S.A.* 18A:6-14. In that the Board suspended respondent without pay under *N.J.S.A.* 18A:6-8.3 *prior to* the expiration of 120 days, as provided by

---

THE COURT: Let's hear it.

* * *

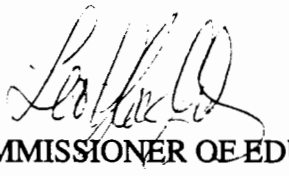
MR. MELLK: -- I can continue with the line of questioning.

THE COURT: Whether or not she was the president or secretary of the association is not relevant, in my judgment. And that objection is sustained. Move forward please.

N.J.S.A. 18A:6-14, the Board is not obligated to retroactively pay respondent for that period of time following her completion of PTI, but before the remainder of the 120 days expired. However, respondent is due back pay and emoluments from the 121st day of that portion of her suspension attributable to *N.J.S.A.* 18A:6-14, until the date of this decision.

Accordingly, the initial decision of the ALJ is adopted in part and modified in part, as set forth above. The Board is directed to compensate respondent for the time frame noted above. Respondent is hereby dismissed from her tenured position with the Board as of the date of this decision, and this matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:1.1-3.6.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

APRIL 28, 1997
DATE OF MAILING APRIL 28, 1997

222-97

222-97

RICHARD P. ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured Chief School Administrator, alleged that the Board improperly withheld a portion of his salary. Board contended the $1,000 withheld was for a function which was eliminated from its school budget.

ALJ granted petitioner's motion for summary decision. ALJ found that the Board's action in reducing petitioner's salary by $1,000 per year was an improper reduction in his compensation violating the tenure laws. ALJ ordered the Board to retroactively pay to petitioner $1,000 per year, retroactive to the 1995-96 school year, which it wrongfully withheld, and to restore such $1,000 per year to his salary.

Commissioner concurred with the initial decision of the ALJ and directed payment to petitioner.

APRIL 28, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 2663-96

AGENCY DKT. NO. 81-3/96

RICHARD P. ADAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE OCEAN GATE SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

Maria M. Lepore, Esq., for petitioner

Joseph L. Foster, Esq., for respondent (McLaughlin, Bennett, Gelson & Cramer, attorneys)

Record Closed: February 20, 1997 Decided: March 10, 1997

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition with the Commissioner of Education on March 5, 1996, alleging that his annual compensation as a Chief School Administrator was reduced by $1,000 contrary to

N.J.S.A. 18A:28-5 and *N.J.S.A.* 18A:6-10. In its response, respondent alleges that this payment made by respondent to petitioner was for a function which was eliminated from its school budget. The matter was transmitted to the Office of Administrative Law (OAL) on April 8, 1996 for hearing as a contested case.

The matter was scheduled for a prehearing conference on June 25, 1996. On that date, and with the consent of the parties, the prehearing conference was converted to a scheduling conference and by a Letter Order entered on June 28, 1996, a schedule was established for the completion of discovery by July 26, 1996, for the submission of a summary decision motion by petitioner by August 26, 1996, and a response by respondent by September 26, 1996. Because of delays in providing discovery a Letter Order was entered on October 9, 1996, amending the prior schedule and providing for the completion of discovery by October 15, 1996, for the submission of a summary decision motion by petitioner by November 15, 1996, and a response by respondent by December 16, 1996.

Petitioner's motion for summary decision was filed on November 14, 1996 (P-1 and P-2), and respondent's response was filed on January 31, 1997 (R-1 and R-2). As a result of a telephone conference held on February 4, 1996, petitioner was given the opportunity to file a reply, and this was filed on February 20, 1997 (P-3), whereupon the record closed.

FACTUAL DISCUSSION

At the scheduling conference held on June 25, 1996, the attorneys for the respective party indicated that there was no dispute as to the facts and that this matter was appropriate for resolution as a matter of law. The undisputed facts are summarized herein.

Petitioner has been employed as the Chief School Administrator by respondent, Ocean Gate Board of Education for approximately 23 years, and has tenure in this position.

On December 3, 1991, petitioner and the respondent Board of Education entered into an Agreement beginning July 1, 1990 and ending June 30, 1992, providing for petitioner's

employment as the Chief School Administrator, and setting forth the terms and conditions of employment (P-1, Exhibit A). Article VII of that Agreement provides as follows:

Salaries

The salary of the Chief School Administrator shall be $55,000.
The salary will be budgeted as follows:

Line 110 Administrative Salaries	53,200
Line 310 Salaries Health Services (attendance officer)	500
Line 610A1 Contracted Services (asbestos manager)	1,000
Line 660B2 Operation (gas reimbursement)	300
Total	55,000

That Agreement expired on June 30, 1992. However, beginning July 1, 1992, respondent continued to pay petitioner an annual salary of $55,000 as his compensation every school year until the 1995-96 school year, and reported to the Teacher's Pension and Annuity Fund that petitioner earned a salary of $55,000.

Petitioner asserts that on December 11, 1995, the Board President of respondent directed the Board Secretary/Business Administrator not to pay petitioner $1,000 of his salary. It was alleged that the Board President took this action on her own and without any vote or action on the part of the Board to direct the Board Secretary/Business Administrator to withhold or reduce part of petitioner's compensation. The Board Secretary/Business Administrator did not pay to petitioner $1,000 of his salary at that time.

On February 20, 1996, respondent eliminated the position and budget item for "asbestos manager." Respondent has no job description or any other type of documentary evidence indicating that this was a position which required duties in addition to those performed by him as the Chief School Administrator.

On March 5, 1996 Mr. Adams filed the petition in this matter alleging an illegal reduction in compensation pursuant to *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:6-10.

In support of its position, respondent submitted the Certification of Paulette Konopka, Board President, dated January 31, 1997 (R-2). Ms. Konopka identified a true copy of the 1995-95 School District budget (R-2, Exhibit A) which excluded any appropriation for contracted services for asbestos manager. She indicates that the Board took this action based on the fact that the facilities had become asbestos free as a result of certain construction programs undertaken by the Board. The appropriation for asbestos manager was eliminated by the Board for economy reasons on the basis of District Policy 4117.4 (R-2, Exhibit B). As a result, the petitioner did not receive compensation as asbestos manager due to the exclusion of that line item from the Budget. A resolution was adopted by the Board of Education on February 21, 1997 confirming this (R-2, Exhibit C).

LEGAL DISCUSSION

Summary decision is a device for expeditiously reviewing the merits of a case to determine if the moving party is entitled to a favorable decision without the necessity of a hearing. *See, Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954). It may be granted if the papers and discovery which have been filed, together with the affidavits, if any, clearly show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b); *Templeton v. Boro. of Glen Rock,* 11 *N.J. Super.* 1, 4 (App. Div. 1950). As the Supreme Court recently stated:

> . . . [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Brill v. Guardian Life Ins. Co. of America, 142 *N.J.* 520, 540 (1995) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In order to determine if a motion for summary decision should be granted or denied, the applicable law must be applied to the undisputed facts. Here, where there are no facts in dispute, it is clear that this matter should be resolved by way of summary decision.

Petitioner herein relies on *N.J.S.A.* 18A:6-10 which provides that no person shall be dismissed or reduced in compensation if that person is under tenure of office, position or employment. *N.J.S.A.* 18A:28-5 provides in relevant part that a person who has met the requirements to attain tenure in office,

> . . . shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title . . .

Article VIII of the Agreement between the parties dated December 3, 1991 (P-1, Exhibit A), provides that "the salary of the Chief School Administrator shall be $55,000." Petitioner points out that the language of the Agreement contains no provision that petitioner would be paid portions of his salary for performing certain duties. The Agreement merely indicates that petitioner's salary as the district's Chief School Administrator is to be $55,000 without qualification as to how that amount was to be allocated. While the Agreement indicates how the salary will be budgeted, it has not been argued by respondent that the budgeting of these funds is a condition precedent to the payment of the salary.

Petitioner argues that under New Jersey law "an agreement arises from offer and acceptance, and must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty." *Weichert Co. Realtors v. Ryan,* 128 *N.J.* 427, 435 (1992), citing *West Caldwell v. Caldwell,* 26 *N.J.* 9, 24-25 (1958); *Friedman v. Tappan Dev. Corp.,* 22 *N.J.* 523, 531 (1956); *Leitner v. Braen,* 51 *N.J. Super.* 31, 38-39 (App. Div. 1958). It is undisputed that the parties entered into an agreement which provided with certainty that petitioner was to be paid a salary of $55,000 per year for performing the duties of Chief School Administrator. It is also undisputed that respondent continued to pay petitioner a salary of $55,000 for performing the duties of Chief School Administrator in the years following the

expiration of the Agreement. Therefore, I **FIND** that petitioner's annual salary for performing the duties of Chief School Administrator is $55,000.

Respondent relies on *N.J.S.A.* 18A:28-9 and *Impey v. Bd of Educ.*, 273 *N.J. Super.* 429 (App. Div. 1994), affirmed 142 *N.J.* 388 (1995), as authority for its actions in this matter. The foregoing authorize a board of education to reduce the number of staff members and abolish positions for reasons of economy and other good cause. However, in *Impey*, the position of a part-time speech correctionist was eliminated and she was terminated from the school district and her former duties were undertaken by a county educational services commission. That is not the same as the action taken with respect to petitioner's position. There is no suggestion in this matter that petitioner's position has been eliminated or that his hours have been reduced so as to make it a part-time position. Respondent is simply eliminating one of the duties and responsibilities imposed on petitioner. The position held by petitioner has never been reduced from a full-time position so as to permit respondent to reduce petitioner's full-time salary. *See, Bassett v. Bd. of Educ. of the Boro. of Oakland,* 223 *N.J. Super.* 136 (App. Div. 1988).

The tenure rights of a teaching staff member are set by statute and there is no right conferred on boards to tamper with those rights based upon a funding source which may be tenuous. *See, e.g., Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 81 (1982) (holding that teachers acquire tenure even though their positions were created based upon federal funds which may be tenuous). Once tenure is acquired, a teaching staff member acquires the right not to be reduced in compensation unless the tenured teaching staff member is dismissed for cause or for good faith economic reasons. Once respondent began paying petitioner a certain salary, respondent was not authorized to unilaterally reduce or remove a portion of that salary by eliminating one of the funding sources for the salary contained in the budget.

It is undisputed that respondent took no action to reduce Mr. Adams' salary by $1,000 per year in accordance with the tenure laws. Therefore, I **FIND** that respondent's action in reducing petitioner's salary by $1,000 per year is an improper reduction in his compensation. When a board of education interferes with an employee's tenure rights, that employee is entitled to back pay. *See, Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* at 83-84. Because respondent improperly withheld a portion of petitioner's salary and, in effect, reduced his salary, he is entitled to the

payment of $1,000 per year back pay retroactive to the 1995-96 school year. Accordingly, I **CONCLUDE** that respondent shall be ordered to retroactively pay to petitioner the $1,000 per year it wrongfully withheld, and to restore that $1,000 per year to his salary.

In view of the foregoing, it is not necessary to address petitioner's additional argument that respondent is still required to pay to petitioner his full salary of $55,000 for the 1995-96 school year because the budget item was not eliminated until February 1996, more than eight months into the school year. Likewise, it is not necessary to address petitioner's argument that if respondent is permitted to unilaterally eliminate the line item for asbestos manager for the 1995-96 school year, this should be reported to the Commissioner of Education, and the money should be refunded to the New Jersey Department of Education for failure to comply with *N.J.S.A.* 18A:58-68 to -76.

Since there is nothing in the record to establish that respondent's action was taken in bad faith or was a deliberate violation of the statute, it is unnecessary to consider the award of interest pursuant to *N.J.A.C.* 6:24-1.16(c)1.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that petitioner's motion for summary decision is hereby **GRANTED,** and it is **ORDERED** that respondent shall be required to retroactively pay to petitioner $1,000 per year which it has wrongfully withheld, and to restore $1,000 per year to his salary.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

March 10, 1997.
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

3-12-97
DATE

DNF
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 13 1997
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

/cat

APPENDIX

LIST OF EXHIBITS

For Petitioner:

P-1 Notice of Motion for Summary Decision dated November 14, 1996

Exhibit A. Petitioner and respondent Agreement dated December 3, 1991

P-2 Brief in Support of Petitioner's Motion

P-3 Attorney for petitioner letter brief dated February 14, 1997

For Respondent:

R-1 Attorney for respondent Letter Memorandum dated January 31, 1997

R-2 Certification of Paulette Konopka dated January 31, 1997 with attachments:

Exhibit A. Ocean Gate Board of Education 95/96 School Budget

Exhibit B. Board Policy 4117.4 entitled "Abolishing a Position"

Exhibit C. Resolution abolishing Asbestos Manager on February 21, 1996

OAL DKT. NO. EDU 2663-96
AGENCY DKT. NO. 81-3/96

RICHARD P. ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the Board's action in reducing petitioner's salary by $1,000 per year constitutes an improper reduction in his compensation. While the Board was free to choose to reallocate the payment of petitioner's salary within the budget, it was not entitled to discontinue any portion of such salary without following the procedures set forth in *N.J.S.A.* 18A:6-9 *et seq.* As such, petitioner is entitled to have this amount restored to his salary and to receive payment of $1,000 per year retroactive to the 1995-96 school year.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. Summary decision is hereby granted to petitioner and the Board is ordered to retroactively pay petitioner the $1,000 per year which it wrongfully withheld, and to restore such $1,000 per year to petitioner's salary.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 28, 1997
DATE OF MAILING APRIL 28, 1997

224-97

224-97

GERALD DUDZINSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner alleged that although in January 1995 he was tenured as a guidance counselor, the Board, in violation of his tenure rights, hired a nontenured individual to fill a full-time guidance counselor position. The Board contended petitioner's duties were more limited in scope than those of a certified guidance counselor.

Citing *Spiewak* and testimony of witnesses, the ALJ concluded petitioner was entitled to the guidance counselor position. ALJ found that petitioner met all three requirements of *Spiewak* for one to claim statutory tenure -- 1) work in a position for which a certificate is required; 2) hold such a certificate; and 3) work the requisite number of years in the position. Moreover, the ALJ found that petitioner's duties were exactly those activities a guidance counselor would normally perform, albeit not as often as a full-time person. The Board was instructed immediately to take such steps as may be necessary and appropriate to place petitioner in said guidance counselor position.

Commissioner concurred with the ALJ that petitioner, in January 1995, was entitled by virtue of his tenure to be appointed to the full-time guidance counselor position awarded by the Board to a nontenured individual and that he must, therefore, be immediately placed in such position. Commissioner found, as did the ALJ, that the record was abundantly clear that petitioner, while properly certified, performed the very duties which guidance counselors perform for the statutorily requisite period of time and, thus, petitioner satisfied the criteria necessary in order to claim tenure in said position pursuant to *Spiewak*. Board was directed to place petitioner in the full-time guidance counselor position immediately. The Commissioner further urges all boards of education to review informal appointments to tenure-eligible positions being made by their administrators.

APRIL 28, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5162-95

AGENCY DKT. NO. 162-4/95

GERALD DUDZINSKI,

Petitioner,

v.

BOARD OF EDUCATION,

OF THE BOROUGH OF FRANKLIN, SUSSEX COUNTY,

Respondent.

Louis P. Bucceri, Esq., for petitioner

(Bucceri & Pincus, attorneys)

Richard M. Salsberg, Esq., for respondent

(Stanton, Hughes, Diana & Zucker, P.C.)

Record Closed: January 31, 1997 Decided: March 7, 1997

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

PROCEDURAL HISTORY

This case was transmitted to the Office of Administrative Law by the Department of Education in May 1995 as the result of the filing of a verified petition by Gerald Dudzinski alleging that although in January 1995 he was tenured as a guidance counselor the Board, in violation of his tenure rights, hired a non-tenured person to fill a vacancy in a full-time guidance counselor position in the school district. A prehearing conference was conducted by the undersigned on September 1, 1995 and several issues were identified. They included, in addition to the basic issue of petitioner's tenure claim to entitlement to the guidance position, separate defenses of the "90-day" bar of *N.J.A.C.* 24-1.2, estoppel, laches, waiver and unclean hands.

Hearing dates originally scheduled for April 1996 had to be adjourned and the hearing took place in September 1996. Thereafter, a schedule for the filing of post-hearing briefs was established and briefs were filed with me. As the result of an order the due date for this initial decision was extended until March 17, 1997.

STIPULATED FACTS:

Prior to the commencement of the hearing counsel agreed to a Partial Stipulation of Facts (Court Exhibit 1) as follows (exhibit references deleted):

1. Petitioner was initially hired by respondent effective February 1, 1996, for service as a teacher under his instructional certificate.

2. Petitioner achieved tenure under his instructional certificate in February 1969.

3. Prior to the 1982-83 school year, the Franklin school system was a K through 12 district. Since and including the 1982-83 school year, the district is limited to grades K through 8. Grades 9 through 12 were regionalized beginning at the start of the 1982-83 school year.

4. During the course of the 1988-89 school year petitioner was voluntarily reassigned from teaching duties to the position of School Business Administrator. During the course of the 1991-92 school year, petitioner returned to a teaching position voluntarily. He is currently still employed by respondent as a full-time teacher.

5. Petitioner holds the following educational certificates and endorsements:

Instructional

Secondary Teacher of English, issued 1966

Temporary Elementary Education, issued 9/2/82-11/2/82

Regular Elementary School Teacher, issued 12/82

Educational Services

Student Personnel Services, issued 6/82

Administrative

Principal Supervisor, issued 2/81

School Business Administrator, issued 2/89

6. Respondent's current job description for the position of Guidance Counselor is attached. . . .

7. On March 16, 1987, respondent appointed Dennis Snyder as a full-time guidance counselor for the 1987-88 school year. He continued in that position into the 1994-95 school year.

8. On December 7, 1994, Dennis Snyder was promoted to the position of Vice Principal. On or about December 8, 1994, respondent posted the position of Guidance Counselor. Petitioner applied for the position and participated in the interview process.

9. Petitioner was notified by letter of January 18, 1995 that he would not be appointed to the guidance counselor position vacated by Mr. Snyder.

10. Respondent hired a new employee, Suzanne Crisman, as its sole guidance counselor, effective February 1, 1995. Ms. Crisman holds a Student Personnel Services endorsement which was issued in November, 1992. Ms. Crisman is not a tenured employee of respondent.

11. During the period from September 1982 to March 15, 1987, respondent did not adopt any resolutions appointing anyone to serve as a guidance counselor in its district.

12. On March 5, 1982, petitioner was appointed by respondent to serve as a 'Student Advisor' for the Guidance Department for the remainder of that school year. No subsequent resolutions appointing 'Student Advisors' were adopted by the Board.

13. A true copy of the minutes of respondent's work session of October 9, 1984 are attached. . . .

14. A true copy of the current job description for the position of elementary teacher in respondent's district is attached. . . .

15. Petitioner's 1995-96 salary as a guidance counselor would have been the same as the salary he actually earned as a teacher for that year.

TESTIMONY

A. Testimony for Petitioner

Dudzinski testified at length on his own behalf. Prior to 1982 he was employed as a elementary school teacher in Franklin Township, then a K-12 school district. In the Spring of 1982 an opening occurred for an elementary guidance person since the individual who performed that function in the district had been appointed to be head of guidance at the 9-12 regional high school which the Franklin Township Board had just joined. In early March 1982, Dudzinski and two others were appointed to perform certain functions one period per day which, he claimed, were distinctly guidance in nature. Although petitioner by then had completed his course work to obtain guidance certification, the actual certificate was not issued to him until June 1982.

In September 1982, Dudzinski was assigned to teach 8th grade but he continued to be assigned as well, to work one period a day in the "career office". During the school years 1982-83 through 1986-1987 petitioner continued to perform those functions, either one or two periods per day, and insisted they were guidance in nature. Indeed, many of the duties were the same as those set forth in a guidance counselor job description which had been adopted by the Board in 1995 (Exhibit J-7).

Although a full-time elementary guidance position was posted in 1987, Dudzinski did not apply for it and he continued to serve as an elementary teacher through the 1988-89 school year. From September 1989 to sometime during 1992 he served as the district's school business administrator. Since then, he has returned to a regular teaching position. In late 1994, when the individual who had taken the full-time guidance position in 1987 (Dennis Snyder) was appointed a vice principal, Dudzinski applied for the vacated position and was interviewed for it. However, Crisman, not he, was selected (Exhibit J-8), effective February 1, 1995.

During the course of his direct testimony the witness identified a variety of documents which, he claimed, supported his position. For example, in October 1984,

the then Superintendent of Schools, Dr. Patrick Piegari, wrote to thank Dudzinski for participating in a presentation made to the Board on October 9, 1984 dealing with the "guidance program" (Exhibit P-2). So too, in a letter dated June 10, 1987 addressed "To Whom It May Concern", Dr. Piegari referred to the fact that Dudzinski had been a " . . . successful part-time guidance counselor . . . for the past five years", and " . . . as a guidance teacher, he is very effective working with parents and students and often has to deal with some very difficult situations" (Exhibit P-3). Dr. Piegari went on to observe that Dudzinski had made, " . . . constructive suggestions that helped with the smooth operation of our guidance program [and] . . . has also been actively involved in our district testing program and is very competent, analyzing and presenting test results to parents and staff (Exhibit P-3). Piegari concluded that letter by referring to petitioner as " . . . an asset to our guidance department . . . [who] would be a successful addition to any elementary or secondary guidance program" (Exhibit P-3). Thus, the Superintendent "highly" recommended petitioner for a position in whatever district was reviewing the letter of reference.

Another document identified by Dudzinski during his direct testimony was a letter dated March 1, 1990 sent to the Superintendent of the Passaic Valley Regional High School District by Ms. Naomi Davidsson, Principal of the Franklin Elementary School, in reference to an application Dudzinski had made for a position as "grade level supervisor" in that district. According to Davidsson's letter, Dudzinski had served successfully in Franklin not only as a supervisor and a teacher, but, in addition, had " . . .served as a guidance counselor in grades 5 - 12 [and that] . . . Dudzinski [had] piloted the guidance program at the elementary level because no program had existed there." (Exhibit P-4). Thus, Davidsson recommended Dudzinski for the position "without reservation".

When cross-examined, Dudzinski first conceded that since Ms. Davidsson had not been employed in the district prior to 1987, the information she put in her letter was obtained from him. He also agreed that after March 1982 he never received any formal letter or resolution of appointment from the superintendent, the Board or from any other official, person or entity concerning the "guidance" position.

Dudzinski also identified a variety of other documents including: (1) his application in January 1989 for SBA certification wherein no reference was made by him to any guidance experience (Exhibit R-1); (2) a seniority worksheet which he completed in January 1985 which also failed to claim any guidance experience (Exhibit R-2); (3) a seniority list prepared in September 1985 which gave him no credit for any guidance activities (Exhibit R-3); (4) an employment history form contained in his personnel file which contained no reference to any guidance activities (Exhibit R-4); and (5) a letter of recommendation prepared in August 1983 by the then Superintendent of Schools, Thomas L. Komlo, addressed "To Whom It May Concern" in support of Dudzinski's application to other districts to be an administrator wherein no reference was made to any guidance function either (Exhibit R-6).

In addition on cross-examination, the petitioner was "walked through" the 1995 guidance job specification (Exhibit J-7) and he agreed with respect to many of the items contained therein that they also are performed by teachers. He also admitted that at no time did he conduct any guidance workshops, nor group meetings with parents as a guidance person. However, he did meet often with parents regarding student test results.

Finally, with respect to the letter from Dr. Piegari concerning the October 1984 presentation made to the Board, Dudzinski agreed that was the only time he ever appeared before the Board in connection with any activities that could be called guidance related.

On redirect examination, Dudzinski explained that the reason he did not stress any guidance activities prior to applying for the 1995 vacancy was simply that he did not appreciate the strength of any potential claim he might have based upon his tenure.

B. Testimony for Respondent

The first witness for the Board, Dr. Piegari, was Superintendent of Schools in Franklin between October 1983 and June 1987. At present he is Superintendent of Schools in West Milford.

Piegari explained that upon being hired he became concerned there was no full-time guidance counselor at the elementary level. Thus, in order immediately to deal with that problem he determined to assign a few regular elementary teachers to provide "guidance support services" one period per day. He earlier had discussed this situation with the Board but implementation had been somewhat delayed because of budget concerns.

Thus, Dr. Piegari tabbed a small number of teachers (including petitioner) to serve the one duty assignment period per day. In 1983-84, Dennis Snyder who was a 4th grade teacher, was assigned to counsel 3rd and 4th graders. Another teacher performed the same function for grades 5 and 6 and Dudzinski was assigned the function for 7th and 8th graders. All three, he said, had expressed both an interest in this activity and a willingness to carry it out. Piegari denied there was any consideration given by him to the fact that Dudzinski and the other teachers were certified in guidance. As far as Piegari was concerned, the basic duties to be carried out by all three merely were to put together a program for Career Day, take referrals from teachers, counsel students regarding failing grades, and help coordinate testing programs. In October 1984 he asked the three to make a presentation to a Board workshop meeting in order to inform it of the guidance activities which had been put in place that school year. At no time was any "formal" appointment of Dudzinski or the others recommended by Piegari, nor was any made by the Board.

In 1986 Piegari prepared a guidance counselor job description in anticipation of the creation of a full-time guidance position at the elementary level (Exhibit R-8). That job description was adopted by the Board (Exhibit R-9) and Snyder was appointed to be the guidance counselor in March 1987. Piegari left the district at the end of the

1986-87 school year and could not recall whether Dudzinski had applied for the job vacated by Snyder (he had not).

Piegari insisted that Dudzinski never performed testing and pupil placement in any meaningful way insofar as true guidance activities are concerned, although he conceded petitioner could have talked informally with students and parents on topics that guidance counselors normally did as well.

With respect to the letter of recommendation that he wrote on Dudzinski's behalf in June 1987 (Exhibit P-3), Piegari explained he did so at Dudzinski's request in connection with an application petitioner had made for an out-of-district position. Although he made reference in that letter to guidance activities carried out by Dudzinski, in fact the petitioner did not in Piegari's view perform any activities which a regular teacher could not do.

On cross-examination, Piegari insisted that he never required, no less think of requiring guidance certification for petitioner and the other persons performing the guidance-type support services as a duty assignment, and he reiterated the reason the function was kept in place was in order to provide some sort of ad hoc activity designed to fill a gap stemming from the Board's inability to budget for a full-time counselor.

Finally, Piegari agreed it is possible the building principal could have delegated certain functions to Dudzinski with respect to assisting students in their transition from elementary to high school.

On redirect examination, the witness insisted that Dudzinski did not perform any function which a regular classroom teacher could or would not have performed if directed to do so by the superintendent if the person had the time to do it.

The last Board witness, Thomas N. Turner, is respondent's Superintendent of Schools and succeeded Piegari in that position in 1987. When he arrived Snyder recently had been appointed as full-time guidance counselor. In late 1994, when

Snyder was promoted to be a vice principal, the district posted the vacancy in the full-time guidance position. Dudzinski applied and was interviewed by Turner and Snyder. However, the screening committee determined to recommend to the Board the appointment of Ms. Crisman and this was done, effective February 1, 1995.

DISCUSSION

The parties agree that the decision in *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982) establishes the criteria necessary in order for one to claim statutory tenure - (a) work in a position for which a certificate is required; (b) hold such a certificate; and (c) work the requisite number of years in the position. In my view Dudzinski met all three requirements. Nor is his claim to the position to be denied on the basis that at no time after 1982 was any formal resolution adopted by the Board appointing him to perform guidance counselor functions.

Specifically, the functions of guidance counselors set forth in the Board's own job description (Exhibit R-8), when matched against the kinds of activities that Dudzinski testified without contradiction that he performed, clearly demonstrate that during one or two periods per day from March 1982 to June 1987 he was performing in a guidance counselor capacity and not simply providing some amorphous disconnected "support service". He was: (a) involved directly in the maintenance and assembly of student records; (b) orienting students to school procedures; (c) assisting students with respect to standardized test scores; (d) screening new students for proper placement; (e) coordinating the carrying out of tests; (f) discussing test scores and other matters with parents; (g) speaking with students who had been referred by others to him; (h) counseling students in respect to problems they might have either in school, at home, or elsewhere; (i) arranging for tutoring; (j) initiating and conducting conferences with parents; and (k) working with teachers and other staff members to familiarize them with the guidance-type services offered at the elementary level. Indeed, as set forth in the Board's initial brief, a discussion which I had with Dr. Piegari points inexorably to the conclusion that the kinds of activities and functions carried out by Dudzinski during the period or two per day he performed the duty assignment given

to him were exactly those activities which guidance counselors normally would perform, albeit not as often because he was not acting in a full-time position (See Tr., 163-14 through 166-6). In short, as urged by Dudzinski, his activities during the period from March 1982 to June 1987 met the first part of the *Spiewak* test.

Second, it has been stipulated that petitioner held a valid Student Personnel Services endorsement as of June 1982 (Exhibit C-1, para. 5), and Dudzinski testified as to his eligibility for that endorsement even prior to issuance of the certificate. Thus, it cannot be disputed that his performance since March 1982 must count toward tenure.

Finally, even though he worked only part-time in the guidance function, there is no dispute that petitioner worked the requisite number of years to achieve tenure under his Educational Services certification and his Student Personnel Services endorsement thereto. Thus, he has satisfied all three prongs of *Spiewak*.

A major defense posited by the Board is its contention that petitioner cannot have accrued eligible time toward tenure in a guidance position since he was never formally appointed to do so by the Board. However, as noted by petitioner in his reply brief, the primary authority offered for this proposition rests upon the decision in *Buehler v. Bd. of Ed. of Ocean Tp.* 1970 *S.L.D.* 436, (December 17, 1970), aff'd St. Bd. of Ed., 1971 *S.L.D.* 660, (June 2, 1971), aff'd *N.J. Super.*, (App. Div.), 1972 *S.L.D.* 664, (November 2, 1972) (unreported), which petitioner argues has been rendered inapplicable by subsequent decisions. I agree.

The major decision upon which petitioner understandably places great emphasis is *Ayoub v. So. Plainfield Bd. of Ed.*, 1988 *S.L.D.* 941. In *Ayoub*, as in this case, the petitioner claimed tenure in a position to which he had never formally been assigned by the Board. There the petitioner had been transferred to a teaching position from a position as a cooperative industrial education coordinator and had been certified for both positions. The administrative law judge relied upon *Buehler* to reject *Ayoub's* claim by concluding that since petitioner had never been appointed as a cooperative industrial education coordinator by the Board, but simply had been assigned those

duties, there was no basis for him to claim tenure. Nor was there any allegation in that case that the Board had acted in bad faith by endorsing by silence the informal appointment in order to avoid the consequences of tenure attaching to *Ayoub's* position. The Commissioner, however, rejected the initial decision since under *Spiewak,* the petitioner in *Ayoub* worked while duly certified in the position of coordinator for the requisite number of years - all that was needed. With regard, in particular, to the claim that Ayoub's assignment to be a coordinator could not be honored because it was never the subject of a Board resolution, the Commissioner flatly disagreed, observing that " . . . tenure is a legislative protection which the Commissioner must vigilantly and assiduously guard from erosion, evasion or subterfuge", *Ayoub, supra*, 1988 *S.L.D.* at 950. See also, *Zielinski v. Bd. of Ed. of Guttenberg*, 1970 *S.L.D.* 202, rev'd St. Bd. 1972 *S.L.D.*, 664, aff'd *N.J. Super.* (App. Div. 1972), 1972 *S.L.D.*, 692. In light of *Ayoub*, *Zielenski* and subsequent decisions which stress the need to honor the legislative prescription as to the elements needed for acquisition of tenure and the need as well, assiduously to avoid any subterfuge, real or potential[1], it was wrong to deny Dudzinski appointment to the guidance counselor position in favor of a non-tenured person. The absence of a formal Board resolution, under these circumstances, is not relevant.

The remaining issues are whether Dudzinski's claim is barred by application of either the doctrines of laches or estoppel. The Board's additional separate defenses (waiver, the "90 day" rule and unclean hands) seem to have been dropped since no reference was made to them either in the respondent's original brief or in its reply brief.

With respect to its laches defense, the Board argues that petitioner "slept" on whatever rights he had to claim the guidance position on the basis of tenure since, if petitioner was correct in his interpretation, he was entitled as early as March 1987 to put in a claim to the new guidance position which was awarded that year to Snyder. Thus, by waiting almost eight years to assert the same claim he now should be barred from pursuit of his case. Indeed, the Board also stresses that neither when petitioner applied for the position vacated by Snyder in late 1994, nor interviewed, did he even

[1] *See, e.g., Schulz v. State Bd. of Ed.*, 132 *N.J.L.* 345 (E.& A. 1945)

assert any tenure claim and it was not until after Crisman was appointed and began working that he first put forth that contention. Thus, according to the Board, had petitioner timely acted to assert his claim, if not in 1987, at least in late 1994, the respondent would have had an opportunity to evaluate the claim in a "non-litigation" context and perhaps avoided going through the interview process and the hiring of Crisman who, it claims, left another job in order to accept the position with the respondent.

In my view, the laches argument must be rejected. First, as petitioner points out in his reply brief, the claim in this case relates not to the 1987 appointment of Snyder which was never challenged by Dudzinski (and need not have been), but to the appointment of Crisman in January 1995. There clearly was no delay, unreasonable, unexplained or otherwise, between the appointment of Crisman and the filing of the verified petition in this case and I perceive no undue prejudice either to the Board or to Crisman by any action or inaction of the petitioner. Indeed, even though the "90-day rule" claim has not been pursued by the Board, it seems obvious that under settled case law, even if it was pursued, the petitioner would prevail. Thus, on the very face of the situation, if petitioner meets the strictures of the "90-day rule" how can he possibly be barred by application of the doctrine of laches? The short answer is that he cannot[2].

The last issue, then, is whether under the circumstances petitioner's claim should be barred by application of the doctrine of estoppel. According to the Board, since petitioner did not even claim tenure until after Crisman was appointed, it justifiably relied on his "silence" as evidence that he had no tenure and pursuit of that contention now is unduly prejudicial both to the Board and to Crisman. This argument, too, should be rejected since there is no evidence of undue prejudice to the Board, even assuming Dudzinski had some obligation to have pursued his claim earlier than he did. Moreover, no competent testimony was presented as to Crisman's situation. The essential facts necessary to a decision in this case were presented through the partial stipulation and through the testimony of persons having knowledge of those

[2] Petitioner also argues that since there is a regulatory limitation period (*N.J.A.C.* 6:24-1.2(c), laches cannot even be raised. I have chosen not to address that issue.

facts - especially Dr. Piegari. In short, as with laches, the Board's estoppel defense also is rejected as no prejudice, undue or otherwise, has been shown.

In reaching the decision I do in this case, I am not unmindful that as a consequence the Board, through no intentional act or fault of its own, tolerated a situation whereby Dudzinski can claim entitlement to a guidance position to which he never was formally appointed. However, that must be the result where the tenure laws are involved if they are to be applied in a prophylactic fashion to protect the rights of teaching staff members who meet all of the statutory criteria for entitlement to that legislatively prescribed protection. Thus, it may be, as the Board contends, that the assignment of Dudzinski and the others to perform "guidance support" duties were never intended as actual guidance functions but only as an informal "activity" which was needed to fill a gap. That is irrelevant under *Spiewak*. Nor need I agree with petitioner's argument that Piegari's actions are suspect since he clearly knew or should have known of the certifications held by Dudzinski and the others. Whatever the case may be in that respect, the Board still cannot avoid the legally required consequences of what actually took place during the period March 1982 until June 1987. Whether the Board by formal resolution or otherwise made any specific appointments, and whether petitioner knew or should have known that he had a tenure claim, similarly are irrelevant under the circumstances of this case. Just as the letters of recommendation by Komlo, Piegari and Davidsson referring to Dudzinski's activities as those of a guidance counselor (Exhibits P-2, P-3, P-4) are not dispositive - neither is he barred from asserting his tenure claim because he did not insist that the guidance functions he performed be included on seniority worksheets, lists, etc. (Exhibits R-1 through R-4). Neither teaching staff members, Superintendents nor Boards can create the legal requirements for tenure - that is the function of the legislature which has spoken in this area. Simply put, the proofs demonstrate that: (1) while properly certificated the petitioner; (2) for the requisite time; (3) performed the very duties that certified guidance counselors perform. Thus, no assumptions, implications or interpretations can stand in the way of his entitlement under the law to claim tenure in that position.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth herein, I **CONCLUDE** that the petitioner was, in January 1995, entitled by virtue of tenure to be appointed to the full-time guidance counselor position vacated by Snyder and which was awarded instead to Crisman, a non-tenured person. The Board is instructed immediately to take such steps as may be necessary and appropriate to place petitioner in that position.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton,**

New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 7, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

3-12-97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mh

APPENDIX

Witness List:

For Petitioner: Gerald Dudzinski

For Respondent: Dr. Patrick Piegari
Thomas N. Turner

Exhibit List:

Court Exhibit 1 Partial Stipulation of Facts (with attached Joint Exhibits 1 through 12a)

P-1	Letter of 6/15/82 from Dudzinski to Komlo
P-2	Letter of 10/15/84 from Piegari to Dudzinski
P-3	Letter of 6/10/87 from Piegari to To Whom It May Concern
P-4	Letter of 3/1/90 from Davidsson to Centolanza
P-5	Letter of 9/29/93 from Komlo
R-1	Application for school business administrator certification, 1/28/89
R-2	Seniority worksheet, 1/14/85
R-3	Seniority list of teaching staff members as of 6/30/86
R-4	Employment history form as of 1994-95 school year
R-5	Letter of 6/22/82 from Komlo to Dudzinski
R-6	Letter of 8/24/83 from Komlo
R-7	Application for guidance counselor position, 12/20/94
R-8	Guidance counselor job description, 6/30/86
R-9	Minutes of regular Board meeting 1/26/87
R-10	Letter of 10/24/85 from Piegari to Snyder

OAL DKT. NO. EDU 5162-95
AGENCY DKT. NO. 162-4/95

GERALD DUDZINSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent Board's exceptions and replies thereto of petitioner were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

The Board's exceptions[1] essentially recast and reiterate its arguments advanced before the Administrative Law Judge (ALJ) in post-hearing submissions, again contending that not only was petitioner "never ***required*** to possess a Student Personnel Services certificate in order to work in the administrative guidance assignment he performed between 1982 and 1987" (emphasis in text) (Board's Exceptions at p. 3), he also "never performed work which was equivalent to the work a certified guidance counselor would be required to perform.***" (*Id.* at p. 4) It offers specific hearing testimony of Dr. Piegari to support its contention that the duties performed by petitioner were "*far* more limited in scope than the duties a certified guidance

[1] The Board's exceptions note that there is a typographical error in the ALJ's recitation of the parties' Stipulated Facts on Page 2 of the Initial Decision. Stipulated Fact No. 1 should read "Petitioner was initially hired by respondent effective February 1, *1966,*" rather than 1996 as indicated in the decision.

counselor would perform." (*Id.* at p. 5) The Board cites *Dennery v. Board of Education,* 131 *N.J.* 626, 640 (1993) for the proposition that the mere fact that some of petitioner's duties may have "overlapped" with those performed by a guidance counselor, "does not support a finding that the guidance assignment was the *equivalent* of a guidance counselor position for purposes of conferring tenure status." (*Id.* at p. 6) As such, the Board maintains that petitioner did not satisfy the necessary requirements for the acquisition of tenure pursuant to *Spiewak.*

The Board next renews its post-hearing contention with respect to the controlling law in this matter, excepting to the ALJ's conclusion that petitioner could acquire tenure as a guidance counselor without a board appointment to these duties. In this connection, it avers that the ALJ erroneously determined that *Buehler v. Board of Education of the Township of Ocean,* 1970 *S.L.D.* 436, aff'd 1971 *S.L.D.* 660 (State Board), aff'd 1972 *S.L.D.* 664 (App. Div.) was inapplicable in this matter, instead relying on *Ayoub v. South Plainfield Board of Education,* 1988 *S.L.D.* 941. It maintains that *Ayoub*, rather than overturning *Buehler* as the ALJ improperly found, merely carves out a narrow exception to *Buehler* in cases where it is established that a board has acted in bad faith, *i.e.*, "engaged in *subterfuge to circumvent the tenure laws.*" (emphasis in text) (Board's Exceptions at p. 17) The Board advances that the within matter is totally distinguishable from *Ayoub*, in that "there is absolutely no evidence that the Board even knew Petitioner was performing guidance functions much less that the Board engaged in subterfuge to circumvent his tenure rights***." (*Id.* at p. 18) It, therefore, argues that absent the "bad faith" exception carved out of *Buehler* in *Ayoub*, *Buehler*, requiring board appointment to a position as a prerequisite to an individual's ability to earn tenure in such position, is controlling herein.

In reply, petitioner avers that notwithstanding the Board's attempts to distinguish the "Guidance Support Services" work performed by petitioner from that of a guidance counselor, such contention is clearly specious. He posits that, "[p]etitioner verified that he performed virtually all of the duties outlined in the job description for guidance counselor which was eventually adopted by the Board in 1987 ([Exhibit] R-8)." (Petitioner's Reply at p. 2) He further contends that it is irrelevant whether or not the possession of a guidance certificate was a Board requirement, as such certification is clearly required by *N.J.A.C.* 11-11.11, "Student personnel services," which under subsection (a) provides

> This endorsement is *required* for *any person* assigned to perform student personnel services such as study and assessment of individual pupils with respect to their status, abilities, interest and needs; counseling with teachers, students, and parents regarding personal, social, educational, and vocational plans and programs; and developing cooperative relationships with community agencies in assisting children and families. (emphasis supplied)
>
> (*Id.* at pp. 8-9)

Petitioner avers that the record substantiates that the duties he performed fall within the purview of this regulation and he cites *DeCesare v. Board of Education of North Bergen*, 1983 *S.L.D.* 680, for the proposition that "[w]hen the duties assigned require certification by law, the work is tenure-eligible, even if no local district requirement for certification exists." (*Id.* at p. 9)

In summary on this issue, petitioner advances

> ***The simple fact is that petitioner and his colleagues were the Guidance Department in Franklin from 1982 through June, 1987. They performed guidance duties as to all of the students in the grades they covered. Not simply as to pupils in their own classes, but as to every pupil who needed help. Petitioner submits that this is the essence of pupil personnel services.*** (*Id.* at p. 10)

With respect to the controlling law in this case, petitioner argues that there is no rational basis for the Board's contention that "decisions prior to the Supreme Court's ruling in *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63 (1982), should be resurrected to amend the Supreme Court's analysis of the standards for tenure accrual.***" (Petitioner's Reply at p. 2) He maintains that the ALJ's determination that cases subsequent to *Buehler, supra,* which was decided in 1970, including *Ayoub, supra,* had rendered *Buehler* inapplicable in this matter was fully correct. Further, he contends that the Board's attempt to distinguish this matter from *Ayoub* based on "bad faith" or any other differentiator is "fruitless." (Petitioner's Reply at. p. 11) Rather, he asserts that the within facts fall squarely within the Commissioner's *Ayoub* analysis wherein he stated

> As to the fact that petitioner's assignment as CIE Coordinator was not effectuated by Board resolution, the Commissioner disagrees with the ALJ that tenure acquisition is thus precluded. As repeatedly stated in case law, tenure is a legislative protection which the Commissioner must [vigilantly] and assiduously guard from erosion, evasion or subterfuge. *That the Board in this matter for 15 years impermissibly abdicated or delegated its power to name the district's CIE Coordinator(s) to the high school principal (with notification thereof from the assistant superintendent) cannot be used as an excuse to prevent petitioner's tenure acquisition*, given that he has served in the position for the requisite period of time under a valid certificate required of the position. *Spiewak, supra.* Thus, the Commissioner is unpersuaded that *Buehler, supra*, should be controlling in this matter, particularly in light of the fact that the Commissioner's holding in that matter relied on his determination in *Zielinski v. Bd. of Ed. of Guttenberg*, 1970 *S.L.D.* 202 rev'd State Board 1972 *S.L.D.* 664, aff'd. N.J. Superior Court, Appellate Division, 1972 *S.L.D.* 692. (See Initial Decision, *ante.*) This determination was subsequently reversed by the State Board as explained by its words below:
>
> > ***[T]he Commissioner also held that [Zielinski's] employment did not come about by "a recorded roll call majority vote of the full membership of the board" as prescribed in *N.J.S.A.* 18A:27-1. Since the tenure statute,

> in describing the periods of service for purposes of tenure, uses the phrase, "******after employment in such district or by such board,*" one must conclude that the Legislature recognized a difference between an employment in a district as distinguished from an employment by a board. An almost identical distinction is recited in *N.J.S.A. 18A:28-4.*
>
> > No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position***.
>
> These statutes lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who taught continuously and performed all the duties of a regular teacher because the formality of a roll call vote may not have been undertaken where, as here, the Board had full knowledge of the details of petitioner's employment, assignment and benefits, and where the actions of its Superintendent were ratified and concurred in by the Board.*** (at 668)
>
> Accordingly, for the reasons stated herein, it is determined that petitioner's removal from his tenured CIE Coordinator position was improper. It is ordered, therefore, that he be reinstated forthwith to such position. (emphasis supplied)
> (Petitioner's Reply at pp. 13-15, quoting *Ayoub*, *supra,* at 950-951)

Petitioner asserts that such discussion of the State Board in *Zielinski*, *supra*, as cited in *Ayoub*, *supra,* "clearly and correctly analyzes the tenure law" (*id.* at p. 15), and is consistent with the Supreme Court's decision in *Spiewak*, *supra.*

Upon a comprehensive, independent review of the record in this matter, including the exception arguments advanced by the parties and transcripts of the hearing conducted at the OAL[2], the Commissioner concurs with the findings and conclusion of the ALJ that petitioner

[2] It is noted that the hearing in this matter transpired on September 17, 1996.

was, in January 1995, entitled by virtue of his tenure to be appointed to the full-time guidance counselor position awarded by the Board to a nontenured individual and he must, therefore, be immediately placed in such position.

In this connection, the Commissioner finds the Board's exception arguments without merit, as he concludes, as did the ALJ, that the record is abundantly clear that petitioner, while properly certified, performed the very duties which guidance counselors perform for the statutorily requisite period of time and, thus, has satisfied the criteria necessary in order to claim tenure to such position pursuant to the Supreme Court's ruling in *Spiewak, supra*. He, likewise, concurs with the ALJ that *Spiewak* and subsequent decisions of the Commissioner have rendered *Buehler, supra,* inapplicable here. In reaching the decision which was compelled in this matter, the Commissioner is mindful, as was the ALJ, of the consequences which could inure to similarly situated boards and, therefore, he strongly urges boards of education to review informal appointments to tenure-eligible positions being made by their administrators.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. The Board is hereby directed to place petitioner in the full-time guidance counselor position to which he was entitled by virtue of tenure, which was improperly awarded by the Board to a nontenured individual.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 28, 1997
DATE OF MAILING APRIL 29, 1997

224-97

EDU #5162-95
C # 224-97
SB # 52-97

GERALD DUDZINSKI,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN, SUSSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, April 28, 1997

For the Petitioner-Respondent, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Stanton, Hughes, Diana, Zucker & Salsberg (Richard K. Salsberg, Esq., of Counsel)

The State Board of Education has reviewed the proposed settlement submitted by the parties in this appeal and finds it to be in accord with the principles expressed in Cardonick v. Board of Education of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. The State Board therefore approves the settlement in this matter.

September 3, 1997

Date of mailing SEP 05 1997

225-97

225-97

DENISE DOCHERTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

APRIL 29, 1997

OAL DKT. NO. EDU 5538-96
AGENCY DKT. NO. 123-4/95

DENISE DOCHERTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 29, 1997
DATE OF MAILING APRIL 29, 1997

226-97

226-97

BUENA PLUMBING, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VO-TECH SCHOOL DISTRICT, BURLINGTON COUNTY AND DEMEGLIO CONSTRUCTION COMPANY,	:	DECISION
RESPONDENTS.	:	

APRIL 29, 1997

OAL DKT. NO. EDU 4894-96
AGENCY DKT. NO. 219-6/96

BUENA PLUMBING, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VO-TECH SCHOOL DISTRICT, BURLINGTON COUNTY AND DEMEGLIO CONSTRUCTION COMPANY,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

APRIL 29, 1997
DATE OF MAILING APRIL 29, 1997

229-97

IN THE MATTER OF THE TEACHING	:	
CERTIFICATE OF CHRISTINE L. COBIN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE SALEM	:	DECISION
COUNTY VOCATIONAL SCHOOL,	:	
SALEM COUNTY.	:	
_____	:	

April 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8448-96

AGENCY DKT. 402-9/96

IN THE MATTER OF THE TEACHING CERTIFICATE OF CHRISTINE L. CORBIN, SALEM COUNTY VOCATIONAL TECHNICAL SCHOOL, SALEM COUNTY,

---

George G. Rosenberger, Jr., Esq., for petitioner
(Butler, Butler & Rosenberger, attorneys)

John D. Jordan, Esq., for respondent

Record Closed: March 4, 1997 Decided: March 11, 1997

BEFORE **EDGAR R. HOLMES,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 25, 1996, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14-F-1 to -13.

The parties have agreed to settle this matter and have set forth the following settlement terms:

The teaching certificate of the respondent is suspended for a period of six months terminating on June 30, 1997. This settlement was effectuated so that the respondent's license suspension would not still be in effect next school year.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

3/11/97
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

3-17-97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 1997
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

lmh

ATTACHMENTS TO SETTLEMENT

C-1 Letter dated 3/3/97 to Judge Holmes from Mr. Rosenberger acceptance of settlement with attachment

C-2 Letter dated 1/3/97 to Judge Holmes from Mr. Rosenberger

C-3 Letter dated 12/23/96 to Judge Holmes from Mr. Jordan advising the matter being settled.

LAW OFFICES

BUTLER, BUTLER & ROSENBERGER

A PROFESSIONAL CORPORATION

279 EAST BROADWAY

P. O. BOX 72

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FACSIMILE 609-935-8335

e-mail ggr@water.waterw.com

HERBERT H. BUTLER
HERBERT H. BUTLER, JR.
GEORGE G. ROSENBERGER, JR.
WILLIAM L. HORNER

MULLICA HILL OFFICE
39 SOUTH MAIN STREET
MULLICA HILL, NEW JERSEY 08062

609-478-4144

March 3, 1997

Honorable Edgar R. Holmes, ALJ
1201 Bacharach Boulevard
Atlantic City, NJ 08401

RE: In the Matter of the Teaching Certificate
of Christine L. Cobin, et al.
OAL Docket No. EDU 8448-96
Agency Docket No: 402-9/96

Dear Judge Holmes:

As you requested by phone, a copy of correspondence from the Board's secretary is enclosed which officially recognizes the Board's acceptance of the settlement proposal. No formal resolution was prepared and the acceptance of the recommended six month suspension was incorporated with the acceptance of the superintendent's report which included this recommendation. Please accept this as sufficient authorization to complete the final settlement documentation which should provide for a six month suspension commencing December 1, 1996. That date is suggested since the settlement conference was held on November 21, 1996 and the December 1 date is simply a convenient reference point to begin the suspension to make sure it does not carry over into the school year beginning September 1, 1997.

I look forward to hearing from you in the near future and trust this documentation will be sufficient for your purposes.

Respectfully yours,

BUTLER, BUTLER & ROSENBERGER

By: George G. Rosenberger, Jr.

GGR/dbp
Enclosure
cc: John D. Jordan, Esquire
William H. Adams, Ed.D.

Vo-Tech R2473-D ltr 6

C1

4 ~

Salem County
Vocational Technical Schools

(609) 769-0101
FAX (609) 769-3602
Office of the Board
of Education

Box 350, Woodstown, NJ 08098-0350

February 21, 1997

Mr. George G. Rosenberger, Jr., Esquire
Butler, Butler & Rosenberger & Farrell
279 East Broadway
P.O. Box 72
Salem, NJ 08079-1188

RE: Christine L. Corbin a/k/a Christine L. Corbin

Dear Mr. Rosenberger:

I am please to report that at its meeting of January 28, 1997 the Salem County Board for Vocational Education accepted your report and recommendation for a six month suspension.

By this letter I certify as Board Secretary to the Salem County Board for Vocational Education that said Board acted at its meeting of January 28, 1997 to accept your recommendation by a unanimous vote.

Sincerely,

James L. Riehman
Business Administrator/Board Secretary

JLR/rs

xc: William H. Adams, Ed.D.

C1a

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WILLIAM L. HORNER

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MULLICA HILL, NEW JERSEY 08062

609-478-4144

January 3, 1997

Honorable Edger R., Holmes, ALJ
1201 Bacharach Boulevard
Atlantic City, NJ 08401

RE: In the Matter of the Teaching Certificate
of Christine L. Cobin, et al
OAL Docket No. EUD 8448-96
Agency Docket No. 402-9/96

Dear Judge Holmes:

I concur with the representations of Mr. Jordan detailed in his letter to you of December 23, 1996. I have recommended this proposal to the School Board and am confident my recommendation will be accepted. Should you need any additional documentation, please advise.

Respectfully yours,

BUTLER, BUTLER & ROSENBERGER

Geo. G. Rosenberger, Jr.

By: George G. Rosenberger, Jr.
Attorney for Salem County
Vocational School Board

GGR/dbp - dictated not read
cc: William H. Adams, Ed.D.
Vo-Tech R2473-D ltr 3

LAW OFFICES
JOHN D. JORDAN
111-113 NORTH BROADWAY
PENNSVILLE, NEW JERSEY 08070

TELEPHONE:
(609) 678-3370

FACSIMILE
(609) 678-2317

December 23, 1996

Honorable Edgar R. Holmes, A.L.J.
1201 Bacharach Boulevard
Atlantic City, NJ 08401

Re: In the Matter of the Teaching Certificate
of Christine L. Cobin, et al
OAL Docket No. EDU 8448-96
Agency Docket No. 402-9/96

Dear Judge Holmes:

I am pleased to advise you that the parties to the above litigation have settled all of the matters raised therein. My client, Christine L. Cobin, agrees to the suspension of her teaching certificate, with the suspension to be effective immediately and terminating June 30, 1997. Essentially, this is a suspension for a six month period which will parallel the balance of the current school year. Accordingly, the Commissioner will not be offended by the suspension of my client's teaching certificate during part of another school year.

As you know, George G. Rosenberger, Jr. represents the Salem County Vocational Technical School, the other party to this matter. If he has not done so already, Mr. Rosenberger will confirm the details of the settlement with you.

Please advise me and Mr. Rosenberger if you need any additional documentation prepared by either of us at this time. Thank you for your cooperation.

Respectfully yours,

John D. Jordan

JDJ/cse

cc: George G. Rosenberger, Jr., Esquire
Ms. Christine L. Cobin

C 3

OAL DKT. NO. EDU 8448-96
AGENCY DKT. NO. 402-9/96

IN THE MATTER OF THE TEACHING	:	
CERTIFICATE OF CHRISTINE L. COBIN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE SALEM	:	DECISION
COUNTY VOCATIONAL SCHOOL,	:	
SALEM COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law with the parties' stipulation of settlement have been reviewed.

Initially, the Commissioner notes that the terms of the instant settlement appear to have already been effectuated, in that respondent's period of proposed suspension is nearly complete. In this regard, the Commissioner stresses that settlements of controverted matters are of no force or effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1. However, in that the Board and respondent have agreed that suspension of respondent's certificate until June 30, 1997, is appropriate resolution to this matter, the Commissioner will not reject the proposed settlement and hereby forwards this matter to the State Board of Examiners for its immediate suspension of respondent's certificate through June 30, 1997.

In reaching this determination, the Commissioner reminds boards of education and teaching staff members that they may not, themselves, effectuate a suspension of certificate for wrongful cessation of performance of duties pursuant to *N.J.S.A.* 18A:26-10,

absent an order from the Commissioner or a voluntary surrender to the State Board of Examiners, of which there is no evidence in the present record.

Accordingly, the matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision is being forwarded forthwith to the State Board of Examiners so that it may take immediate action with respect to respondent's certificate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

231-97

231-97

MELINDO PERSI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, Superintendent of Schools, claimed entitlement to indemnification for legal costs, pursuant to *N.J.S.A.* 18A:16-6.1, for defending criminal municipal court charges which were ultimately dismissed.

ALJ concluded that petitioner met the two-prong indemnification test as the criminal charges against him were dismissed with the final disposition of the charges in his favor and the alleged criminal actions were found to have arisen out of and in the course of the performance of the duties of his employment as superintendent. ALJ ordered the Board to reimburse petitioner for the reasonable counsel fees and expenses incurred by him in defending all of the criminal charges. The ALJ, however, ordered that the Board should not reimburse petitioner for the counsel fees and costs relating to the verified petition since the Commissioner does not have jurisdictional powers to award counsel fees and costs in controversies and disputes presented to him under *N.J.S.A.* 18A:6-9.

Commissioner adopted findings and determination in initial decision as his own with the clarification that the Commissioner concluded that the *charges* against petitioner (not his alleged criminal *actions*) arose out of and in the course of performing his duties as a superintendent. Commissioner ordered reimbursement to petitioner for reasonable counsel fees and expenses incurred by him in defending the criminal charges pursuant to *N.J.S.A.* 18A:16-6.1. Commissioner concurred with the ALJ that he is not entitled to reimbursement for the costs of bringing the petition herein.

MAY 5, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9263-95

AGENCY DKT. NO. 297-7/95

MELINDO PERSI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,

Respondent.

Patrick C. English, Esq., for petitioner (Dines and English, attorneys)

Matthew P. DeMaria, Esq., for respondent

Record Closed: March 3, 1997 Decided: March 18, 1997

BEFORE **MARIE P. SIMONELLI**, A.L.J.:

STATEMENT OF THE CASE

Petitioner, Melindo Persi (Mr. Persi), seeks indemnification from respondent, Board of Education of the Borough of Elmwood Park, Bergen County (the Board), for legal fees, expenses and costs incurred by him in defending criminal municipal court charges and for fees and costs incurred in this matter, pursuant to *N.J.S.A.* 18A:16-6.1.

PROCEDURAL HISTORY

On July 26, 1995, Mr. Persi filed a Verified Petition. On July 28, 1995, the Board filed an Answer. On August 15, 1995, the Department of Education transmitted this matter to the Office of Administrative Law (the OAL) for a hearing as a contested case. The OAL scheduled a hearing for May 9 and 10, 1996. At the request of the parties, the undersigned adjourned the hearing to January 29 and 30, 1997.

Prior to the hearing date, the parties requested that the undersigned decide this matter on the papers. On October 17, 1996, Mr. Persi submitted his papers. On December 23, 1996, the Board submitted its papers. On January 31, 1997, Mr. Persi submitted his reply. On March 3, 1997, the Board submitted its reply. The record closed on March 3, 1997, after the submission of all papers.

FACTS

Having read and considered all of the papers submitted by the parties, I **FIND** the following **FACTS**:

From June 1, 1992 until October 31, 1994, the Board employed Mr. Persi as Superintendent of Schools. At the time the Board hired Mr. Persi, he and the Board executed an Employment Contract which contains the following provision:

> 7. PROFESSIONAL LIABILITY
>
> A. The Board agrees that it shall defend, hold harmless, and indemnify the Superintendent from any and all demands, claims, suits, actions, and legal proceedings brought against the Superintendent capacity [*sic*] or in his official capacity as agent and/or employee of the board, provided the incident arose while the Superintendent was acting within the scope of his employment; or as part of his duties, and, as such, liability coverage is within the authority of the Board to provide under state law.

The Board held a public meeting on October 11, 1994 at Elmwood Park High School. Mr. Persi claims that a certain Board member, Thomas LaPorte (Mr. LaPorte), acted abusively toward him during that meeting. Mr. Persi also claims that, after the meeting, Mr. LaPorte followed him down a hallway to a set of stairs, "continuing his haranguing." The parties seem to agree that the two were engaged in some type of argument at the time. It must be noted at this point that there can be no serious dispute that Mr. Persi and Mr. LaPorte did not have a cordial relationship and that they did not have any contact or dealings with each other outside the business of the Elmwood Park School District.

Although the parties disagree about what happened between Mr. Persi and Mr. LaPorte in the stairway, the parties do not dispute that on October 12, 1994, Mr. LaPorte caused a Complaint to be filed against Mr. Persi in the Elmwood Park Municipal Court. Mr. LaPorte alleged that on October 11, 1994, Mr. Persi assaulted him by throwing a large heavy box at him, striking him in the head, neck and shoulder in violation of *N.J.S.A.* 2C:12-1(a)(1).

On October 21, 1994, Mr. LaPorte caused five more Complaints to be filed against Mr. Persi. One alleges that Mr. Persi had assaulted Mr. LaPorte on September 1, 1994, by striking him in the left shoulder with a door, in violation of *N.J.S.A.* 2C:12-1(a)(1); one alleges that Mr. Persi harassed Mr. LaPorte on October 12, 1994, in violation of *N.J.S.A.* 2C:33-4; one alleges that Mr. Persi harassed Mr. LaPorte on September 1, 1994, in violation of *N.J.S.A.* 2C:33-4; one alleges that, on September 1, 1994, Mr. Persi purposefully prevented Mr. LaPorte, a public servant, from performing an official function by means of intimidation, in violation of *N.J.S.A.* 2C:29-1; and one alleges that Mr. Persi harassed Mr. LaPorte on October 11, 1994, in violation of *N.J.S.A.* 2C:33-4.

With respect to the allegations concerning the incident that occurred on September 1, 1994, Mr. LaPorte had gone to the High School to conduct his own investigation of a certain matter. That matter involved Mr. Persi's investigation of a student who allegedly lived outside the District and was improperly registered as a student at the High School. Mr. Persi had scheduled a meeting with the student in question. Mr. LaPorte demanded to be present at that meeting. Mr. LaPorte allegedly became abusive and belligerent when Mr. Persi advised him that

he would not be permitted to attend the meeting because it was an administrative matter that only Mr. Persi was authorized to handle.

On October 10, 1996, Mr. LaPorte also filed a Complaint for damages against Mr. Persi in the Superior Court of New Jersey, Law Division, Bergen County. That Complaint stems from the conduct underlying the criminal charges against Mr. Persi. That Complaint, however, has not been served on Mr. Persi.

On October 21, 1994, Mr. Persi caused four Complaints to be filed against Mr. LaPorte: one alleges that Mr. LaPorte harassed Mr. Persi on September 1, 1994, in violation of *N.J.S.A.* 2C:33-4; one alleges that Mr. LaPorte harassed Mr. Persi on October 11, 1994, in violation of *N.J.S.A.* 2C:33-4; one alleges that, on September 1, 1994, Mr. LaPorte purposefully prevented Mr. Persi, a public servant, from performing an official function by means of intimidation, in violation of *N.J.S.A.* 2C:29-1; and one alleges that Mr. LaPorte harassed Mr. Persi on October 12, 1994, in violation of *N.J.S.A.* 23:33-4.

Mr. Persi denied all of the charges filed against him. On October 24, 1994, Mr. Persi requested that the Board indemnify him. On December 8, 1994, the Board notified Mr. Persi that its insurance carrier had denied coverage under the Board's Commercial General Liability Policy. The insurance carrier denied coverage because the insurance policy did not cover criminal claims.

Mr. Persi proceeded to defend himself against the criminal Complaints and to prosecute the Complaints against Mr. LaPorte. A private attorney, Patrick C. English, Esq., represented Mr. Persi. Another private attorney, Thomas J. Duch, Esq. (Mr. Duch), represented Mr. LaPorte. There is a dispute as to what happened with the charges. Mr. English states in paragraph 4 of his Affidavit, dated October 15, 1996, that "On March 15, 1995 the charges were dismissed." In paragraph 4 of his Affidavit, dated December 19, 1996, Mr. Duch states that

> ... both parties voluntarily withdrew complaints. There was no adjudication, no finding of facts or conclusions, nor any finding of guilt by the Court.
>
> There was no dismissal or a final disposition in favor of ... Mr. Persi. There was, however, an acknowledgment of apology offered on the record on behalf of [Mr. Persi] to Mr. LaPorte.

In a Supplemental Affidavit, dated January 30, 1997, Mr. English states as follows:

> The charges against Mr. Persi were dismissed by Judge William H. Schmidt, by consent. There was absolutely no "public apology on the record" by Mr. Persi. Mr. LaPorte demanded such an apology, on the record, and it was not given. Mr. LaPorte first objected, then consented to the withdrawal of the charges which we were fully prepared to defend and to which Mr. Persi had plead Not Guilty. However, Mr. LaPorte did not have the right to simply withdraw the charges. It is a legal requirement that the Court dismiss them technically, the dismissal was on the Motion of the Prosecutor, who participated in "in-Chambers" discussion. [Emphasis in original.]

In paragraph 3 of his Affidavit, dated February 28, 1997, the Board's attorney conceded, in pertinent part, that:

> ... On the date scheduled for hearing ... , the parties mutually agreed to withdraw or allow dismissals of the Complaint, one against the other. Very simply, there was an agreement by parties not to pursue their Complaints. The Court agreed. Therefore, there was a dismissal placed on the record by Municipal Court Judge Schmidt.

On April 21, 1995, Mr. Persi again requested indemnification from the Board. The Board again declined Mr. Persi's request The Board claims that Mr. Persi's criminal acts against Mr. LaPorte were not within the scope of the Mr. Persi's employment as Superintendent, nor were his actions considered part of the his duties as Superintendent. The Board also claims that Mr. Persi was acting outside his capacity as Superintendent and not within his Superintendent duties as defined by law or by his job description. The Board further claims that Mr. Persi was not exculpated of the charges against him. The charges merely were mutually withdrawn and dismissed and there was no adjudication of those charges on the merits.

Mr. Persi then filed his Verified Petition. He seeks indemnification for all fees, expenses and costs incurred by him in defending against the criminal Complaints, plus the costs of bringing the Verified Petition.

DISCUSSION AND CONCLUSION

It is necessary to state at this time that this proceeding is limited to the issues set forth in the Verified Petition transmitted to the OAL by the Department of Education. Those issues are whether are not Mr. Persi is entitled to indemnification for the legal fees, expenses and costs incurred by him as a result of the criminal Complaints filed against him and the legal and fees and costs incurred by him in bringing the Verified Petition. Since this tribunal has no jurisdiction to hear criminal matters, this proceeding cannot and will not involve a determination of whether either Mr. Persi and/or Mr. LaPorte are guilty or innocent of the criminal charges each caused to be filed against the other.

The terms of Mr. Persi's Employment Contract with the Board notwithstanding, indemnification of school board employees involved in criminal actions is governed by *N.J.S.A.* 18A:16-6.1, which provides:

> Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

This statute requires that the criminal proceeding must be dismissed or result in a final disposition in favor of the charged employee. In *DelRossi v. DHS,* 256 *N.J. Super.* 286, 293 (App. Div. 1992), the Appellate Court stated that:

> Criminal charges are disposed of by trial resulting in acquittal or conviction, entry of a guilty plea resulting in conviction, *dismissal of the charges either on defendant's motion or at the request of the prosecuting authority (equivalent perhaps to an acquittal)* or dismissal of the charges through PTI or similar programs that avoid an adjudication of guilt or innocence. [Emphasis added.]

In *Cressinger v. Bd. of Ed.*, 256 *N.J. Super.* 155, 156 (App. Div. 1992), *cert. den.*, 130 *N.J.* 394 (1992), the Appellate Court stated:

> In *Rubin v. Nowak*, 248 *N.J. Super.* 80, 83, 590 *A.2d* 249 (App. Div. 1991), we held that administrative dismissal of a criminal charge by the prosecutor pursuant to *R.* 3:25-1 was a favorable termination of a criminal proceeding for the purpose of supporting plaintiff's action for malicious prosecution.

There is no dispute in the present case that the criminal charges against Mr. Persi were dismissed. *N.J.S.A.* 18A:16-6.1 requires either a dismissal or a final disposition in favor of the charged employee. By virtue of the holding in *DelRossi*, a dismissal is equivalent to an acquittal. By virtue of the holding in *Cressinger*, a dismissal also is a favorable termination of a criminal proceeding against the person charged. *See also, Bower v. Bd. of Ed. of City of East Orange*, 287 *N.J. Super.* 15, 22 (App. Div. 1996) (the dismissal of an indictment with prejudice constitutes a final disposition in favor of the person indicted).

I, therefore, **CONCLUDE** that Mr. Persi has met the first prong of the test as to whether or not he is entitled to indemnification under *N.J.S.A.* 18A:16-6.1. The criminal charges against him were dismissed and there was a final disposition of those criminal charges in his favor.

To be entitled to reimbursement for legal fees and expenses under *N.J.S.A.* 18A:16-6.1, Mr. Persi must meet the second prong of the test. He must show that his actions arose out of and in the course of the performance of the duties of his employment as Superintendent. *Bower, supra; Scirrotto v. Warren Hills Bd. of Ed.*, 272 *N.J. Super.* 391 (App. Div. 1994); *Cressinger* at 155. This prong of the test also will cover the obligation of the Board under Paragraph 7 of Mr. Persi's Employment Contract.

The Board argues that Mr. Persi was not acting in the scope of his duties as Superintendent when he allegedly committed the criminal acts against Mr. LaPorte. The Board also argues that Mr. Persi's job description did not contemplate or include his alleged acts against Mr. LaPorte. Mr. Persi argues that all of the criminal charges arose directly from the performance of his duties as Superintendent. He also argues that all of the incidents occurred while he was performing his duties as Superintendent and that they occurred on District property. He further argues that he had no contact with Mr. LaPorte, except for matters concerning the business of the District.

In *Bower*, a Grand Jury returned an indictment against Bower, a tenured kindergarten teacher, for aggravated sexual assault and endangering the welfare of children. The incidents allegedly took place during school hours, on school property and against Bower's students. A Superior Court Judge dismissed the indictment without prejudice. Another Grand Jury returned a second indictment against Bower on the same charges. A Superior Court Judge dismissed the second indictment with prejudice. 287 *N.J. Super.* at 18-19.

Prior to the dismissal of the second indictment, Bower had filed a petition with the Commissioner of Education for indemnification under *N.J.S.A.* 18A:16-6.1. An Administrative Law Judge denied indemnification and the Commissioner affirmed that denial. The State Board of Education eventually upheld the Commissioner's denial and Bower appealed to the Superior Court, Appellate Division. *Id.* at 19-20. The main issue on appeal was whether Bower's alleged conduct leading to the criminal charges arose out of and in the course of the performance of his duties as a kindergarten teacher. *Id.* at 22.

The problem faced by the Appellate Court in *Bower* was that it was never established on the merits that Bower had engaged in aggravated sexual assault on and endangering the welfare of his students. Rather than focus on Bower's alleged conduct, the Appellate Court examined the charges which provided the basis of Bower's criminal prosecution to see if those charges arose out of and in the course of his employment. In so doing, the Appellate Court looked to the area of workers' compensation for guidance and it referred to the case of *Coleman v. Cycle Transformer Corp.*, 105 *N.J.* 285 (1986). *Id.* at 30.

The Appellate Court noted that, in *Coleman*, the Supreme Court construed the term "arising out of" to mean casual origin and the term "course of employment" to mean time, place and circumstances of the incident in relation to employment. *Coleman* also amplified the definition of "arising out of employment" as follows:

> The accident, in order to arise "out of" the employment, must be of such nature the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it. A risk is incidental to employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. [Citations omitted.]
>
> [*Id.* at 31.]

The Supreme Court in *Coleman* also stated that the "but for" test applies and that,

> [u]nder the "but for" test, an injury arises out of employment if it is more probable that the injury would *not* have occurred under the normal circumstances of everyday life outside of the employment. ... [Citation omitted. Emphasis in original.]
>
> [*Id.* at 31.]

The Appellate Court in *Bower* stated that this same test applies to criminal charges that ultimately are dismissed. That test is that:

> [t]he criminal charges, in order to arise "out of" the employment, must be of such nature the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it. A risk is incidental to the employment when it belongs to or is connected with what a [teacher] has to do in fulfilling his contract of service.
>
> [*Id.* at 32.]

In applying the reasoning in *Coleman* to the facts in *Bower*, the Appellate Court held that Bower's alleged conduct met the standard of "arising out of and in the course of employment" as required by *N.J.S.A.* 18A:16-6.1, and that that conduct was unique to and a function of Bower's profession. The alleged conduct occurred during school hours in the school where Bower taught and the alleged victims were Bower's students. The acts allegedly occurred during a time when the alleged victims were under Bower's tutelage in his capacity as their teacher. *Id.* at 31-33. The Appellate Court further stated:

> We conceive that a teacher may be at risk for allegations of improper conduct, and even criminal conduct, in a setting in which he or she is exposed to the imagination of an immature student population. We think it would be highly improper to require a teacher to defend against the charge of criminal conduct which is withdrawn by the accuser or which is dismissed with prejudice by a court where the alleged improper conduct clearly arose because of the teacher's status. Said differently, but for the teaching relationship, or the teacher's proximity to an alleged victim, the allegations would not have been filed in the first instance.
>
> [*Id.* at 32.]

Thus, the Appellate Court concluded that Bower was entitled to be reimbursed for the fees and expenses he incurred in defending the two indictments.

In Mr. Persi's case, his alleged criminal actions on September 1, 1994, occurred on school property during normal school hours while he was conducting an administrative investigation of an alleged non-resident student. He clearly was acting in his capacity as Superintendent at the time and his alleged actions clearly arose because of his status as Superintendent. I, therefore, **CONCLUDE** that since Mr. Persi's actions on September 1, 1994, arose out of and in the course of the performance of the duties of his employment as Superintendent, he is entitled to reimbursement for reasonable counsel fees and expenses incurred by him in defending the criminal charges relating thereto under *N.J.S.A.* 18A:16-6.1.

Mr. Persi's alleged criminal actions on October 11, 1994, also occurred on school property. Although those actions did not occur during normal school hours, they occurred directly after a public Board meeting that Mr. Persi attended in his capacity as Superintendent. The incident also was an extension of matters that apparently occurred at the meeting between Mr. Persi and Mr. LaPorte. They clearly had an argument after the meeting about something that had occurred during the meeting. Mr. Persi would not have been at the Board meeting "but for" the requirement of his job description that he attend and participate in all Board meetings. (*See* Job Description, p. 2, attached as an Exhibit to the Affidavit of Joseph Casapulla, dated December 19, 1996.) Thus, Mr. Persi's alleged criminal actions clearly were connected with what he was doing to fulfill his job duties. I, therefore, **CONCLUDE**, that since Mr. Persi's actions on October 11, 1994, arose out of and in the course of the performance of the duties of his employment as Superintendent, he is entitled to reimbursement for reasonable counsel fees and expenses incurred by him in defending the criminal charges relating thereto pursuant to *N.J.S.A.* 18A:16-6.1.

Mr. Persi also seeks reimbursement for counsel fees and costs relating to the Verified Petition. Jurisdiction of the Commissioner is set forth in *N.J.A.C.* 18A:6-9 which provides, in pertinent part:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws. ...

While the courts have "repeatedly reaffirmed the great breadth" of the Commissioner's power, that power it not limitless. *Henfrey v. Matawan Regional Bd. of Ed.*, 77 *N.J.* 514, 524 (1978). One area specifically excepted from the Commissioner's jurisdictional powers is the power to award counsel fees and costs in controversies and disputes presented to him under *N.J.S.A.* 18A:6-9. *Balsely v. No. Hunterdon Bd. of Ed.*, 117 *N.J.* 434, 442-443 (1990); *Lilenfield v. Bd. of Ed. of Watchung*, 1977 *S.L.D.* 315, 323; *Watsula v. Bd. of Ed. of Plumstead*, 1977 *S.L.D.* 692, 695. The Commissioner also lacks jurisdiction over contractual disputes, such as Mr. Persi's Employment Contract. *Picogna v. Bd. of Ed. of Cherry Hill Twp.*, 249 *N.J. Super.* 332 (App. Div. 1991); *So. Orange-Maplewood Ed. Ass'n v. Bd. of Ed. of South Orange*, 146 *N.J. Super.* 457 (App. Div. 1977); *Newark Teacher's Union v. Bd. of Ed. of Newark*, 149 *N.J. Super.* 367 (Ch. Div. 1977). Since the Commissioner does not have the power to award counsel fees and costs or determine contract disputes, the undersigned also does not have this power.

Based upon the foregoing, I **CONCLUDE** that counsel fees and costs relating to the Verified Petition cannot be awarded to Mr. Persi by the undersigned.

ORDER

I, therefore, **ORDER** that the Board shall reimburse Mr. Persi for the reasonable counsel fees and expenses incurred by him in defending all of the criminal charges. I further **ORDER** that the Board shall not reimburse Mr. Persi for the counsel fees and costs relating to the Verified Petition.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 18, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

March 21, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 25 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 9263-95
AGENCY DKT. NO. 297-7/95

MELINDO PERSI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and the replies thereto were filed pursuant to *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board essentially renews its arguments raised before the Administrative Law Judge (ALJ), again contending that petitioner has not satisfied the two-pronged test for indemnification under *N.J.S.A.* 18A:16-6.1. The Board argues that the dismissal of the criminal charges against petitioner by virtue of their mutual consent to a withdrawal does not constitute a favorable disposition for petitioner. (Board's Exceptions at p. 2) Additionally, the Board maintains that petitioner does not meet the second prong of the test since "***it is difficult to agree that the alleged conduct of the petitioner in throwing a box or slamming a door would be 'contemplated by a reasonable person' as *** conduct arising out of the performance of his job duties." (*Id.*, citing *Powers v. Union City Board of Education,* 124 *N.J. Super.* 590 (Law Div. 1973))

Petitioner counters that a dismissal of charges with prejudice is a disposition in favor of the person charged. (Petitioner's Reply at p. 1) As to the second prong of the indemnification test, petitioner maintains that, in his affidavit, he analyzed each of the complaints brought against him. He avers that his "factual assertions *** were completely un-rebutted," (*id.* at p. 2) and, thus, reasons that the findings of the ALJ were amply supported by the record.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioner has demonstrated that he satisfies the statutory requirements found at *N.J.S.A.* 18A:16-6.1, so as to be entitled to indemnification for reasonable legal fees incurred by him in defending against the criminal complaints filed by Thomas LaPorte. In so determining, the Commissioner concurs with the ALJ that petitioner satisfies the first prong of the two-pronged test for indemnification, in that the criminal charges against him were dismissed, and said dismissal constitutes a favorable disposition to petitioner. (Initial Decision at p. 7)

As to the second prong of the test, the Commissioner finds instructive the distinction created by the *Bower* court with respect to petitioners seeking indemnification for legal expenses involved in defending criminal cases which are fully adjudicated, versus those cases that are not fully adjudicated, as in the instant matter. The *Bower* court opined,

> We think that there is a need to distinguish those cases in which an act is alleged and a school employee is vindicated after trial, such as *Powers*, from those cases in which an allegation of misconduct is asserted against an employee and the charge is withdrawn or dismissed prior to trial. In the latter set of cases, there will be no findings of fact concerning the actual conduct of the defendants.*** (*Bower, supra,* at 26)

The Appellate Division therein relied upon the rationale articulated by the Supreme Court in *Valerius v. Newark*, 84 *N.J.* 591 (1980),* a matter concerning the right to indemnification of legal fees for police officers under *N.J.S.A.* 40A:14-155. The *Bower* court

> *** read *Valerius* to advocate an examination not of the official's alleged conduct, but of the *charges which provide the basis of a criminal prosecution when those charges are dismissed for reasons other than the merits.* That case suggests that a public official should be indemnified for attorney's fees if the charges -- not the official's actual conduct -- "arise out of and in the course of employment." (emphasis added) (*Bower* at 30)

As noted by the ALJ, the *Bower* court then interpreted "arising out of and in the course of employment," in accordance with the reasoning in *Coleman*, *supra*, holding that the charges against Bower arose out of his status as a teacher, inasmuch as Bower's alleged victims were his students and the alleged criminal acts occurred during the school day, and upon school premises. (*Bower* at 33)

Similarly, in the instant matter, the criminal charges against petitioner were dismissed prior to trial; there are no findings of fact as to petitioner's *actual* conduct. Therefore, like *Bower*, it is appropriate to examine the charges which provided the basis of the criminal prosecution. Here, the charges for assault (*N.J.S.A.* 2C:12-1(a)(1)), harassment (*N.J.S.A.* 2C:33-4) and obstructing the administration of law or other governmental function (*N.J.S.A.* 2C:29-1) arose from petitioner's status as a superintendent. That a school district superintendent in the performance of his contractual duties could draw the ire of the public *is* a risk incidental to his employment. (*Bower* at 31) The alleged criminal acts occurred, in one instance, in the course of

* The Appellate Division also noted that the net result of *Valerius* had been rendered obsolete by subsequent legislation which eliminated indemnity for charges arising from acts outside the scope of police duties, but occurring in the course of performance of those duties, as well as for "status charges," and confining coverage to those instances where an officer "is a defendant *in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his official [police] duties****." (emphasis in text) (*Bower* at 29, citing amendment to *N.J.S.A.* 40A:14-155)

the school day and, in the second instance, following a board meeting at Elmwood Park High School. In accordance with *Bower's* reasoning, but for the administrative relationship, or petitioner's proximity to LaPorte, the allegations would not have been filed in the first instance. (*Id.* at 32)

Accordingly, the initial decision of the ALJ is adopted and clarified to the extent that the Commissioner concludes that the *charges* against petitioner, stemming from the September 1, 1994 and the October 11, 1994 incidents, arose out of and in the course of performing his duties as a superintendent. Therefore, having satisfied both prongs of the test, he is entitled to reimbursement for reasonable counsel fees and expenses incurred by him in defending the criminal charges, pursuant to *N.J.S.A.* 18A:16-6.1. He is not, however, for the reasons expressed by the ALJ, entitled to reimbursement for the costs of bringing the within action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 5, 1997
DATE OF MAILING MAY 5, 1997

232-97

232-97

J.D. AND F.D., on behalf of J.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents sought to have their son's (J.D.) suspension expunged. High School student J.D. was suspended for three days for setting off a fire alarm in his school.

Relying on testimony of witnesses and the credibility of J.D., the ALJ found that the three-day suspension was a minor punishment for a serious offense. Board's action was presumed to be valid; petitioners did not show that said action was arbitrary, capricious or unreasonable. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

MAY 5, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6590-96

AGENCY REF. NO. 185-5/96

J. D. and F. D. ON BEHALF OF J.D.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,

Respondent.

J. D., parent, on behalf of **J.D,** petitioner

Bruce Gorman, Esq., for respondent

Record Closed: February 13, 1997 Decided: March 20, 1997

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner was suspended for three days for setting off a fire alarm in his school. He requested a hearing before the Commissioner of Education and the matter was transmitted to the

Office of Administrative Law (OAL) to be heard as a contested case, pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15, the act creating the OAL, N.J.S.A. 52:14F-1 to -13.

J.D. is a 16 year old 9th grade student at Wildwood High School. On January 24, 1996, a regular school day, at approximately 2:09 p.m., J.D. pulled the handle on a fire alarm box inside the school and drove 750 people, both students and employees, including persons with special needs, into a driving rainstorm. He said it was an accident.

The principal, Walter Dull interviewed many students. Two told him that J.D. planned in advance to pull the alarm. There was no otherwise legally competent evidence to corroborate these statements so that an ultimate finding of fact cannot be made in reliance upon them as to J.D.'s intention. *N.J.A.C.* 1:1-15.5. It was the principal who described the seriousness of J.D.'s actions during the rainstorm.

Betty Harshaw is a Physical Education Instructor at the school. When she heard the fire alarm on January 24, 1996, she got everyone in the gym out of the building. As she was standing in the door escorting her students through the door, J. told her he pulled the alarm accidentally.

Lt. Neill, a fire fighter got the call on January 24, 1996. He determined that the box by the gym was the source of the alarm. He reset it. It is the one J. D. says he pulled accidentally.

The fire alarm box is a red box with a pull handle encased by a metal grill. The grill defends the box from accidental encounters with the lever. One has to insert one's hand into the grill in order to pull the lever to set off the alarm.

This case can be decided solely on the credibility of J.D. He admitted that he set off the alarm but claimed it was accidental. In his opening remarks he said he "was leaning on the fire box and it went off." He said he "slipped."

During his actual testimony he stated that he was talking to someone, "leaned over real fast and his hand went over the casing he slipped and his hand went in and pulled the alarm down."

In the space of a very few minutes J.D. gave two versions of the event. First he was "leaning on the box" when his hand slipped and set off the alarm. His second version was that he slipped and his hand went into the box and pulled the lever down.

I believe J.D. only when he said he was very scared. I do not believe that this was an accident.

In part J.D. is relying on the fire department acceptance of the event as an "accident." That may only mean that it did not want to file criminal charges against him as a juvenile.

A three day suspension is a minor punishment for so serious an offense. Any one of the persons evacuated could have been injured in the wet conditions that prevailed in the street. This was also a major interruption in the educational process that day. Who knows what great insight was interrupted or lost forever when the fire alarm began to clang. In such matters the Board of Education's action is presumed to be valid and the petitioner must show the action was arbitrary and unreasonable. *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327,332 (App. Div. 1965); *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

I **AFFIRM** the action of the Wildwood Board of Education which suspended the petitioner for three days.

Accordingly the petition filed herein is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/20/97
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

3/25/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

J.D.

FOR RESPONDENT:

WALTER DULL

BETTY HARSHAW

LT. NEILL

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

NONE

FOR RESPONDENT:

R-1 STATEMENT OF T.T.

R-2 STATEMENT OF N.M.

R-3 THROUGH R-6 PHOTOS OF FIRE BOX

OAL DKT. NO. EDU. 6590-96
AGENCY REF. NO. 185-5/96

J.D. AND F.D., on behalf of J.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and relying upon the credibility determinations rendered by the Administrative Law Judge (ALJ), the Commissioner concurs that petitioners have failed to establish that J.D.'s suspension for three days, under the circumstances herein, was arbitrary, capricious, unreasonable, or otherwise improper.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 5, 1997
DATE OF MAILING MAY 5, 1997

233-97

DOMINICK J. CICALA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

MAY 5, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

RETURNING CASE TO AGENCY

OAL DKT. NO. EDU 4852-96

AGENCY DKT. NO. 156-4/96

DOMINICK J. CICALA,

Petitioner,

v.

NEW JERSEY

STATE BOARD OF EXAMINERS,

Respondent.

Dominick J. Cicala, petitioner, appearing *pro se*

Geraldine Callahan, DAG, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: March 13, 1997 Decided: March 21, 1997

BEFORE **BARBARA A. HARNED** ALJ:

STATEMENT OF THE CASE

In this matter petitioner, Dominick J. Cicala, is contesting the denial of his application for certification as a Teacher of Skilled Trades by respondent New Jersey State Board of Examiners. The denial was based on petitioner's conviction for homicide. By letter dated January 31, 1996, the

Secretary to the Board of Examiners notified Mr. Cicala that the Board had voted to deny issuance of the certificate because "[i]t is at this time unable to find that you are sufficiently rehabilitated to be entrusted with the care of school children." On April 29, 1996, Mr. Cicala filed a Petition with the Commissioner of Education, challenging the Board's denial of his application for certification. Mr. Cicala included with his Petition documents concerning his rehabilitation which he had not submitted to the State Board and which were not therefore considered by the Board when it issued its decision.

On June 14, 1996, the Commissioner of Education transmitted the Petition to the Office of Administrative Law for determination as a contested case. *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. A prehearing conference was held on August 19, 1996. During that conference, counsel for respondent Board argued that the standard for reviewing the Board's denial is whether it was arbitrary, capricious or an abuse of discretion. Counsel also argued that under that standard of review, the proceeding before the Commissioner of Education is not a *de novo* hearing and the only evidence which may be introduced in this proceeding is that which was submitted and reviewed by the Board. Mr. Cicala contended, however, that he is entitled to a *de novo* hearing and to present any relevant evidence as to his rehabilitation regardless of whether that evidence was submitted to the Board. Following the conference, a prehearing order was entered which established a briefing schedule for these issues and a hearing date of December 18 and 19, 1996.

Respondent Board submitted a brief on August 30, 1996. However, Mr. Cicala asked for an extension of time within which to file his brief and adjournment of the December hearing date as a result of family health problems. With no objection from the Board, Mr. Cicala's requests were granted and an amended prehearing order was entered on December 20, 1996. Mr. Cicala filed his brief on January 14, 1997. The Board filed its responsive brief on January 22, 1997. The hearing was rescheduled for March 20 and 21, 1997.

On March 7, 1997, the undersigned issued an Order which determined that the standard for review in this matter was whether the decision of the Board was arbitrary or capricious; that, therefore, the hearing is not a *de novo* proceeding and petitioner may not introduce evidence beyond that which was submitted to the Board. In a cover letter, however, the following regulation was brought to the attention of the parties:

> [w]hen the Office of Administrative Law acquires jurisdiction over a matter that arises from a State agency's rejection of a party's application, and at the hearing the party offers proofs that were not previously considered by the agency, the judge may either allow the party to amend the application to add new contentions, claims or defenses or, if considerations of expediency and efficiency so require, the judge shall order the matter returned to the State agency. If the matter is returned to the agency and thereafter transmitted for hearing, the agency's response to any new contentions, claims or defenses shall be attached to the transmittal form required by *N.J.A.C.* 1:1-8.2.

The cover letter further advised the parties that pursuant to this regulation it appeared that the matter should be returned to the Board for consideration of the additional materials submitted by petitioner but that oral argument would be held before that action was taken. Oral argument by telephone conference call was held on March 13, 1997. An oral decision was rendered on that day returning the matter to the Board with the intent of subsequently entering this written Order. As a result of the oral decision, the hearing scheduled for March 20 and 21, 1997 was canceled.

DISCUSSION

At oral argument petitioner argued that under the above-quoted regulation, the matter should be returned to the Board for consideration of the additional materials he had submitted. Counsel for the Board, however, argued that the regulation did not apply to the instant proceeding but only to those proceedings wherein *de novo* review is available. There is no language in the regulation limiting its applicability to *de novo* proceedings. All the regulation requires is that the proceeding be one which "arises from a State agency's rejection of a party's application" during which "the party [at the hearing] offers proofs that were not previously considered by the agency. *N.J.A.C.* 1:1-3.2(b). This proceeding is a rejection by the Board, a state agency, of petitioner's application for teacher certification. In addition, petitioner has offered "proofs not previously considered by the agency." While the proofs were not actually offered at the hearing, to deny application of the regulation on this basis would be elevating form over substance. It is also more expedient and efficient for the matter to be returned to the agency at this time for consideration of the additional proofs submitted by petitioner rather than requiring that he submit a second application with the additional materials.

CONCLUSION AND ORDER

For the reasons discussed above **I CONCLUDE** and **ORDER** that this matter be returned to the New Jersey State Board of Examiners for consideration of the materials submitted by petitioner in his petition filed with the Commissioner of Education from the denial by the Board of his application for certification as a Teacher of Skilled Trades.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

BARBARA A. HARNED, ALJ

Receipt Acknowledged:

3/25/97

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 1997

Barbara A Harned

DATE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 4852-96
AGENCY DKT. NO. 156-4/96

DOMINICK J. CICALA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge that, inasmuch as the standard of review for the matter before him is whether the State Board of Education's decision, issued on January 31, 1996, was arbitrary and capricious, and said standard does not permit a *de novo* hearing, petitioner may not introduce evidence of rehabilitation which was not considered by the State Board of Examiners in rendering its decision.

Accordingly, the within petition appealing the State Board of Examiners' decision of January 31, 1996, is dismissed without prejudice to petitioner's right to appeal, if he so chooses, any subsequent determination by the State Board of Examiners with respect to his reapplication for certification. Petitioner is hereby noticed that he may reapply to the State Board of Examiners for certification as a Teacher of Skilled Trades, and, in so doing, may present to the Board any and all evidence of rehabilitation, in accordance with pertinent State Board of Examiner guidelines.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 5, 1997
DATE OF MAILING MAY 5, 1997

235-97

C #235-97L
SB # 53-97

IN THE MATTER OF THE DISTRIBUTION :
OF LIQUID ASSETS UPON DISSOLU- :
TION OF THE UNION COUNTY : STATE BOARD OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT : DECISION ON MOTION
NO. 1, UNION COUNTY. :

Decided by the Commissioner of Education, February 5, 1997

For the Petitioner-Appellant Mountainside Borough, Post, Polak, Goodsell & MacNeill (Charles R. Church, Esq., of Counsel)

For the Respondent-Respondent Kenilworth Borough, Thomas A. Vitale, Esq.

For the Respondent-Respondent Board of Education of Mountainside, David B. Rubin, Esq.

For the Respondent-Respondent Board of Education of Berkeley Heights, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Springfield, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Respondents-Respondents Garwood Borough and Board of Education of Garwood, DeCotiis, Fitzpatrick & Gluck (Agnes I. Rymer, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Clark, Kenny, Gross & McDonough (Douglas J. Kovats, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Kenilworth, James P. Granello, Esq.

May 6, 1998

For the Respondent-Respondent Board of Education of the Union County Regional High School District, Schwartz, Simon, Edelstein, Celso & Kessler (Jeffrey A. Bennett, Esq., of Counsel)

Inasmuch as we find that the application of Mountainside Borough fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

May 6, 1998

Date of mailing MAY 08 1998

235-97

C #235-97L
SB # 53-97

IN THE MATTER OF THE DISTRIBUTION :

OF LIQUID ASSETS UPON DISSOLU- :

TION OF THE UNION COUNTY : STATE BOARD OF EDUCATION

REGIONAL HIGH SCHOOL DISTRICT : DECISION

NO. 1, UNION COUNTY. :

Decided by the Commissioner of Education, February 5, 1997

Decision on motion by the Commissioner of Education, February 20, 1998

For the Petitioner-Appellant Mountainside Borough, Post, Polak, Goodsell & MacNeill (Charles R. Church, Esq., of Counsel)

For the Respondent-Respondent Kenilworth Borough, Thomas A. Vitale, Esq.

For the Respondent-Respondent Board of Education of Mountainside, David B. Rubin, Esq.

For the Respondent-Respondent Board of Education of Berkeley Heights, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Springfield, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Respondents-Respondents Garwood Borough and Board of Education of Garwood, DeCotiis, Fitzpatrick & Gluck (Agnes I. Rymer, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Clark, Kenny, Gross & McDonough (Douglas J. Kovats, Esq., of Counsel)

July 1, 1998

For the Respondent-Respondent Kenilworth Board of Education, James P. Granello, Esq.

For the Respondent-Respondent Board of Education of the Union County Regional High School District, Schwartz, Simon, Edelstein, Celso & Kessler (Jeffrey A. Bennett, Esq., of Counsel)

This is an appeal by the Borough of Mountainside from a decision of the Commissioner of Education involving the division of assets of the Union County Regional High School District No. 1 upon its dissolution.

Union County Regional High School District No. 1 was a limited purpose regional district comprised of Berkeley Heights, Kenilworth, Mountainside, Garwood, Clark, and Springfield. By letter from the Commissioner of Education dated November 8, 1995, the boards of education and the municipal governing bodies of these districts were notified that the Board of Review[1] had decided to grant a petition for dissolution of the Regional School District that had been submitted by the constituent districts,[2] and that it had thereby authorized a referendum on the question.[3]

[1] N.J.S.A. 18A:13-56 confers on a board of review consisting of the Commissioner as chairperson, a member of the State Board of Education appointed by the President of the State Board, the State Treasurer or his designee, and the Director of the Division of Local Government Services in the Department of Community Affairs the responsibility to make a determination as to whether the petition should be granted and, if so, the amount of indebtedness to be assumed by the districts involved before the question may be submitted to the voters.

[2] The district boards of education and the governing bodies of Berkeley Heights, Kenilworth, Mountainside, Clark, and Springfield submitted a petition for dissolution, and the district board and governing body of Garwood submitted a cross-petition and third party petition.

[3] The Commissioner's letter indicated that such grant was conditioned on Kenilworth's agreement to accept Garwood's high school students if Garwood chose to enter into a sending-receiving relationship with that district.

On December 13, 1995, the Commissioner of Education, as chairperson of the Board of Review, issued an amplification of the Board of Review's November 8 determination.[4]

On March 8, 1996, the parties were advised by the Acting County Superintendent, David Livingston, that unless they requested and agreed to an alternate method of distribution, the liquid assets of the Regional District would be distributed according to the statutory plan set forth in N.J.S.A. 18A:13-62 and N.J.S.A. 18A:8-24. On May 14, 1996, the voters approved dissolution. The ballot question did not indicate that an alternate method would be used for distributing the liquid assets. The Borough of Mountainside then petitioned the Commissioner of Education seeking a distribution of the liquid assets according to then County Superintendent Leonard Fitts' feasibility report of April 7, 1995 rather than the statutory plan. If the distribution scheme in County Superintendent Fitts' report been followed, Garwood and Mountainside would have received all of the liquid assets because neither had any buildings in their districts and could not share in the division of real property.

Prior to transmittal of the matter to the Office of Administrative Law (OAL), the Commissioner dismissed the petition under authority granted him by N.J.A.C. 6:24-1.9.[5] In doing so, he relied on the Appellate Division's decision in Egg Harbor Bd. of Ed. v.

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[4] Such amplification of the Board of Review's November 8 statement was submitted to the Appellate Division and mailed to the parties pursuant to R 2:5-1(b) of the New Jersey Court Rules. That rule provides that within 15 days of notice of appeal to the Appellate Division from a decision or action by an administrative agency or officer, that agency or officer may file and mail to the parties an amplification of a prior statement, opinion or memorandum, or, if there is no prior statement, he must file a written opinion stating his findings of fact and conclusions of law.

[5] N.J.S.A. 6:24-1.9 provides that:

> At any time after the receipt of the answer and prior to the transmittal of the pleadings to the OAL, the Commissioner, in his or her discretion, may dismiss the petition on the grounds that no sufficient cause for determination has been advanced, lack of jurisdiction, failure to prosecute or other good reason.

Greater Egg Harbor, Etc., 188 N.J. Super. 92 (App. Div. 1983) (hereinafter "Egg Harbor") to conclude that because no method of distribution of liquid assets had been specified in the question placed before the voters in the referendum, the liquid assets had to be distributed in accordance with the plan set forth in N.J.S.A. 18A:13-62 and N.J.S.A. 18A:8-24.

Mountainside appealed to the State Board, arguing that the Commissioner had improperly interpreted Egg Harbor as an absolute bar to an alternative method of distributing the liquid assets in the absence of specification of such method in the referendum question placed before the voters. Mountainside asserted that in petitioning the Board of Review, all of the constituent districts had agreed that Mountainside and Garwood would get the liquid assets and that the Board of Review had incorporated this scheme for distribution in its determination by virtue of the petitions it had before it and the County Superintendent's feasibility report. Mountainside further argues that it is unfair to apply the statutory scheme because the other districts were to get the buildings in their districts while Mountainside and Garwood would be left with nothing since there were no buildings in their districts.

After reviewing the record and the applicable law, we affirm the Commissioner's determination as modified herein. Initially, we concur with Mountainside that the Appellate Division's decision in Egg Harbor does not stand for the proposition that, as a matter of law, any departure from the statutory distribution scheme is prohibited unless it has been included in the question placed before the voters. In point of fact, that decision was an equitable one, grounded in the specific circumstances of that case. However, careful examination of the Court's decision reveals that it was based on circumstances far different than those reflected by the record before us in this case.

The issues in Egg Harbor arose from a withdrawal by one district from a regional school district rather than, as here, from the dissolution of a regional district.[6] The underlying case had been initiated when Egg Harbor sought to withdraw from the Greater Egg Harbor Regional School District, a limited purpose school district comprised of five constituent districts. On Egg Harbor's application, the County Superintendent investigated the advisability of the withdrawal and issued his report as provided by N.J.S.A. 18A:13-52. In his report, the County Superintendent set forth what he considered to be the appropriate basis for dividing assets and liabilities. As here, the County Superintendent's view of the appropriate manner to divide the assets and liabilities departed from the statutory scheme.

Egg Harbor then petitioned the Commissioner for permission to submit the issue of withdrawal to the voters. As provided by N.J.S.A. 18A:13-56, the Commissioner submitted the petition to the Board of Review, see supra note 2, which authorized a special election on the question.

In its decision, the Board of Review included the finding that Egg Harbor did not seek to acquire any assets if it were permitted to withdraw from the Regional District, that Egg Harbor assumed that it would not incur any liabilities, and that all remaining assets and liabilities would be assessed proportionately to the remaining districts. Then, adopting verbatim the County Superintendent's report, the Board of Review specified that the question submitted to the voters must include a statement to that effect.

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[6] We note that until August 1993, the language of the applicable statutes included only withdrawals. Effective August 13, 1993, the statutes were amended to expressly provide for dissolution. L. 1993 c. 255. See N.J.S.A. 18A:13-51 et seq.

Nonetheless, following voter approval of the withdrawal, Egg Harbor sought distribution of assets and liabilities pursuant to N.J.S.A. 18A:13-62. In response the County Superintendent indicated that the assets and liabilities were to be distributed in accord with the scheme described in the ballot question rather than the statutory scheme.

The following spring, Egg Harbor petitioned the Commissioner to compel the Regional District to pay it a distributive share of its budget surplus from the previous year. At that point, the matter was transmitted to the Office of Administrative Law. There, acting on a motion to dismiss by the Regional District, an Administrative Law Judge (ALJ) found that Egg Harbor had waived any claim to the assets of the Regional District by acquiescing to the Board of Review's approval of the election, which had been given on the condition that Egg Harbor would neither assume any further debts or acquire any assets. The ALJ further concluded that Egg Harbor's claim was barred by res judicata since the Board of Review had been fulfilling its quasi-judicial function when it had granted approval to place the question of withdrawal before the voters.

The Commissioner adopted the ALJ's decision, and the State Board affirmed the determinations of the ALJ and Commissioner with modification.[7] On appeal to the Appellate Division, Egg Harbor argued that N.J.S.A. 18A:13-62 mandated the distribution of all assets other than school buildings, grounds, furnishings and equipment, and provided the sole means for distributing those assets by specifying that they be divided in the same manner as provided in N.J.S.A. 18A:8-24.

[7] The State Board modified the decisions below to indicate that the County Superintendent should have filed a report on the Regional District's assets and liabilities even though Egg Harbor was not entitled to a share of those assets.

The Appellate Division rejected the claim, stressing that both the County Superintendent and the Board of Review had considered the impact of Egg Harbor's withdrawal on debt service for the remaining districts and, in that context, had determined that Egg Harbor should not acquire assets at the time of final distribution. The Court found that Egg Harbor had not protested the terms of the Board of Review's approval although it had sufficient notice of those terms to enable it to protest. Consequently, the Regional District, the voters, and the remaining constituent districts had been induced to suppose that Egg Harbor had agreed to relinquish its assets. Hence, Egg Harbor was estopped from requesting a distribution of assets because, by its acquiescence, it had allowed the voters to approve a plan under which it was required to relinquish any claim to the Regional District's assets.

The Court further found that because it had resolved the issue of Egg Harbor's acquiescence in the affirmative, there was no need to decide whether Egg Harbor's claim was barred by res judicata on the basis of the Board of Review's decision. Given that the State Board's decision had not rested on grounds of res judicata, the Court found it unnecessary to reach that issue in order to affirm that decision.

As set forth herein, the Court's decision in Egg Harbor was an equitable decision, grounded in an examination of the particular circumstances presented by that case. That examination was not limited to the ballot question placed before the voters, but focused equally on the other circumstances which surrounded the proceedings before the Board of Review. Basically, the Court concluded that under all of those circumstances, including the wording of the ballot question, it would be unfair to permit Egg Harbor to claim assets. Hence, Egg Harbor can not properly be read so broadly as to create an absolute bar to any claim involving a different arrangement than provided

by the statute because the arrangement was not included in the wording of the ballot question.

However, neither can Egg Harbor be read to entitle Mountainside to pursue its claim in this case. Quite simply, Mountainside has not shown any circumstances that would warrant a departure from the statutory scheme. In contrast to Egg Harbor, there is no indication in the record before us that the Board of Review intended a departure from the statutory method for distributing the assets at issue. To the contrary, the Commissioner's letter of November 8, 1995 states that the Board of Review was not convinced that following the statutory scheme "results in such inequity of such proportion as to provide a basis for denying the petition [for dissolution]." Further, the December 13 amplification of the Board of Review's November 8 statement states that:

> The apportionment of the remaining assets and liabilities, as defined in N.J.S.A. 18A:8-24 as those assets other than school buildings, grounds, furnishings and equipment, is directly proportional to the amount of local contribution that each of the municipalities has contributed to the regional district. Therefore, each municipality will leave the regional district structure with the same percentage share of these assets as its contribution to them.

In this context, we reject Mountainview's contention that the petitions and the County Superintendent's feasibility report provide a sufficient basis to assume that an alternate scheme was adopted by the Board of Review, especially in view of the fact that the ballot question did not reflect such scheme. Quite simply, given the record before us, we can only speculate as to the circumstances surrounding the proceedings before the Board of Review.

While we recognize that judicial doctrines such as res judicata and collateral estoppel are not automatically applicable to quasi-judicial proceedings such as these, we can find no basis to justify a review in this context of the proceedings before the

Board of Review. City of Hackensack v. Winner, 82 N.J. 1 (1980). In this respect, we stress that the applicable statutory scheme does not confer on either the Commissioner or the State Board of Education the authority to determine whether a petition for dissolution should be granted, but rather entrusts that determination to a board of review comprised of both the Commissioner and a member of the State Board of Education, as well as the State Treasurer and the Director of the Division of Local Government Services. N.J.S.A. 18A:13-56. See supra note 2. Consistent with the character of the composition of such board, appeals from determinations by the Board of Review have been made, not to the State Board, but rather directly to the Appellate Division pursuant to R 2:2-3(a)(2). See In re Petition For Authorization to Conduct a Referendum on Dissolution of Union County Regional High Sch. Dist. No. 1, 298 N.J. Super. 1 (App. Div. 1997). Nothing presented to us in this case reflects that application of the statutory scheme to the division of liquid assets involved here would result in an inequity such as to provide a basis for denying the finality of the resolution of this issue that is embodied in the Board of Review's determination. City of Hackensack v Winner, 82 N.J. at 30-33.

Attorney exceptions are noted.

Sam Podietz did not participate in deliberations in this matter.

July 1, 1998

Date of mailing JUL 06 1998

236-97

DR. EDWIN DUROY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN *ET AL.*, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

MAY 7, 1997

OAL DKT. NO. EDU 10108-93
AGENCY DKT. NO. 332-9/93

DR. EDWIN DUROY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN *ET AL.*, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on March 27, 1997, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

237-97

237-97

ALEXANDER AND GAIL M. CIECIERSKI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, , 1997

OAL DKT. NO. EDU 7336-96
AGENCY DKT. NO. 199-5/96

ALEXANDER AND GAIL M. CIECIERSKI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

238-97

238-97

BETH ALBERT AND HARVEY ARATON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1997

OAL DKT. NO. EDU 5412-96
AGENCY DKT. NO. 95-3/96

BETH ALBERT AND HARVEY ARATON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

239-97

239-97

DIANE HARRIS AND CHRIS TIPOVSKI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1997

OAL DKT. NO. EDU 5408-96
AGENCY DKT. NO. 98-3/96

DIANE HARRIS AND CHRIS TIPOVSKI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

240-97

240-97

EDWARD J. FOLEY AND JOYCE M. FOLEY,:

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN OD MONTCLAIR, ESSEX COUNTY, : DECISION

RESPONDENT. :

MAY 7, 1997

OAL DKT. NO. EDU 5402-96
AGENCY DKT. NO. 93-3/96

EDWARD J. FOLEY AND JOYCE M. FOLEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OD MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

241-97

241-97

MARY C. ECKSTEIN AND PETER C. ECKSTEIN, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY, : DECISION

RESPONDENT. :

MAY 7, 1997

OAL DKT. NO. EDU 5401-96
AGENCY DKT. NO. 100-3/96

MARY C. ECKSTEIN AND PETER C. ECKSTEIN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

242-97

242-97

ROY NATHANS AND MARIA NATHANS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1997

OAL DKT. NO. EDU 5410-96
AGENCY DKT. NO. 103-3/96

ROY NATHANS AND MARIA NATHANS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

243-97

243-97

GARY D. TRABKA AND LOUISE M. TRABKA,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 7, 1997

OAL DKT. NO. EDU 5409-96
AGENCY DKT. NO. 101-3/96

GARY D. TRABKA AND LOUISE M. TRABKA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

244-97

244-97

ANTHONY FLANDERS AND BERNICE FLANDERS,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 7, 1997

OAL DKT. NO. EDU 5407-96
AGENCY DKT. NO. 99-3/96

ANTHONY FLANDERS AND BERNICE FLANDERS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

245-97

RAYMOND PAPERA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1997

OAL DKT. NO. EDU 5406-96
AGENCY DKT. NO. 94-3/96

RAYMOND PAPERA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

246-97

LINDA TENNER BLUME AND GERALD W. BLUME,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 7, 1997

OAL DKT. NO. EDU 5405-96
AGENCY DKT. NO. 102-3/96

LINDA TENNER BLUME AND GERALD W. BLUME,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

247-97

247-97

WILLIAM ILNYCKYJ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1997

OAL DKT. NO. EDU 5404-96
AGENCY DKT. NO. 96-3/96

WILLIAM ILNYCKYJ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING MAY 7, 1997

248-97

248-97

RICHARD E. BERSE AND RORI L. BERSE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 7, 1997

OAL DKT. NO. EDU 5403-96
AGENCY DKT. NO. 104-3/96

RICHARD E. BERSE AND RORI L. BERSE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Deputy Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-33, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION

MAY 7, 1997
DATE OF MAILING M AY 7, 1997

257-97

257-97

C.B., on behalf of her minor children, J.B. AND L.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 9, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 10332-96

AGENCY DKT. NO. 480-10/96

C.B., ON BEHALF OF HER MINOR CHILDREN, J.B. AND L.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN COUNTY,

Respondent.

C.B., petitioner, *pro se*

Honora O'Brien Kilgallen, Esq., for respondent (Kramer, Kramer & Kilgallen, attorneys)

Record Closed: March 18, 1997 Decided: March 19, 1997

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE

This matter arises from the challenge by the petitioner, C.B., of the respondent's residency determination. The respondent (Township of Ocean School District) alleged that C.B.'s two (2) children, J.B. and L.B., did not reside in the school district.

On November 22, 1996 this matter was transmitted to the Office of Administrative Law (OAL) for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for a telephone prehearing conference on January 14, 1997 at 4:00 p.m. C.B. was not at the telephone number when the call was placed. The attorney for the respondent, Ms. Kilgallen, indicated that C.B. had signed her two children out of the Ocean Township School District, which was certified to be true by the Superintendent of Ocean Township School District, Douglas Deicke, in his certification dated January 30, 1997.

Accordingly, Ms. Kilgallen filed with the undersigned a Notice of Motion to dismiss petitioner's petition, serving copies of said motion with C.B. Receiving no opposition from the petitioner, I signed the attached Order dismissing the matter.

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

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

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

DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

March 26, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

KRAMER, KRAMER & KILGALLEN, ESQS.
82 Bethany Road
Hazlet, New Jersey 07730
(908) 888-4700

CHRISTINE BIVINS, Petitioner, vs. DOUGLAS A. DEICKE, SUPERINTENDENT OF SCHOOLS AND TOWNSHIP OF OCEAN BOARD OF EDUCATION, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY MONMOUTH COUNTY Agency Reference# 516-11/96 OAL Docket No. EDUOS 10332-96S CIVIL ACTION ORDER

THIS MATTER having come before the Court on Respondent Township of Ocean School District's Motion for Summary Decision, and the Court having considered all submissions, and for other good and sufficient cause having been shown; it is on this 18th day of March, 1997, **ORDERED**:

1. That the Petition of Christine Bivins be and is hereby dismissed; and

2. That a copy of this Order be served upon Christine Bivins within 14 days of the date hereof.

ROBERT MILLER
Administrative Law Judge

OAL DKT. NO. EDU 10332-96
AGENCY DKT. NO. 480-10/96

C.B., on behalf of her minor children, J.B. AND L.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is properly dismissed, in that petitioner has removed her children from respondent's school system as of December 2, 1996,* and, further, has failed to respond to the Board's Motion for Summary Decision.

Accordingly, the initial decision of the ALJ is adopted as the final decision in this matter. The within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* As per the certification of Superintendent Douglas Deicke, January 30, 1997.

MAY 9, 1997
DATE OF MAILING MAY 9, 1997

259-97

EDU #5255-96
C # 259-97ML
SB # 47-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANNE OPPEL, STATE-	:	STATE BOARD OF EDUCATION
OPERATED SCHOOL DISTRICT OF	:	DECISION ON MOTION
JERSEY CITY, HUDSON COUNTY.	:	

Decision on motion by the Commissioner of Education, May 12, 1997

For the Petitioner-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Mark J. Blunda, Esq., of Counsel)

For the Respondent-Appellant, New Jersey Principals & Supervisors Association (Wayne J. Oppito, Esq., of Counsel)

After reviewing respondent's arguments, the State Board of Education denies her motion for leave to appeal an interlocutory decision rendered by the Commissioner of Education. We stress, however, that the interlocutory ruling may be subject to review by the State Board upon appeal from a final decision of the Commissioner on the merits of the case. N.J.A.C. 1:1-14.10.

July 2, 1997

Date of mailing JUL 08 1997

260-97

260-97

K.A.W., on behalf of minor child, J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10781-96

AGENCY DKT. NO. 573-12/96

K.A.W. ON BEHALF OF MINOR CHILD J.W.,

Petitioner,

v.

LENAPE REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

Stephen H. Dunbar, Esq., for petitioner

Arthur F. Risden, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: March 26, 1997 Decided: March 27, 1997

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 9, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

March 27, 1997
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

April 2, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 4 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 10781-96
AGENCY DKT. NO. 573-12/96

K.A.W., on behalf of minor child, J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision rendered by the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

The Commissioner is unable to accept the written settlement in its present form to the extent that the language of the Stipulation of Settlement, Term 4, requires that "[t]he terms of this Agreement shall remain confidential." It is observed that, although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or, for that matter, any other individual to such confidentiality. In this regard, the parties must also remember that, in the absence of a motion to seal the record, a Commissioner's decision and its underlying proceedings are matters of public record.*

* Given the nature of the Commissioner's rejection of the settlement in this matter, the parties' proposed agreement is not appended to this decision.

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or such other action as may be appropriate to effectuate the parties' intention.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 15, 1997
DATE OF MAILING MAY 15, 1997

261-97

J.A. AND A.A., on behalf of their minor children,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5544-96
AGENCY DKT. NO. 157-4/96

J.A. and A.A. on Behalf of Their Minor Children,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

Respondent.

Michael J. Sprague, Esq., for petitioners
(Cillick & Sprague, attorneys)

Robert T. Tessaro, Esq., for respondent

Record Closed: March 12, 1997 Decided: March 26, 1997

BEFORE: **ELINOR R. REINER**, ALJ:

On April 25, 1996, petitioners J.A. and A.A. filed a petition of appeal with the Commissioner of Education requesting that the Commissioner order respondent Board of Education to permit petitioners' minor children to remain resident students in the Fort Lee school district. On May 9, 1996, respondent filed an answer, alleging that petitioners are not domiciled within the Borough of Fort Lee and seeking an award of tuition from petitioners. The matter was transmitted to the Office of Administrative Law on May 24, 1996 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The case was assigned to the undersigned judge on July 10, 1996, and a prehearing conference scheduled for August 20, 1996. The prehearing conference was rescheduled to September 10, 1996 at the request of counsel for petitioners. The telephone prehearing conference was held on September 10, 1996, at which time the issues were isolated, and a hearing scheduled for December 17 and 18, 1996 at the Office of Administrative Law. As a result of settlement conferences held between the parties, a settlement was reached and the hearing was adjourned.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement, indicating the terms of settlement.

I have reviewed the record and the settlement terms and find:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representative's signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and these proceedings be concluded.

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

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

March 26, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

4/3/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 03 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

ROBERT T. TESSARO, ESQ.
1624 Palisade Avenue
P. O. Box 2083
Fort Lee, New Jersey 07024
Attorney for Respondent,
Fort Lee Board of Education

J.A. & A.A. ON BEHALF OF THEIR MINOR CHILDREN Petitioners vs. FORT LEE BOARD OF EDUCATION Respondent.	**STATE BOARD OF EDUCATION** **OFFICE OF ADMINISTRATIVE LAW** **DOCKET NO. 05544-96N** **AGENCY REF. NO. 157-4/96** **STIPULATION OF SETTLEMENT**

This matter having been brought before the court on the Petition of A.J. and A.A. on behalf of their minor children, and the parties having reached agreement with regard to this settlement, of all claims and causes of action regarding this matter, it is hereby stipulated and agreed as follows:

1. The Petitioners shall pay the sum of $1,000.00 in ten (10) equal One Hundred Dollar ($100.00) installments, commencing January 15, 1997 to the Fort Lee Board of Education, at the Board's Office, 255 Whiteman Street, Fort Lee, New Jersey.

2. Petitioners will have a fifteen (15) day grace period in regard to each payment. If any installment provided hereunder is not made within the time provided for in this stipulation of settlement and the grace period, the Board will have

the right to request entry of judgment for the sum of $6,913.50, based on fifty (50) days enrollment period X three children enrolled at a per diem rate of $46.09 per day.

3. The Board will continue to permit the Petitioners' children to attend school without tuition as long as a bona fide domicile is maintained within the Borough of Fort Lee. The Board recognizes that the Petitioners and their children have been domiciled within the Borough of Fort Lee since on or about September, 1996 and continuing through the date of the Stipulation.

4. The parties will execute release of any and all claims which they may have regarding the investigation and litigation of the within matter.

5. All other claims and causes of action by and between the parties regarding the enrollment of Petitioners' minor children are hereby dismissed with prejudice.

Date: March 4, 1997
Witness:
Michael J. Sprague

Julian Avellano
Antonette Avellano
Antonette Avellano

Date: 3/10/97
Witness:

FORT LEE BOARD OF EDUCATION
By:

OAL DKT. NO. EDU 5544-96
AGENCY DKT. NO. 157-4/96

J.A. AND A.A., on behalf of their minor children, PETITIONERS, V. BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 15, 1997
DATE OF MAILING MAY 15, 1997

262-97

262-97

E.C., on behalf of minor children, J.C., D.C. AND J.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAY 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5994-96

AGENCY DKT. NO. 147-4/96

E C. ON BEHALF OF HER
CHILDREN, J.C., D.C. AND J.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH
OF OLD TAPPAN, BERGEN COUNTY,

Respondent.

Margaret A. Holbrook, Esq., for petitioner

Joseph R. Letcher, Esq., for respondent

Record Closed: March 20, 1997 Decided: March 26, 1997

BEFORE **EDITH KLINGER,** ALJ:

On June 19, 1996, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to

N.J.S.A. 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for May 2, 1997 at the OAL in Newark, New Jersey.

On March 20, 1997, the parties advised the undersigned that the matter had been resolved this matter and submitted the attached Stipulation of Dismissal indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced on the record and by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, it is **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500,**

Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 26, 1997
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

4/3/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

JOSEPH R. LETCHER, ESQ.
Post Office Box 490
31 Sheridan Avenue
Ho-Ho-Kus, New Jersey 07423-0490
(201) 670-6700
Attorney for the Respondent-Counterclaimant

ELIZABETH COLUMBUS, ON BEHALF OF HER CHILDREN, J.C., D.C., AND J.C. Petitioner, vs. OLD TAPPAN BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 147-4/96 O.A.L. DOCKET NO. EDUOS-05994-96N **STIPULATION OF DISMISSAL**

The matter in difference in the above entitled action having been amicably resolved between the Petitioner, Elizabeth Columbus, on behalf of herself and all of her minor children, J.C., D.C. and J.C., and the Respondent, the Board of Education of the Borough of Old Tappan, Berghen County, New Jersey, it is hereby stipulated and agreed by the parties hereto that both the Petition and the Counterclaims between the above parties are hereby dismissed with prejudice and without costs against either party.

DATED: March 18, 1997

JOSEPH R. LETCHER, ESQ.
Attorney for the Respondent,
Board of Education of the
Borough of Old Tappan,
Bergen County, New Jersey

MARGARET A. HOLBROOK, ESQ.
Attorney for the Petitioner,
Elizabeth Columbus

OAL DKT. NO. EDU 5994-96
AGENCY DKT. NO. 147-4/96

E.C., on behalf of minor children, J.C., D.C. AND J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal based on a joint stipulation of dismissal of the parties transmitted to the Commissioner by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.2, have been reviewed.* The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a dispute before him and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in her initial decision. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a Stipulation of Dismissal, this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

264-97

M.F., on behalf of minor child, S.L.T., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning grandparent alleged that Board improperly had a psychiatric evaluation conducted on minor child, S.L.T. Petitioner sought to enjoin Board from compelling any future evaluation or counseling absent her prior notification and approval.

ALJ found Board properly responded to the incident of threat of suicide by S.L.T., 4th grade student. ALJ found that the psychiatric evaluation of S.L.T. conducted at the Jersey Shore Medical Center's Crisis Evaluation Unit was appropriate and correct. ALJ further found that there was no basis for enjoining the Board from calling for psychiatric evaluations of S.L.T., should a similar circumstance arise again.

Having reviewed the Board's Student Suicide policy, the Commissioner concurred with the ALJ's findings and determination. Petition was dismissed.

MAY 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8583-96

AGENCY DKT. NO. 328-8/96

M.F. ON BEHALF OF MINOR CHILD S.L.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

M.F. grandmother of **S.L.T.**, petitioner, *pro se*

James T. Hundley, Esq., for respondent (Hundley & Parry, attorneys)

Record Closed: March 5, 1997 Decided: March 27, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

This matter (EDU 8583-96) was brought by the grandmother of S.L.T. alleged that the BOE improperly conducted a psychiatric evaluation of her granddaughter and she seeks to enjoin the Neptune Township Board of Education from conducting psychological testing of her granddaughter without prior notice.

EDU 8583 was transferred to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13, on October 3, 1996. A hearing was scheduled for March 5, 1997, at the Office of Administrative law, Trenton, New Jersey.

STATEMENT OF THE CASE

S.L.T. is a 9 year old girl, now in the 4th grade at Green Grove Elementary School, who was classified as perceptually impaired (PI) by a child study team in June, 1994

On June 13, 1996, S.L.T. threatened to commit suicide, and tightened a belt around her neck, doing this in front of her classmates, who reported this to their teacher. S.L.T. had threatened suicide before (R-3. The school administration responded to the June 13, 1996 incident by taking S.L.T. to Jersey Shore Medical Center's Crisis Evaluation Unit.

Dr. Michael Lake, Superintendent of the Neptune BOE, said that the Crisis Intervention Team had taken S.L.T. to Jersey Shore Medical Center after she had tightened a belt around her neck and told her classmates that she was going to kill herself. Dr. Lake said he learned of the incident in a telephone call from the Green Grove school principal, Ms. Sweeney, in which it was described that S.L.T. was in serious emotional turmoil and that she presented a risk of bodily harm.

Dr. Lake said that telephone calls were placed to M.F.'s residence, but that his office could not get through to anyone. In a subsequent conference call with Ms. Sweeney and Ms. Gillette, the school guidance counselor, Dr. Lake made an administrative determination to have S.L.T. taken in a private automobile to the Jersey Shore Medical Center's Crisis Evaluation Unit (CEU). Dr. Lake also called the BOE's attorney, Mr. Hundley. While they were at Jersey Shore Medical Center, the Child Study Team psychologist, Maxine Perrine and Ms. Gillette, continued to attempt to reach M.F. or an adult who could come to the medical center immediately, but they were told that no guardian could come. Dr. Lake said that S.L.T. could not be treated without the consent of her guardians, and that he (Dr. Lake) was satisfied with the attempts made to

contact the guardians. Due to the fact that no guardian could (or would) come to the hospital, Dr. Lake told Ms. Sweeney to contact the Division of Youth and Family Services (hereinafter DYFS) for child abuse or neglect intervention.

Dr. Lake said that DYFS responded immediately, and that DYFS told M.F. and her husband, S.L.T.'s guardians, that one of them should immediately go to Jersey Shore Medical Center. Dr. Lake said that, eventually, M.F.'s husband, W.F., did arrive at Jersey Shore CEU, and gave his consent to treatment of S.L.T. Dr. Lake said that S.L.T. was eventually released to her guardian W.F. and was taken home.

On cross, Dr. Lake said that, although Ms. Sweeney was on vacation on June 13 and Ms. Sanders was the acting principal, Ms. Sweeney was available for telephone calls, and as Ms. Sweeney lives close to the school, she could and did participate in the activities described. Dr. Lake said he also spoke to Ms. Sanders that day.

Dr. Lake said that he felt he had no choice but to take S.L.T. to the CEU, and that he decided that DYFS should be called in, and that he strongly felt that S.L.T. needed psychiatric counseling.

M.F.'s husband, W.F., testified that his wife called him to advise him that S.L.T. had been taken to Jersey Shore Medical Center. W.F. did not recall speaking to anyone from the school. W.F. said he went to the hospital and gave his permission for his granddaughter to be evaluated. W.F. was not sure whether or not there was a message from the school on their answering machine.

M.F. testified that, while she was at work, she received a call from Ms. Perrine around lunch time, and that Ms. Perrine was already at Jersey Shore Medical Center with S.L.T. M.F. said that she did not want S.L.T. to be evaluated, and that she did not take S.L.T.'s suicide threat seriously, and that suicide threats were merely S.L.T.'s response to getting into trouble. M.F. said that S.L.T. had forgotten her gym shoes that day, and had been "yelled at" by her teacher. M.F. said that the earlier suicide threat was because S.L.T. had lost a teacher's calculator and was

afraid of getting into trouble. M.F. said that S.L.T. was imitating a cousin in Philadelphia who always threatened suicide. M.F. said that she told S.L.T. not to wear a belt with the dress S.L.T. wore on June 13, but that S.L.T. must have snuck the belt out of the house without M.F.'s knowledge. M.F. also said that there were no messages from Green Grove school on her answering machine.

DISCUSSION

Joking suicide threats by children, or even imitative "fooling around," can turn out to have very serious consequences. The Green Grove school personnel and Dr. Lake were justified in taking her threat seriously. If they had not responded and if, for example, the girl had slipped while her belt was tightened about her neck, the result would have been disastrous.

I **FIND** that the actions of Dr. Lake and of the personnel of the Green Grove School in responding to the incident of June 13, 1996, were appropriate, correct and timely.

I further **FIND** that the psychiatric evaluation of S.L.T. (P-1) conducted at the Jersey Shore Medical Center's Crisis Evaluation Unit was appropriate and correct.

I further **FIND** that there is no basis for enjoining the BOE from calling for psychiatric evaluations of S.L.T., should a similar circumstance arise again. The petition of M.F. is **DENIED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 27 1997
DATE

KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

April 4, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 7 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ej

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Access/Crisis Evaluation, dated June 13, 1996

P-2 Letter from Michael T. Lake to M.F., dated December 11, 1995

P-3 Letter from M.F. to Janice Sweeney, Principal, Green Grove School, dated October 11, 1996

P-4 Letter from Rosetta Jordan to M.F., dated December 15, 1995

For Respondent:

R-1 Letter from Michael T. Lake to M.F., dated June 19, 1996

R-2 Letter from Frances J. Taylor to M.F., dated June 21, 1996

R-3 Response to call from Pam Galatro

R-4 Annual Review Report of S.T.

R-5 Activities Caldendar of Neptune Township Public Schools

R-6 Letter from Lawrence P. Masgay to M.F., dated December 17, 1996

R-7 Student Suicide Awareness and Procedures pamphlet

R-8 Letter from Dennis F. Thompson to M.F., dated October 28, 1996

OAL DKT. NO. EDU 8583-96
AGENCY DKT. NO. 328-8/96

M.F., on behalf of minor child, S.L.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions initially charge that the issue decided in this matter is not the one raised in her Petition of Appeal. Specifically, she alleges that her petition "was not to enjoin the Neptune Township Board of Education from conducting psychological testing on [S.L.T.]," but rather "to enjoin the Board from forcing [S.L.T.] to undergo outside non school funded psychiatric counseling." (Petitioner's Exceptions at p. 1)

Petitioner next alleges that the Administrative Law Judge's (ALJ) factual recitation in this matter is incorrect in numerous areas, and she presents, in detail, her version of the facts and the conclusions which she avers should be adduced from them. Petitioner further urges that this case should be reconsidered in that the Board denied her access to S.L.T.'s records

both prior to and after the hearing and, notwithstanding that she informed the ALJ of such denial, the ALJ did not compel the Board to provide the records.

Finally, petitioner objects to the ALJ's conclusion that the Board's actions in this matter were reasonable. She alleges that, in this connection, the Board did not even follow its own Suicide Prevention Procedures policy, asserting

> ***[t]hese procedures state that when they have a "suicide attempt," that the nurse is summoned immediately for first aid services. It then states that the local rescue squad is contacted. It is after these actions have been taken that the child is taken to the hospital. It also states that the Child Study Team will conduct follow-up services and that the child will not be re-admitted to school without the recommendation of the Child Study Team. None of these procedures were followed.***
>
> (Petitioner's Exceptions at p. 2)

Further, she maintains that the written report of the Jersey Shore Medical Center's Crisis Evaluation Unit, reporting that S.L.T. "was not suicidal, in emotional turmoil or in risk of bodily harm," is dispositive in this matter and necessitates a reconsideration of the ALJ's decision. (*Id.* at p. 3)

After an independent and comprehensive review of the record in this matter, the Commissioner finds petitioner's exception arguments, fully addressed below, unpersuasive, and he concurs with the findings and conclusion of the ALJ that the Board's action of having a psychiatric evaluation conducted on minor child, S.L.T., under the circumstances existing here, was appropriate and correct. The Commissioner further agrees with the ALJ that there is no basis for enjoining the Board from seeking future psychiatric evaluations of this child should a similar circumstance again arise.

In reaching his determination herein, the Commissioner initially believes that it is necessary to clarify that, notwithstanding petitioner's contention to the contrary, a full review of the Petition of Appeal filed in this matter clearly reveals that the petitioner therein raised the issue of the propriety of the Board's action in compelling a psychiatric evaluation of the minor child, S.L.T, while the question of responsibility for payment was not presented as an issue before the Commissioner. Moreover, the Commissioner concludes that such an assertion, at this point in time, is inexplicable given that in the Commissioner's letter decision, dated September 27, 1996, which severed the special education issues contained in petitioner's Petition of Appeal from the one which was properly before him, it was unambiguously stated:

> The one remaining issue in this matter seeks the Commissioner to render a determination regarding the propriety of the Board's intervention with respect to a psychiatric evaluation conducted on S.L.T. on June 13, 1996, and further requests that the Board be enjoined from compelling any such evaluation or counseling, absent prior notification and approval of the petitioner, in the future.

As such, the Commissioner finds petitioner's allegation, which apparently seeks to refocus the objective of these proceedings at this juncture in the case, without merit.

Moving to that portion of petitioner's exceptions which contests the factual findings of the ALJ, it is noted that the record before the Commissioner does not include a transcript of the hearing below. Challenges to the factual findings made by an ALJ require the objecting party to supply the agency head with the relevant portion of the transcript for his review and consideration. See *Rowley v. Board of Education of Manalapan-Englishtown*, 205 *N.J. Super.* 65, 75 (App. Div. 1985); *In re Morrison*, 216 *N.J. Super.* 143, 158-159 (App. Div. 1987). Thus, without a transcript from which to draw his own conclusions, and finding no basis in the

record to challenge the factual recitation of the ALJ, the Commissioner accepts such factual recitation as correct. The Commissioner, likewise, concludes that petitioner's objection that she was refused access to S.L.T.'s records by the Board, thus requiring a full reconsideration of the within matter, is without support in the record, in that there is no evidence of any motion by petitioner to compel discovery, the procedure routinely utilized in these matters to exact information from a recalcitrant party.

Finally, a full review of the Board's "Student Suicide Awareness and Procedures" policy (Exhibit R-7) indicates that the Board acted in accordance with that portion of its policy entitled "Suicidal Ideation (Verbal threat or communication of possible suicidal intent)" which was the situation faced in this matter. The portion of the policy quoted in petitioner's exceptions deals with procedures to be followed in cases of "Actual Attempt of Suicide," which was clearly inapplicable in the instant case. Furthermore, the Commissioner concludes that the fact that staff at the hospital crisis evaluation unit found S.L.T. to be in no immediate physical or mental jeopardy at the time of their evaluation does not diminish or invalidate the Board's legitimate concern or the need to implement applicable policy when faced with the situation underlying this matter.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein, and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 19, 1997
DATE OF MAILING MAY 19, 1997

264-97

EDU #8583-96
C # 264-97
SB # 55-97

M.F., on behalf of minor child, S.L.T.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 19, 1997

For the Petitioner-Appellant, M.F., pro se

For the Respondent-Respondent, Hundley & Parry (James T. Hundley, Esq., of Counsel)

The decision of the Commissioner of Education dismissing the petition in this matter is affirmed for the reasons expressed therein. We agree with the Commissioner that school personnel acted appropriately in seeking an immediate psychiatric evaluation of petitioner's granddaughter after she tightened a belt around her neck and threatened to commit suicide. However, we also remind the Board of the importance of its staff following its express written procedures for handling such exigencies.

September 3, 1997

Date of mailing SEP 05 1997

265-97

IN THE MATTER OF BETTIE JO ZIEMER, :

BRADLEY BEACH BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MONMOUTH COUNTY. : DECISION

:

MAY 19, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
BETTY JO ZIEMER,	:	
Bradley Beach Board of Education	:	
Monmouth County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Betty Jo Ziemer was elected to serve three-year term on the Bradley Beach Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Betty Jo Ziemer to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Ziemer replied that she missed prior sessions due to childbirth and illness and planned to attend the Fall training session; and

WHEREAS, the Commission notified Ms. Ziemer that the Commission would discuss this matter at its April 22,1997 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Ms. Ziemer has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 1996 to April 1997 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is removal from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Betty Jo Ziemer violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of removal from the board.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: April 22, 1997

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on April 22, 1997.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF BETTIE JO ZIEMER, :
BRADLEY BEACH BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
MONMOUTH COUNTY. : DECISION
:

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 26, 1997, the Commission issued an Order to Show Cause as to why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member provided to the Commission an answer noting that she planned to take the training twice, in October 1996 and in March 1997, but was unable to attend due to childbirth in the first instance and due to the illness of her children in the second, however, such explanation was deemed by the Commission as an insufficient reason for her nonattendance; and

Whereas, the Commission voted on April 22, 1997, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute,

memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 3, 1997, the above-named Board member filed before the Commissioner a response to said resolution recommending removal, stating that the flu which befell her children and caused her to miss her March training course was potentially life-threatening to one of her children, a twin who is prone to seizures; and

Whereas, the Board member further explained that her inability to attend the June 1997 course was due to her prior registration at a conference on birth defects associated with premature and multiple births, and concluded by asking the Commissioner whether she could substitute her college education and profession as Certified Tax Collector, since she has also served as a Treasurer of School Monies, for completion of the training requirement; and

Whereas, the Commissioner of Education has carefully considered the record of this matter, the decision of the School Ethics Commission, and the Board member's comments; having done so, he finds that *N.J.S.A.* 18A:12-33 does not allow for exceptions to the statutory training requirement, nor for substitution of experience and education, and that board member training is a significant and well-established obligation of board membership, and that a penalty is warranted in that seven courses were offered between April 1996 and April 1997, of which the above-named Board member has demonstrated why she was unable to attend only two; however, based on the Board member's assertion that she would take the Fall 1997 training course and that she has provided reasons deemed sufficient by the Commissioner for not attending two conferences as planned, removal is not warranted at this point however; now therefore

IT IS ORDERED that the above-named Board member shall not be removed from office subject to her attendance at the October 1997 training session but, rather, shall be suspended from office for a period of three months to commence as of the date of this decision, and shall be removed without further proceedings should she not attend the October 1997 session as set forth above.

COMMISSIONER OF EDUCATION

MAY 19, 1997
DATE OF MAILING MAY 19, 1997

265-97

C #265-97
SB # 57-97

IN THE MATTER OF BETTY JO ZIEMER, :

BRADLEY BEACH BOARD OF EDUCA- : STATE BOARD OF EDUCATION

TION, MONMOUTH COUNTY. : DECISION

Decided by the School Ethics Commission, April 22, 1997

Decided by the Commissioner of Education, May 19, 1997

For the Petitioner-Respondent, Nancy Kaplen, Deputy Attorney General
(Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Betty Jo Ziemer, pro se

On April 22, 1997, the School Ethics Commission determined that Betty Jo Ziemer (hereinafter "appellant"), a member of the Board of Education of the Borough of Bradley Beach, had violated N.J.S.A. 18A:12-33 by failing to attend mandated training sessions for new school board members, and recommended that she be removed from the board as a result of such violation. On May 19, 1997, the Commissioner of Education modified the penalty recommended by the Ethics Commission, directing that appellant be suspended from her membership on the board for a period of three months.

On June 11, 1997, appellant filed a notice of appeal with the State Board, along with a request for a stay of the Commissioner's decision.

9/3/97

By letter dated June 24, 1997, the counsel to the State Board advised appellant that a brief in support of her appeal was due on July 1. She also advised appellant that the State Board could not entertain her request for a stay of the Commissioner's decision since such a motion must be made first to the Commissioner. N.J.A.C. 6:2-2.2.

Pursuant to N.J.A.C. 6:2-1.11(a), appellant's brief in support of her appeal was due on July 1, 1997, 20 days after she filed her notice of appeal. Appellant, however, failed to file a brief by that date. By letter dated July 8, 1997, appellant was notified that no appeal brief had been filed and that this matter was therefore being referred to our Legal Committee for consideration of her failure to perfect the appeal. Appellant has still failed to file a brief in support of her appeal, more than two months after the deadline for such filing, and nearly two months after she was provided with notice of her failure to file. Nor has appellant offered any explanation for her failure to file or requested an extension of time.

Consequently, the State Board of Education dismisses the appeal in this matter for failure to perfect. N.J.A.C. 6:2-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

September 3, 1997

Date of mailing SEP 05 1997

266-97

IN THE MATTER OF ANDREW MC ILVAINE, :

BOARD OF EDUCATION OF THE TOWN- : COMMISSIONER OF EDUCATION

SHIP OF CHERRY HILL, CAMDEN : DECISION

COUNTY. :

_____:

MAY 19, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
ANDREW G. McILVAINE,	:	
Cherry Hill Board of Education	:	
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Andrew G. McIlvaine was elected to serve three-year term on the Cherry Hill Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Andrew McIlvaine to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. McIlvaine replied that he missed a session due to a conflict with work and planned to attend the next available session in June, which is the June 6-8, 1997 training session; and

WHEREAS, the Commission notified Mr. McIlvaine that the Commission would discuss this matter at its April 22,1997 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Mr. McIlvaine has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1996 to April 1997 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until he attends the June session and removal if he fails to attend the June session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Andrew McIlvaine violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until he attends the June session and removal from the board if he does not attend the June 6-8 training session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: April 22, 1997

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on April 22, 1997.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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AGENCY DKT. NO. 137-4/97

IN THE MATTER OF ANDREW MC ILVAINE,	:	
BOARD OF EDUCATION OF THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF CHERRY HILL, CAMDEN	:	DECISION
COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 26, 1997, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission by letter dated April 2, 1997, that he planned to attend the training program to be held in June 1997; and

Whereas the Commission voted on April 22, 1997, to recommend suspension of the above-named Board member until he attends the June session, and removal from the Board if he fails to attend the June training session, in accordance with State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on April 24, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was forthcoming;* and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the date of this decision, pending his attendance at the June training session, but is hereby removed from said office, without further proceedings, should he fail to attend the June training session.

COMMISSIONER OF EDUCATION

* It is noted that a letter, dated April 29, 1997, was submitted by the Superintendent of the Cherry Hill Public Schools, asking that the Commissioner not suspend the above-named Board member given his intention to attend training in June. In that such letter was submitted outside of the record of this matter, it is not considered herein.

267-97

IN THE MATTER OF ROBBIN MARVIN,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF LAWNSIDE, CAMDEN	:	DECISION
COUNTY.	:	

MAY 19, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
ROBBIN MARVIN,	:	
Lawnside Board of Education	:	
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Robbin Marvin was elected to serve three-year term on the Lawnside Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Robbin Marvin to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Marvin replied that she could not attend the January 25, 1997 session because of work and that she planned to attend the June 6-8, 1997 training session; and

WHEREAS, the Commission notified Ms. Marvin that the Commission would discuss this matter at its April 22,1997 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Ms. Marvin has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1996 to April 1997 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until she attends the June session and removal if she fails to attend the June session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Robbin Marvin violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension until she attends the June session and removal from the board if she does not attend the June 6-8 training session.

Paul C. Garbarini, Chairman
School Ethics Commission

Dated: April 22, 1997

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on April 22, 1997.

Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF ROBBIN MARVIN,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF LAWNSIDE, CAMDEN	:	DECISION
COUNTY.	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 26, 1997, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission by letter dated April 1, 1997 that she is scheduled to attend the training program to be held in June 1997; and

Whereas, the Commission voted on April 22, 1997, to recommend suspension of the above-named Board member until she attends the June session, and removal from the Board if she fails to attend the June training session, in accordance with State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on April 24, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the date of this decision, pending her attendance at the June training session, but is hereby removed from said office, without further proceedings, should she fail to attend the June training session.

COMMISSIONER OF EDUCATION

MAY 19, 1997
DATE OF MAILING MAY 19, 1997

269-97

HOWARD CAESAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11771-95
AGENCY DKT. NO. 397-10/95

HOWARD CAESAR,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF NEWARK,
Respondent.

Melissa Vance Kirsch, Esq., for petitioner

Louis R. Franzese, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: February 20, 1997 Decided: February 21, 1997

BEFORE **RICHARD McGILL,** ALJ:

Howard Caesar filed a petition with the Commissioner of Education, seeking reimbursement for unused sick and vacation days upon abolishment of his position and subsequent retirement. The matter was transmitted to the Office of Administrative Law on October 27, 1995 for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time

limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Feb. 24, 1997
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

Feb. 27, 1997
DATE

J N Caramanis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS

A PROFESSIONAL CORPORATION

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DAVID JAY
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BARBARA A. SCHWARTZ
HARRIS C. GOLDBLAT
KRISTEN SKOG BUERSTETTA
CRAIG ECKSTEIN
PETER J. KOZLOWSKI
JONATHAN N. MARCUS
MONICA D. PALESTIS
ANTHONY J. TUTHS
SERENA VISWANATHAN
ELNARDO J. WEBSTER II

[□] ADMITTED IN NY ONLY
[◊] ADMITTED IN JURISDICTION (S) OTHER THAN NJ

February 19, 1997

PLEASE REPLY TO NEWARK

Honorable Richard McGill, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Howard Caesar v. State Operated School District of Newark
Docket No. EDU-1771-95N

Dear Judge McGill:

Enclosed please find the original and two copies of the executed Settlement Agreement which resolves the above-referenced matter. Kindly have a member of your staff mark the document "filed" and return a conformed copy to this office in the enclosed self-addressed stamped envelope.

Thank you.

Respectfully yours,

Louis R. Franzese

LOUIS R. FRANZESE

LRF:zab
Enc.
cc: Melissa Vance Kirsch, Esq.

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Respondent

FEB 20

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

HOWARD CAESAR,	:	AGENCY REF. NO. 397-10/95 O.A.L. DOCKET NO. EDU 1771-95N
Petitioner,	:	
-vs-	:	
STATE-OPERATED SCHOOL DISTRICT OF NEWARK,	:	**SETTLEMENT AGREEMENT**
Respondent.	:	

THIS AGREEMENT and GENERAL RELEASE, dated January 28, 1997, is made by and between Petitioner HOWARD CAESAR and Respondent STATE-OPERATED SCHOOL DISTRICT OF NEWARK to resolve the pending appeal before the Commissioner of Education. In consideration of the mutual promises and undertakings contained in this Agreement, the parties agree as follows:

1. The State Operated School District of Newark will issue payment to Howard Caesar in the amount of $37,730.00, representing a total of 98 earned sick days and vacation days (73 sick days and 25 vacation days) at the rate of $385.00 per day.

2. Howard Caesar hereby releases and forever discharges the State Operated School District of Newark, its agents and employees from all claims, causes of action, suits, etc., which he now has or ever had against the Newark Board of Education and/or its successor, the State Operated School District of Newark and its agents and employees (the "District") arising in or out of the State takeover of the Newark Board of Education and subsequent abolishment of Caesar's position of employment. Howard Caesar further releases and forever discharges the District from any and all claims, causes of action, suits, etc. for any accrued sick, vacation, personal or other leave time.

3. The parties agree not to disclose the terms of this Agreement to outside parties unless necessary to effectuate the terms of the Agreement.

4. This Agreement does not constitute an admission of liability by the State Operated School District of Newark.

5. This Agreement and General Release constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any persons shall in any manner or degree modify the terms and provisions of this Agreement and General Release.

FOR PETITIONER HOWARD CAESAR

Date: January 28, 1997

Howard Caesar
HOWARD CAESAR

FOR RESPONDENT STATE OPERATED
SCHOOL DISTRICT OF NEWARK

Date: 2/11/97

Beverly L. Hall
DR. BEVERLY L. HALL
State District Superintendent

OAL DKT. NO. EDU 11771-95
AGENCY DKT. NO. 397-10/95

HOWARD CAESAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 21, 1997
DATE OF MAILING MAY 21, 1997

270-97

ANN BERGER, THERESA GOLZ, JOAN GRUBE, AND THE PATERSON EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11722-95
AGENCY DKT. NO. 367-9/95

ANN BERGER, THERESA GOLZ, JOAN GRUBE AND THE PATERSON EDUCATION ASSOCIATION,
Petitioner,
v.
THE STATE OPERATED SCHOOL DISTRICT OF PATERSON,
Respondent

Mary J. Hammer, Esq., for petitioner
(Bucceri & Pincus, Attorneys)

Louis Flora, Esq., General Counsel, for respondent

Record Closed: March 10, 1997 Decided: April 8, 1997

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 24, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for March 19, 1997 at

the OAL in Newark, New Jersey. Prior to the hearing date, the parties requested that the hearing be adjourned because a settlement had been reached. A stipulation of settlement was signed by the parties and was filed in the OAL on April 7, 1997. The stipulation of settlement is attached hereto and made a part hereof.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

4/8/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

4/14/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

BUCCERI AND PINCUS

COUNSELORS AT LAW

1200 ROUTE 46

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(201) 773-5665

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SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS
LINDA GANZ OTT

April 4, 1997

Hon. Irene Jones, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102-3011

Re: Berger, et al. v.
State-Operated School District
of the City of Paterson
Docket No. EDU 11722-95

Dear Judge Jones:

Enclosed herewith please find the following documents:

X	Stipulation of Settlement (Orig. & 3)	___	Interrogatories
___	Certification	___	Answers to Interrogatories
___	Brief	___	Complaint
___	Order	___	Check in the amount of_____
___	Verified Petition	X	Return Envelope
___	Proof of Service	___	Other_____

With respect to said matter, would you kindly:

___	File.	___	Sign order, file original, return conformed copy marked "filed" in envelope.
___	Charge our account.	X	File and return copies marked "filed" in envelope.
___	Sign, date and return in envelope.	___	Other_____
___	Answer and return.		
___	Review and advise.		

Very truly yours,
BUCCERI & PINCUS, ESQS.

By: Mary J. Hammer
Mary J. Hammer

/lg
cc: Louis M. Flora, Esq.

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Petitioners

ANN BERGER, THERESA GOLZ, JOAN GRUBE and THE PATERSON EDUCATION ASSOCIATION,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	O.A.L. DOCKET NO. EDU 11722-95 AGENCY REF. NO. 367-9/95
v.	:	
THE STATE-OPERATED SCHOOL DISTRICT OF PATERSON,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

The petitioners, Ann Berger, Theresa Golz, Joan Grube and the Paterson Education Association, and the respondent, the State-Operated School District of the City of Paterson (hereinafter the "District") state as follows:

WHEREAS, the instant petition concerns assaults that were committed by students against teachers in the Spring of 1995, and

WHEREAS, the District, as required by the Commissioner of Education, adopted a policy regarding assaults by students against teachers, other staff members, administrators or board members in September of 1996, and

WHEREAS, the parties do not wish to unnecessarily waste the resources of the Office of Administrative Law or

either of the parties, they therefore consent to the following:

1. In the case of petitioner Joan Grube the District attempted to comply with N.J.S.A. 18A:37-2.1 but was unable to hold a suspension or expulsion hearing because the student fled the District. The respondent shall hold such a hearing if the student, A.G., ever attempts to re-register in the District.

2. In the case of Theresa Golz, the District failed to comply with the requirements of N.J.S.A. 18A:37-2.1. However, in September of 1995, the student was dropped from the rolls of the District for excessive absence and the District has been unable to locate him since that time. The respondent shall hold a suspension or expulsion hearing if the student, K.R., ever attempts to re-register in the District.

3. In the case of Ann Berger, the District failed to comply with the requirements of N.J.S.A. 18A:37-2.1. However, the student, L.W., is a classified student who has been placed in a more restrictive environment and has been re-evaluated since the time of the assault.

4. The petitioners shall withdraw their petitions in exchange for the promises and admissions above-stated.

5. This Stipulation is subject to the approval of the Office of Administrative Law and the Commissioner of Education.

6. The undersigned represent that they have been duly authorized by their respective clients to enter into this Settlement.

Mary J. Hammer
Attorney for Ann Berger, Theresa Golz, Joan Grube and the Paterson Education Association

Dated: 3-7-97

Louis Flora
Attorney for the State-Operated School District of the City of Paterson

Dated: 3/7/97

OAL DKT. NO. EDU 11722-95
AGENCY DKT. NO. 367-9/95

ANN BERGER, THERESA GOLZ, JOAN GRUBE, AND THE PATERSON EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 21, 1997
DATE OF MAILING MAY 21, 1997

271-97

271-97

L.J., on behalf of her minor son, N.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3456-97

AGENCY DKT. NO. 93-3/97

L.J., on behalf of her minor son, N.M.,

Petitioner,

v.

BOARD OF EDUCATION OF UNION TOWNSHIP,

Respondent.

Ellen M. Boylan, Esq., for petitioner
(Education Law Center, attorneys)

James Plosia, Esq., for respondent

Record Closed: March 24, 1997 Decided: April 9, 1997

BEFORE **DIANA C. SUKOVICH**, ALJ:

Petitioner filed a motion for emergent relief with the Bureau of Controversies and Disputes (Bureau), State Department of Education, on March 14, 1997. The Bureau transmitted the matter to the Office of Administrative Law on March 21, 1997 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for March 24, 1997. The parties appeared on that date, conferred, reached a resolution of the matter, and executed a stipulation of dismissal with prejudice. The stipulation provides that N.M. shall be reinstated to school no later than April 7, 1997. Attached herewith is a copy of the stipulation.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

April 9, 1997
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

4/15/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

State of New Jersey

L.J. v. Township of Union Board of Education

OAL DKT No. EDU 3456-9
Agency Ref. No.

Stipulation of Dismissal With Prejudice

The parties hereby agree that the student N. M. shall be reinstated to school by no later than Monday, April 7, 1997. Petitioner agrees to dismiss her Petition with Prejudice

Dated: March 24, 1997

Lynette Jackson
Lynette Jackson
Petitioner

Ellen Boylan
Ellen Boylan
Attorney for Petitioner

James V. McLaughlin
James V. McLaughlin
Director of Special Services

James L. Plosia, Jr.
James L. Plosia, Jr.
Attorney for Respondent

OAL DKT. NO. EDU 3456-97
AGENCY DKT. NO. 93-3/97

L.J., on behalf of her minor son, N.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 22, 1997
DATE OF MAILING MAY 22, 1997

272-97

D.D. and V.D., on behalf of minor child, J.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

MAY 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3788-97
AGENCY DKT. NO. 112-3/97

D.D. and V.D., on behalf of minor child, J.D.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,
Respondent.

D.D. and V.D., appearing pursuant to *N.J.A.C.* 1:1-5.4(a)1, for petitioners

Arnold H. Chait, Esq., for respondent
(Vogel, Chait, Schwartz & Collins, attorneys)

Record Closed: April 15, 1997 Decided: April 16, 1997

BEFORE **RICHARD McGILL,** ALJ:

D.D. and V.D. filed a petition with the Commissioner of Education to contest a determination by the Board of Education of the Town of Boonton (respondent) to discontinue home study provided to their child, J.D., after his expulsion and further contending that the respondent failed to follow required procedures prior to the expulsion. Respondent filed an answer, and the matter was transmitted to the Office of Administrative Law on April 10, 1997 for determination as a contested case.

A hearing in regard to a request for emergency relief was scheduled for April 15, 1997, at the Office of Administrative Law in Newark, New Jersey. On the hearing day, the parties agreed to an amicable resolution of all issues in this matter and completed a Stipulation of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time

limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Apr. 16, 1997
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

4/18/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 21 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

STIPULATION of SETTLEMENT

DD AND VD on behalf of JD v. BOARD OF EDUCATION OF TOWN OF BOONTON

AGENCY DKT NO. 112-3/97.
EDU 3788-97

On the hearing date of the emergent relief application the parties reached the following agreement disposing of the issues presented by the petition filed in this matter.

1. JD remains expelled from the Boonton School District effective March 26, 1997.

2. Petitioners withdrawal any claims or disputes regarding the expulsion action of the respondent Board.

3. The respondent school district will permit JD to take tests or submit incomplete assignments for which an incomplete grade was recorded during the second or third marking period, provided that the missing tests or assignments are scheduled with Joanne DeFilippo guidance counselor. The incomplete

tests and assignments must be completed by the end of the fourth marking period.

4. The school district will provide the petitioners with the curriculum requirements and coursework, tests and assignments which JD would have been given if he had not been expelled. The petitioners will retain a licensed teacher to provide private tutoring and instruction to JD for the remainder of the current school year. The school district teacher for the respective class will review and grade the tests and assignments submitted by the privately retained teacher as the work completed by JD, provided that all such assignments and tests are administered and received before June 12, 1997, the end of the fourth marking period. The grades so earned through private instruction or 1997 summer school will be credited toward the tenth grade academic proficiencies except for incompletes as of the end of the fourth marking period and excepting failing grades.

5. Except as set forth in paragraph 4, the respondent school district will have no further obligation to provide teaching or educational services to JD.

6. If petitioners elect, at their expense, to provide summer schooling for JD during the 1997 year, the school district will accept the grades earned by JD in a licensed public school program in New Jersey.

7. The school district will also accept grades given by school district teachers based upon their review and grading of the work of JD submitted by the privately retained home instructor, if submitted before the end of the fourth marking period in 1997.

8. Petitioners acknowledge that no assurance has been given by respondents that JD will satisfy the academic proficiencies for the 10th grade, and that this determination will be made by Joanne DeFilippo after receiving the grades earned by JD as a result of completing incomplete tests and assignments, and the grades received as a result of private home instruction during the third and fourth marking periods, and after the grades are received from the 1997 summer program.

9. It is the intent of petitioners to enroll JD at Morris Catholic High School for the 1997-98 academic year.

10. Petitioners withdrew their request for a child study team referral and evaluation of JD because petitioners intend to privately place JD in a regular school program other than the Boonton

School District.

12. This stipulation resolves all issues and disputes and accordingly the petition in this matter is withdrawn.

Agreed to this 15th day of April, 1997

Vincent D'Accardi
VINCENT D'ACCARDI

Dolores D'Accardi
DOLORES D'ACCARDI

FOR RESPONDENTS

ARNOLD H CHAIT
ATTORNEY AT LAW of N.J.

OAL DKT. NO. EDU 3788-97
AGENCY DKT. NO. 112-3/97

D.D. and V.D., on behalf of minor child, J.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 22, 1997
DATE OF MAILING MAY 22, 1997

273-97

J.T. and J.T., on behalf of minor child, B.B., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, : DECISION

RESPONDENT. :

MAY 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT/ WITHDRAWAL
OAL DKT. NO. EDU 9701-96
AGENCY DKT. NO. 374-8/96

J.T. AND J.T., ON BEHALF OF MINOR CHILD B.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,
Respondent

Phillip Feintuch, Esq., for petitioners
(Feintuch, Porwich & Feintuch, attorneys)

James L. Plosia, Jr., Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: March 31, 1997 Decided: April 18, 1997

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioners, J.T. and J.T. on behalf of minor child B.B., filed a Verified Petition with the Commissioner of Education challenging the Board's adverse residency determination relating to the attendance of B.B. as a student in the respondent district.

On September 27, 1996, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13. A hearing date was scheduled for March 31, 1997. The parties conferred for purposes of settlement prior to the hearing date, after the petitioner's submitted additional documentation to the Board's attorney. This resulted in a determination by the Board that the student did in fact meet the requirements of the district, and the Board would no longer challenge his residency. A letter to that effect was forwarded to the OAL by counsel. A copy of the letter, dated March 27, 1997, is attached hereto and made a part hereof.

Based on the foregoing, it is **CONCLUDED** that good cause has been shown to accept the settlement and withdrawal of this matter, which is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the settlement and withdrawal be approved and that this matter be **DISMISSED**.

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

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

April 15 1997
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

4/28/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 30 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

FEINTUCH, PORWICH & FEINTUCH
ATTORNEYS AT LAW

PHILIP FEINTUCH
ALAN S. PORWICH
HOWARD S. FEINTUCH

26 JOURNAL SQUARE
SUITE 1003
JERSEY CITY, NEW JERSEY 07306
PHONE: (201) 656-8600
FAX: (201) 656-7125

March 27, 1997

VIA TELEFAX & REGULAR MAIL

3/31 hearing date

Hon. Arnold Samuels
Office of Administrative Law
185 Washington Street
Newark, NJ 07102-3011

Re: J.T. and J.T on Behalf of Minor Child B.B.
vs. Board of Ed of the City of Bayonne, Hudson County
OAL Doc. No. EDUOS 09701-96N

Dear Judge Samuels:

I am pleased to advise you that the above matter has been settled in that the school district is no longer objecting to the minor child, B.B.'s attendance in the Bayonne School System.

I am advised by the attorney for the Board, James Plosia, of Appruzzese, McDermott, Mastro & Murphy, that documents recently completed by the youngster's parents have met the requirements of the district and they no longer challenge his residency.

Accordingly, no one will be appearing to prosecute or defend this matter.

Thank you for the courtesies extended to me in this matter.

Respectfully yours,

PHILIP FEINTUCH

srs
cc: James Plosia, Esq. via Telefax & Regular Mail

OAL DKT. NO. EDU 9701-96
AGENCY DKT. NO. 374-8/96

J.T. and J.T., on behalf of minor child, B.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The initial decision, record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 22, 1997
DATE OF MAILING MAY 22, 1997

274-97

274-97

C.S., on behalf of minor, K.S., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning parent contested Board's expulsion of eighth grade student, K.S., from school. While in the seventh grade K.S. sold a substance which she believed to be LSD to another student. K.S. pled guilty in Family Court to distributing an "imitation" drug.

ALJ found the Board's decision to expel based on its "zero tolerance" policy for drugs was not arbitrary, capricious or unreasonable, given the nature and severity of the wrong K.S. committed and the potential risks and harm to her classmates. ALJ sustained the determination of the Board to expel.

Commissioner set aside the initial decision of the ALJ, finding, instead, that the Board's action expelling K.S., under the particular facts herein, was arbitrary and unreasonable. While the Commissioner is mindful of the Board's need to take a firm disciplinary stance against drugs, its action to expel K.S., a student who just completed seventh grade and against whom the Board had never found cause to take prior disciplinary action, was unreasonable even though K.S. was provided home instruction. Commissioner found that her young age had to be considered because expulsion truncates her entire secondary public school experience and because a twelve-year-old cannot reasonably be expected to understand the implications of potential expulsion, notwithstanding that she may have been aware of district polices. Moreover, the Commissioner found that the Board failed to consider, investigate and effectively utilize the local- and county-based alternative education program options which are available. Thus, the Commissioner could not conclude that expulsion was employed as the "last-ditch expedient," which it is expected to be. Commissioner directed the Board to resume its obligation under *N.J.S.A.* 18A:38-1 to provide K.S. with a free public education and to undertake to evaluate K.S., prior to the start of the 1997-98 school year, for the purpose of finding a suitable local- or county-based alternative education program assignment for her. The Board, therefore, was directed to continue to provide K.S. with home instruction, in accordance with its policy, through the remainder of the 1996-97 school year, and to evaluate and readmit K.S. at the start of the 1997-98 school year, in conformance with the above-noted parameters.

May 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8778-96

AGENCY DKT. NO. 467-10/96

C.S. ON BEHALF OF MINOR, K.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,

Respondent.

Francis J. Campbell, Esq., for petitioner (Kalac, Newman, Lavender & Campbell, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: March 14, 1997 Decided: April 2, 1997

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 17, 1996, the petitioner, C.S., on behalf of K.S., a minor, filed a petition before the Commissioner of Education seeking emergent relief requiring respondent Board of Education of the Township of Piscataway, Middlesex County, ("the Board" or "Piscataway") to reinstate K.S. to the eighth grade at the Quibbletown Middle School in Piscataway Township

Public Schools. The relief was sought following a meeting of the Board on June 18, 1996, which resulted in the expulsion of K.S. from the Piscataway Township Public School System, effective on that date.

Thereafter, on October 28, 1996, oral argument and documentary submissions were entertained by Administrative Law Judge Jeff Masin in respect to the emergent relief request. Mr. Rubin, in opposition to the emergent relief motion, submitted a letter brief to Judge Masin, dated October 25, 1996. On October 29, 1996, Judge Masin denied the emergent relief request and scheduled the matter for plenary hearing. On November 18, 1996, the matter was transmitted to my office for hearing on a plenary basis. Presumably, prior to this date, the Commissioner either through silence or through the issuance of a decision (my file is unclear in this regard) upheld Judge Masin's order denying K.S.'s emergency relief motion. On that same date I directed a letter to counsel and directed that they advise me as soon as possible in respect to the procedures they wished to subsequently employ in respect to a plenary disposition of this appeal. Following this letter, various telephone conferences were conducted and the parties stipulated that the case would be heard based upon the factual record, memorialized in a transcript of the proceedings conducted before the Board on June 18, 1996, and the submission of letter motions in support of their respective decisions. My office received the certified transcript of the proceedings (C-1) on March 10, 1997. On January 14, 1987, obviously preceding the submission of the transcript, Mr. Rubin submitted his letter brief in support of the Board's position on plenary disposition.

Following my receipt and review of the foregoing documents, I discovered that there was no brief submitted by Mr. Campbell on the plenary issues. Thereafter, on March 25, 1997, my secretary placed a telephone call to Mr. Campbell's office who advised that he would rely on the legal arguments embodied in the brief which he submitted to Administrative Law Judge Masin in support of the emergent relief motion. He noted as well that, in his view, the arguments on the emergent relief issue which were embodied in his brief went beyond the limited scope of the standard for emergent relief and would be sufficient to support his arguments on the plenary issues at bar. Accordingly, the record closed on the latter date, March 25, 1997. [1]

[1] By letter of March 11, 1997, which my office received on or about March 14, 1997, Mr. Rubin brought to my attention the fact that while C-1 obstensibly suggests at page 63 that the resolution to expel K.S. was made moments after the testimony was introduced, in fact the Board "reconvened for the purpose of deliberating before

ISSUE AND BURDEN OF PROOF

The singular issue to be addressed in this proceeding is whether the conduct and actions of K.S. warranted her expulsion from the Piscataway School District. In respect to this issue the burden rests squarely upon the petitioner: the action of a local school district which lies within the area of its discretionary powers may not be upset, unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div.) 1960 at 7. Mere disagreement, if any, with the Board is insufficient legal grounds to recommend to the Commissioner of Education that a new judgment be substituted. The Board must first be found to have been arbitrary, capricious or unreasonable for reversal or modification to occur.

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts in this matter. I have derived the facts from the pleadings in the case and primarily from the certified transcript of the hearing conducted before the Board (C-1). Accordingly, I **FIND**:

At the time of the submission of the motion for emergent relief, K.S., C.S.'s daughter, was thirteen years of age and in the eighth grade of the Piscataway Township Public Schools. K.S. resides with both the parents and her sister in Piscataway Township. On March 22, 1996, while K.S. was in the seventh grade at the Quibbletown Middle School, K.S. sold to another seventh grade female student a substance which K.S. believed to be LSD, lysergic acid diethylamide, a hallucinogenic controlled substance. Shortly after this transaction the child who bought the LSD experienced in school what appeared to be a drug-induced hallucinatory episode. At paragraph 6 of the motion for emergent relief, counsel indicates that after a laboratory analysis was conducted, "it was evident that the substance that was purchased from K.S. by the classmate who ingested it, was not a controlled dangerous substance of any type." In his post-hearing submission, Mr.

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entertaining a resolution. Because the deliberations were not tape recorded, it may have appeared from the tape that the resolution immediately followed the testimony."

Rubin at footnote 3 at page 2 indicates that the Board was presented with two laboratory analyses in respect to whether the substance sold by K.S. was LSD or any other controlled dangerous substance. Based upon these analyses, the Board was not able to conclude that no illegal substances were involved. Nevertheless, Mr. Rubin notes, given the inability of the prosecuting authorities or the school health provider to establish the presence of LSD or any other controlled and dangerous substances the Board, for purposes of the expulsion proceeding, gave K.S. the benefit of the doubt and assumed that what K.S. sold was not a controlled dangerous substance of any type.

K.S. admitted to school officials to selling the substance to her classmate, having secured it from her older sister, then a high school student at Piscataway who has since withdrawn from the school system voluntarily. Following the incident, K.S. was immediately suspended from school and placed on home instruction pending further disciplinary proceedings as directed by the superintendent of the district.

The superintendent initiated expulsion proceedings before the school board but that proceeding was held in abeyance at the request of K.S.'s counsel pending disposition of a Middlesex County family court prosecution which arose as a result of the March 22nd incident. K.S. pleaded guilty to distributing an "imitation" drug, see *N.J.S.A.* 2C:35-11 and on June 3, 1996, was sentenced to a period of probation with a variety of conditions. In spite of the fact that the petitioner pled guilty to distributing an "imitation" drug, at the Board hearing, she acknowledged having sold to her classmate what she indeed thought to be LSD.

The originally scheduled Board hearing was postponed to June 18, 1996, so as to give the petitioner, at her parents' request, the opportunity to have K.S. evaluated by the Board's child study team. As part of its evaluation, the team determined that the incident at issue was not caused either by a learning disability or other handicapping condition which would have made K.S. eligible for special education.

Following the proceedings conducted on June 18th by the Board, following lengthy deliberations, voted 6 to 3 to expel K.S. from the school district, effective immediately. The

decision was thereafter communicated by the superintendent directly to K.S.'s parents. Subsequently, on June 27, 1996, a written statement of "Findings and Determination" was issued by the Board which detailed the reasons for its decision to expel. The decision referred to Board Policy 5620 under which the superintendent would recommend to the Board alternate educational program for the Fall 1996 semester. Eventually, the superintendent implemented a program of home instruction, which went into effect at the commencement of the Fall semester. As noted by Mr. Rubin in his post-hearing submission, the expulsion policy of the Township of Piscataway provides that where a student below the age of sixteen is expelled the Board must provide an alternate educational program. The Board would argue, if the issue were justiciable, Mr. Rubin notes, that absent such internal policy the Board as a matter of law would not have been obliged to provide such program. The child study team, however, did recommend that K.S. be reinstated to the Quibbletown School as soon as possible as well as a variety of other remedies. (See attachment B to petitioner's emergent relief application.) K.S. has no record of any significant disciplinary action instituted against her. As noted in the emergent relief application, she never even had detention. It is also represented in the motion papers that K.S.'s family, on its own initiative, began a family counseling program with K.S., as well as her sister, within weeks following the offense.

ANALYSIS

There is no dispute that K.S. intended to sell LSD (and may have well sold that substance) to another student on school grounds for money. That the drug may not have been LSD is of no consequence in respect to K.S.'s intention, *mens rea*, and motive. The sole question then becomes whether the decision by the Board expelling K.S. from the Quibbletown Middle School based upon her actions and based as well upon the subsequent conviction by entering a plea of guilty to *N.J.S.A.* 2C:35-11, under all of the circumstances of this case can be demonstrated by the petitioner to have been patently arbitrary, without rational basis, or induced by improper motives. In my judgment, the petitioner has failed to establish its burden of proof. It is not arbitrary, unreasonable or capricious for the school district to have a zero tolerance for drugs. As indicated by the Board in its "Findings and Determination", the distribution and use of controlled dangerous substances, or other illegal drug-related conduct will not be tolerated in the Piscataway

School System. As a government agency charged with responsibility for the supervision of students during the school day, the Board has a legal responsibility to take reasonable steps to halt illegal drug-related activity on school grounds. The Board has also made a moral commitment to the children of this community to use its best efforts to assure that students attend schools free of illegal drugs and drug-related activity. The present case is a test of that commitment." Exhibit A to petitioner's emergent relief motion at 3. The Board also took into consideration the fact that even if *arguendo* the substance sold by K.S. was not a controlled dangerous substance, pursuant to *N.J.S.A.* 2C:35-11(d), the distribution of substances which while not actually illegal appear to be is deemed to be an indictable crime of the third degree. .

The Board also took into consideration K.S.'s record separate and apart from the offense at issue. It acknowledged that she was an above-average student and that there was no prior instances of disciplinary action instituted against her. It considered the fact that there was absence of proof that the substance sold was indeed LSD or any other controlled dangerous substance but as properly noted by the Board the absence of such proof "was pure happenstance." [K.S.] intended to distribute a dangerous illegal drug on school grounds for money. The fact that she may have been duped herself entitles her to no more credit than an armed robber who puts hostages in fear "of their lives by pointing an unloaded weapon at them." [2]

The Board also considered the argument offered that K.S. was trying to emulate her sister, from whom she apparently received the drugs, to "be cool". The Board reasonably acknowledged that it was mindful of the traditional adolescent rites of passage but the Board did not view K.S.'s desire to enhance herself esteem as an excuse for knowingly committing a felony. It noted at page 5 of its Findings "the only conclusion to be drawn is that she was at all times in complete control of her conduct, was conscious of the potential consequences, yet made a deliberate choice to act as she did." *Id.* at 5.

The Board also considered K.S.'s ostensible remorse for her behavior and the presumed profound consequences expulsion would have on her. It notes, "[K.S.] was processed through the juvenile justice system, placed in detention where she spent her thirteenth birthday, and

[2] The latter part of the quotation is not found in Exhibit B and I have simply assumed that that was the latter part of the analogy.

remained confined to her home until her sentencing earlier this month. Having given due weight to this consideration, however, the Board is of the view that the circumstances do not overcome the aggravating circumstances involved." *Ibid.*

The Board viewed the most significant mitigating factor, K.S.'s youth and the fact that she had only completed seventh grade thus requiring her family to arrange for up to five years of secondary education elsewhere (assuming of course that the family deems the "alternate educational program" under which the Piscataway District operates unacceptable.). The Board emphasized, however, that this fact would have carried more weight had there been evidence that K.S.'s age itself had a bearing on her appreciation of the nature and consequences of her conduct. The Board properly notes that the record proves otherwise.

The Board also took into consideration the argument raised by counsel, which ostensibly would not be consistent with its position, [3] While the Board took no position in respect to its ability to predict the future it did conclude, however, that contrary to reinstating K.S. to Quibbletown that she would benefit from a "fresh start" in another setting. This was indeed the case, pursuant to K.S.'s mother's testimony before the Board in respect to K.S.'s older sister. The latter had apparently withdrawn from the school system and enrolled in Middlesex County Vocational and Technical High School to get a "fresh start" in the wake of the incident involving K.S.

The Board by a vote of 6 to 3 determined that the aggravating circumstances involving K.S.'s sale of an apparently controlled dangerous substance outweighed the mitigating circumstances by a sufficient margin so as to warrant her immediate expulsion from Piscataway. That the child study team may have recommended a less severe penalty is entitled to little weight given that the purpose of the child study team is to determine whether conduct was caused by some disability which would render K.S. eligible for special education and classification. Thus its role in assessing the penalty for a child who is deemed to be in all ways competent and not subject to special education is quite narrow and, in my view, significantly departs from the expertise of those comprising the team itself. Unlike the Board, as Mr. Rubin notes at page 6 of his brief, the

[3] At the hearing before the Board it also considered that were K.S. to return to Quibbletown she would be ostracized by her peers, frowned upon by her teachers and other staff and be in relative isolation.

child study team is not obliged to balance the interests of other children who may be affected by wrongdoing or to vindicate broader district policies which transcend the field of special education.

Drugs are anathema to our society and to the extent that a school is a microcosm of that society it is also anathema to our educational system. There is absolutely no reasonable excuse for K.S.'s behavior. Had the substance, in fact been LSD one can only speculate as to the harm that could have been done to the child to whom she sold the drugs. That K.S. is in a family counseling program is promising. Nevertheless, that is the responsibility of K.S. and her family. In this instance, the school district is not in *loco parentis* and clearly on balance the application of its drug policy, as applied to K.S. , by expelling her from the school district, given the nature and severity of the wrong she committed, and the potential risks and harm to her classmates is not outweighed by the mitigating factors presented. The decision by the Board is not arbitrary, capricious or unreasonable.

Accordingly and based upon the foregoing, the termination by the Board of Education of the Township of Piscataway, which expelled K.S. be and is hereby **SUSTAINED**. The petitioner has failed to meet its burden.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 2, 97

DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

April 4, 1997

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 7 1997

DATE

OFFICE OF ADMINISTRATIVE LAW

ej

DOCUMENTS IN EVIDENCE

For The Court

C-1 Transcript of expulsion proceedings of K.S., conducted before the Board of Education of the Township of Piscataway, Middlesex County, June 18, 1996

OAL DKT. NO. EDU 8778-96
AGENCY DKT. NO. 467-10/96

C.S., on behalf of minor, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Initially, petitioner contends that if the Administrative Law Judge's (ALJ) decision of using expulsion as a last resort, is permitted to stand, it will represent a disturbing reversal of long-standing decisional precedent in that the "[e]xpulsion of a 12-year-old seventh grade student for a single offense is not a factual precedent in any cases that the petitioner has found." (Exceptions at p. 1) Petitioner further asserts that in the initial decision, the ALJ considers only the arguments raised by the Board which substantiate the Board's position that its action to expel K.S. was not arbitrary. (*Id.* at p. 3) As a result, the decision reiterates errors, including the Board's reference to K.S.'s juvenile offense as a felony which petitioner casts as a serious mischaracterization. Petitioner points out that the notion that juvenile offenses are not criminal acts and must be viewed differently is a recognized and strong public policy of New Jersey. (*Id.*)

Petitioner next avers that the minimal home instruction being provided K.S. is neither thorough nor efficient, as prescribed by our State Constitution, and that the Board has

unconstitutionally usurped K.S.'s right to a free public school education which constitutes a grievous and unconstitutional harm to K.S. (*Id.* at pp. 3-4) Petitioner asserts that the Board's and the ALJ's finding that K.S. was at all times in complete control of her conduct, and its potential consequences when she acted, was erroneous noting that such requires "mature judgment on the part of pre-teen children." (*Id.* at p. 4) Petitioner disagrees with the finding that K.S.'s age had no bearing on the appreciation of her conduct and states that K.S. certainly appreciates the nature and consequences of her conduct now. (Id.)

Finally, petitioner states that, "[w]hile the juvenile justice system accentuates the public policy that youthful offenders must be rehabilitated, the respondent Board accentuates its own arbitrary policy that punishment is paramount irrespective of the offender's age." (*Id.*) To support this contention, petitioner avers the ALJ ignores the guidance contained in the Commissioner's decision in *Scher v. West Orange Board of Education*, 1968 *S.L.D.* 92 at 96-97, where the Commissioner directs school boards to make such decisions grounded on competent advice from its psychologist and other appropriate sources. Petitioner avers the Board acted contrary to the advice of its child study team and seeks reinstatement of K.S. to school. (Petitioner's Exceptions at p. 4)

In reply, the Board contends that the initial decision is correct and that petitioner may not complain that the ALJ adopted in substantial measure the factual findings made by the Board, so long as those findings were grounded in the evidential record made before the Board. Indeed, if the Board could have reasonably reached those conclusions from the record, it avers, the ALJ is required to give deference to the Board's ability to assess the evidence first hand. (Reply Exceptions at p. 1) The Board next notes that whether K.S.'s conduct was technically juvenile delinquency as opposed to criminal behavior, the student's conduct was extremely serious and harmful and her age does not minimize the seriousness of the infraction. (*Id.* at p. 2) As to petitioner's argument that its decision deprives K.S. of her constitutional right to a thorough and efficient education, and the Board points out that K.S. is not being deprived of a complete cessation of services but, rather, is receiving instructional services to allow her to progress from grade to grade through age sixteen. As such, the Board contends there is no basis for considering this constitutional argument. (*Id.* at pp. 2-3)

Next, the Board objects to petitioner's assumption that, in reaching this decision, it found all 12-year-olds to possess mature judgment. It avers that it only found that this student, based on the evidence in this case and her intelligence, was mature enough to understand the consequences of her actions. (*Id.* at p. 3) The Board reiterates that the present record supports a finding that K.S. understood the seriousness of her conduct and what might occur if she were caught. It asserts that

> ***[n]o one could seriously argue surprise at the prospect that drug dealing on campus, even the first time, might result in expulsion. In any event, the announced policy of the Piscataway School District is that illegal drug-related activity will not be tolerated on school grounds or at school-sponsored events. At no time during the hearing did the student claim ignorance of this policy.***
>
> (Reply Exceptions at p. 4)

Finally, the Board objects to the argument that it, and the ALJ, gave too little weight to the child study team reports in this case, noting that, "the members of the child study team, competent as they are in their particular fields, are not disciplinarians." (*Id.*) It concluded that even if the child study team's assumption were true, that K.S. would not commit the offense again, a school could reasonably conclude that the sanction imposed here was essential to the integrity of a "zero tolerance" drug policy. (*Id.* at p. 5)

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the initial decision of the ALJ, finding, instead, that the Board's action expelling K.S., under the particular facts herein, was arbitrary and unreasonable.

Initially, the Commissioner underscores that he endorses the ALJ's view of the seriousness of K.S.'s actions in the instant matter; there is no question that districts cannot tolerate the distribution of illegal chemical substances, real or imitation, which contaminate the bodies and minds of their students. The Commissioner further recognizes and supports the significant role which local districts must assume in the daily struggle to ensure that they provide an environment which is safe from the influence of drugs. Both the Legislature and the State Board of Education have taken notable steps in recent years to guide local districts in carrying out that role, while, at the same time, ensuring that the rights of the individual student are not extinguished. Herein, the Board has adopted a "zero tolerance" policy which, when applied to

the extraordinary facts herein, necessitates striking a delicate balance of the interests of the student body as a whole, and those of K.S.

In the instant matter, while the Commissioner is mindful of the Board's need to take a firm disciplinary stance, he finds that its action to expel K.S., a student who had just completed seventh grade and against whom the Board had never found cause to take prior disciplinary action, is unreasonable, notwithstanding that it may be providing K.S. with home instruction, a service dictated by its internal policy, rather than requirement of law, and, thus, subject to revocation or revision. While the Board takes the position that the record is devoid of evidence that K.S.'s age "had a bearing on her appreciation of the nature and consequences of her conduct," (Initial Decision at p. 7), the Commissioner finds that her age *must* be considered, both because her expulsion from the school system effectively truncates her entire secondary public school experience and because a twelve-year old cannot reasonably be expected to fully comprehend the implications of such a sanction, notwithstanding that she may have been aware of the district's "zero tolerance" policy.[1] Under these circumstances, the Commissioner cannot conclude that expulsion was employed as the "last-ditch expedient," which it is expected to be. *Scher, supra.*

Short of expulsion, but in furtherance of the Board's objective to remove K.S. from its regular education program, the Commissioner finds that the Board failed to consider, investigate and effectively utilize the local- and county-based alternative education program options which are available. These alternative education programs are specifically designed to serve the dual purposes of removing the disruptive student from the regular education program, thus, permitting the district to maintain an educational climate that is both safe and conducive to learning, and assisting the alternative education student to continue her educational program in a public school setting, satisfy credit-year curriculum requirements and develop more responsible patterns of behavior. Where a student such as K.S. is removed, perhaps on a permanent basis, from the regular education program, the Board's "zero tolerance" policy cannot be viewed as

[1] The Commissioner notes in this regard that, while the role of the child study team in a disciplinary proceeding is limited in a formal sense, as properly found by the ALJ, and that its members are not disciplinarians, as stated by the Board, the findings of the team nonetheless reflect the judgment of professionals trained in the assessment of various aspects of pupil behavior and are not without relevance to this matter.

emasculated, notwithstanding that such removal does not absolutely terminate a student's entitlement to an education within the district.

The Commissioner, therefore finds that the Board's action to expel K.S., under the circumstances herein, was unreasonable and cannot be upheld. The Board is directed to resume its obligation under *N.J.S.A.* 18A:38-1 to provide K.S. with a free public education, and to undertake to evaluate K.S., prior to the start of the 1997-98 school year, for the purpose of finding a suitable local- or county-based alternative education program assignment for her.[2]

Accordingly, the initial decision of the ALJ is reversed for the reasons set forth above. The Board is directed to continue to provide K.S. with home instruction, in accordance with its policy, through the remainder of the 1996-97 school year, and to evaluate and readmit K.S. at the start of the 1997-98 school year, in an appropriate placement consistent with the above parameters.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] The Commissioner notes that the within decision does not preclude K.S.'s eventual return to the regular education program, as the Board may determine; nor does it prevent the Board from taking disciplinary action against K.S. should she fail to abide by the rules and policies of any alternative education program in which she is placed, or of the regular education program should the Board subsequently determine to readmit her.

May 19, 1997
Date of Mailing, May 22, 1997

274-97

EDU #8778-96
C # 274-97
SB # 56-97

C.S., on behalf of minor, K.S.,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 19, 1997

For the Petitioner-Cross/Appellant, Kalac, Newman, Lavender & Campbell
(Francis J. Campbell, Esq., of Counsel)

For the Respondent-Appellant, David Rubin, Esq.

On March 22, 1996, K.S., a 12-year-old seventh-grade student at the Quibbletown Middle School, sold another seventh-grade student a substance which K.S. believed to be lysergic acid diethylamide (LSD), a controlled dangerous substance, on school grounds. Although the student who purchased the substance appeared to experience a drug-induced hallucinatory episode, subsequent laboratory analysis did not indicate the presence of a controlled dangerous substance. However, K.S. admitted that she had intended to sell LSD. The Board of Education of the Township of Piscataway (hereinafter "Board") suspended K.S. from school and provided her with home instruction pending further disciplinary proceedings. The child study team determined that the incident was not caused by a learning disability or other handicap.

April 1, 1998

As a result of that incident, K.S. subsequently pleaded guilty in Middlesex County family court to a charge of distributing an imitation drug. N.J.S.A. 2C:35-11.

Following a hearing on June 18, 1996, the Board determined by a 6 to 3 vote to expel K.S. from the district. The Board issued its written findings and determination on June 27, 1996. Pursuant to its policy, the Board provided K.S. with home instruction commencing in September 1996.

On October 17, 1996, petitioner C.S. filed a petition of appeal and a motion for emergent relief on behalf of her daughter K.S. with the Commissioner of Education, seeking a directive requiring the Board to reinstate K.S. to her regular school program. On October 29, 1996, an Administrative Law Judge ("ALJ") denied petitioner's request for emergent relief and scheduled the matter for plenary hearing.

On April 2, 1997, another ALJ assigned to hear the case dismissed the petition, finding that petitioner had failed to satisfy her burden of demonstrating that the Board's action in expelling K.S. was arbitrary, capricious or unreasonable. The ALJ stressed that K.S. had intended to sell a dangerous illegal drug on school grounds and noted that the Board, in determining to expel K.S., had taken into consideration K.S.'s age; the fact that there had been no prior instances of disciplinary action taken against her: that K.S. was remorseful about her behavior; and that K.S. was apparently trying to emulate her sister, from whom she had apparently received the substance. Consequently, the ALJ recommended upholding the expulsion, finding that the nature and severity of the offense, as well as the potential risk of harm to other students, was not outweighed by the mitigating factors.

On May 19, 1997, the Commissioner rejected the ALJ's recommendation, concluding that the Board's action in expelling K.S. was arbitrary and unreasonable. While recognizing the Board's need to take a firm disciplinary stance against drugs, the Commissioner concluded that its action to expel a 12-year-old student against whom it had never taken previous disciplinary action was unreasonable, notwithstanding that it was providing her with home instruction. The Commissioner found that K.S.'s age was a critical consideration "both because her expulsion from the school system effectively truncates her entire secondary public school experience and because a twelve-year-old cannot reasonably be expected to fully comprehend the implications of such a sanction, notwithstanding that she may have been aware of the district's 'zero tolerance' policy." Commissioner's Decision, slip op. at 15. In addition, the Commissioner found that the Board had failed to consider local and county-based alternative education programs designed to remove a disruptive student from a regular education program. Thus, the Commissioner concluded that the Board's action in expelling K.S. was unreasonable under the circumstances and could not be upheld. He therefore directed the Board to continue to provide K.S. with home instruction through the 1996-97 school year and to evaluate K.S. prior to the 1997-98 school year for the purpose of finding a suitable local or county-based alternative education program for her.

The Board filed the instant appeal to the State Board, arguing that petitioner had failed to demonstrate that its action was arbitrary, capricious or unreasonable. Petitioner filed a cross-appeal, contending that the Commissioner, in view of his decision, should have directed the Board to reinstate K.S. to her regular school program.

After a careful review of the record, we affirm with clarification the decision of the Commissioner.

As noted by the ALJ, action of a district board which lies within its discretionary powers may not be upset unless it is shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). The scope of this agency's review is not to substitute our judgment for that of the district board but to determine whether the underlying facts were as the board claimed and whether it had a reasonable basis for its conclusion. The burden of proving unreasonableness is on the appellant. Kopera, supra.

In this case, it is undisputed that K.S. intended to sell a controlled dangerous substance to another student on school premises, notwithstanding the fact that laboratory analysis did not confirm the presence of an illegal substance. While the applicable legal standard precludes us from substituting our judgment for that of the Board, we find that petitioner has demonstrated that the Board did not have a reasonable basis under the particular facts of this case for its decision to expel K.S. from the district. We emphasize, like the Commissioner, that K.S. was just 12-years-old at the time of the incident. Although the Board did give some consideration to K.S.'s age, we find that it did not give sufficient weight to this factor. Rather, the Board's decision was geared more towards the fact that K.S. had "just completed seventh grade, and that expulsion would require her family to arrange for up to five years of secondary education elsewhere." Decision of Piscataway Board, at 5. The Board

added that "[t]his factor may have carried more weight...had there been evidence that [K.S.'s] age had a bearing on her appreciation of the nature of her conduct." Id. at 5-6.

We find that K.S.'s age cannot be so lightly discounted. There is nothing in this record that would lead us to believe that this particular twelve-year-old sufficiently appreciated the nature and potential consequences of her conduct, particularly in an instance in which she may have been attempting to emulate an older sibling. Indeed, the Board notes that the incident has had "a meaningful impact" on K.S. Id. at 5. "She was processed through the juvenile justice system, placed in detention where she spent her thirteenth birthday, and remained confined to her home until her sentencing...." Id. Nor is there any indication that K.S. had been subject to any previous disciplinary action in the district.

We stress that our decision rejecting expulsion in this case is not intended in any way as an indictment of the Board's "zero tolerance" policy towards drugs. To the contrary, we commend the Board for its aggressive stance on the use of illegal drugs. Nor would our decision today preclude the Board from expelling a student under its "zero tolerance" policy under a different set of circumstances. Rather, after careful consideration of the facts in the record before us, we find that the Board did not have a reasonable basis for its determination that the appropriate disciplinary action in this particular instance was the ultimate sanction of expulsion from the district.

Consequently, as clarified herein with regard to the legal standard, we affirm the decision of the Commissioner reversing the Board's decision to expel K.S. In so doing, however, we reject petitioner's contention that the Board should be required to reinstate K.S. to her regular school program at this time. Given the nature of K.S.'s offense, we

direct the Board to evaluate K.S. for the purpose of finding an appropriate local or county-based education program for her.

S. David Brandt opposed.

April 1, 1998

Date of mailing APR 0 3 1998

278-97

278-97

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD MORGAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
_____	:	

MAY 27, 1997

AGENCY DKT. NO. 50-2/97

IN THE MATTER OF THE TENURE	:	
HEARING OF RONALD MORGAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

For the Board, Thomas W. Sumners, Jr., Esq.

This matter having been opened before the Commissioner of Education on February 6, 1997, through certification of tenure charges of excessive absenteeism and unbecoming conduct against a tenured custodian of the Board of Education of the City of Trenton; and

The Commissioner having directed respondent, via both certified and regular mail on February 10, 1997, the certified copy having been signed for on February 14, 1997, to file an Answer to the tenure charges against him; and

The Commissioner having sent such notice, again, on March 10, 1997, and on April 1, 1997, via regular and certified mail, with the certified copies having been signed for on March 13, 1997, and April 2, 1997, respectively; and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against him is deemed to be admitted; now therefore

IT IS ORDERED this 27th day of May 1997 that summary judgment shall be granted to the Board, and Ronald Morgan shall be dismissed from his tenured position as a custodian in the Board's employ as of the date of this order.

COMMISSIONER OF EDUCATION

MAY 27, 1997
DATE OF MAILING MAY 27, 1997

279-97

BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.P. AND K.P., parents of C.P.,	:	DECISION
RESPONDENTS.	:	
	:	

MAY 27, 1997

AGENCY DKT. NO. 564-11/96

BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C.P. AND K.P., parents of C.P.,	:	DECISION
RESPONDENTS.	:	

For Petitioner: Michael P. Stanton, Esq.

This matter, having been brought before the Commissioner of Education by the Board of Education of the City of Ocean City by way of a Petition of Appeal filed on November 25, 1996, requesting that respondents be ordered to pay the Board tuition in the amount of $10,210.96; and

Whereas, the Board conducted a disenrollment hearing on January 24, 1996 and respondents, represented by an attorney, did not dispute their nonresidency; and

Whereas the Board subsequently sought reimbursement for tuition and, at the request of Respondent C.P., convened to discuss tuition calculations and, thereafter, petitioner and Respondent C.P. agreed on a payment schedule; and

Whereas Respondent C.P. failed to confirm said agreement by his signature on the Board's letter dated March 19, 1996, and, further, was unable to be reached; and

Whereas, the Commissioner of Education, having a duly filed petition before him has directed respondents and/or their attorney of record by notices dated December 3, 1996, December 23, 1996, January 14, 1997[1] and February 13, 1997[2] to file an Answer to the charges against them; and

Whereas, neither respondents, nor any attorney on their behalf, having filed an Answer to the charges against them, and each count of the charges against the respondents having been deemed to be admitted; now therefore

IT IS ORDERED on this 27th day of May 1997 that summary decision shall be granted to the Board of Education and that respondents shall pay tuition in the amount of $10,210.96 due the Board for the period of time in which C.P. was ineligible to attend school in the Board's district.

COMMISSIONER OF EDUCATION

[1] Return receipt number Z-754573420 signed and dated January 16, 1997.
[2] Return receipt number Z-754568517 signed and dated February 18, 1997.

281-97

281-97

VICTOR MIZZONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 27, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9322-96
AGENCY DKT. NO. 283-7/96

VICTOR MIZZONE,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent

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

Gregory G. Johnson, Esq., for respondent

Record Closed: March 24, 1997 Decided: April 18, 1997

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, Victor Mizzone, filed a Verified Petition with the Commissioner of Education claiming of violations of seniority rights in connection with a reduction in force that adversely affected him.

On September 11, 1996 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to 13. A Prehearing conference was held on December 2, 1996, and a Prehearing Order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was scheduled to be held on August 18, 1997.

In February 1997, the parties conferred for purposes of settlement, and an agreement was reached. The terms of the settlement were incorporated into a written settlement agreement dated February 24, 1997 and signed by the parties and their authorized representatives.

A copy of the settlement agreement is attached hereto and made a part hereof.

Having reviewed and considered the issues involved in this dispute, it is **CONCLUDED** that the parties have voluntarily and knowing agreed to the settlement, as evidence by the attached agreement. It is further **CONCLUDED** that the settlement is fair and fully dispositive of all issues in controversy.

It is therefore **ORDERED** that the settlement be approved and that this matter be **DISMISSED**.

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

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

April 18, 1997
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

4/28/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 30 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(201) 773-5665
Counsel for Petitioner

VICTOR MIZZONE,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 283-7/96 O.A.L. DOCKET NO. EDU 9322-96N
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

Petitioner, Victor Mizzone, residing at 92 Kilian Place, Totowa, New Jersey 07512 (hereinafter "Mr. Mizzone"), and the State-Operated School District of the City of Paterson (hereinafter referred to as "the District") hereby enter into this Settlement Agreement as follows:

WHEREAS, Mr. Mizzone filed the above-captioned petition claiming a violation of his seniority rights regarding a reduction in force affecting him;

WHEREAS, Mr. Mizzone has been reinstated to a full-time teaching position in the District effective February 1, 1997;

WHEREAS, as a result of discovery, the parties have mutually agreed that Mr. Mizzone is entitled to reinstatement with full back salary, less mitigation, and compensation for the cost of alternative medical insurance;

IT IS on this 24TH day of February, agreed:

1. In return for compliance with this Agreement, and based on the needs of the District, Mr. Mizzone has been assigned to a full-time teaching position within the scope of his certifications, effective February 1, 1997. He shall receive the salary and benefits due to every teaching staff member as prescribed by law, contract, practice and policy for his service after reinstatement.

2. Mr. Mizzone shall be paid back salary in the gross amount of $18,164.50. This amount is the balance due after a reduction of $5,792.00 reflecting mitigation due to the receipt of state unemployment insurance benefits by Mr. Mizzone during the period from July 1, 1996 to February 1, 1997. The District shall refund this amount of $5,792.00 to the State of New Jersey, Department of Labor, as required by law and thereby discharge Mr. Mizzone's duty to repay that sum.

The amount of gross back salary due to Mr. Mizzone after mitigation ($18,164.50) shall be subject to normal payroll deductions. Payroll deductions shall be calculated based on the gross salary amount of $18,164.50.

The net amount of salary, after payroll deductions, shall be paid to Mr. Mizzone within 30 days of the approval of the Settlement by the Commissioner of Education.

3. Mr. Mizzone shall be reinstated to all medical, dental and other health insurance plans maintained by the District, retroactive to July 1, 1996. It is understood that Mr. Mizzone has incurred medical and dental bills since July 1, 1996, which must be submitted to the District's carrier for

coverage as to any excess beyond the amounts provided by Mr. Mizzone's alternative insurance.

If, for any reason, Mr. Mizzone is denied retroactive insurance coverage from July 1, 1996, the District will compensate Mr. Mizzone for the amount in excess of his alternative insurance that would have been paid by the Board's carrier if that coverage had been in effect.

4. Mr. Mizzone shall not be required to comply with any 'waiting period' for any form of health insurance on or after the date of his reinstatement.

5. Mr. Mizzone shall be paid the amount of $984.68 as reimbursement for the cost of alternative medical and dental insurance. Said sum shall be paid within 30 days of the approval of this Agreement by the Commissioner of Education. Said amount shall be paid as a lump sum with no deductions or withholdings taken from it. The District may issue a Form 1099 as to this sum. If any income tax is due as to this amount, it shall be Mr. Mizzone's responsibility to determine the amount of tax due, if any, and pay said tax when due.

6. Mr. Mizzone shall receive retroactive seniority credit for the period September 1, 1996, through January 31, 1997, in the same manner as would have been the case if he had been employed for that period. This time span shall count as time employed for all other purposes under district policy, practice or contract as to Mr. Mizzone.

7. In return for compliance with this Agreement, Mr. Mizzone agrees to the dismissal of the above-captioned litigation, with prejudice and without costs. This Agreement is

subject to approval by the Office of Administrative Law and the Commissioner of Education and shall be null and void if not so approved.

FOR PETITIONER:

Witness:

Victor Mizzone

Victor Mizzone

Louis P. Bucceri

Dated: February 24, 1997

FOR RESPONDENT:

Witness:

Dr. Carol S. Wilson

Deborah West

Dr. Carol S. Wilson State District Superintendent

Dated: March 17, 1997

OAL DKT. NO. EDU 9322-96
AGENCY DKT. NO. 283-7/96

VICTOR MIZZONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 27, 1997

DATE OF MAILING MAY 27, 1997

282-97

282-97

U.M., on behalf of minor niece, H.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAY 27, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2235-97
AGENCY DKT. NO. 600-12/96

U.M., ON BEHALF OF MINOR NIECE, H.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN,
Respondent.

U.M., petitioner, *pro se*

David A. Luthman, Esq., for respondent (Toll, Sullivan & Luthman, attorneys)

Record Closed: May 1, 1997 Decided: May 2, 1997

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

U.M., petitioner, contested the Pennsauken Board of Education determination that her niece, H.C., is not qualified under *N.J.S.A.* 18A:38-1 to attend Pennsauken High School.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13. The hearing was calendared for May 1, 1997 at 9:00 a.m. at the Office of Administrative Law, Trenton, New Jersey.

On the morning of May 1, 1997, U.M. telephoned the judge's chambers and stated that she would not appear because her niece, H.C., was incarcerated and, in any event, the petitioner lacked transportation. Counsel for the Pennsauken Township Board appeared as did an investigator retained by the Board. The investigator confirmed that the seventeen-year old niece is incarcerated and will be for approximately three years.

I **FIND** that the petition is **MOOT** under these circumstances. I **CONCLUDE** that the petition must be dismissed for mootness. Accordingly, it is **ORDERED** that the petition of appeal in this matter be and is hereby **DISMISSED** for mootness.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2 MAY 1997
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

May 6, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 7 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

slf

OAL DKT. NO. EDU 2235-97
AGENCY DKT. NO. 600-12/96

U.M., on behalf of minor niece, H.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is properly dismissed for mootness.

Accordingly, the initial decision of the ALJ is adopted as the final decision in this matter. The within Petition of Appeal is hereby dismissed.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that this dismissal neither forecloses adjudication of, nor implies any position regarding, any dispute which may arise with respect to determining H.C.'s district of residence for purposes of tuition or program provision, if applicable.

286-97

A.B. AND R.B., on behalf of minor children, A.B., A.B. AND A.B., PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY, RESPONDENT.	:	DECISION

SYNOPSIS

Petitioning parents challenged Board's residency determination.

In light of the testimony of witnesses and review of the record, the ALJ concluded that petitioners' children were domiciled in the District as A.B. and R.B. and their four children have lived with A.B.'s aunt and mother in Lawnside for a number of years and, thus, were entitled to a free public education in Lawnside. The Board was ordered to permit petitioners' children to be enrolled in its schools free of charge.

Relying on the record and the credibility determinations of the ALJ, the Commissioner adopted the findings and determination in the initial decision as his own.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6603-96S

AGENCY DKT. NO. 267-7/96

A.B. and R.B. ON BEHALF OF MINOR CHILDREN

A.B., A.B., A.B. and A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,

Respondent.

R.B., petitioner, appearing *pro se*

Harvey C. Johnson, Esq., for Respondent

Record Closed: December 12, 1996 Decided: April 14, 1997

BEFORE **BARBARA A. HARNED** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A.B. and R.B., on behalf of their four minor children, contest the determination of the Board of Education of the Lawnside School District (Board) that their children are not entitled to a free public education from the Lawnside School District. By letter dated June 14, 1996, the Board advised A.B. and R.B. that it had determined they were not domiciled in Lawnside and that their

children were not living in the home of another person domiciled in the district and supported gratis by that individual (R-3). Accordingly, A.B. and R.B. were advised to withdraw their children from the District (R-3). The letter additionally advised the parents of their appeal rights (R-3).

A.B. and R.B. filed a petition of appeal with the Commissioner of Education on June 30, 1996. On July 29, 1996, the Commissioner transferred the matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A telephone prehearing conference was held on September 19, 1996. The hearing was held on November 12, 1996. The record was kept open for the submission of tax returns by A.B. and R.B. to the Board and was closed thereafter on December 12, 1996. The B. children have continued to attend school in the Lawnside district pending the outcome of this proceeding.

FACTUAL DISCUSSION AND FINDINGS

Unless otherwise noted, the following facts are undisputed and I adopt them as **FINDINGS OF FACT.** Disputed facts are noted and findings as to those disputed facts are set forth at the end of this factual discussion. R.B. and A.B. have four children: a son A.B., Jr. age 17, and three daughters, A.B. age 12, A.B. age 9, and A.B. age 6. A.B.'s mother, G.W. age 71, owns a home at 1411 Ormond Avenue, Camden, New Jersey. However, G.W. does not live in the Ormond Avenue home but rather lives with her sister, M.J., age 77, in a home owned by M.J. at 131 Ashland Avenue, Lawnside, New Jersey. G.W. moved in with her sister approximately six to eight years ago when it became clear that she could no longer live alone. G.W. suffers from a chronic mental disorder, complicated by memory deficits and requires twenty-four hour supervision (P-1). R.B. and A.B. testified that they and their four children live with A.B.'s aunt and mother in Lawnside. The Board, however, contends that A.B., R.B. and their four children live at the 1411 Ormond Avenue address in Camden.

R.B.'s son A.B., Jr., was born in 1979. R.B. and the baby's father, A.B., married in 1982 and lived with A.B.'s mother at the 1411 Ormond Avenue address in Camden for about one year. R.B. and A.B. subsequently had three daughters. While disputed by the Board, R.B. testified that in 1982 or 1983, she, A.B. and A.B., Jr. moved in with M.J. in Lawnside, that their daughters were born

while they lived in Lawnside and that the family has continuously lived in Lawnside since 1982 or 1983.

R.B. testified as to the sleeping arrangements at the Lawnside residence. There are four bedrooms in that home. R.B. testified that M.J. and the two older daughters sleep in one bedroom and that her youngest daughter sleeps in the same room as her grandmother G.W. A.B., Jr. has his own bedroom and R.B. and A.B. have a bedroom in the basement.

The children have always attended school in the Lawnside district with one exception, discussed below. The Board entered into evidence documents relating to the children's attendance at school in the district. In September, 1990, the children's great aunt, M.J., signed an Affidavit of Residency when the B.'s oldest daughter entered kindergarten (R-2, Exhibit 13, page 4). In this Affidavit, M.J. swore that she maintained a permanent residence at 131 Ashland Avenue and that A.B. and his family also maintained a permanent residence at that address (R-2, Exhibit 13, page 4). Also entered into evidence by the Board is a partially completed Affidavit of Support of Minor with the oldest daughter's name filled in, suggesting that M.J. claimed she supported the child (R-2, Exhibit 13, pages 5 through 8). However, this document is unsigned and undated and therefore I will not accord it any evidential weight. On a medical information form completed in relation to the oldest daughter's entering kindergarten in September, 1990, her address was listed as 131 Ashland Avenue (R-2, Exhibit 16). Registration forms completed in September, 1992 and September, 1995, respectively, when the two younger daughters entered kindergarten, also list their home address as 131 Ashland Avenue and state that the children live with their mother and father at that address (R-2, Exhibits 14 and 15).

The one exception noted above occurred when A.B., Jr., was in eighth grade and was not promoted to the ninth grade. R.B.'s mother suggested that he live with her in Camden, attend summer school and enter Camden High School. A.B., Jr. did live with his maternal grandmother for the year, completed ninth grade at Camden and returned to the Lawnside school district the following year to enter Haddon Heights High School, with which Lawnside has a sending/receiving relationship (R-2, Exhibit 13, page 1). R.B. testified that while her son attended Camden High School, he visited the Lawnside residence every day and she and her husband supported him. A.B., Jr.'s great aunt,

M.J., completed an Affidavit of Residency on September 2, 1994 in connection with A.B., Jr.'s return to Lawnside. In this Affidavit M.J. swore that A.B., Jr. maintained a permanent residence at the 131 Ashland Avenue address (R-2, Exhibit 13, page 1). The Board also submitted into evidence a partially completed Affidavit of Residency Parents/Guardian in which M.J. is listed as the guardian of A.B., Jr. (R-2, Exhibit 13, page 2). However, this document is undated and unsigned (R-2, Exhibit 13, page 2). Therefore, I will not accord it any evidential weight.

R.B. testified that the family does not live at the 1411 Ormond Avenue, Camden address. Rather, they only visit that home on occasion when the stress of caring for her mother-in-law becomes too great. G.W. suffers from schizophrenia and Alzheimer's disease (P-1, P-2, P-3 and P-4). According to G.W.'s treating psychiatrist, Dr. Rao, as of May 22, 1995, G.W. "needs 24 hour supervision and assistance in all her daily activities" and that A.B. "is a primary caregiver for [G.W.]" (P-1). Dr. Rao also stated that

> [c]urrently, [G.W.] lives with her elderly sister who is overwhelmed by the care the patient needs. Her son, Mr. A.B., has been a great help for both his mother and her sister in assisting in her care on a daily basis. Mr. B. assists his mother in feeding, bathing, finances, dressing, and taking her medications, which helps the patient to be maintained in the community.
>
> Without the son's help, patient is very difficult for her sister to manage alone. His daily presence there is of utmost importance to her well-being and continued care (P-1).

R.B. testified that at times the family needs to take a break because of the difficulty in dealing with G.W. In addition, G.W. sometimes does things that are not good for the children. She will wake up in the middle of the night screaming which scares the children. According to R.B., the family stays in the Camden house one or two days a week when G.W. gets "too bad." Sometimes, G.W. will be "bad" for a week or two and the family will go to Camden until her medicine starts working. The family often spends the weekends at the Camden address. R.B. and the children have some clothes and the children have toys at the Camden house. In addition, the children have old bikes in Camden while they have new bikes in Lawnside. R.B. keeps her important papers at the Camden address because G.W. destroys correspondence.

Both R.B. and A.B.'s driver's licenses list the Lawnside address as their address. In addition, R.B. and A.B. submitted into evidence sixteen pieces of correspondence, thirteen addressed to A.B. and three addressed to R.B., all mailed to the Lawnside address. The correspondence includes items such as bills from doctors, lawyers and Bell Atlantic Mobile, as well as a citation from traffic court. The envelopes bear postmark dates from 1986 (one item, the traffic citation) through 1996, with the majority of the documents dated 1994 to 1996 (P-6 through P-21). On their 1995 income tax return, R.B. and A.B. listed their address as 131 Ashland Avenue, Lawnside, NJ and claimed the four children as dependents (R-2, Exhibit 10). It is undisputed that R.B. and A.B. fully support their four children.

James Allen, District Investigator, testified for the Board. He had been asked by the Acting Superintendent, Cassandra Brown, to investigate the B. family because Ms. Brown had been told by teachers that the family lived in Camden and that the younger children were frequently late to school. Mr. Allen observed the home at 1411 Ormond Avenue, Camden on four occasions. On Friday, April 19, 1996, Mr. Allen arrived at 1411 Ormond at approximately 5:30 a.m. (P-5). He observed Mr. B.'s car parked in a side driveway. Mr. B. walked out of the house at approximately 7:37 a.m. and started his car. Mr. B. walked back to the front of the house and then started working in the back yard (P-5). Mr. Allen videotaped Mr. B. walking to the front of the house and working in the back yard (R-1, P-5). At approximately 7:45 a.m., Mrs. B. walked up the driveway and got into the car with Mr. B. (P-5).

On Monday, April 22, 1996, Mr. Allen returned to 1411 Ormond at approximately 6:30 a.m.. At approximately 7:47 a.m., Mr. Allen observed Mr. B. and the B.'s three daughters walk out the front door, around to the driveway and get into their car (P-5). Mrs. B. then came out of the house, got into the car and they drove away (P-5). Mr. Allen followed the B family after they left the 1411 Ormond address. They drove to 131 Ashland Avenue in Lawnside and dropped off the youngest daughter at that address (P-5). Mr. Allen arrived at 131 Ashland at approximately 8:16 a.m. on April 22, 1996, observed and videotaped the same car that had left 1411 Ormond, now parked at 131 Ashland (R-1, P-5). After dropping off their youngest daughter at 131 Ashland, the B.'s drove their other two daughters to their school in Lawnside (P-5).

Mr. Allen returned to 1411 Ormond on Tuesday, April 23, 1996. At approximately 7:30 a.m. he observed Mr. B. walk out of the house and start his car (P-5). Mr. B. went back to the front of the house and put out the trash (P-5). Mr. Allen described the trash as one container, several large bags and several smaller bags. He thought it "appeared to be trash from a family living there." Shortly thereafter, Mrs. B. came out of the house, got into the car with her husband and they drove away (P-5). On Monday, April 29, 1996, Mr. Allen returned to 1411 Ormond (P-5). At approximately 7:30 a.m. he observed Mr. B. come out of the house and start his car (P-5). He then observed Mrs. B. come out of the house carrying a large overnight bag (P-5).

Mr. Allen again visited 1411 Ormond on May 1, 1996, at approximately 9:30 a.m. (P-5). His purpose was to interview the neighbors of the B. family. Mr. Allen went to 1415 Ormond Avenue and spoke with Mr. Thomas, a long time resident (P-5). Mr. Thomas told Mr. Allen that he knew the B. family and that they had lived at 1411 Ormond for about thirty years (P-5). In response to Mr. Allen's inquiry about the children's activities, Mr. Thomas responded that "[t]hey play outside when its hot, but it's been cold lately so I don't see them that much" (P-5). Mr. Allen also interviewed Mr. Mustapha who lives at 1466 Bradley Street, across the street from 1411 Ormond (P-5). Mr. Mustapha stated that he knew the B. family. When asked by Mr. Allen how long the B.'s had lived at 1411 Ormond, he responded that he had been living in his house for thirteen years and that the B.'s "were here when I came" (P-5). When asked if he ever saw the children playing outside, Mr. Mustapha replied "I see the girls riding their bikes around my house and playing in the park across the street all the time" (P-5). On cross examination, Mr. Allen acknowledged that the park referred to by Mr. Mustapha is a vacant lot with no swings or slides. When asked about A.B., Jr., Mr. Mustapha replied that he "is usually with his father" (P-5).

Mr. Allen further testified that some children are bused to the high school in Haddon Heights and that with an address in Lawnside, A.B., Jr., would have a bus pass. Mr. Allen followed the buses approximately ten times between February and June, 1996 and saw A.B., Jr., get off the bus in the morning only two times. He never saw A.B., Jr. use the bus in the afternoon. Some of the students on the bus asked Mr. Allen why he was following the bus and he replied that he was investigating students who do not live in Lawnside. The students responded that A.B., Jr. did not live in Lawnside. Mr. Allen is aware of some teenagers who take the Speed Line from Camden to Lawnside and that

1411 Ormond is only a few blocks from the high speed line but he acknowledged on cross examination that he had never observed A.B., Jr. taking public transportation to school. R.B. testified that her son does not use the bus because his girlfriend drives him to school.

Cassandra Brown is a sixth grade teacher who was serving as Acting Superintendent of the Lawnside school district in 1995/96. She testified that the teaching staff told her that the B. family lived in Camden and that they were late to school a lot. School starts at 8:25 a.m. and the late bell rings at 8:35 a.m. If a student is late, he or she must report to the office. Ms. Brown estimated it would be a ten to fifteen minute walk to school from the 131 Ashland address. One of R.B. and A.B.'s daughters is in Ms. Brown's class this year and she is late to class at least two times a week. On cross examination, Ms. Brown acknowledged that the number of unexcused latenesses would be shown on a student's report card. She also acknowledged that other children are late to school.

Affidavits of Residency for the four children were signed by M.J. and R.B. for the 1996/97 school year in which M.J. and R.B. swore that the children resided full time in M.J.'s home and maintained a permanent residence in her 131 Ashland Avenue home (R-2, Exhibits 2, 4, 6 and 8). In addition, Affidavits of Residency for Parents/Guardians were signed by R.B. and A.B. for the 1996-97 school year for each of the four children in which the parents swore that they reside at the 131 Ashland Avenue address on a permanent basis and are the legal parents and guardians of the children (R-2, Exhibits 3, 5, 7 and 9).

Based on the above discussion, it is clear that resolving where the B. family lives requires a determination of the credibility of the witnesses. In this instance, I found all three witnesses to be creditable. R.B.'s explanation that the family sometimes stays in Camden when G.W. is acting out has the ring of truth to it. Moreover, R.B.'s testimony is strongly supported by the letter from Dr. Rao in which he states that A.B. is "a primary caregiver for" G.W. who "needs 24 hour supervision and assistance in all her daily activities" and that A.B.'s "daily presence there is of utmost importance to [G.W.'s] well-being and continued care"(P-1). It is reasonable to conclude that in order to provide this primary care on a 24-hour basis, A.B. must live with his mother in his aunt's Lawnside residence. This letter provides particularly strong support since it is dated prior to the commencement of the investigation into the B. family's residence and thus clearly was not prepared in connection with this

litigation. The Board contends, however, that the letter supports its position because Dr. Rao also states in the letter that G.W. "lives with her elderly sister who is overwhelmed by the care the patient needs" instead of stating that G.W. lives with her elderly sister and A.B. and his family (P-1).[1] The Board asks that an inference be drawn from this statement that A.B. and his family do not live in the Lawnside residence. However, such a strong inference cannot be derived from the quoted language. The doctor could just as easily have referred only to M.J. in that statement because he knew M.J. owned the house in Lawnside. R.B.'s testimony is also supported by documentary evidence such as the sixteen pieces of correspondence addressed to either A.B. or R.B. at the Lawnside address, the Lawnside address on both petitioners' drivers licenses and the Lawnside address on their income tax form. Moreover, R.B.'s description of the sleeping arrangements in the four bedrooms in the Lawnside home was essentially uncontradicted by the Board and seems reasonable.

I also found the testimony of Investigator Allen entirely credible. Indeed, petitioners do not dispute that on the first, second and fourth days he observed the Camden address, Mr. and Mrs. B. came out of the Camden residence and that on the third day Mr. and Mrs. B. and their daughters left that residence and drove to the Lawnside address. Mr. Allen's observations on these four days, however, are consistent with R.B.'s testimony that the family lives in Lawnside but goes to the Camden residence on occasion to relieve the stress of caring for her mother-in-law.

Moreover, the one instance of observing the daughters leaving the Camden house is insufficient to establish that the family lives at that address, especially since the children were not observed on three other occasions. While Ms. Brown's testimony, which I also find credible, that one of the children is in her class this year and is late at least two times a week may be suggestive, it would be speculation to conclude that the child is late because she lives in Camden. The fact that Mr. Allen observed A.B., Jr. taking the school bus on only a few occasions and speculated that A.B., Jr. could be taking the speed line from Camden is too inconclusive to establish that A.B., Jr. lives at the Camden residence. The only other evidence that the children live at the Camden address is hearsay testimony from neighbors, classmates and teachers. The only non-speculative and non-hearsay evidence on this issue is Mr. Allen's observations. I conclude that those observations are insufficient to support a finding that the family lives in the Camden residence in light of my finding that R.B.'s

[1] I note that both parties submitted Dr. Rao's letter into evidence. Petitioners as P-1 and the Board as R-2, Exhibit 18.

explanation of why they occasionally stay at the Camden residence is credible and a reasonable explanation of why Mr. Allen observed them leaving the Camden residence.

Based on the foregoing, I make the following additional **FINDINGS OF FACT**:

1. In 1982 or 1983, R.B., A.B. and A.B., Jr. moved in with M.J. in M.J.'s 131 Ashland Avenue, Lawnside, N.J., residence.
2. R.B. and A.B.'s three daughters were born while the family was living at 131 Ashland Avenue, Lawnside, N.J.
3. The B. family has continuously lived in Lawnside since 1982 or 1983.
4. There are four bedrooms in the 131 Ashland home. M.J. and the two older daughters of R.B. and A.B. sleep in one bedroom. G.W. and the youngest daughter sleep in a second bedroom. A.B., Jr., has his own bedroom. R.B. and A.B. have a bedroom in the basement of the house.
5. G.W. suffers from schizophrenia and Alzheimer's disease and requires 24 hour supervision and assistance. A.B. is a primary caregiver for his mother, G.W.
6. On occasion when the stress of caring for G.W. becomes too great, the B. family will stay at the 1411 Ormond Avenue, Camden house owned by G.W. The family stays in the Camden house approximately one or two days a week and frequently will stay there on weekends. Occasionally the family will stay at the Camden address for a week, if G.W.'s medication is not working. G.W. sometimes wakes up during the night and starts screaming which frightens the younger B. children.
7. R.B. and the children have some clothes and the children have some toys at the Camden house. In addition, the children have old bikes in Camden and new bikes in Lawnside. R.B. keeps her important papers at the Camden address because G.W. sometimes destroy correspondence.
8. After receiving reports that the B. family lived in Camden, the Acting Superintendent of the Lawnside school district asked the District Investigator, James Allen, to investigate.
9. Mr. Allen observed the residence at 1411 Ormond Avenue, Camden, on four days, i.e. on April 19, 22, 23 and 29, 1996.

10 On April 19, 1996, at approximately 7:37 a.m. Mr. B. walked out of the house at 1411 Ormond Avenue and started his car. Mr. B. then started working in the back yard of that residence. At approximately 7:45 a.m., Mrs. B. walked up the driveway and got into the car with Mr. B.

11 On April 22, 1996, Mr. B. and his three daughters walked out of the front door of the residence at 1411 Ormond Avenue and got into Mr. B.'s car. Shortly thereafter, Mrs. B. came out of the same house and got into the car. The family drove to 131 Ashland Avenue in Lawnside where the youngest daughter was dropped off. Mr. and Mrs. B. then drove their other two daughters to their school in Lawnside.

12. On April 23, 1996, at approximately 7:30 a.m. Mr. B. walked out of the house at 1411 Ormond Avenue and started his car. Mr. B. went back to the front of the house and put out the trash which consisted of one container, several large bags and several smaller bags. Shortly thereafter, Mrs. B. came out of the 1411 Ormond Avenue residence, got into the car with her husband and they drove away.

13. On April 29, 1996, at approximately 7:30 a.m. Mr. B. walked out of the house at 1411 Ormond Avenue and started his car. Shortly thereafter, Mrs. B. came out of the 1411 Ormond Avenue residence carrying a large overnight bag.

CONCLUSIONS OF LAW

Pursuant to *N.J.S.A.* 18A:38-1, a local school district is required to provide a free public education to any person over five and under twenty years of age who is domiciled within the school district. A person may have several residences but can have only one domicile. *State v. Benny,* 20 *N.J.* 238, 251 (1955). Domicile is defined as

> [i]n a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. . .. Home is the place where a person dwells and which is the center of his domestic, social and civil life . . .. Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence. *Matter of Unanue,* 225 *N.J. Super.* 362, 374 (Law Div. 1991).

As the Court explained in *State v. Benny, supra,* 20 *N.J.* at 251, residency is different than domicile in that a

> [r]esidence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a "home" according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile. Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile.

Petitioners have the burden in this proceeding of proving by a preponderance of the competent and credible evidence that their family is domiciled in Lawnside and thus entitled to attend Lawnside public schools free of charge. *N.J.S.A.* 18A:38-1b(2). Based on my findings set forth above, **I CONCLUDE** that A.B. and R.B. never intended to make 1411 Ormond Avenue, Camden, their "home" as described in *State v. Benny, supra.* The address on their drivers' licenses, correspondence and income tax return is 131 Ashland Avenue, Lawnside. Moreover, one piece of correspondence with the Ashland Avenue address is dated December 8, 1986, (P-9), indicating that the B. family has lived at that address for a long period of time. Indeed, with the exception of one year, A.B., Jr. has been attending Lawnside schools for the past twelve years. His sisters have been attending Lawnside schools since 1990, 1992 and 1995 respectively. Despite this long attendance at Lawnside schools, the Board offered no testimony of a concern the family did not live in Lawnside until sometime in 1996 when Mr. Allen was asked to investigate. In addition, I found R.B.'s testimony that the family stays at the Camden home several times a week when the stress of caring for G.W. becomes overwhelming to be convincing. It may have been these visits to the Camden home that caused speculation that the B. family no longer lived in Lawnside. However, those visits do not amount to an intention by R.B. and A.B. to make the Camden house their home or domicile.

For the foregoing reasons, **I CONCLUDE** that petitioners' children are entitled and at all times relevant have been entitled to attend the public schools in respondent's district free of charge pursuant to *N.J.S.A.* 18A:38-1(a).

ORDER

For the reasons expressed herein, respondent is **ORDERED** to permit A.B., Jr., A.B., A.B., and A.B. to continue to be enrolled in their schools free of charge.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/14/97
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

4/14/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Letter from Leela S. Rao, M.D., dated May 22, 1995

P-2 Pamphlet entitled Alzheimer's

P-3 Pamphlet entitled Schizophrenia

P-4 Pamphlet entitled Excerpts from Surviving Schizophrenia

P-5 Memorandum from Mr. James H. Allen to Cassandra T. Brown, dated April 29, 1996

P-6 David Orthopeadic Associates invoice addressed to A.B. at 131 Ashland Avenue, dated November 16, 1995

P-7 Letter from Eltman, Eltman & Cooper to A.B. at 131 Ashland Avenue, dated November 5, 1993

P-8 John Hancock Diversified Stock Fund quarterly report 1994 addressed to A.B. at 131 Ashland Avenue

P-9 Commonwealth of Pennsylvania violation addressed to R.B. at 131 Ashland Avenue, dated October 17, 1986

P-10 Robert D. Smith letter to A.B. at 131 Ashland Avenue, dated May 5, 1995

P-11 CHS of Camden account statement addressed to A.B. at 131 Ashland Avenue, dated July 3, 1996

P-12 The Carlton Group pamphlet addressed to R.B. at 131 Ashland Avenue, dated September 25, 1996

P-13 Envelope from William E. Haddix addressed to A.B. at 131 Ashland Avenue, postmarked August 25, 1993

P-14 David Orthopeadic Associates invoice addressed to A.B. at 131 Ashland Avenue, dated June 5, 1996

P-15 University Radiology Services account balance addressed to R.B. at 131 Ashland Avenue, dated March 25, 1995

P-16 Paul L. Pasternack statement addressed to A.B. at 131 Ashland Avenue, dated October 23, 1995

P-17 Hayt Hayt & Landau installment payment notice addressed to A.B. at 131 Ashland Avenue, dated July 12, 1991

P-18 Thomas A. Bartlett letter addressed to A.B. at 131 Ashland Avenue, undated

P-19 Cherry Hill Pediatrics Group letter addressed to A.B. at 131 Ashland Avenue, postmarked April 5, 1996

P-20 Bell Atlantic bill addressed to A.B. at 131 Ashland Avenue, dated February 22, 1995

P-22 Photograph of B. children at 131 Ashland Avenue home

P-21 Garden State Cable TV envelope addressed to A.B. at 131 Ashland Avenue, postmarked November 23, 1994

For respondent:

R-1 Videotape of observations at 1411 Ormond Avenue

R-2 1996 Student Re-Registration Checklist (Exhibit 1)

1996 Affidavit of Residency regarding A.B. (Exhibit 2)

1996 Affidavit of Residency regarding A.B. (Exhibit 3)

1996 Affidavit of Residency regarding A.B. (Exhibit 4)

1996 Affidavit of Residency regarding A.B. (Exhibit 5)

1996 Affidavit of Residency regarding A.B. (Exhibit 6)

1996 Affidavit of Residency regarding A.B. (Exhibit 7)

1996 Affidavit of Residency regarding A.B. (Exhibit 8)

1996 Affidavit of Residency regarding A.B. (Exhibit 9)

1995 Income Tax Returns of A.B. and R.B. (Exhibit 10)

Letter dated June 13, 1996 to Mr. & Mrs. A.B. from Cassandra T. Brown (Exhibit 11)

Investigation Report of James Allen (Exhibit 12)

1994 Affidavit of Residency of A.B. (Exhibit 13)

1992 Registration of A.B. (Exhibit 14)

1995 Registration of A.B. (Exhibit 15)

1990 Registration of A.B. (Exhibit 16)

Interrogatories answered by R.B. and A.B. (Exhibit 17)

May 22, 1995 letter from Dr. Rao (Exhibit 18)

R-3 Letter from Cassandra Brown to Mr. and Mrs. A.B., dated June 14, 1996 (2 pages)

WITNESSES

For Petitioners

R.B., petitioner

A.B., petitioner

For Respondent

James Allen, District Investigator

Cassandra Brown, teacher and former Acting Superintendent

OAL DKT. NO. EDU. 6603-96
AGENCY DKT. NO. 267-7/96

A.B. AND R.B., on behalf of minor children, A.B., A.B. AND A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter,* and relying upon the credibility determinations rendered by the Administrative Law Judge (ALJ), the Commissioner affirms the ALJ's findings and conclusions, and concurs that petitioners have demonstrated they are domiciled in Lawnside, so as to permit their children to attend school in that District, free of charge, pursuant to *N.J.S.A.* 18A:38-1a.

Accordingly, the initial decision of the OAL granting petitioners' appeal to set aside the Board's decision to disenroll their children is adopted as the final decision in this matter. The Board is hereby ordered to continue to admit petitioners' children into its public school system, free of charge, so long as there is no change in petitioners' circumstances that would alter their entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is herein noted that the record before the Commissioner did not include a transcript of the hearing before the OAL.

MAY 29, 1997
DATE OF MAILING MAY 29, 1997

288-97

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY, JOY NORTHROP DE VINCENZI, AND WALTER ANGILLY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Consolidated matters involved the sending-receiving relationship between Petitioning Lincoln Park Board and Respondent Boonton Board. Dispute involved 1) interpretation of applicable school laws and parties' Agreement on matters regarding the rights of the Lincoln Park representative (appointee) to the Boonton Board and 2) petitioner's allegation that the respondent Board and its Superintendent, DeVincenzi, acted arbitrarily, capriciously, illegally and in bad faith in the selection search process and the appointment of Respondent Angilly to the position of Principal of Boonton High School.

First, the ALJ assessed and detailed the rights and responsibilities of the Lincoln Park appointee pursuant to *N.J.S.A.* 18A:38-8.1, considering the plain language of this provision, its legislative history and intent, and the Agreement in place between the parties. Next, the ALJ concluded that the Boonton Board and its superintendent acted arbitrarily, capriciously and in bad faith in implementing the principal selection search process and, as such, the appointment of Walter Angilly to the position of Booton High School was invalid.

Having reviewed transcripts of the 12 days of hearings and the voluminous record in this matter, the Commissioner adopted findings and determination in initial decision as his own. Commissioner concurred with the ALJ's assessment of the rights and responsibilities of the Lincoln Park appointee to the Boonton Board, finding these properly reflected the two separate directives mandated by the applicable statute, were consistent with the statute's legislative history and intent, and comported with the contemplated spirit of cooperation envisioned by the parties' Agreement. Both Boards were directed to immediately take those actions necessary to conform their policies and procedures to reflect the rights and responsibilities of the Lincoln Park representative to the Boonton Board. As to the principal selection search process, the Commissioner, relying on the ALJ's summations of testimony, assessments of witness credibility, overall characterization of underlying situations and specific findings and conclusions, and finding all of these to be amply supported in the record, agreed with the ALJ that the Board and its superintendent acted arbitrarily, capriciously and in bad faith in implementing the process. (*Driscoll*; *Onulak*; *McKnight*) The Commissioner ordered the appointment of Angilly be vacated and a new principal selection process developed and implemented. He further ordered that Angilly remain in the position of Acting Principal during the course of this process and retain all rights to apply and be considered for the position.

MAY 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED
OAL Dkt. Nos. EDU 9620-95
EDU 12270-95
Agency Docket Nos. 259-7/95
436-11/95

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY, JOY NORTHROP DI VINCENZI (SUPERINTENDENT), AND WALTER ANGILLY (SCHOOL PRINCIPAL),

Respondents.

David B. Rand, Esq., and **Russell J. Schumacker**, Esq., for petitioners (Rand, Algeier, Tosti & Woodruff, attorneys)

Arnold H. Chait, Esq., and **Susan M. Kalp**, Esq., for respondents Boonton Board of Education and Joy Northrop DiVincenzi (Vogel, Chait, Schwartz & Collins, attorneys)

Robert M. Schwartz, Esq., for respondent Walter Angilly

Record Closed: October 11, 1996 Decided: January 23, 1997

BEFORE **MUMTAZ BARI-BROWN**, ALJ

STATEMENT OF CASE

These consolidated matters involve the sending/receiving relationship between petitioner Board of Education of the Borough of Lincoln Park ("petitioner" or "Lincoln Park" or "Lincoln Park BOE") and respondent Board of Education of the Town of Boonton ("respondent" or "Board" or "Boonton").

Pursuant to *N.J.S.A.* 18A:38-11 *et seq.*, Lincoln Park sends its high school students, grades 9 through 12, to Boonton High School ("BHS"). On April 10, 1990, Lincoln Park and Boonton entered into an "Agreement" to continue their sending/receiving relationship. In January 1995, the Legislature enacted *N.J.S.A.* 18A:38-8.1, which provides that a sending district whose students comprise at least 10 percent of the total enrollment of the students in the receiving district shall have one representative on the receiving board of education. Lincoln Park students comprise approximately 56 percent of the total student population of BHS, and thus petitioner has one voting representative on the Boonton Board.

OAL DKT. NO. EDU 9620-95, Agency Dkt. No. 259-7/95

The major dispute between the parties is the interpretation of the Agreement and applicable school laws on matters regarding the rights of the Lincoln Park BOE and/or its representative ("appointee"). Petitioner asserts that the Lincoln Park BOE and its appointee have the right pursuant to the Agreement and *N.J.S.A.* 18A:38-8.1 to receive and discuss among themselves all information, matters, business, and other concerns relating to high school programs brought before the Boonton BOE prior to action taken on the information by the Board. Petitioner seeks a remedy which directs the Board (1) to provide to the appointee all documents and information provided to members of the Board, (2) to allow the appointee full rights and privileges as a member of

the Board, subject to the statutory voting restrictions, and (3) to allow the appointee to communicate with the Lincoln Park BOE and its superintendent on matters pending before the Boonton Board.

OAL DKT. NO. EDU 12270-95, Agency Dkt. No. 436-11/95

The second matter involves three respondents: the Board; the Board's superintendent, Joy Northrop DiVincenzi ("DiVincenzi"); and the principal of Boonton High School, Walter Angilly ("Angilly"). Petitioner asserts that the Board and DiVincenzi acted arbitrarily, capriciously, illegally and in bad faith in the "selection search process" and the appointment of Angilly to the position of principal of Boonton High School. Petitioner seeks an order from the Commissioner vacating the appointment of Angilly and a resumption of the selection search process.

PROCEDURAL HISTORY

On July 3, 1995, Lincoln Park filed a petition before the Commissioner and requested that Boonton provide to Lincoln Park through its superintendent of schools a copy of all appendices to the Board agenda affecting the high school program. Petitioner claimed that the information was necessary to allow Lincoln Park and its appointee to effectively participate in the decision-making process at the Board's meetings.

On July 31, 1995, Lincoln Park filed a petition for emergent relief and requested that the Commissioner enjoin Boonton from taking any further actions to screen, interview and/or appoint a new high school principal.

Boonton timely replied to the petitions and filed an Answer and Cross-Petition for Declaratory Judgment concerning the application of school laws

governing the sending/receiving relationship and Agreement between Lincoln Park and Boonton. Boonton also requested that the Commissioner consolidate the petitions and retain jurisdiction of the matters.

On August 25, 1995, the Commissioner denied Lincoln Park's application for emergent relief and Boonton's application for Declaratory Judgment. Also, the Commissioner denied Boonton's application to retain jurisdiction of the proceedings and transmitted the matters to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13. The Commissioner also recommended that these matters be consolidated.

On October 31, 1995, a telephone status conference was held and petitioner filed a substitution of attorney, substituting Rand, Algeier, Tosti & Woodruff, attorneys, for Peggy O'Dowd, Esq., withdrawing attorney. On November 7, 1995, Lincoln Park filed the current petition (EDU 12270-95, Agency Dkt. No. 436-11/95), essentially updating the July petition which sought to enjoin Boonton from hiring a high school principal. The November petition requested that the Commissioner vacate the appointment of respondent Walter Angilly to the position of high school principal. On December 8, 1995, the Commissioner transmitted the matter to the OAL to be consolidated with OAL Dkt. No. EDU 9620-95. On November 14, 1995, I entered an Order to consolidate OAL Dkt. Nos. EDU 9620-95 and EDU 12270-95.

Prehearing conferences were held on December 22, 1995, and January 30, 1996. Hearings were held on February 15, March 11 and 12, April 9, 11, 19, and 22, and May 13, 16, 17, 23, and 28, 1996. On July 31, 1996, the parties filed a stipulation of agreement which provided in part that during the pendency of this matter Angilly would not assert tenure rights to the position of principal based on his services as a middle school administrator. The parties also agreed

that petitioner will not apply for emergent relief seeking the removal of Angilly from his position of Boonton High School principal, provided that the Commissioner issues his decision on or before June 30, 1997. The parties filed posthearing briefs and the record closed on October 11, 1996.

The forty-five-day statutory period within which to file the Initial Decision with the Department of Education expired on November 25, 1996. Based on the administrative law judge's voluminous case load and the complexity of these consolidated matters, a forty-five-day extension of time to complete the Initial Decision was twice granted. *N.J.S.A.* 52:14B-10(c); *N.J.A.C.* 1:1-18.8.

STIPULATION OF FACTS

The following stipulated facts are adopted as **FACT**:

1. Pursuant to *N.J.S.A.* 18A:38-20, the boards of education of the Borough of Lincoln Park and the Town of Boonton entered into a sending/receiving agreement dated April 10, 1990 (the "1990 Agreement") under which Lincoln Park, as a sending district, reaffirmed and redesignated Boonton as the receiving district for the high school pupils of Lincoln Park.

2. The 1990 Agreement perpetuated an existing sending/receiving contract due to terminate on June 30, 1994, by extending the contractual sending/receiving relationship for a ten-year period through the 1998-99 school year.

3. According to the October 15, 1995 report of the Boonton public schools, as of October 15, 1995, there were 564 students attending Boonton High School, apportioned 319 from Lincoln Park and 245 from Boonton.

4. Pursuant to *N.J.S.A.* 18A:38-8.1, since Boonton's organizational meeting in April 1995, Boonton's nine member board of education has been increased to ten members in order to include one Lincoln Park appointee, initially Ms. Susan Boykas, then replaced by Ms. Bonnie Sudol, who in January 1996 was followed by Patrick English ("Lincoln Park appointee").

5. In July 1995, the boards of education of Lincoln Park and Boonton received a written report jointly prepared by the superintendents of Boonton and Lincoln Park communicating the results of their coordination.

6. The 1990 Agreement requires each to designate at least two, but less than a majority, of its members to serve as liaison representatives to the other board and to meet periodically.

7. The boards of education of Lincoln Park and Boonton have adopted policies establishing a Bi-District Committee, composed of four members from each district, as well as the two superintendents and the principal of Boonton High School.

8. The first posting and advertisement of the principal position occurred on June 13, 1995, when the position was published in the *Star Ledger* and *Daily Record*, fixing a July 7, 1995, deadline for application submissions.

9. The previously employed principal of Boonton High School, Robert Kane, retired on June 30, 1995.

Stipulated facts ten (10) through thirty (30) pertain to the principal selection process and the appointment of Walter Angilly. They are contained in section VII: Principal Selection Search Process.

31. After approval, the minutes of public meetings of the Boonton Board of Education are sent to the Lincoln Park superintendent and subsequently distributed by him to the Lincoln Park Board of Education.

ISSUES

The list of issues was submitted by the parties and incorporated into the Prehearing Order:

1. Does the Lincoln Park BOE have a right under *N.J.S.A.* 18A:38-8.1 or under the sending/receiving contract to receive all information and documents available to Boonton BOE members pertaining to the high school, before the information is available to the public and prior to consideration of the same information by the Boonton BOE?

2. Is the deliberative role of the Lincoln Park appointee (sending district) on the Boonton BOE (receiving district) limited to the categories on which Lincoln Park's appointee is eligible to vote under *N.J.S.A.* 18A:38-8.1?

3. Is the Lincoln Park appointee (sending district) entitled to receive copies of all information and communications distributed to the Boonton BOE (receiving district) that are not related to the categories on which the Lincoln Park appointee is eligible to vote under *N.J.S.A.* 18A:38-8.1?

4. As a member of the Boonton receiving district board, is the appointee from Lincoln Park (sending district) bound to maintain the confidentiality of, and not disclose to other members of the sending district board, the information received and deliberations conducted in closed session meetings of the receiving district board pursuant to the Open Public Meetings Act?

5. Is it proper for the Lincoln Park BOE appointee to disseminate to other members of the sending district board, information and communications which the sending district appointee receives as a member of the Boonton receiving district board before the information is considered or acted upon by the Boonton BOE?

6. Does the Lincoln Park BOE as a matter of law or contract have the right to limit the authority granted to the Boonton BOE to appoint administrators at Boonton High School to candidates acceptable to the Lincoln Park BOE?

7. May a receiving district agree by contract, board action, policy or practice to place limitations on its authority under *N.J.S.A.* 18A:16-1 and *N.J.S.A.* 18A:27-1 to appoint a school principal?

8. May a receiving district through contract, board action, policy or practice consider candidates for high school principal not recommended by the chief school administrator of the receiving district?

9. With respect to the receiving district superintendent's general supervision authority under *N.J.S.A.* 18A:17-20(b) and appointment recommendation authority under *N.J.S.A.* 18A:27-4.1, may a receiving district through contract, board action, policy or practice cede or share that authority with the sending district board, the sending district superintendent, or a bi-district committee?

10. Did the Boonton BOE cede to any other body the final authority to determine the principal selection process?

11. Pursuant to *N.J.S.A.* 18A:27-4.1, could the Boonton BOE have voted not to appoint to the position of high school principal the candidate recommended by the superintendent?

12. Does the relief sought by the Lincoln Park BOE contravene the statutory scheme for a sending/receiving relationship and the statutory authority of the Boonton BOE over the operation and management of its school district?

13. Do the contract and grievance rights of Angilly preclude his removal prior to expiration of the current contract term?

14. Can the Commissioner substitute his judgment for the judgment of the receiving district board and its superintendent although the appointee is qualified for the position of principal?

15. Was the conduct of respondents Boonton BOE and Northrop DiVincenzi arbitrary, capricious, unreasonable, illegal or exercised in bad faith in the appointment of Angilly to the position of high school principal?

16. With regard to the principal selection process, did the Lincoln Park BOE act with predetermined bias and is, therefore, precluded from challenging the selection process and the appointment of Angilly to the position of high school principal?

17. What is the principal selection process and what is the function of the Bi-District Committee in the principal selection process?

18. Did the principal selection process used by respondents Boonton BOE and Northrop DiVincenzi, which resulted in the appointment of Angilly by the Boonton BOE, violate the "Agreement" between the Lincoln Park BOE and the Boonton BOE?

DISCUSSION AND CONCLUSIONS

OAL DKT. NO. EDU 9620-95

I

Issues one through five will be discussed together, as each raises overlapping questions whose answers are dependent upon an interpretation of *N.J.S.A.* 18A:38-8.1 and the Agreement.

The Agreement between Lincoln Park and Boonton provides, in pertinent part:

> 8. Policy and Procedural Provisions. The parties hereby agree to abide by the following policies and procedural provisions governing the sending/receiving relationship:
>
> A. The Boonton Board will take the concerns of the Lincoln Park and Lincoln Park Boards of Education into account in making all decisions and taking all actions affecting Lincoln Park and Lincoln Park pupils and the Boards.
>
> . . . .
>
> E. There shall be a mutually acceptable agreement between the two (2) districts respecting the following areas, and

> this coordination is to be worked out between Superintendents and the results communicated by them in a jointly prepared written report to the Boards by July 1st of every year:
>
> (1) Orientation of Lincoln Park and Lincoln Park's eighth graders into Boonton High School;
> (2) Program Articulation;
> (3) Lincoln Park and Lincoln Park pupil records and reporting of them to Boonton;
> (4) Scheduling, including school calendar and class hours;
> (5) Curriculum and program offerings;
> (6) Class size and staffing;
> (7) Extracurricular activities;
> (8) Transportation schedules;
> (9) Such other areas as any of the participating districts' Boards, Superintendents, or Business Administrators shall deem appropriate.
>
> [J-1.]

The Agreement established the structure of the relationship between Lincoln Park and Boonton. Thomas Curtin, Esq., negotiated the Agreement for the Boonton BOE. He testified that the intention of paragraph 8A was that the boards would cooperate with one another. Paragraph 8E indicates that the petitioner and the Board shall reach mutually acceptable agreements in nine areas, including a catch-all section which requires agreement on "[s]uch other areas as any of the participating districts' Boards, Superintendents, or Business Administrators shall deem appropriate." The contract has been strengthened and broadened by the enactment of *N.J.S.A.* 18A:38-8.1, which entitled Lincoln Park to a seat on the Boonton Board of Education.

II

N.J.S.A. 18A:38-8.1 was amended effective August 19, 1996. The statute provides as follows:

> In addition to the members of the board of education of a Type I and Type II school district provided by law, in a school district which is receiving pupils from another district or districts pursuant to N.J.S.A. 18A:38-8, there shall be an additional

> member as provided pursuant to section 2 of this act to represent the board of education of each sending district. Any additional member shall be a member of the board of education of a sending district designated annually by the board of that district and shall be eligible to vote on the following matters before the receiving district board of education:
>
> a. Tuition to be charged the sending district by the receiving district *and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district*;
>
> b. New capital construction to be utilized by sending district pupils;
>
> c. Appointment, transfer or removal of teaching staff *members* providing services to pupils of the sending district, *including any teaching staff member who is a member of the receiving district's central administrative staff; and*
>
> d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district.
>
> [Amendments emphasized.]

The 1996 amendments clarified and expanded the voting rights of the sending district's appointee by broadening the areas upon which the appointee could vote. Indeed, the Senate Education Committee stated its purpose as follows:

> [T]his bill would permit the representatives also to vote on the operating budget for any facilities or staff providing services to pupils of the sending district upon which the tuition charge is based. In addition, language is added to make clear that the representatives may vote on the appointment, transfer or removal of professional administrative staff who provide services to pupils of the sending district.
>
> The committee adopted amendments which delete the word "directly" in both subsections being revised in order to clarify further the services on which the sending district representatives may vote.
>
> [Senate Education Committee Statement to S. 1031 with committee amendments (May 2, 1996).]

Further, the legislative history reveals that *N.J.S.A.* 18A:38-8.1, bill S. 151, as originally proposed, authorized the appointee from the sending district to "vote on all matters before the receiving district board of education, except those matters pertaining exclusively to the grades of the receiving district in which no students from the sending district are enrolled including, but not limited to,

matters of facilities, personnel and programs." Senate Education Committee Statement to S. 151 (May 16, 1994). This authorization also included eligibility "to vote on the annual budget prepared for the receiving school district." Senate Statement to S. 151 (Second Reprint).

Governor Whitman vetoed the bill and returned it to the legislators with recommendations for reconsideration. The changes to the bill were precipitated by two concerns. First, that "the bill may provide disproportionate representation to the sending district, in contravention of the Constitutional rights of the voters in the receiving district," and second, that "the bill authorizes the sending district representative to vote on all matters before the receiving board including matters that do not affect the sending district." Governor Whitman's Veto Message with Recommended Action, S. 151 (Oct. 20, 1994). Thus, the Governor recommended a change in the formula for determining the sending district's representation on the receiving board of education which capped representation at one member where the sending district's student enrollment is 10 percent or above of the total enrollment in the receiving district or two members where two or more sending districts collectively have at least 15 percent of the total enrollment. *Ibid.* She also recommended limiting the voting rights of the sending district representative to matters concerning the tuition to be charged the sending district by the receiving district; new capital construction to be utilized by sending district pupils; the appointment, transfer or removal of teaching staff directly providing services to sending district pupils; and the addition or deletion of curricular and extracurricular programs involving sending district pupils. *Ibid.*

The Governor, nonetheless, recognized the legislation's meritorious goals:

> The goal of this bill, to provide the sending district with a voice on the receiving district board of education, is laudable. I am

> encouraged by the Legislature's recognition of the merits of regionalization by establishing a formal line of communication between the districts. Such communication will foster an atmosphere of trust and cooperation between the respective boards of education.
>
> [*Ibid.*]

The bill was amended to conform to the Governor's recommended action. The third reprint of S. 151 was enacted with passage by the Senate on June 13, 1994, and by the Assembly on September 12, 1994. It became effective on January 12, 1995.

III

The Board posits that the entire rights of membership of the sending district are controlled by the statutory limitations on voting. Thus, the Board argues that the appointee's right to receive information in advance of public dissemination and the right to discuss or debate any matters are triggered only when the Board addresses those issues upon which the appointee can vote. The Board maintains that on all other matters, "the appointee's rights are no greater than any other member of the public." Boonton's Reply Brief at 2.

I reject the Board's argument that the appointee's right to receive information and documents available to other Board members is strictly confined to the statutory subject areas upon which the appointee is eligible to vote. Here, the Board's interpretation of *N.J.S.A.* 18A:38-8.1 is restrictive and contrary to the legislative intent. "The interpretation of any statute necessarily begins with consideration of its plain language." *Lammers v. Point Pleasant Bd. of Educ.,* 134 *N.J.* 264, 267 (1993). The language of *N.J.S.A.* 18A:38-8.1 addresses only two subjects, eligibility for membership and voting rights. Specifically, the statute (1) grants to the sending district entitlement to membership on a receiving district's board of education as a representative of the sending district, and (2) designates those matters on which the appointee shall vote. No other

limitations are placed upon rights of the appointee's membership, nor are the terms of the statute defined or given any special meaning. Thus, "[a]bsent a legislative intent to the contrary, such language should be given its ordinary meaning." *Id.* at 268.

The ordinary meaning of the statute is that the appointee has limited rights of voting. The Legislature expresses no intention to limit either the appointee's access to documents/information or the appointee's level of participation outside of voting eligibility. "Statutes are to be construed as written, not according to some unexpressed intention." *Herrera v. Township of South Orange,* 270 *N.J. Super.* 417, 420 (App. Div. 1993). The Board's leap to severely circumscribe the appointee's rights of membership based on limited voting rights is not expressed in the statute or legislative history, nor can it be reasonably inferred from the plain language of the statute. Indeed, the legislative history shows that the Legislature originally intended not to place any limit on the appointee's voting rights.

Moreover, the Board's interpretation of *N.J.S.A.* 18A:38-8.1 does not comport with what the Governor recognized as the purpose of the legislation. Indeed, in her veto message, the Governor concluded that the underlying intent of the legislation is to promote communication between the sending and receiving school districts which will foster an atmosphere of trust and cooperation.

In contrast, the Board has created an atmosphere of distrust and suspicion between the sending and receiving school districts by setting apart the rights of the appointee's membership, stretching the limitations imposed upon the appointee, and relegating the status of the appointee to that of a member of the public. The Board presented clearly its position on the rights of the appointee's membership:

> Boonton acknowledges the right of the Lincoln Park appointee to receive information related to his statutory voting rights at the same time as the elected Boonton board members, and to receive information outside those categories when it is made available to the public. *N.J.S.A.* 18A:38-8.1 does not require Boonton to make information on extra-statutory subjects available to the appointee prior to the public meeting at which it will be considered. With respect to these subjects, the appointee's rights are no greater than any other member of the public.
>
> [Boonton's Reply Brief at 2.]

The Board's interpretation of *N.J.S.A.* 18A:38-8.1 is unreasonable and deters harmonious dialogue between the school districts. Also, it is inconsistent with the Agreement that the boards would cooperate with one another.

I also reject the Board's argument that by providing the appointee with the disputed information in advance of public dissemination "Boonton's statutory obligation and authority to govern its own school district" will be hindered. Boonton's Initial Brief at 16. The appointee is a board member and, contrary to the Board's position, nothing in *N.J.S.A.* 18A:38-8.1 expresses or implies that when the subject matter before the Board is outside the voting categories the appointee reverts to a member of the public with no greater rights. Moreover, the Board's positions are alienating and more likely to hinder collaboration between the two school districts, in contrast to the intent of the Agreement. Additionally, the Board's position ignores the Governor's acknowledgment that "a formal line of communication [has been established] between the districts." Governor Whitman's Veto Message with Recommended Action, S. 151 (Oct. 20, 1994). Restricting the appointee's access to information would not foster communication between Lincoln Park and Boonton.

Additionally, the Board's interpretation is overbroad and not supported by *Callowhill v. Board of Education of Atlantic City,* Decision on Motion for Emergent Relief, Commissioner of Education (May 13, 1996). In *Callowhill* the receiving

board was not ordered to accept and consider input from the appointee because the appointee was not entitled to cast a vote. Thus, the active participation of the appointee would not be required.

Although Boonton correctly notes that the appointee is not entitled to vote on "extra-statutory subjects" such as "student discipline, staff leaves of absence, or reduction in force, to name a few," I am persuaded that the receiving district would not be consistently able to determine when matters which are not directly related to the sending district will raise issues that do impact its pupils. *See* Boonton's Initial Brief at 15. Indeed, the Legislature recognized that the appointment, transfer or removal of teaching staff affects students from the sending district, although the staff members do not provide direct services to these pupils. Thus, the Senate Education Committee deleted the word "directly" from the text:

> 1. . . . Any additional member . . . shall be eligible to vote on the following matters before the receiving district board of education: . . .
>
> c. Appointment, transfer or removal of teaching staff *directly* providing services to pupils of the sending district . . . .
>
> [Senate Education Committee Statement to S. 1031 (May 2, 1996).]

The Board, however, ignores the fact that "student discipline, staff leaves of absence, [and] reduction in force, to name a few," affect all students. Thus, withholding "extra-statutory" information from the appointee until the information is available to the public places the appointee at a severe disadvantage. In contrast, permitting the appointee to review in advance of public dissemination information on "extra-statutory" subjects on which he has no vote merely ensures that the appointee will be a well-informed Board member. The Board's concern that Lincoln Park will control the administration of Boonton High School is unfounded. *See* Boonton's Initial Brief at 1, 21. The appointee is a minority Board member and cannot impose its will on the majority. Thus, the receipt of

information prior to dissemination to the public does not undermine the receiving board's authority to control the conduct of any Board member, as the administration of Boonton High School lies within the control of the Boonton Board.

Thus, on issue three, I **CONCLUDE** that the appointee is entitled to receive copies of all information, documents and communications when distributed to the other Board members, even though the items are not listed within the categories upon which the appointee is entitled to vote under *N.J.S.A.* 18A:38-8.1.

IV

The analysis applied to issue three is equally applicable to the question of the scope of the appointee's deliberative role, issue two. Although the Commissioner in *Callowhill* would not compel the receiving district to accept and consider the evaluative input of the appointee, *N.J.S.A.* 18A:38-8.1 does not address an appointee's deliberative role or limit participation to questions arising under voting categories.

The cases relied on by the Board are inapposite.[1] Each involved a zoning board member who was deemed disqualified from voting because a conflict of interest existed. Thus, participation by these members in the proceedings was inappropriate. The court in *Szoke v. Zoning Board of Adjustment,* 260 *N.J. Super.* 341, 345 (App. Div. 1992), noted that the participation of such members "poisoned the spirit of impartiality with which the Board's quasi-judicial proceedings must be governed," which required "that the Board action be voided." In the present matter, no conflict of interest exists.

[1] *Szoke v. Zoning Board. of Adjustment,* 260 *N.J. Super.* 341 (App. Div. 1992), *Kremer v. City of Plainfield,* 101 *N.J. Super.* 346 (Law Div. 1968).

Unless a governing body adopts rules limiting the rights of the members, board members have the right to full participation in the proceedings. This includes the right to make motions, the right to speak in debate, and the right to vote. Here, the Legislature has limited the sending district's voting rights by designating on which matters the appointee may vote. Notwithstanding statutory limitations, the Governor, in her veto message, was encouraged by the line of formal communication between the sending and receiving districts which *N.J.S.A.* 18A:38-8.1 sought to establish. In light of the legislative history, and the recognition of the importance that the sending district's voice be heard, the appointee's deliberative role should not be limited unless it is expressed in the statute.

Rather, the extent of an appointee's deliberative participation, like that of any other Board member, should be governed by the Board's parliamentarian procedures.[2] Pursuant to parliamentary procedure the presiding officer maintains control over the procedure of the Board meeting and conduct of the Board members.[3] Once a Board member is recognized by the presiding officer or chair, he or she may speak unless ruled out of order. Thus, in a Board meeting composed of ten members, including one representative from Lincoln Park, the presiding officer determines, for example, when it is appropriate to allow members to obtain the floor before making motions or speaking, to not limit the number of times a member may speak, or to allow informal discussion of a

[2] *N.J.A.C.* 6:1.2.1 provides that parliamentary procedures in meetings of the State Board shall be governed by *Robert's Rules of Order.* Thus, it is assumed that each local board of education shall adopt an authoritative parliamentary procedure, *e.g.,* Henry M. Robert, *Robert's Rules of Order Newly Revised* (9th ed. 1990); Alice Sturgis, *Standard Code of Parliamentary Procedure* (3rd ed. 1988); Henry A. Davidson, *Handbook of Parliamentary Procedure* (1955).

[3] Subject to applicable federal and state laws the duties of the presiding officer to control the meeting are governed by parliamentary rules of order, *e.g.,* the presiding officer opens the meeting at the appointed time by taking the chair, calls the meeting to order, announces the sequence of business in accordance with the agenda, recognizes members, states and puts to vote all questions before the board, and announces the vote. *See Robert's Rules of Order, supra* note 2.

subject while no motion is pending. Permitting the Board to maintain control of the procedure is in accord with *Callowhill*, as it does not compel the appointee's deliberative role in extra-statutory matters; it simply permits the appointee to participate in discussion at the Board's discretion. In the exercise of its discretion, the law presumes that local public bodies will act fairly with proper motives and for valid reasons. *Kramer v. Sea Girt Bd. of Adjustment,* 45 *N.J.* 268 (1965).

Notwithstanding that differences of opinion between the two school districts may exist, permitting the appointee to debate on extra-statutory subjects does not undermine the receiving board's authority to control the meeting or the conduct of Board members. Moreover, where the subject of debate is a matter outside of the appointee's voting eligibility, it is improbable that the appointee will find need to participate in the discussions. However, where the appointee rises to obtain the floor to participate in the discussion on the merits of the question before the Board, his or her comments may have significant bearing on the subject of debate. Indeed, the appointee's input may expand the knowledge of all members of the Board.

Additionally, permitting the appointee to voice an opinion on extra-statutory subjects is consistent with the intent of the Agreement. Mr. Curtin, the chief negotiator on behalf of Boonton, explained that the intent "must be construed in the context of the relationship between the two districts, *i.e.*, that Boonton was the receiving district and that it therefore retained the statutory authority to run the district; that Boonton would listen to Lincoln Park and evaluate its input, but that ultimately the final decisions belong to Boonton." Boonton's Initial Brief at 28. A well-informed Board member who understands all issues affecting the high school will be more knowledgeable when voting upon issues that affect any aspect of the school district. The appointee's participation,

therefore, could be beneficial to the process rather than detrimental, as viewed by the Board.

Thus, on issue two, I **CONCLUDE** that the deliberative role of the appointee on the Boonton BOE is not limited to the categories upon which the appointee is eligible to vote under *N.J.S.A.* 18A:38-8.1. I **CONCLUDE** that the presiding officer controls the procedure of the meeting and may recognize any Board member who seeks the floor to discuss, remark or comment on the merits of the pending question.

V

Issues one, four and five involve the rights of Lincoln Park to receive copies of all information, documents and communications when distributed to the other Board members and the appointee's right to communicate with the Lincoln Park BOE and its superintendent.

Petitioner contends that there is a legitimate need for the appointee to consult with the superintendent to obtain his expertise on educational matters and to receive insight and information from his or her board on matters before the Boonton BOE. Petitioner's Initial Brief at 24. Further, petitioner asserts that communications among Lincoln Park's appointee, the Lincoln Park superintendent, and other board members are implicit in *N.J.S.A.* 18A:38-8.1, "which deems the newly-created position to be 'representative' in nature." *Ibid.* Thus, petitioner requests that the appointee be allowed to communicate with the Lincoln Park superintendent and board on matters pending before Boonton. *Ibid.*

Boonton does not challenge the appointee's right to seek input from the superintendent and the Lincoln Park BOE. However, it urges this tribunal to

consider the consequences of permitting the appointee to disseminate confidential information and documents prior to their becoming available to the public. Boonton argues that it is not proper for the appointee to disseminate to the full Lincoln Park BOE the information and communications which he receives as a member of the Boonton Board before the information is considered and acted upon the Board.[4] Further, Boonton argues that the appointee, as a member of the Boonton Board of Education, is bound to maintain the confidentiality of information received and deliberations conducted in closed meetings pursuant to the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 to -21. Moreover, the statutory appointee functions in the same manner as the elected members of the Board, and thus he is bound to exercise independent judgment, not the will of the majority of the Lincoln Park BOE. Boonton's Initial Brief at 17.

I agree that students' records and personnel matters must be kept confidential. *N.J.S.A.* 10:4-12(b)(8). Additionally, matters regarding bargaining units and property acquisition negotiations should maintain a level of confidentiality. However, the appointee's right to consult with the superintendent facilitates the appointee's ability to better represent Lincoln Park and better function as a member of the Boonton Board of Education, and fulfills the intent of the Agreement and *N.J.S.A.* 18A:38-8.1. Moreover, the OPMA does not prohibit communication between the appointee and the superintendent. Boonton is willing to provide to the Lincoln Park superintendent and the appointee copies of all appendices to Boonton meeting agendas, "subject to a stipulation that the information will not be released to the remainder of the Lincoln Park Board or the public prior to its consideration by the Boonton Board." Booton's Initial Brief at 21.

[4] "Currently, the agenda and appendices for each public meeting of the Boonton Board are available to the Lincoln Park appointee at the same time that they are provided to Boonton Board members and to Boonton residents . . . ." Boonton's Initial Brief at 23.

Based on the above, I **CONCLUDE** that by virtue of the statutory entitlement to a seat on the receiving board, *N.J.S.A.* 18A:38-8.1, a sending district's appointee may freely communicate with its superintendent on matters regarding documents and information received pertaining to the Board meeting. For the reasons discussed here, I further **CONCLUDE** that the superintendent must be bound to maintain strict confidentiality as to all issues so designated.

VI

The appointee's and the superintendent's communications with the Lincoln Park BOE and Lincoln Park's right to receive all information available to Boonton BOE members before the documents are available to the public and prior to their consideration by Boonton are complicated and limited by law. The State Board of Education and each local board of education are public bodies and are governed by the OPMA. *N.J.S.A.* 18A:10-1. The central section of the OPMA, *N.J.S.A.* 10:4-12, provides that with limited exception all meetings of public bodies shall be open to the public at all times. However, the OPMA does not limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting. *N.J.S.A.* 10:4-12(a). Further, *N.J.S.A.* 10:4-12(b) lists nine subject matters where the public body may exclude the public only from that portion of the meeting when discussion is held on the enumerated subject. "[A]ny exception from the full public disclosure mandated by the statute is to be strictly construed." *Rice v. Union County Regional High Sch. Bd. of Educ.,* 155 *N.J. Super.* 64, 70 (App. Div. 1977). Before excluding the public from a meeting to discuss any of the matters described in *N.J.S.A.* 10:4-12(b), the public body must adopt a resolution at a public meeting "[s]tating the general nature of the subject to be discussed," and "[s]tating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public

body can be disclosed to the public." *N.J.S.A.* 10:4-13. Moreover, the minutes of the meetings shall be available to the public. *N.J.S.A.* 10:4-14.

Where the issues concern information received and deliberations conducted in closed session meetings of the Boonton Board, the appointee's communications with Lincoln Park must also be in a closed session. However, Lincoln Park must also adhere to the OPMA. Thus, where the Board may satisfy one of the exceptions from holding a public meeting, Lincoln Park will not. For example, matters involving employment may be discussed in closed session by the public body which employs or has appointed the employee in question, *N.J.S.A.* 10:4-12(b)(8). A closed session held for this purpose by the Board would be appropriate. However, if the appointee determined that it was necessary to discuss the same issue with Lincoln Park, the sending district could not satisfy the statutory exception because it would not meet the requirement of being the "public body which employs or has appointed the employee." Thus, the only time an appointee may communicate confidential issues to Lincoln Park is in a closed session, which may only be convened where one of the specific exceptions required under *N.J.S.A.* 10:4-12(b)(1)-(9) exists. It is unlikely that Lincoln Park will ever satisfy this requirement. Therefore, the appointee will be bound to maintain the confidentiality of the information received and deliberations conducted in closed session of the Board.

Regarding the information and communications which the Board has not considered or acted upon, the appointee may only disseminate such matters to Lincoln Park where the sending district has convened as a full board and the subject matter is not confidential. Under general parliamentary procedure, the appointee may not communicate with individual members of the Lincoln Park BOE. If communication with Lincoln Park is necessary, it must convene as a full board. A board can transact business only in a properly called meeting and at which a quorum, unless otherwise properly established, is present. "The

personal approval of a proposed action obtained separately by telephone or individual interview, even from every member of the board, is not approval of the board, since the members were not present in one room where they could mutually debate the matter." *Robert's Rules of Order, supra* note 2, at 477. Also, if Lincoln Park must call a meeting, it must provide adequate public notice, *N.J.S.A.* 10:4-8(d),[5] and the timing of the meeting could not be used to delay the Board's consideration of any matter.

I **CONCLUDE** that as a member of the Boonton Board, the appointee is entitled to receive all documents and information provided to members of the Board. I further **CONCLUDE** that the appointee is bound to maintain the confidentiality of, and not disclose to other members of the sending district board, the information received and deliberations conducted in closed session meetings of the receiving district board pursuant to the Open Public Meetings Act.

Based on the mandates of *N.J.S.A.* 18A:10-1 and the OPMA, I **CONCLUDE** that Lincoln Park is not entitled to receive copies of all information, documents and communications when distributed to Boonton and Board members before the information is available to the public and prior to consideration by the Boonton BOE.

Further, I **CONCLUDE** that is not proper for the appointee to disseminate to members of the sending district board, information and communications which the appointee receives as a member of the Boonton Board before the information is considered or acted upon by the Board.

ORDERS

[5] Waived if matter is deemed one of "urgency and importance" as established under *N.J.S.A.* 10:4-9.

It is **ORDERED** that the Lincoln Park appointee to the Boonton BOE receive copies of all information, documents and communications when those materials are distributed to the other Boonton BOE members.

Further, it is **ORDERED** that the Lincoln Park appointee to the Boonton BOE be permitted to participate/debate on the merits of extra-statutory matters.

Further, it is **ORDERED** that the Lincoln Park appointee to the Boonton BOE be permitted to freely communicate with its superintendent on matters regarding documents and information received pertaining to the Board meeting. It is further **ORDERED** the Lincoln Park superintendent be bound to maintain strict confidentiality as to all issues so designated. It is further **ORDERED** that the Lincoln Park appointee to the Boonton BOE not be permitted to disseminate to members of the sending district board, information and communications which the appointee receives as a member of the Boonton Board before the information is considered or acted upon by the Board.

Further, it is **ORDERED** that Lincoln Park not be permitted to receive copies of all information, documents and communications when distributed to Boonton and Board members before the information is available to the public and prior to consideration by Boonton BOE.

VII

OAL DKT. NO. EDU 12270-95

Principal Selection Search Process

The remaining issues listed in the PreHearing Order involve the principal selection search process and the appointment of Angilly to the position of principal of Boonton High School. Petitioner does not dispute Boonton's right to

appoint administrators at the high school which are unacceptable to Lincoln Park (issue six) or Boonton's authority to appoint a school principal (issue seven). Petitioner does not assert that Boonton may consider candidates for high school principal who were not recommended by its chief school administrator (issue eight) or that Boonton may cede to or share with the sending district board, the sending district superintendent, or a bi-district committee the general supervision authority granted to the receiving district's superintendent under *N.J.S.A.* 18A:17-20(b) and *N.J.S.A.* 18A:27-4.1 (issue nine). In essence, petitioner does not seek to limit either the authority of the Board to appoint administrators to Boonton High School or DiVincenzi's authority to recommend appointments to such positions. Thus, discussion on each point is unnecessary.

Rather, the central allegation by Lincoln Park in this proceeding is that DiVincenzi and the Boonton BOE agreed to a principal selection process and then unilaterally discarded it, which constituted a breach of the Agreement. Thus, petitioner submits that the Board and DiVincenzi acted arbitrarily, capriciously, illegally and in bad faith in the "selection search process" and the appointment of Angilly to the position of principal of Boonton High School.

Therefore, the critical questions to be resolved are, (a) what were the agreed-to components of the principal search process; (b) was the agreed-to process binding under the Agreement; and, if so, (c) were the changes to the selection process made in bad faith (issues seven through eighteen).

Based on a review of the evidence, I **FIND** the following relevant **FACTS**:

1. On June 13, 1995, DiVincenzi published an advertisement for the position of principal of BHS (J-11). The position stated two qualifications as follows:

(1) Master Degree of higher with a minimum of five years of successful administrative experience;

(2) Must possess, or be eligible for, a New Jersey Principal Certificate.

2. On June 20, 1995, DiVincenzi presented a draft of the search process for principal of BHS to the Bi-District Committee (J-5). DiVincenzi proposed the following:

(a) an 18-member screening committee to review, evaluate, and recommend to an interview committee top candidates to be interviewed;

(b) an 8-member interview committee to conduct personal interviews and recommend to the Boonton superintendent "no fewer that three (3) but no more than five (5) candidates acceptable to all members of the committee";

(c) the 8 members of the interview committee include two Lincoln Park representatives, two Boonton representatives, one parent of a high school student from Lincoln Park, one parent of a high school student from Boonton, one staff member and one administrator. DiVincenzi represented to the Committee that no BHS administrator would be on the interview committee.

3. The minutes of the June 20, 1995, Bi-District Committee meeting (J-4) state that, "[n]umerous changes [to the search process] were made by consensus." Also, the minutes reflect the following:

(a) Discussions were had on the screening process presented by DiVincenzi and on its use in the past;

(b) In response to questions about the need to place a teacher on the interview committee, DiVincenzi noted that this may be a contractual requirement. Thus, until she researched the issue the total membership of the interview committee would include seven members, two Lincoln Park representatives (including the superintendent), two Boonton representatives, two parents (one each from Lincoln Park and Boonton), one administrator, not from BHS;

(c) DiVincenzi would sit in on all interviews;

(d) Finalist would be interviewed by a student panel;

(e) The screening committee would meet on July 10;

(f) The two superintendents would review all applications for completeness.

4. DiVincenzi presented the principal search process memorandum, J-6, to the Boonton BOE on June 26, 1995. The memorandum contained several revisions made at the Bi-District Committee meeting. The most notable was that both superintendents would complete a screening of all applicants received to ensure completeness prior to the start of the paper screening. Also, under the heading "Interviewing Committee," DiVincenzi deleted the words "acceptable to all members of the interview committee" and inserted "*Need six yes votes to be a finalist.*"

5. DiVincenzi was also the Board secretary and prepared the minutes of the Board's June 26, 1995 meeting (J-7). The minutes state in pertinent part:

> NEW BUSINESS
>
> 1. Selection Process - Boonton High School Principal
>
> . . . The qualifications defined by individuals attending the Bi-District meeting, as well as, the results of the discussion of the process were distributed. Dr. Berlinghoff clarified the qualifications listed were made by individuals attending the Bi-District, not as defined by either Board or by consensus of the committee. . . .
>
> Mrs. Nolan [Board president] reminded the public and press, the document being discussed was a result of a discussion held at the Bi-District Committee meeting. But, as she had indicated during the Bi-District meeting, the Committee made suggestions for the Boonton Board's consideration, but the final process would be approved by the Board tonight after discussion.
>
> Discussion included whether five or six votes were required from the interviewing committee to become a finalist. The Board recommended, and Miss Northrop[-DiVincenzi] agreed, to the requirement of five. It would require five votes from the interviewing committee to become a finalist. The purpose of modifying from six to five is so no one group would be able to control the process, thus ensuring the consensus of the Interviewing Committee as to candidates being recommended to the superintendent as being acceptable to all involved.
>
> Miss Northrop[-DiVincenzi] indicated the screening process had been proposed to both committees [the Bi-District Committee and the Personnel/Education Committee], and discussed accordingly. The items being recommended by the Bi-District were in italics.
>
> [J-7.]

6. The Board meeting on June 26, 1995, was recorded and the audiotape, P-83, was evaluated by audio experts engaged by the parties. The experts concluded that the audiotape was not altered. A transcript was produced from the recording, "Transcript of New Business Portion" (J-29).

At the hearing, DiVincenzi listened to the tape and reviewed the transcript. When asked to identify where the Board members discussed changing six votes to five "to become a finalist [and] the Board recommended and [she] agreed, to the requirement of five," DeVincenzi claimed that the discussion occurred at page 33, line 23, through page 34, line 4, of the transcript.

The section of the discussion identified by DiVincenzi occurred in less than ten (10) seconds "real time."

I have reviewed the evidence and find no mention or reference, expressed or implied, that the Board members discussed at the public session the number of votes needed to become a finalist for the position of principal. Further, there was no acknowledgment that the Board agreed by consensus to change the votes.

7. On June 27, 1995, DiVincenzi distributed the Search Process for the BHS Principal document (J-8), which incorporated "the suggestions given during our meeting on June 26, 1995." The document was revised to show "Need five yes votes to be a finalist."

8. Thirty applications were received as a result of the first-round advertisement (Joint Stipulation no. 10).

9. Dr. Farr, the Lincoln Park superintendent, made arrangements to review the applications at DiVincenzi's office on July 7, 1995. Farr compiled two groups, one containing those candidates who met the qualifications stated in the advertisement and the other containing candidates who did not meet the qualifications listed. Farr determined that Angilly did not meet the qualification of five years of successful administrative experience and placed him in the group of candidates who did not meet the qualifications.

10. All applications were submitted to the Screening Committee comprised of 18 members: 3 board members from each district, 2 parents from each district with students at the middle school and high school, 2 community members from each district, 1 Lincoln Park administrator, 1 Boonton administrator and 2 Boonton High School staff members (Joint Stipulation no. 11).

11. On July 10, 1995, DiVincenzi met with the Screening Committee and reviewed the process to be used by the committee. The committee was to rate the candidates on a numerical scale.

12. The candidates were assigned numbers so that the identities of the candidates were not disclosed on the Ranking Sheets or Tally Sheet (Joint Stipulation no. 12).

13. DiVincenzi directed her secretary to place an asterisk next to each candidate who met all the credentials listed in the advertisement. No asterisk was placed next to Angilly's identification number.

14. The maximum points each candidate could receive from the Screening Committee was 70 per evaluator. Multiplied by 18 evaluators, the maximum total number of points was 1,260 (Joint Stipulation no. 13).

15. The total points for the 30 candidates in the first round ranged from a high of 1,097 to a low of 177 (Joint Stipulation no. 14).

16. The Screening Committee completed its ratings but did not reconvene to determine the cut-off figure. Instead, DiVincenzi unilaterally determined the cut-off at "813." Under that figure, eleven candidates moved forward to the Interview Committee. Angilly made the cut-off, ranking ninth on the list.

17. The numerical ratings and rankings of the Screening Committee of the candidates advanced for interviews were not disclosed to the Interview Committee (Joint Stipulation no. 15).

18. Five of the eleven candidates forwarded to the Interview Committee were interviewed.

19. The Interview Committee was comprised of eight members: the superintendent and one board member from Lincoln Park, two board members from Boonton, one parent of a high school student from each district, one administrator from Boonton High School, and one teaching staff member from Boonton High School (Joint Stipulation no. 16).

20. In the first round, the Interview Committee recommended two candidates to the Boonton superintendent. Walter Angilly, who received five "yes" votes and three "no" votes, was one of the two candidates advanced (Joint Stipulation no. 17).

21. The five "yes" votes were cast by Boonton, the three "no" votes were cast by Lincoln Park.

22. The Boonton Board authorized a second posting and a second advertisement of the position was published in the *Star Ledger* and *Daily Record* on September 3 and 10, 1995 (Joint Stipulation no. 18).

23. The second advertisement did not include the reference to five years' successful administrative experience which appeared in the first advertisement (Joint Stipulation no. 19).

24. Lincoln Park communicated its objection to Boonton to maintain the requirement that the candidate possess five years' administrative experience.

25. The second posting and advertisement produced 40 additional applications (Joint Stipulation no. 20).

26. The Screening Committee rated the candidates. DiVincenzi then polled the committee members and presented a multiple choice to determine which candidate would advance to the Interview Committee. The three choices were: (a) cut-off score of 813; (b) the candidate chosen by the two superintendents; (c) the top six candidates. None of the three choices received a majority vote of the committee. DiVincenzi unilaterally chose the plurality of the votes, (c) the top six candidates.

27. The Boonton superintendent advanced the six highest new candidates as ranked by the Screening Committee, to be interviewed by the Interview Committee (Joint Stipulation no. 21).

28. On September 23, 1995, the Interview Committee interviewed all six candidates advanced in the second round (Joint Stipulation no. 22).

29. The Boonton superintendent referred three candidates, including Walter Angilly, to be interviewed by the Boonton Board and superintendent on October 2, 1995 (Joint Stipulation no. 24).

30. On or about September 27, 1995, the Boonton superintendent provided every member of the Boonton Board, including the Lincoln Park appointee, Ms. Sudol, with application packets providing information on each of the three candidates to be interviewed on October 2, 1995 (Joint Stipulation no. 24).

31. The three candidates were interviewed by the Boonton Board and superintendent on October 2, 1995 (Joint Stipulation no. 25).

32. On October 2, 1995, after the Boonton Board interviewed the three candidates, the Boonton superintendent presented a recommendation that

Walter Angilly be appointed principal of Boonton High School (Joint Stipulation no. 26).

33. At its public meeting on October 2, 1995, the Boonton Board voted 8 to 1 to approve the recommendation of the Boonton superintendent that Walter Angilly be appointed principal of Boonton High School on an effective date to be determined (Joint Stipulation no. 27).

34. At its public meeting on October 25, 1995, the Boonton Board adopted a resolution making Walter Angilly's appointment as Boonton High School principal effective November 1, 1995 (Joint Stipulation no. 28).

35. Walter Angilly has held a Principal's Certificate since 1972, and he has been employed in the Boonton School District for thirty years (Joint Stipulation no. 29).

36. The position of high school principal is within the bargaining unit of the Boonton Administrators Association (Joint Stipulation no. 30).

VIII

DISCUSSION AND CONCLUSIONS

Summary of the Parties' Positions

Petitioner asserts that the principal search process was tainted by bad faith and was conducted in an arbitrary, capricious, and unreasonable manner. Specifically, petitioner boldly asserts that "DiVincenzi lied when she told the Screening Committee that it would be reconvened to determine the cut-off for the advancement of candidates; DiVincenzi lied when she represented that Boonton could not pay a principal above $85,000 when its budget provided for far in excess of that figure; DiVincenzi lied when she told the Bi-District Committee that she would not appoint a Boonton High School administrator to the Interview Committee; DiVincenzi lied when she testified that she provided Mr. Angilly with a draft of his evaluation." Petitioner's Initial Brief at 31. Petitioner submits that the "litany of lies" has tainted the principal search process. *Ibid.* Thus, the

appointment by the Board of Angilly as high school principal must be vacated and declared void *ab initio. Id.* at 26.

Respondents (Boonton BOE, DiVincenzi, and Angilly) argue that the principal selection process was an administrative plan developed by the Boonton superintendent and that the Bi-District Committee's role was advisory only. Respondents' assertions contained in issues six, seven, eight, nine and ten remain unchallenged by petitioner. Thus, respondents submit that Angilly is qualified for the position of principal. Therefore, the Board's decision to appoint Angilly was not arbitrary, capricious, and unreasonable or exercised in bad faith.

IX

Petitioner's assertions that DiVincenzi misrepresented facts and that she and other Board members presented false testimony are serious allegations. *See* Petitioner's Initial Brief at 26. Petitioner has the burden of proof by a preponderance of the credible evidence. *Atkinson v. Parsekian* 37 *N.J.* 143 (1962). The term "burden of proof" refers to the "burden of persuasion." The burden of persuasion entails more than merely producing evidence to establish a state of equilibrium with respect to whether a certain fact exists. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." *Jackson v. Delaware, Lackawanna and Western R.R. Co.,* 111 *N.J.L.* 487, 490 (E. & A. 1933). One factor to consider to determine the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v. Salimone,* 19 *N.J. Super.* 600, 608 (App. Div. 1952). In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. v. Murdoch,* 73 *N.J. Super.* 511 (App. Div. 1962). Thus, I have

carefully reviewed the evidence, including the transcript of the audiotape from the Boonton BOE meeting, to determine if the testimony contains "inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." *In re Perone,* 5 *N.J.* 514, 521-22 (1950).

On June 26, 1995, the subject of the principal selection process was discussed at the Boonton BOE meeting for approximately forty minutes. Boonton's witnesses testified that the discussion to change six required votes to five occurred at the public session. Petitioner's witness testified that it did not. The parties acknowledged, however, that changing the required votes from six to five would prevent Lincoln Park from blocking Boonton's choice of candidates to proceed to the Interview Committee. *See* J-7. Petitioner's allegations that DiVincenzi and Boonton BOE members had the motive and intent to misrepresent the facts turn on complicated inferences from the evidence and are therefore within the province of the fact finder.

The transcript of the audiotape exposed several crucial facts. DiVincenzi presented the search process document to the Board for its review and then announced, "If anyone wants anything added, now is the time for us to add to this, expand, delete and make some final recommendations." J-29 at 5. She also told Board members, "If you want additions, subtractions to that, . . . if you want to take it home and call me in the morning or later in this week, that's fine, too . . . . You may -- if you're anything like I am, after the fact you go to think about something, you come up with several points that should have been included on there." *Id.* at 6.[6] The Board discussed the candidates' qualifications. The advertisement, published on June 13, used the district's

[6] Just as Lincoln Park cannot transact business without a full board, DiVincenzi cannot obtain Board approval on a proposed action "separately by telephone or individual interview, even from every member of the board, since the members were not present in one room where they could mutually debate the matter." *Robert's Rules of Order, supra* note 2, at 477.

standard form for administrative positions. Thus, the position for principal required five years' experience. Some Board members did not want candidates excluded from the process based on lack of minimum years of experience. However, the Boonton BOE took no action to change the five years' minimum experience required in the advertisement. The Bi-District Committee also discussed the candidates' qualifications on June 20, but did not amend the advertisement. DiVincenzi then confirmed Nolan's previous announcement that the Board would decide the selection process that would actually be followed, and that it would be "published following the action" that night. *Id.* at 12.

The tape also revealed that DiVincenzi urged the Boonton BOE to address the subject of the number of votes needed to be a finalist. She presented the issue as follows:

> Ms. Northrop[-DiVincenzi]: . . . The final process once the Interviewing committee had completed its work -- and we did talk about the fact and we need to review the purpose of the Interviewing Committee -- says that the Interviewing Committee will interview candidates recommended by the Screening Committee. Recommend to the Boonton Superintendent of School no fewer than three, but no more than five candidates. Need six yes votes to be a finalist.
>
> Ah - of the people that we have -- remember that we have . . . eight people on the Interviewing Committee. They would need six yes votes to move forward.
>
> Ah - My original proposal to Lincoln Park and to the Bi-District . . . was that everybody be able to live with the candidate. They said that would be unfair. We may never get -- reach a conclusion or consensus. So we . . . need six votes. And the Board needs to address that concept and that thought.
>
> [J-29 at 21-22.]

DiVincenzi's remarks sent a clear signal to Boonton that requiring six affirmative votes to be a finalist could cause a problem for the Boonton BOE. Indeed, DiVincenzi's minutes state that "the purpose of modifying from six to five is so no one group would be able to control the process," J-7. Thereafter, Boonton conceded that requiring five votes had the effect of precluding Lincoln

Park's representatives, if they voted as a bloc, from blocking the advance of a candidate which a majority of the Interview Committee endorsed as a finalist. *See* Respondent's Answers to Petitioner's Request for Admissions, dated January 30, 1996. The Board members, however, did not immediately respond to DiVincenzi's statement about the votes. Instead, they discussed maintaining the candidates' confidentiality during the selection process. J-29 at 22-28. Eventually, an unidentified person asked, "So we get six out of nine?" DiVincenzi replied, "Six out of eight . . . I just sit there . . . I can't comment . . . I can't do anything other than show up." The Board then moved onto other components of the process. *Id.* at 29.

Also during the meeting, Marilyn Nolan, Board president, informed the public and the press that the principal selection process must be approved by the Board. At the hearing, Nolan testified that the discussion about the change in votes from six to five occurred at the end of the public session and was reflected in the transcript of the audiotape at pages 33-34. She also testified that although the Boonton BOE took no formal action on the selection process, it agreed by consensus to change the votes required from six to five.

Also during the meeting, Sheryl O'Neil, another Boonton BOE member, informed the Board of a typographical error in the principal search document, J-6. At the hearing she identified her comments in the transcript of the audiotape at page 33, line 23, through page 34, line 4. O'Neil also testified that at the Boonton meeting she recommended that the votes required should be changed from six to five.

O'Neil's claim that the discussion occurred at pages 39-40 of the transcript is not supported by the evidence. The transcript reveals that the Board took no formal action to adopt O'Neil's recommendation. Moreover, there is no mention by any person present at the public session of the meeting that the votes

required should be changed from six to five. Notably, the transcript discloses DiVincenzi's acknowledgment of several other changes and corrections by Board members regarding the principal selection document. However, there is no acknowledgment by the presiding officer, the secretary, or any other person that a verbal or non-verbal consensus occurred at the public session to change the votes required from six to five. The subject discussed at pages 39-40 was the scheduling of interviews, not the number of votes required. Thereafter, Nolan closed the public discussion and the Board went into closed session.

I have considered the evidence and the testimony and have observed the demeanor of the witnesses. Some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. The testimony must be such that the administrative law judge can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances.

The transcript from the unaltered audiotape uncovered what actually occurred at the Board's meeting and negated the witnesses' versions of the events. I am persuaded by the evidence unveiled in the audiotape that no discussion to change the number of votes required from six to five occurred at the public session. Thus, I reject the testimony presented by DiVincenzi, Nolan and O'Neil because it is overborne by credible evidence. *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

Therefore, I **CONCLUDE** that petitioner has demonstrated by a preponderance of the credible evidence that the Bi-District Committee agreed to implement a principal selection process which provided that an applicant would need six affirmative votes to become a final candidate for principal of BHS. The Boonton superintendent presented the selection process to the Boonton BOE for

consideration. I **CONCLUDE** that during the public session of the meeting the Boonton BOE discussed the principal selection process, but did not take any action to change the votes required from six to five, nor was the change agreed to by consensus of the Board. I **CONCLUDE** that DiVincenzi, Nolan and O'Neil falsely testified that this change had occurred during the public session of Boonton's June 26, 1995 meeting. I **CONCLUDE** that DiVincenzi falsely altered the agreed-upon principal selection process to provide that only five affirmative votes would be required to advance a candidate from the Interview Committee. I **CONCLUDE** that the DiVincenzi fabricated that portion of the minutes of the Board's June 26 meeting to show that during the public session the Board recommended and she agreed that five votes were required from the Interview Committee to become a finalist.

Other inconsistencies further impaired DiVincenzi's credibility. For example, she did not maintain a neutral and non-participatory role in the Screening Committee as she professed. DiVincenzi initially informed the Board that the members of the screening and interview committees would implement the process after both superintendents screened the applications to ensure that they were thorough, complete and ready to proceed forward. She made clear several times that she would not interfere in the screening process, except to "be the facilitator" and to "paper screen" the applications with the Lincoln Park superintendent. She also told the Board that after screening the applications she would conduct the final interviews. DiVincenzi defined her role in the process as follows:

> Ms. Northrop[-DiVincenzi]: One of the things -- of the Screening Committee, I will be meeting with everyone. I will be setting the process in place. And if its agreeable with the Board, I will be asking the Board member to co-Chair that with me so that I'm not part of the screening process and will not -ah - contaminate, for lack of a better wording, any of the results of that Committee.
>
> A Voice: (UI)?

> Ms. Northrop[-DiVincenzi]: No, I will not. I will not be part of the screening process [] [[-- and I will get my shot at a later level of]] the process. And I've deliberately, for a lot of reasons, taken myself out of the process. As I announced earlier, I have taken myself totally out of the process until the final three to five -- Lincoln Park put me back in the process. They felt very strongly that if I could not - if there was a personality issue or there was [], something I saw, that should at least, if nothing else, be present for all of the interviews.
>
> Male: [] What about if in the interviewing you're not voting on that?
>
> Ms. Northrop[-DiVincenzi]: No, I will not . . . .--
>
> [J-29 at 28-29.]

To safeguard the integrity of the screening process and not "contaminate . . . any of the results of that Committee," DiVincenzi assured the public that she would not participate in the screening process. Nonetheless, DiVincenzi unilaterally determined the cut-off figure.

Patrick English, a member of the bi-district and screening committees, testified that DiVincenzi made the same promise to the Screening Committee on July 10. DiVincenzi denied, however, telling the committee that it would reconvene to determine the cut-off figure. She claimed instead that she told the committee it would have a second meeting to review and improve the process. DiVincenzi's testimony is inconsistent with her behavior. After the meeting, DiVincenzi had ample opportunity to inform Lincoln Park that she never agreed to convene the committee to determine the cut-off figure. For example, in a memo dated July 17, English inquired when the committee would meet to determine the "break-point number" for advancement. P-12. DiVincenzi did not reply. Notably, on July 20, Dr. Jack Farr, the Lincoln Park superintendent, reminded DiVincenzi that three issues surrounding the recruiting of a new BHS principal remained unresolved. Dr. Farr identified those issues as follows:

> 1. The establishment of a cut-off score to move a candidate from the screening process to the initial interview.

> 2. Access to the numerical rating for each candidate screened.
>
> 3. Handling of those candidates who are not viable candidates by virtue of the advertised criteria to advance to an interview, if there are such candidates.
>
> [P-14.]

Thus, to resolve these issues, Farr requested an emergency meeting of the Bi-District Committee prior to the interview process moving forward. *Ibid.* DiVincenzi acknowledged receipt of Farr's memo, but she did not inform him that she had already determined the cut-off number on "either the 19th or 20th of July." Instead, she replied, "Your quick fax of July 20 . . . was received after the close of the Office on July 20. It was copied and forwarded to the Board for a response. As soon as the Board decides, I will be in touch." P-15. DiVincenzi forwarded Farr's memo to the Boonton BOE and indicated that all the issues raised by Farr were resolved at the public session of the Board's meeting on June 26. R-48. On August 3, 1995, she thanked Farr for serving on the Screening Committee. DiVincenzi also enclosed a list of the ranking for all 30 candidates and informed Farr that the top 11 would move forward to the Interview Committee. J-14.

Thereafter, on August 15, DiVincenzi told the Bi-District Committee that she had determined who would advance to the Interview Committee. She also explained her methodology, saying, "Um, I looked down a list of numbers and picked a number . . . ." P-27. Under cross-examination, she conceded that she determined the cut-off of "813."

Another major component of the selection process included the individuals chosen to serve on the Interview Committee. Patrick English chaired the meeting of the Bi-District Committee on June 20. He believed that a Boonton staff person serving on the Interview Committee created a potential conflict because the high school principal would be supervising and evaluating an

employee who voted for him. DiVincenzi responded that she believed that the teachers' contract required that a staff member be part of the Interview Committee, and agreed to research the question. This issue was included in the minutes of the Bi-District Committee meeting (J-4).

DiVincenzi maintained that the minutes were incomplete, biased and one-sided. R-54. She testified twice that the minutes did not include comments from the public or the lengthy discussions concerning committee members or votes needed to advance from the Interview Committee. However, she did not refute offering to research the issue raised by English. Nevertheless, on June 26, DiVincenzi informed the Board that "much discussion was held [at the Bi-District Committee meeting] as to having a staff member involved in the interviewing." She then stated,

> However, I did take exception, and I wish to stand by, and I'd like to -- the process that we have always followed in this District of including our staff members in those interviews. . . .
>
> There is something about including our staff in those interviews, and I would encourage the Board to stick with that.
>
> [J-29 at 20.]

She also asked the Board "to entertain maintaining the one staff member and the one administrator on this centralized [interview] committee." *Id.* at 21.

DiVincenzi's testimony about her role in the selection process became more incredible under cross-examination. On June 19, 1995, she attended the Personnel/Education Committee meeting along with Boonton BOE members Malayter, Kaminski and LeFebvre. DiVincenzi distributed a copy of her proposed search process, J-5, to each member. At the hearing, she maintained that the committee did not discuss the selection process. Further, DiVincenzi testified that she told the committee that the matter would be discussed the next day at the Bi-District Committee meeting and on June 26 at the Boonton BOE meeting. DiVincenzi's minutes of Boonton's BOE meeting proved false her

testimony. The minutes state, "Selection Process - Boonton High School Principal. Miss Northrop[-DiVincenzi] indicated this topic had been discussed at the Personnel/Education Committee." J-7. The transcript also reveals that DiVincenzi discussed the selection process with the Personnel/Education Committee. J-29 at 2-3. Additionally, Boonton maintains that DiVincenzi "sought input from the Education/Personnel Committee . . . ." Boonton's Initial Brief at 61.

Also under cross-examination, DiVincenzi further conceded that she represented to the Bi-District Committee on June 20 that no BHS administrator would be on the Interview Committee. She explained that two non-high school administrators were on vacation and the other was a candidate for principal. There were no other non-high school administrators in the district. Therefore, it was necessary to put a BHS administrator on the Interview Committee to keep the process moving forward. Lois Branch agreed to serve on the Interview Committee. Branch is the director of guidance and a tenured administrator assigned to BHS. Although Branch was a long-time colleague of Angilly, DiVincenzi believed that she would not present a conflict because the director of guidance answered to the superintendent, not the school principal. Thus, her vote would not be influenced.

I am persuaded by the evidence that DiVincenzi told English that several candidates dropped out of the first round after she told them that the highest salary offered by Boonton for the position was $85,000. At the Bi-District Committee meeting on August 15, DiVincenzi discussed the salary range of $72,000 to $85,000 for the principal position. During the discussion she acknowledged that the Board could pay a higher amount. P-27.

Boonton conceded that DiVincenzi's testimony contained "some inconsistencies," but, the whole of the record reveals that her testimony was

replete with numerous inconsistencies and contradictions. *See* Boonton's Initial Brief at 8. Indeed, DiVincenzi continued to misrepresent the facts regarding Angilly's position after he became principal of BHS. In March/April 1996, the Boonton BOE considered staff contract renewals. Although she believed that Angilly would attain tenure during the 1996-97 school year, DiVincenzi placed Angilly's name on a list of administrators who would not attain tenure if reappointed. On May 16, 1996, DiVincenzi testified that she had not completed Angilly's evaluation, although she was required to conduct three evaluations of his performance by April 30. She also stated on May 16 that a draft of the evaluation had been provided to Angilly and that it would be finalized in May or June 1996. On May 23, 1996, Walter Angilly credibly testified that he received three evaluations from DiVincenzi on May 20, and that he had not received any evaluations prior to that date.

Under the circumstances, DiVincenzi's testimony that she was unaware that Angilly made her cut-off list is in all probability contrived.

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as a common experience and observation of mankind can approve as probable under the circumstances.
>
> [*Perone, supra*, 5 *N.J.* at 522.]

Indeed, DiVincenzi directed her secretary to place an asterisk next to all applicants who met all the credentials of the first advertisement. She was aware the Angilly applied for the position and believed he was capable of filling the position.

Based on the preponderance of the credible evidence, I **CONCLUDE** that candidates who did not meet the minimum published qualifications established by the advertisement were improperly passed on to the Screening Committee by DiVincenzi. I **CONCLUDE** that after the ratings of the first round of candidates were completed, DiVincenzi failed to reconvene the Screening Committee as

she had represented and arbitrarily chose the cut-off point to determine the advancement of candidates. I **CONCLUDE** that for the second round, DiVincenzi sought "input" from the committee as to the method to determine advancement, but again made the selection on her own.

Further, I **CONCLUDE** that DiVincenzi misrepresented to several qualified candidates the amount of funds available for the salary of the new principal, resulting in their withdrawing from the process. I **CONCLUDE** that an administrator from Boonton High School, a long-time colleague of Angilly, served on the Interview Committee notwithstanding DiVincenzi's assurance that the administrator on this committee would be selected from outside the high school.

Petitioner has presented overwhelming evidence that DiVincenzi misrepresented and fabricated the facts surrounding the principal selection process. Her credibility was impaired to the extent that I must conclude that she is wholly unworthy of belief. Based on the whole of the record, I **CONCLUDE** that DiVincenzi's conduct in the principal selection process constituted bad faith.

X

Petitioner contends that the Agreement permitted the Bi-District Committee to agree to the selection process which was accepted by the Board without substantive changes. Also, petitioner charged that the Boonton BOE and DiVincenzi unilaterally changed the number of affirmative votes needed from the Interview Committee to become a finalist.

Boonton denied the charge, but admitted that it adopted the process on June 26, 1995. Boonton stated:

> The Bi-District Committee made recommendations with respect to the selection process and those recommendations were not

> binding on the Boonton BOE. Respondents admit that the selection process adopted by the Boonton BOE provided for the Interview Committee's advancement of a candidate upon the affirmative vote of five members rather than six members recommended by the Bi-District Committee.
>
> [Respondent's Answers to Petitioner's Request for Admissions, dated January 30, 1996.]

Subsequently, Boonton conceded that it was not required to adopt the selection process and did not vote on it. Boonton's Initial Brief at 8. Moreover, Boonton averred that any changes in the selection process, even if recommended by members of both boards, were "irrelevant to Ms. Northrop DiVincenzi's authority to change the process." *Id.* at 42. The Board further declared that,

> [DiVincenzi] was not bound to accept or incorporate any of the recommendations and, if she had desired, she could have changed the process even after the June 26 Boonton Board meeting. By law, she was not required to obtain the approval of even her own board of education in order to implement a selection process or change the process in any way she saw fit.
>
> [*Ibid.*]

Boonton's pendulous position that the final authority regarding the selection process belonged solely to DiVincenzi and did not require Board approval is a baseless attempt to justify the actions of the Boonton BOE and its superintendent.

Generally, committees cannot make binding decisions on boards of education. To be binding, committee recommendations must be accepted by the board, or approved by previous authorization or agreement. The purpose of the Bi-District Committee is set forth in Exhibit R-26, "Regulations, Board of Education, Town of Boonton," as follows:

> To serve as a committee of both the Boonton and Lincoln Park Boards of Education to discuss issues affecting the students at the high school, to make recommendations for consideration and possible formal adoption to the respective Boards where appropriate concerning issues affecting the students at the high school, to serve as a consultative body between the two boards

> on matters where consultation is required by the contract between Boonton and Lincoln Park and to consult upon and discuss such other matters as may be deemed desirable by the two Boards and by the members of the committee.

Further, the committee's goals are "[t]o serve as an intermediary communication vehicle for both Boards and to address areas of mutual concern regarding the quality of education offered to all high school students with the overall goal of improving the quality of education and student life at Boonton High School." R-26. Thus, the Bi-District Committee was created in part to implement the Agreement.

The selection of a high school principal is an issue which affects "the students at the high school." Indeed, the responsibility of finding a new high school principal is one that concerns both Lincoln Park and Boonton. Thomas Curtin, Esq., testified that it is an area that falls squarely within paragraph 8E(9), the "catch-all" section, of the Agreement. Therefore, I **CONCLUDE** that a selection process to recruit candidates for the position of principal at BHS is consistent with the Agreement. I further **CONCLUDE** that pursuant to the Agreement a recommendation from the Bi-District Committee to implement a selection process is binding upon acceptance by the Board.

The principal selection process was initially proposed by DiVincenzi to the committee on June 20, 1995. The committee engaged in a round-table discussion on various components of the process such as the qualifications of the candidate, the screening process and what individuals would comprise the Interview Committee. Another major item of discussion was the number of votes needed to advance to the finalist position. The round-table discussions resulted in several changes to the proposal introduced by DiVincenzi. For example, the number of votes needed to advance to the finalist position was changed from a unanimous vote to six votes. The Boonton BOE president, Nolan, reminded the

committee that the Board would review the selection process proposal and could make changes.

Boonton's early admission that it adopted a selection process which provided that advancement of a candidate required "the affirmative vote of five members rather than six members recommended by the Bi-District Committee" is refuted by the overwhelming evidence that it accepted the selection process but took no action to change the votes needed. Thus, Boonton now asserts that its superintendent had the final authority on the matter. Boonton and DiVincenzi rely extensively upon *N.J.S.A.* 18A:27-4.1 to support their actions. The relevant section of that statute provides:

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
>
> a. A board of education shall appoint, transfer or remove a certificated or noncertificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> [*N.J.S.A.* 18A:27-4.1.]

Respondents have interpreted the superintendent's recommendation authority as extending to all aspects of the hiring process and assert that,

> [b]ecause of the Boonton Superintendent's broad statutory recommendation authority, not even her own board of education could bind her to a particular selection process, qualifications, or minimum number of committee votes. If her own board cannot, then any attempt, whether by contract, board action, policy or practice to cede or share the appointment authority with Lincoln Park or the Bi-District Committee would directly contravene the statute, and would be invalid.
>
> [Boonton's Initial Brief at 38.]

Respondents' position has no support. Petitioner has correctly observed that the Board advances an interpretation of the statute "which would vest in the superintendent of schools absolute authority to determine all aspects of the

hiring of personnel." Petitioner's Reply Brief at 15. The Board's giant leap to equate the statutory requirement that there be a superintendent's recommendation for all appointments to the premise that the superintendent has total control over the school district's appointment process is absurd. Indeed, Boonton's interpretation divests a board of education of any authority over the hiring process.

The statute speaks only to the final phases of the hiring process; an appointment, transfer or removal. Nothing in the language of *N.J.S.A.* 18A:27-4.1 can be read to prohibit a board of education from establishing a selection process which would ensure that a search results in a qualified pool of candidates. The superintendent would then recommend to the board of education the best candidates. This interpretation of *N.J.S.A.* 18A:27-4.1 does not deprive the superintendent of his or her recommendation authority. Thus, *N.J.S.A.* 18A:27-4.1 has no bearing upon the issue of the principal selection process.

I **CONCLUDE** that the Bi-District Committee agreed to use a selection process in its search to hire the high school principal. The recommendation was accepted and implemented by the Boonton BOE. Therefore, I **CONCLUDE** that pursuant to the 1990 Agreement, the selection process is binding. I **CONCLUDE** that the Boonton superintendent unilaterally changed substantive parts of the selection process, which constituted a breach of the Agreement.

The courts and the Commissioner have repeatedly held that a board of education's decision is entitled to a presumption of correctness, and its decision will not be set aside unless there is a clear showing of abuse of discretion or error. *Thomas v. Morris Tp. Bd. of Educ.*, 89 *N.J. Super.* 327 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 40 (App. Div. 1962); *Quinlan v. North Bergen Bd. of Educ.*, 73 *N.J. Super.* 40 (App. Div. 1962);

McMillan v. South Orange-Maplewood Bd. of Educ., 1977 *S.L.D.* 137; *Ricco v. Bloomfield Bd. of Educ.*, OAL Dkt. No. EDU 8111-84 (May 16, 1985), *adopted,* Comm'r of Educ. (July 8, 1985). Accordingly, the review of the action of the superintendent and the board is not *de novo* and is not to determine whether they acted wisely. Instead, the scope of review is whether the preponderance of the evidence establishes that the board exercised its discretion unreasonably, arbitrarily, capriciously, or in bad faith. *Glynos v. Union County Bd. of Educ.,* 93 *N.J.A.R.*2d (EDU) 673.

Based on the whole of the record, I **CONCLUDE** that the Boonton BOE and its superintendent acted arbitrarily, capriciously, illegally and in bad faith in implementing the "selection search process." Consequently, I **CONCLUDE** that the appointment of Angilly to the position of principal of Boonton High School is invalid.

XI

Remedy

Lincoln Park requests that the parties be returned to the *status quo* as of June 25, 1995, and that the appointment of Angilly be declared void *ab initio*. Lincoln Park also requests that the Commissioner direct Boonton to reinstitute a fair search process consistent with the terms outlined in J-6 and that the candidate for principal of BHS have five years' successful administrative experience.

Boonton argues that non-adherence to the selection process recommended by the Bi-District Committee does not require the nullification of the receiving school district's statutory recommendation and appointment authority. Therefore, the Commissioner should not vacate the appointment of Angilly and redo the selection search process.

Assuming, however, that petitoner is entitled to relief, Boonton and Angilly urge the Commissioner to fashion a remedy which is least disruptive to the educational program of the students and maintains the integrity of the statutory authority of the receiving district superintendent and board. Moreover, respondents maintain that petitioner has not challenged Angilly's performance in the position. Therefore, respondents urge that Angilly continue as acting principal should the Commissioner invalidate the principal appointment and reinstitute the search process. Boonton's Initial Brief at 88; Angilly's Initial Brief at 30-31.

I have carefully considered whether the conduct of the Boonton BOE and its superintendent necessitates nullifying the principal appointment and reinstituting the search process. Boonton's failure to adhere to a planned selection process violated the Agreement between the school districts. The Agreement established the structure of the relationship between Lincoln Park and Boonton. The intent of the Agreement was that the boards would cooperate with one another. *See* J-1 at paragraph 8A. Further, paragraph 8E indicates that Lincoln Park and Boonton shall reach mutually acceptable agreements in nine areas, including a catch-all section which requires agreement on "[s]uch other areas as any of the participating districts' Boards, Superintendents, or Business Administrators shall deem appropriate." Therefore, pursuant to the Agreement, a selection process proposed by the receiving district superintendent, recommended by the Bi-District Committee, and accepted by the Boonton BOE as presented or modified should be followed. Ultimately, however, the receiving superintendent and the Board would retain recommendation and appointing authority under *N.J.S.A.* 18A:27-4.1.

I have also considered the statutory recommendation and appointment authority vested in superintendents and boards of education under *N.J.S.A.*

18A:27-4.1, and the enactment of *N.J.S.A.* 18A:38-8.1, which entitled Lincoln Park to a seat on the Boonton Board of Education. Sending and receiving school districts must be willing to work through their disagreements and any pre-conceived biases. The Agreement between Lincoln Park and Boonton, the creation of a Bi-District Committee and the implementation of a selection process to recruit a high school principal are means to accomplish this goal. Moreover, unless a selection process denies the superintendent of her recommendation authority or the board of its appointment authority, it should not be summarily dismissed. Indeed, the Agreement requires that the superintendents and the sending and receiving boards of education and their representatives exercise good faith in their dealings with one another. That has not occurred here.

The Boonton superintendent breached the Agreement by implementing a principal selection process in bad faith. I have considered the important role of superintendents of schools. Like teachers, they hold a sacred position in our society and must be held to a high standard of conduct. While parents, law enforcement officials and the general public expect teachers to provide students with book learning, superintendents are the leaders of the school district and therefore must impart social and moral values appropriate to the setting. Also, superintendents influence the opinions of their staff and students, thus they are role models. The Commissioner has dealt severely with superintendents who misrepresent critical facts. *See In re Tenure Hearing of Pitch, School District of South Bound Brook, Somerset County,* 1975 *S.L.D.* 763, 773. Further, where the board of education abused its discretion in the search and selection process for a superintendent of schools, the court has nullified the appointment. *Cullum v. North Bergen Bd. of Educ.*, 15 *N.J.* 285 (1954). The Court in *Cullum* also declared that "members of [a] board of education hold positions of public trust and must at all times faithfully discharge their functions with the public interest as their polestar. Amongst their most vital and responsible duties is the proper selection of

personnel, particularly the school superintendent." *Id.* at 292 (citations omitted). I agree that "the appointment of a high school principal is a critical decision of substantially comparable importance [to] that of superintendent of schools." Petitioner's Initial Brief at 27.

I am mindful of the recurrent controversies between Lincoln Park and Boonton, but I cannot be dissuaded by Boonton's omen that, "If Boonton and Lincoln Park are required to agree upon a new selection process, appointment criteria, committee compositions, salary ranges and the like, the predictable impasses at each level will soon return the parties to the OAL." Boonton's Initial Brief at 90. If the Agreement and the Bi-District Committee are to have any meaning, and school officials held to a high standard of conduct, the principal appointment must be invalidated and the selection process reinstituted.

I have also considered the position of Walter Angilly. I agree that he "is an innocent victim [of] what is essentially a political melodrama between the two boards." Angilly's Reply Brief at 2. Removal of Angilly under these circumstances will be disruptive to the Boonton High School educational program and could have detrimental effects on all sending and receiving school districts. I am therefore persuaded that Angilly has presented a more appropriate remedy than that presented by Lincoln Park or Boonton. *See* Angilly's Initial Brief at 31.

ORDERS

It is **ORDERED** that the position of principal of Boonton High School be reopened. It is further **ORDERED** that until a selection process which is consistent with the Agreement has been recommended to the Boonton BOE for consideration and an appointment made, Walter Angilly shall be permitted to retain the position of acting principal of Boonton High School. Further, it is

ORDERED that Walter Angilly shall be given the same opportunity as any candidate to submit his application.

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

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

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

January 23, 1997
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

1-30-97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 30 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses:

For Petitionerr:
Joy Northrop DiVencenzi
Patrick English
Rita Hilbert
John F. Farr, Jr.
Susan Boykas

For Respondent:
Thomas R. Curtin
Joy Northrop DiVencenzi
Marilyn Nolan
Susan Krouse-Bosko
Sheryl O'Neill

For Walter Angilly:
Walter Angilly

Exhibits:

Joint

J-1	(P-1 & R-1)	Sending and Receiving Agreement.	April 10, 1990
J-2	(P-72 & R-28)	Letter from J. Farr to J. Northrop concerning appendices to agenda.	May 22, 1995
J-3	(P-73 & R-29)	Letter from J. Northrop to J. Farr with attachments.	May 22, 1995
J-4	(P-3 & R-32)	Minutes of Bi-District Committee	June 23, 1995
J-5	(P-2 & R-34)	Memorandum from J. Northrop regarding Search Process-Boonton High School Principal.	
J-6	(P-4 & R-37)	Search Process - BHS Principal	June 22, 1995
J-7	(P-5 & R-39)	Minutes of Boonton BOE meeting.	June 26, 1995
J-8	(P-6 & R-41)	Memorandum from J. Northrop with amended Search Process attached	June 27, 1995
J-9	(P-8 & R-44)	Letter from J. Farr to J. Northrop.	June 28, 1995

J-10	(P-9 & R-45	Letter fromJ. Northrop to J. Farr.	July 12, 1995
J-11	(P-7 & R-46)	Posting for the Principal Vacancy and Copy of Advertisement.	
J-12	(P-19 & R-49)	Letter from M. Nolan to P. Whitehorne and P. English.	July 28, 1995
J-13	(P-76 & R-50)	Letter from J. Northrop to J. Farr.	August 2, 1995
J-14	(P-20 & R-51)	Letter from J. Northrop to J. Farr with ranking of Candidates attached.	August 3, 1995
J-15	(P-21 & R-52)	Letter from J. Northrop to J. Farr.	August 3, 1995
J-16	(P-23 & R-53)	Letter from P. Whitehorne and P. English to M. Nolan.	August 7, 1995
J-17	(P-25 & R-54)	Letter from J. Northrop to J. Farr.	August 11, 1995
J-18	(P-28 & R-56)	Letter from J. Northrop to P. Whitehorne and P. English.	August 16, 1995
J-19	(P-34 & R-60)	Letter from M. Nolan to P. Whitehorne.	August 23, 1995
J-20	(P-36 & R-61)	Letter from J. Farr to M. Nolan.	August 25, 1995
J-21	(P-52 & R-66)	Ratings of first round Candidates.	
J-22	(P-51 & R-67)	Screening Committee compilation of the round of Candidates.	
J-23	(P-53 & R-68)	Screening Committee compilation of the second round of Candidates	
J-24	(P-61 & R-73)	Minutes of Boonton Board of Education.	October 2, 1995
J-25	(P-62 & R-76)	Excerpt of Minutes from the Boonton Board of Education.	October 25, 1995

J-26 Notes of Board Meeting dated June 26, 1995.

J-27 Determination regarding Audit Application for State Audit dated November 14, 1995.

J-28 Search Committee Checklist with Documents regarding cut off.

J-29 Cover Letter and Transcript of Board Meetings regarding New Business, dated June 26, 1995.

J-30 Redacted Cover Letter (P-54) of Walter Angilly, dated June 21, 1995.

Petitioner

P-1 (See J-1)

P-2 (See J-5)

P-3 (See J-4)

P-4 (See J-6)

P-5 (See J-7)

P-6 (See J-8)

P-7 (See J-2)

P-8 (See J-9)

P-9 (See J-10)

P-10 Letter from J. Northrop to J. Farr regarding Annual Report, dated July 12, 1995.

P-11 Letter from J. Farr to J. Northrop on the cancellation of Joint Boards Meeting, dated July 13, 1995.

P-12 Memorandum from P. English to J. Northrop, dated July 17, 1995.

P-13 Letter from J. Farr to N. Nolan, dated July 19, 1995.

P-14 Memorandum from J. Farr to J. Northrop concerning the recruitment of the new Principal,d ated July 20, 1995.

P-15 Memorandum from J. Northrop to J. Farr, dated July 21, 1995.

P-16 Memorandum from S. Boykas to J.Northrop, dated July 24, 1995.

P-17 Memorandum from P. English to J. Nolan, dated July 24, 1995.

P-18 Excerpts of Minutes from Lincoln Park Board of Education Meeting and Resolution, dated July 25, 1995.

P-19 (See J-12)

P-20 (See J-14)

P-21 (See J-15)

P-22 Letter from J. Northrop to J. Farr, dated August 3, 1995.

P-23 (See J-16)

P-24 Letter from P. English to J. Northrop, dated August 8, 1995.

P-25 (See J-17)

P-26 Fax from J. Farr to J. Northrop, dated August 15, 1995, regarding Bi-District

Committee Meetings held on May 18, 1995 and June 20, 1995.

P-27 Minutes of Bi-District Committee Meeting with Transcript attached, dated August 15, 1995.

P-28 (See J-18)

P-29 Fax from J. Farr to P. English, dated August 17, 1995.

P-30 Boonton High School schedule of Interviews for position of Principal, dated August 19, 1995.

P-31 Letter from S. Boykas to M. Nolan, dated August 22, 1995.

P-32 Excerpt of Minutes from the Bi-District Committee Meeting, dated August 22, 1995.

P-33 Letter from J. Farr to M. Nolan, dated August 23, 1995.

P-34 (See J-19)

P-35 Letter from S. Boykas to N. Nolan, dated August 25, 1995.

P-36 (See J-20)

P-37 Memorandum from J. Farr to Boonton Board of Education regarding Principal recruitment, dated August 28, 1995.

P-38 Minutes from the Bi-District Committee Meeting, dated August 28, 1995.

P-39 Memorandum from J. Northrop to S. Boykas, dated September 5, 1995.

P-40 Letter from S. Boykas to J. Northrop, dated September 13, 1995.

P-41 Letter from P. English to J. Northrop, dated September 15, 1995.

P-42 Minutes from the Bi-District Committee Meeting, dated September 19, 1995.

P-43 Memo from J. Northrop and J. Farr to the Boonton Board of Education and Lincoln Park Board of Education regarding the Annual Report, dated September 20, 1995.

P-44 Letter from J. Northrop to the Interview Committee, dated September 20, 1995.

P-45 Notes of S. Boykas from the Interview Committee Meeting, dated September 20, 1995.

P-46 Letter from J. Farr to J. Northrop, dated September 29, 1995.

P-47 Ranking Form of S.Boykas (Candidates 1-30).

P-48 Ranking Form of S. Boykas (Candidates 31-70).

P-49 Screening Committee Membership List.

P-50 Interview Committee Membership List.

P-51 (See J-22)

P-52 (See J-21)

P-53 (See J-23)

P-54 (See J-30)

P-55 Redacted Resume, Cover Letter, and Supporting Documentation submitted by Candidate #55.

P-56 Redacted Resume and Cover Letter of Candidate #35.

P-57 Redacted Resume, Cover Letter, and Supporting Documentation of Candidate #20.

P-58 Redacted Cover Letter of Candidate #60.

P-59 Redacted Resume, Cover Letter, and Supporting Documentation of Candidate #62.

P-60 Materials submitted to Boonton Board of Education by three Finalists with Notes of Bonnie Sudol.

P-61 Minutes of Boonton Board of Education Meeting, dated October 2, 1995.

P-62 (See J-25)

P-63 Agreement between the Town of Boonton Board of Education and the Boonton Administrators' Association, 1991-1992.

P-64 Agreement between Boonton Board of Educaton and the Boonton Administrators' Association, July 1, 1992 - June 30, 1995.

P-65 Respondents' Boonton Board of Education and Joy Northrop DeVincenzi's Answers to Interrogatories.

P-66 Respondents' Answers to Petitioner's Request for Admissions.

P-67 Petition to invalidate Appointment of School Principal filed by the Board of Education of the Borough of Lincoln Park against the Board of Education of the Town of Boonton, Joy Northrop DeVincenzi and Walter Angilly.

P-68 Petition filed with the Commissioner of Education by the Lincoln Park Board of Education.

P-69 Cross Petition for Declaratory Judgment.

P-70 Answer to Cross Petition filed on behalf of the Lincoln Park Board of Education.

P-71 Minutes of Closed Executive Session from the Boonton Board of Education Meeting, dated May 8, 1995.

P-72 (See J-2)

P-73 (See J-3)

P-74 Minutes of Closed Executive Session of Boonton Board of Education Meeting, May 22, 1995.

P-75 Minutes of Closed Executive Session of Boonton Board of Education Meeting, dated June 12, 1995.

P-76 (See J-13)

P-77 Letter from R. Piliere to J. Northrop, dated August 7, 1995.

P-78 Letter from P. English to J. Northrop, dated August 7, 1995.

P-79 Letter from J. Farr to J. Northrop, dated August 15, 1995.

P-80 Minutes of Bi-District Committee Meeting, dated August 15, 1995.

P-81 Letter from J. Northrop to J. Farr, dated August 16, 1995.

P-82 Draft Transcript (Tape Portion of June 26, 1996) Boonton Board of Education Meeting. (Identification Only)

P-83 Copy of Taped Portion of Boonton Board of Education Meeting, dated June 26, 1995.

P-84 Audit Report of Boonton Board of Education, dated October 15, 1991.

P-85 Notes of Screening Committee Meeting, dated July 10, 1995.

P-86 Part of Public Agenda with attachments, dated April 29, 1996.

P-87 Agenda - Education/Personnel Committee, dated April 11, 1996.

P-88 Agenda - Education/Personnel Committee, dated April 17, 1996.

Respondent

R-1 (See J-1)

R-2 (See J-2)

R-3 (See J-4) (Identification Only)

R-4 (See J-8) (Identification Only)

R-5 Letter from Dr. James Swalm to Robert F. Savitt, dated March 21, 1989. (Identification Only)

R-6 Letter from Robert F. Savitt, dated March 22, 1989. (Identification Only)

R-7 (See J-24) (Identification Only)

R-8 Contract Proposals of Boonton Township.

R-9 Contract Proposals of Lincoln Park.

R-10 Boonton Board Proposal to Lincoln Park. (Identification Only)

R-11 Curtin draft of Policy and Procedural Provisions.

R-12 Petition Filed by Lincoln Park. (Identification Only)

R-13 Letter from Robert F. Savitt (Guidelines). (Identification Only)

R-14 Two Letters from Dr. James Swalm. (Identification Only)

R15 Two Letters from Savitt with marked Policy Modifications. (Identification Only)

R-16 Letter from Thomas R. Curtin, Esq., to Peggy O'Dowd, Esq. (Identification Only)

R-17 Letter from Kathleen Noonan, Esq., to Peggy O'Dowd, Esq. (Identification Only)

R-18 File Memorandum of Thomas Curtin, Esq. (Identification Only)

R-19 Letter from Kathleen Noonan, Esq. (Identification Only)

R-20 Letter from Peggy O'Dowd, Esq., to Thomas R. Curtin, Esq. (Identidication Only)

R-21 Letter from Kathleen Noonan, Esq., to Peggy O'Dowd, Esq. (Identification Only)

R-22 Letter from Commissioner Cooperman. (Identification Only)

R-23 Policy 9080 Tri-district Liaison Committee.

R-24 Policy 913 Sending/Receiving Board of Education Liaison Relationship. (Identification Only).

R-25 Lincoln Park Bi-District Committee Policy. (Identification Only).

R-26 Policy 9080 Bi-District High School Committee.

R-27 Farr Letter to Northrop.

R-28 (See J-2)

R-29 (See J-3)

R-30 Agenda of Boonton Board Meeting.

R-31 Agenda of Bi-District Meeting.

R-32 (See J-4)

R-33 Boonton Superintendent's Draft of Search Process.

R-34 (See J-5)

R-35 Qualifications of High School Principal.

R-36 Agenda Review distributed by Boonton Superintendent.

R-37 (See J-6)

R-38 Agenda for Boonton Board of Education Meeting, dated June 26, 1995.

R-39 (See J-5)

R-40 Note from Joy Northrop of Boonton Board of Education Public Meeting, dated June 26, 1995.

R-41 (See J-8)

R-42 Letter of Northrop transmitting Final Search Process.

R-43 Search Committee Evaluation Criteria.

R-44 (See J-9)

R-45 (See J-10)

R-46 (See J-11)

R-47 Joint Annual Report of Superintendents.

R-48 Northrop Memorandum to Boonton Board.

R-49 (See J-12)

R-50 (See J-13)

R-51 (See J-14)

R-52 (See J-15)

R-53 (See J-16)

R-54 (See J-17)

R-55 Letter of Berlinghoff to Whitehorne.

R-56 (See J-18)

R-57 Interview Rating Form.

R-58 Angilly's Interview Rating Forms by Dr. Farr and Mr. Siwek.

R-59 Minutes of Inteview Committee Meeting.

R-60 (See J-19)

R-61 (See J-20)

R-62 Agenda of Bi-District Meeting.

R-63 Minutes of Bi-District Meeting.

R-64 Minutes of Boonton Board Meeting.

R-65 Readvertisement for Principal.

R-66 (See J-21)

R-67 (See J-22)

R-68 (See J-23)

R-69 Tally of Top ranking Candidates.

R-70 Search Process Update from Superintendent of Boonton Boad of Education.

R-71 Principal Certificate issued to Walter Angilly, dated October 1972.

R-72 Agenda for Boonton Board Meeting.

R-73 (See J-24)

R-74 Minutes of Boonton Closed Executive Session Interview.

R-75 Agenda of Boonton Board.

R-76 (See J-25)

R-77 Letter of Berlinghoff to Whitehorn.

R-78 Boonton Education Association Letter.

R-79 American Association of Univerisity Professors "Faculty Participation in the Selection, Evaluation, and Retention of Administrators."

R-80 Bi-District High School Committee Minutes, dated May 18, 1995.

R-81 Administrative Bargain Unit.

OAL DKT. NOS. EDU 9620-95 AND EDU 12270-95 (CONSOLIDATED)
AGENCY DKT. NOS. 259-7/95 AND 436-11/95

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY, JOY NORTHROP DE VINCENZI, AND WALTER ANGILLY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner, Board of Education of the Borough of Lincoln Park (hereinafter "Lincoln Park") and respondents Board of Education of the Town of Boonton (hereinafter "Boonton"), Joy Northrop DeVincenzi[1] (hereinafter DeVincenzi), and Walter Angilly[2] (hereinafter "Angilly") were timely filed in accordance with *N.J.A.C.* 1:1-18.4 as

[1] By letter dated February 6, 1997, Arnold H. Chait, counsel for Boonton and Ms. DeVincenzi, requested that Donald M. Weitzman, Esq., be permitted to be substituted for Chait's firm as individual counsel for Respondent DeVincenzi in order that he may file exceptions on her behalf to permit the respective interests of the Board and DeVincenzi to be separately advocated. Upon receipt of this communication, all parties were provided an opportunity to submit objections to such request. In that no opposing submission was filed, the substitution of attorney request for Ms. DeVincenzi was granted.

[2] On February 7, 1997, counsel for Respondent Angilly advised that he had not yet received a copy of the initial decision in this matter. He reported that upon checking with the OAL he was informed that a copy was being mailed and he, therefore, requested an extension of time within which to file exceptions in this case. Based upon the circumstances presented, counsel was accorded the regulatorily specified 13 days from the February 7 mailing within which to file exceptions to the initial decision. Angilly's exceptions were timely filed pursuant to the established timeline.

were replies of Lincoln Park to the exceptions of Angilly and those of DeVincenzi and Boonton and replies of Boonton and DeVincenzi to the exceptions of Lincoln Park.

The parties extensive exceptions and replies essentially recast and reiterate the arguments advanced in their post-hearing submissions before the ALJ, which the Commissioner finds were fully considered and addressed in the initial decision. As such, only the most salient exception and reply arguments of each of the parties are briefly presented below.

LINCOLN PARK EXCEPTIONS

Lincoln Park excepts to the ALJ's conclusion, on Page 23 of the Initial Decision, that its representative on the Boonton Board may not disseminate information and communications which will be considered by the Boonton Board to Lincoln Park Board members. It advances that depriving the representative of this ability places him or her "in the position of having to deliberate and vote on issues which impact the Lincoln Park Board without having the opportunity to consult with other board members." (Lincoln Park Exceptions at pp. 2-3). It urges that such dissemination is necessary "to ensure proper preparation for Lincoln Park at Boonton Board meetings." (*Id.* at p. 3)

With respect to the ALJ's remedy to the principal selection process issue, Lincoln Park urges the Commissioner to order the immediate implementation of the previously agreed upon principal selection process (Exhibit J-6), "with an express prohibition against any participation in the process by Ms. DeVincenzi." (Lincoln Park Exceptions at p. 4) It contends such exclusion of involvement by Ms. DeVincenzi is clearly dictated by the ALJ's findings and conclusions that she exercised bad faith and misconduct in the previous selection. Lincoln Park further requests the Commissioner to direct that the requirement of five years of successful administrative experience, as was set forth in the initial advertisement for the principal position,

be retained and only candidates meeting such qualification be considered. It additionally proffers that if Ms. DeVincenzi is not removed, it would be entirely appropriate, under the circumstances, for the Commissioner "to direct that Lincoln Park's superintendent be given the authority pursuant to *N.J.S.A.* 18A:27-4.1 to recommend the appointment of the new principal of Boonton High School." (*Id.* at p. 6) Finally, Lincoln Park submits that, based upon the ALJ's findings and conclusions regarding "fabrication of minutes and false testimony" by Ms. DeVincenzi, the Commissioner should recommend that the State Board of Examiners initiate proceedings to revoke all of her certificates. (*Id.* at p. 7)

In reply, Boonton urges that Lincoln Park's argument that information and communications received from the Boonton Board should be disseminated to the Lincoln Park Board before such information is considered or acted upon by the Boonton Board indicates that Lincoln Park misperceives the role of its appointee to the Boonton Board. In this connection it asserts that

> [Lincoln Park] argues, in effect, that its appointee functions as a surrogate for the full Lincoln Park Board, and that the appointee is bound to consult and confer with his or her fellow Lincoln Park Board members to solicit their views on all issues before deliberating and voting upon them before the Boonton Board. To the contrary, Lincoln Park's appointee should function in the same manner as the other elected members of the Boonton Board. Each member of a board is bound to exercise independent judgment in the performance of his or her duties. Lincoln Park seems to want to have its appointee surrender that judgment to the will of a majority of the Lincoln Park Board.
>
> (Boonton Reply Exceptions at pp. 2-3)

Further, it concurs with the ALJ's determination that the need for confidentiality with respect to certain matters is of paramount concern and such sharing of this information with the Lincoln Park Board is clearly precluded by the Open Public Meetings Act. Boonton proffers that the

appointee is not disadvantaged by the determination that the materials may not be shared in advance with the Lincoln Park Board, as this individual is permitted to share such information with the Lincoln Park Superintendent and, thus, have the benefit of his or her experience and educational expertise in determining how to vote. Additionally, it warrants that "because the agenda for the Boonton Board meetings is made public in advance, all Lincoln Park Board members have advance notice of the exact subjects and issues which will be discussed at the Boonton Board meeting, and can provide their input to their appointee on these subjects." (*Id.* at p. 6)

Boonton next urges the Commissioner to reject Lincoln Park's request that he enter an order calling for the immediate implementation of the principal selection process outlined in Exhibit J-6. Notwithstanding Boonton's continuing argument that it never agreed to this process, it asserts that such a directive is clearly contrary to law. In this regard, it proffers that the within events, including the creation of the outlined selection process, occurred over two years ago and, subsequent to this time, there have been a number of changes in the membership of both boards. Boonton argues that "[i]t is well-established that a board of education is a noncontinuous body, whose authority is limited to its own official life and whose actions can bind successor boards only in those ways and to the extent expressly provided for by statute." (citations omitted) (Boonton Reply Exceptions at p. 10) It argues that here, Lincoln Park is requesting the Commissioner to impose "a search policy which the ALJ presumed to be acceptable to a predecessor board ***" upon the current Boonton Board, thereby unlawfully depriving the current Board of its right "to determine its own criteria and qualifications for both the process and the principal position." (*Id.*) Moreover, Boonton charges that Lincoln Park's proposal that the Lincoln Park Superintendent be vested with full authority to recommend the

principal appointment in the *receiving* district should Boonton Superintendent DeVincenzi not be removed from office, is preposterous and a "blatant violation of the statutory framework governing sending/receiving relationships." (*Id.* at p. 9)

In her reply, DeVincenzi urges that the harsh remedies requested by Lincoln Park, over and above those contained in the initial decision, *i.e.*, her removal from the principal selection process and an Order to Show Cause to review her certifications, due to the ALJ's conclusion that she acted in bad faith in the principal selection process, are clearly premature in this matter. DeVincenzi asserts that all of the adverse findings of the ALJ have been refuted in her exceptions (DeVincenzi's exception arguments are presented below) and, therefore, no sufficient basis exists for the imposition of such remedies.

BOONTON EXCEPTIONS

Boonton's exceptions renew its post-hearing assertion, contrary to the ALJ's finding, that Lincoln Park's appointee to the Boonton Board should not have entitlement to information relating to grades which are not encompassed in the sending/receiving relationship, *i.e.*, grades K-8 of the Boonton School System, prior to the release of this information to the public, again arguing that this information is not an area within the legitimate concern of Lincoln Park. Likewise, it reiterates its arguments in support of its contention that the deliberative role of Lincoln Park's appointee should be confined. "***Inasmuch as there are a number of subject areas in which the sending district appointee is unable to act (i.e. vote), and/or which have no impact upon sending district pupils, there should be no right in that appointee to participate in the formal deliberations in those subject areas." (Boonton Exceptions at p. 14)

Boonton next excepts to the ALJ's determination that the Boonton Board accepted the principal selection process which had been recommended by the Bi-District Committee. In

this connection, Boonton presents cited portions of hearing testimony which it contends establishes that when the proposed search process was submitted to the Bi-District Committee, it was clearly understood that this was only being done to solicit "input," and that any recommendation of this Committee was never intended to be binding on the Boonton Board or its superintendent. (Boonton Exceptions at p. 18) It argues that "[i]n a leap of logic," the ALJ turned the inaction of the Boonton Board at its June 26 meeting "into formal action, concluding that a failure to reject or modify [the Bi-District Committee's recommendations] represented an approval by the Board." (*Id.* at p. 20) It argues that "the only manner in which the Bi-District Committee recommendations could have become binding on the Superintendent and/or Boonton Board was if they had specifically agreed to be bound by them." (*Id.* at p. 19)

Boonton next excepts to the ALJ's finding that the irregularities which occurred in the principal selection process warrant the invalidation of Angilly's appointment to this position. It posits that, notwithstanding the recognition that there were some inconsistencies in testimony, or perhaps even flaws in the process, such irregularities do not rise to the level of demonstrating "bad faith" necessitating the Commissioner's overturning of "the appointment of a candidate who is clearly qualified for the position and who was selected after a comprehensive, inclusive selection process which incorporated the input of all possible constituencies, which is all the Boonton Superintendent was required to do[.]" (Boonton's Exceptions at p. 8) Boonton urges the Commissioner to review every instance where bad faith is asserted in light of the "legal significance" test. It advances that given that the ultimate statutory responsibility for personnel appointments is conferred exclusively upon the superintendent and the Board, there is no legal significance to any of the charged modifications made to the selection process. (*Id.)*

Finally, Boonton argues that the remedy to the selection process recommended by the ALJ is unworkable and unlawful. It posits that the ALJ's proposed process "conditions the ability of the receiving Board and Superintendent to adopt and implement a selection process and criteria upon the ability of the Bi-District Committee to reach consensus and put forth a recommendation." (Boonton's Exceptions at p. 40) Boonton perceives that the ability of the Bi-District Committee to reach consensus is compromised by the fact that of the nine members comprising this body, four are Lincoln Park representatives, four are Boonton representatives, and the remaining member is the Principal of Boonton High School, Respondent Angilly. It proffers that given that Angilly would most likely be required to recuse himself from voting, in that he would be a candidate for the position, each district would have equal representation on the Committee, creating "a real potential of stalemate, resulting in perpetuation of the continuing disputes, thereby placing the administration of the high school in limbo." (*Id.* at pp. 40-41)

In reply, Lincoln Park avers that Boonton's claim that its Board never accepted the principal selection process disingenuous, in that Boonton and its superintendent claim on one hand that the recommendations of the Bi-District Committee were subject to the approval of the Board, but on the other hand, the Board did not accept or approve the principal selection process. It asserts that the process proposed by DeVincenzi and modified at the Bi-District Committee meeting of June 20, 1995, and presented to the Boonton Board on June 26, 1995, was not modified by that body at the meeting. Further, it contends, there is nothing in the record to support Boonton's claim that it had given its superintendent authority to modify the process as presented. As such, Lincoln Park contends that "[t]he ALJ properly concluded that Boonton was bound to follow the process outlined in Exhibit J-6," (Lincoln Park Reply Exceptions at p. 10)

Further, Lincoln Park asserts that Boonton advances no support for its contention that it was "free to ignore an agreed upon principal selection process which in no way stripped it of its ultimate authority to appoint a principal of Boonton High School." (*Id.* at p. 12)

Finally, Lincoln Park discounts as without merit, Boonton's assertions that the irregularities in the principal selection process do not warrant the invalidation of Angilly's appointment. It contends

> Boonton has gone to great lengths to argue that the appointment of the high school principal should not be invalidated in spite of overwhelming evidence that the appointment resulted from a tainted process. Boonton's argument that the improprieties in the process have no "legal significance" must be rejected, especially in light of the egregious conduct of public officials which has been revealed in this matter. (Lincoln Park Reply Exceptions at p. 13)

DE VINCENZI EXCEPTIONS

DeVincenzi generally excepts to all of the ALJ's "findings of bad faith, misrepresentation, falsifying of facts and documents, and any other allegations directed at [her] on the issue of bad faith," contending that such findings are not supported by the within record, and that she was, in fact, at all times "acting pursuant to her authority under *N.J.S.*[*A*] 18A:27-4.1" (DeVincenzi Exceptions at p. 1) In this regard, DeVincenzi presents her version of the facts and citations of selected testimony advanced at the hearing underlying each of the areas where she maintains the ALJ made erroneous determinations that she acted in bad faith, *i.e.*, the published qualifications issue, the cutoff score, inclusion of Boonton High School staff members and administrators in the selection process, and the maximum pay scale issue, arguing that a fair consideration of these facts must lead to the inevitable conclusion that she exercised "good faith efforts with respect to the process" in each of these areas. (*Id.* at p. 5)

With regard to the "change" from six votes to five, DeVincenzi proffers that testimony at the hearing demonstrates a divergence of opinion as to whether this issue was discussed at the meeting of the Boonton Board on June 26. She advances that notwithstanding that such "discussion is not audible on the tape recording of the meeting, ***two members of the Boonton Board of Education testified at the trial that such a discussion did take place[,] [she] says such a discussion took place[, and] the minutes [she took] indicate that the discussion took place." As such, DeVincenzi asserts that "[c]ommon sense leads to the conclusion that some consensus must have taken place on this issue." (*Id.* at pp. 7-8) DeVincenzi charges that "[t]he ALJ uses this [ambiguous] incident regarding the June 26, 1995 meeting as requiring a ruling to disbelieve all of [her] remaining testimony on the other issues." *(Id.)* She cites *United Stations of N.J. et al. v. Getty Oil Co. et al.*, 102 *N.J. Super.* 459, 476 (Ch. Div. 1968), affirmed 54 *N.J.* 150 for the proposition that such a generalization on the part of the ALJ is clearly contrary to the laws of evidence, arguing

> In [*United Stations*] the Court below found that a party who was occasionally contradicted, and whose credibility on some issues may have been impaired, had not been shown to be wholly unworthy of belief and so unclean as to be undeserving of equitable relief. It is submitted that such is true of the case at hand. The law of evidence "False in one, false in all" was misapplied. To disbelieve all of DeVincenzi's testimony and ascribe an overall finding of bad faith on every issue is clearly an error based on the facts set forth above. (*Id.* at p. 9)

In reply, Lincoln Park argues that the exception arguments advanced by both DeVincenzi and the Boonton Board, "do not serve as any basis to reject the ALJ's findings and conclusions in this matter," as all such findings and conclusions are "amply supported by the voluminous record in this matter." (Lincoln Park Reply Exceptions at p. 2) Lincoln Park again presents its arguments, noting that such are fully amplified in its post hearing brief, with respect

to "[t]he fabrication of the minutes, false testimony[,] in addition to other lies and misrepresentations***demonstrat[ing] the bad faith which tainted the principal selection process." (*Id.*) As to the ALJ's determinations regarding the credibility of witnesses, it posits that "[i]n reviewing credibility determinations, the Commissioner must give 'due regard to the opportunity of the one who heard the witnesses to judge their credibility,'" citing *McKnight v. Mercer Vocational-Technical Schools*, 1986 *S.L.D.* 117, 134; and *Onulak v. Metuchen Board of Education*, 1986 *S.L.D.* 1372, 1392, as its authority for this proposition. (*Id.* at p. 7)

ANGILLY EXCEPTIONS

Angilly's exceptions renew his post-hearing arguments that the circumstances in this matter do not warrant his removal from his position. In this connection, he reargues that "the dispute in this case is essentially a political one between the Lincoln Park Board of Education and Boonton." (Angilly's Exceptions at p. 1) Angilly maintains that he was not at all involved in the process developed to fill his position and concurs with the ALJ that he is an "innocent victim" of the "political melodrama" between Lincoln Park and Boonton. (*Id.* at p. 2) Angilly argues, that notwithstanding Lincoln Park's contentions to the contrary, the ultimate decision with respect to any appointment was statutorily that of the Boonton Board, upon recommendation of its superintendent. He maintains that he was the overwhelming choice of the Boonton Superintendent and the Boonton Board for the position, and "whatever may have transpired during the selection process cannot be used to upset his appointment." (*Id.* at p. 4) He urges that "[u]ltimately, the current focus should be on what [he] has done since his appointment to merit remaining the high school principal and not what occurred in the 1995 selection process before his appointment." (*Id.* at p. 6)

In response, Lincoln Park asserts that although Angilly attempts to distance himself from the conduct of DeVincenzi and the Boonton Board with regard to the implementation of the principal selection process "which ensured his appointment," it finds significant that Angilly does not take exception to the ALJ's conclusions that Ms. DeVincenzi

> 1) improperly advanced candidates, including Mr. Angilly, who did not meet the published minimum qualification of five years of successful administrative experience; 2) acted in bad faith to change the number of affirmative votes of the Interview Committee members needed to advance as a finalist; 3) arbitrarily established the cut-off score for advancement in the first round (ensuring Mr. Angilly's advancement); and [4] appointed a high school administrator who was a longtime colleague of Mr. Angilly to the Interview Committee in spite of assurances that no high school administrator would serve on that committee.
>
> (Lincoln Park Reply at p. 2)

Lincoln Park proffers that as a result of these and other circumstances existing herein, Mr. Angilly's appointment was the outcome of the arbitrary, capricious and illegal process which was implemented in bad faith, [and], pursuant to *Cullum v. North Bergen Board of Education*, 15 *N.J.* 285 (1954), the invalidation of the appointment of the principal is warranted. (*Id.* at p. 3)

COMMISSIONER'S DETERMINATION

Upon an independent and comprehensive review of the record in this matter, which included transcripts of the 12 days of hearings before the ALJ[3] the Commissioner concurs with the ALJ's assessment of the rights and responsibilities of Lincoln Park's appointed representative to the Boonton Board, pursuant to *N.J.S.A.* 18A:38-8.1 and the Agreement in place between the parties, as discussed on pages 8-24 of the Initial Decision. The Commissioner finds without merit the parties' exception arguments which seek to either enhance or circumscribe the appointee's right to receive information, the necessary concomitant restrictions on the

[3] The record reflects that the hearings in this matter were conducted on February 15, 1996, March 11 and 12, 1996, April 9, 11, 19 and 22, 1996, and May 13, 16, 17, 23 and 28, 1996.

maintaining of confidentiality of such information, as well as this individual's deliberative and participatory role on the Board. As aptly noted by the ALJ, the relevant statute, *N.J.S.A.* 18A:38-8.1 addresses two distinct subjects, *i.e.*, it 1) grants the sending district entitlement to membership on the receiving district's board of education as a representative of the sending district, and it 2) designates those matters on which the appointee shall vote. The Commissioner finds that the ALJ's analysis properly reflects this duality of purpose, is consistent with both the plain language of the statute, its legislative history and intent, and fully comports with the contemplated spirit of cooperation envisioned by the parties' Agreement.

With respect to the issues surrounding the principal selection process, the Commissioner agrees with the ALJ, for the reasons comprehensively detailed on pages 24-48 of the Initial Decision, that the Boonton Board and its superintendent acted arbitrarily, capriciously, in bad faith and in violation of the spirit of the Agreement between the Boards in implementing the principal selection search process at issue herein and, as such, the appointment of Walter Angilly to the position of principal of Boonton High school must be deemed invalid. In reaching this determination, the Commissioner was not persuaded by exception arguments of the parties with respect to errors which they contend the ALJ made in reaching her findings and conclusions based upon the credibility of the testimony of witnesses in this matter. It is observed that the governing standard of review with regard to an ALJ's factual determinations was succinctly set forth in *In the Matter of the Tenure Hearing of Walter Driscoll, School District* of *Woodstown-Pilesgrove Regional High School*, decided by the Commissioner March 2, 1982, aff'd State Board September 8, 1982, aff'd New Jersey Superior Court, Appellate Division, October 28, 1983, Dkt. No. A-798-82T2, wherein the Commissioner stated

> Where conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support

> the findings made, the Commissioner will defer to the judgment of the hearer on questions of credibility since he/she had the opportunity to hear and observe the witnesses and so was in a better position to assess credibility. *Cf. Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965); *Parker v. Dornbierer*, 140 *N.J. Super.* 185, 188 (App. Div. 1976). (*Id.*, slip op. at pp. 39-40)

See also *Onulak, supra, and McKnight, supra.* The Commissioner observes that not only does the record provide no cause to challenge the ALJ's summations of testimony, assessments of witness credibility, overall characterization of underlying situations and specific findings and conclusions, in fact, he finds that all of these are amply established by such record.

Finally, in addressing the appropriate remedy in this matter, the Commissioner is in accord with the ALJ's conclusion that the conduct of the Boonton Board and its superintendent necessitates nullifying the principal appointment and reinstating the search process to fill this position. Notwithstanding this conclusion, the Commissioner is fully cognizant of the importance of maintaining educational continuity for the students and of assuring a minimization of disruption during this interim period. He is also mindful that the two Boards in this matter are autonomous bodies which are vested with the full authority to develop and implement the parameters of the principal selection process and have an established mechanism in place for accomplishing this task. As such, the Commissioner rejects the exception arguments of Lincoln Park which suggest that the Commissioner should intervene to dictate the specifics of such process. Further, the Commissioner discounts as inappropriate Lincoln Park's suggestion that he remove Boonton's superintendent from the selection process. Rather, he concludes that such a proclamation would be inopportune in the context of the within proceeding, as it would have the potential for introducing a measure of turmoil into what is already recognized as a difficult and complex situation. This determination, however, does not

preclude the Boonton Board from implementing whatever measures it deems appropriate to control, limit, or otherwise deal with its superintendent's participation in the process or to initiate whatever other actions it ordains the situation necessitates.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein. In view of the finding that the Boonton Board and its superintendent acted arbitrarily, capriciously, in bad faith and in violation of the spirit of the Agreement between the Boards, it is hereby ordered that the appointment of Walter Angilly to the position of Principal of Boonton High School be vacated and a new selection process developed and implemented in accordance with the dictates of this decision. It is further ordered that Walter Angilly shall remain in the position of Acting Principal during the course of this process and shall retain all rights to apply and be considered for the principal position as any other applicant. In addition, the two within Boards are directed to immediately take those actions necessary to conform their policies and procedures to reflect the rights and responsibilities of the Lincoln Park representative to the Boonton Board as detailed herein. Finally, a copy of this decision is hereby forwarded to the State Board of Examiners for review and such action, if any, as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 30, 1997
DATE OF MAILING MAY 30, 1997

289-97

289-97

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY GERVASIO,	:	COMMISSIONER OF EDUCATION
MORRIS SCHOOL DISTRICT, MORRIS	:	DECISION
COUNTY.	:	

MAY 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9841-96

AGENCY DKT. NO. 378-8/96

BOARD OF EDUCATION OF THE

MORRIS SCHOOL DISTRICT,

Petitioner,

v.

ANTHONY GERVASIO,

Respondent.

Fredric J. Sirota, Esq., for petitioner
(Wiley, Malehorn and Sirota, attorneys)

Louis P. Bucceri, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: April 17, 1997 Decided: April 23, 1997

BEFORE **DIANA C. SUKOVICH**, ALJ:

On or about August 1, 1996, tenure charges against respondent, a tenured staff member of petitioner, were filed with the then acting secretary of petitioner. Subsequent to service of the charges upon respondent, a response to the charges was

filed on respondent's behalf. On August 26, 1996, petitioner certified the charges to the Commissioner of the Department of Education (DOE). The DOE transmitted the matter to the Office of Administrative Law on October 2, 1996 for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

Subsequent to the conducting of a conference, the parties reached a resolution of the matter. An executed stipulation of settlement was filed on April 17, 1997, on which date the record was closed. Hearings previously scheduled for April 23, 24, and 25, 1997 were adjourned. Attached herewith is a copy of the stipulation of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

April 23, 1997
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

5/2/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

njf

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
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APR 17 11 40 AM '97

WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(201) 539-1313
Attorneys for Petitioner, Board of Education of the Morris School District

IN THE MATTER OF THE TENURE HEARING OF ANTHONY GERVASIO,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	AGENCY REF. NO. 378-8/96 O.A.L. DOCKET NO. EDU 9841-96N STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between Anthony Gervasio (hereinafter "Mr. Gervasio""), residing at 5 Arbor Way, Morristown, New Jersey, and the Board of Education of the Morris School District (hereinafter "Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt and sufficient of which is hereby acknowledged, the undersigned state:

WHEREAS, Mr. Gervasio has been employed as a Teacher by the Board since 1968; and

WHEREAS, the Board certified tenure charges against Mr. Gervasio to the Commissioner of Education by resolution of August 26, 1996, suggesting that he be suspended without pay for one year; and

WHEREAS, Mr. Gervasio was suspended without pay for the first 120 days of the 1996-97 school year; and

WHEREAS, the certified charges allege incapacity, unbecoming conduct or other just cause for the reduction in Mr. Gervasio's

compensation or his dismissal as a result of his transmission of an anonymous e-mail message on or about June 14, 1996, his alleged failure to promptly acknowledge responsibility for the same and his alleged failure to recognize the significance of his act; and

WHEREAS, Mr. Gervasio has issued a formal apology to the Superintendent of Schools; and

WHEREAS, Mr. Gervasio has determined that he wishes to permanently retire from the teaching profession and as an employee of the Board; and

WHEREAS, the Board has determined that further proceedings in this matter given the total circumstances are inappropriate in light of Mr. Gervasio's determination to retire;

IT IS on this 7 day of April, 1997, agreed that:

1. Mr. Gervasio hereby signs and tenders an irrevocable and permanent notice of retirement, effective June 1, 1997, in the form attached hereto as Schedule A. By doing so, Mr. Gervasio understands that he hereby irrevocably gives up any and all rights to tenure, seniority, recall, reinstatement, or any other right to employment by the Board, as well as any right to salary or benefits after May 31, 1997, except as otherwise provided herein. Nothing in this Agreement will in any way impair Mr. Gervasio's pension rights.

Mr. Gervasio has already filed an application for retirement, effective June 1, 1997, with the New Jersey State Teachers' Pension and Annuity Fund. The Board makes no

representation as to the amount of pension benefits, if any, Mr. Gervasio will be entitled to receive.

2. The Board agrees to pay Mr. Gervasio his full salary through May 31, 1997, and to maintain full heath insurance and any other benefits provided to regular teaching staff members through May 31, 1997. Any salary paid to Mr. Gervasio will be paid in the normal course with all normal payroll deductions in the same manner as any other teacher.

3. The Board agrees to dismiss, without prejudice, the pending tenure charges as moot, subject to the approval of the Office of Administrative Law and the Commissioner of Education.

4. The parties shall exchange mutual general releases in the forms attached hereto. Each party will retain the right to enforce this Agreement. The originals of said releases shall be signed but held in escrow by each party's respective counsel until approval of this settlement by the Commissioner of Education is received.

5. Mr. Gervasio shall be entitled to receive compensation for accumulated, but unused, sick leave days in the same manner as would be the case for any other teacher in the Board's employ who was retiring on June 1, 1997. The monies due shall be paid on or before July 1, 1997. No pension contribution shall be taken from such payment since it is not pension-eligible compensation. However, all other normal payroll deductions shall apply in the same manner as would be the case for any other teacher.

6. Mr. Gervasio understands that the Commissioner of Education will refer his case to the State Board of Examiners for its review as to the issue of whether or not an Order to Show Cause should be instituted seeking the revocation or suspension of his educational certificates and endorsements. Nothing herein shall prevent such a proceeding, or the Board's cooperation with same.

7. Mr. Gervasio acknowledges that he has hereby been advised in writing that he has the right to consult with an attorney or a representative of his own choosing prior to signing this Agreement, and has done so, and that he signs this Agreement as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

8. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

9. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

10. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of any employee, nor in the future, other than Mr. Gervasio.

11. The Board shall process Mr. Gervasio's application for pension benefits under the Teachers' Pension and Annuity Fund in the normal manner for such processing.

3d

12. Both parties acknowledge that their agreement to dismiss the tenure charges is subject to the approval of the Office of Administrative Law and the Commissioner of Education. Only this agreement to dismiss the tenure charges shall be null and void if such approval is not received.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

Louis P. Bucceri, Esq.

DATED: 3/31/97

Anthony Gervasio

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT

Fredric J. Sirota, Esq.

By: John Schafer
Board President

Elizabeth DeMatteo
Board Secretary

ANTHONY GERVASIO
5 ARBOR WAY
MORRISTOWN, NEW JERSEY 07960

March 31, 1997

Dwight Pfennig, Superintendent
Morris School District Public Schools
Normandy Parkway
Morristown, NJ 07960

Re: Notice of Retirement

Dear Dr. Pfennig:

I hereby irrevocably retire from my position as a teaching staff member. My retirement, though irrevocable, shall take effect on June 1, 1997.

Respectfully submitted,

Anthony Gervasio

/lg

RELEASE

This Release, dated April 7, 19 97, is given

BY the Releasor(s) BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, ITS AGENTS AND EMPLOYEES

referred to as "I",

TO ANTHONY GERVASIO

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

Any and all claims I may have against you, including, but not limited, to any and all claims arising out of your employment by me. Any and all claims related to tenure charges certified against you on August 26, 1996. This Release is given as part of a settlement agreement between You and I. I do not release my rights under said agreement nor do I waive or release my right to enforce the terms of said agreement.

2. **Payment.** I have been paid a total of $1.00 and other good and valuable consideration as set forth in the Agreement between You and I in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

2XXXX

RELEASE

This Release, dated 3/31 , 19 97 , is given

BY the Releasor(s) ANTHONY GERVASIO

refe

TO BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT,
ITS AGENTS AND EMPLOYEES

referre

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights which I may have against you. This relea including those of which I am not aware and those not mentioned in this Release. This Release applies to claims anything which has happened up to now. I specifically release the following claims:

Any and all claims I may have against you, includi but not limited, to any and all claims arising out my employment by you. Any and all claims related tenure charges certified against me on August 26, 19 This Release is given as part of a settlement agreem between You and I. I do not release my rights un said agreement nor do I waive or release my right enforce the terms of said agreement. I waive any all claims related to alleged violations of my ci and constitutional rights, including, but not limi to, any claim as to my right to freedom of speech.

2. **Payment.** I have been paid a total of $1.00 and other valuable consideration as set forth in the Agreement between \ in full payment for making this Release. I agree that I will anything further including any other payment from you.

2XXXX

OAL DKT. NO. EDU 9841-96
AGENCY DKT. NO. 378-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY GERVASIO,	:	COMMISSIONER OF EDUCATION
MORRIS SCHOOL DISTRICT, MORRIS	:	DECISION
COUNTY.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

MAY 30, 1997
DATE OF MAILING MAY 30, 1997

292-97

D.P. AND O.P., on behalf of minor child, C.P., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY, : DECISION

RESPONDENT. :

:

JUNE 3, 1997

OAL DKT. NO. EDU 1888-97
AGENCY DKT. NO. 613-12/96

D.P. AND O.P., on behalf of minor child, C.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 2, 1997, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1997
DATE OF MAILING JUNE 3, 1997

287-97 R
(451-96)

A.S., on behalf of minor, A.S. AND N.S. AND R.F.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning mother and grandparents alleged minor child, A.S., was wrongfully denied a free public education in the District. ALJ dismissed petition for failure to appear. Commissioner remanded matter in the interest of fundamental fairness as petitioners attested they were unaware of hearing date.

ALJ concluded that petitioners did not carry their burden of proof that A.S. is not residing with her grandparents solely for the purpose of receiving a free public education in the District. ALJ found there was no hardship and the mother was able to provide for A.S. ALJ found that petitioners were liable to the Board for prorated tuition for the period from December 1, 1995 through June 1996 and for 48 days in 1996-97 school year for a total amount due of $8,575. Petitioners were ordered to pay the amount due to the District.

Commissioner reversed the initial decision of the ALJ, finding that, notwithstanding the temporary nature of the living arrangement (A.S. lived with her grandparents while her mother, an entertainer, traveled), and irrespective of any deficiencies which may exist in petitioners' affidavits, A.S. was deemed to have been entitled to a free public education in the District until she returned to living with her mother in Maplewood.

MAY 29, 1997

294-97

294-97

IN THE MATTER OF THE TENURE	:	
HEARING OF MC CRAY BUSSEY,	:	COMMISSIONER OF EDUCATION
PRINCETON REGIONAL SCHOOL	:	DECISION
DISTRICT, MERCER COUNTY,	:	
_____	:	

JUNE 3, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8513-96
AGENCY DKT. NO. 359-8/96

BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
McCRAY BUSSEY,
Respondent.

Mark Blunda, Esq., for petitioner (Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: April 28, 1997 Decided: May 5, 1997

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 30, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 5, 1997
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

5/7/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Petitioner

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STATE OF NEW JERSEY
COMMISSION OF EDUCATION

BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT	:	
Petitioner,	:	OAL Docket No. EDUOA 8513-96 Agency Reference No. 359-8/96
-vs-	:	
McCRAY BUSSEY	:	STIPULATION OF SETTLEMENT
Respondent.	:	

On April 14, 1997, the parties placed on the record before the Honorable Robert Miller, A.L.J., the following terms for a full and final resolution of the above captioned matter, subject to the approval of the Commissioner of Education. The individual parties have acknowledged to the court their understanding of and agreement to these terms and to the fact that the agreement was reached voluntarily. The court has indicated its approval of this resolution.

1. The petitioner, Princeton Regional School District Board of Education (hereinafter "Board"), shall restore the previously withheld contractual salary increments

of McCray Bussey for school years 1994-95, 1995-96, 1996-97. The payroll check(s) issued to respondent Bussey shall be net of all appropriate and required withholdings for state and federal income taxes, pension contributions, dues deductions and the like. In addition, the Board shall withhold and apply those annuity and credit union deductions as were previously authorized by Mr. Bussey;

2. McCray Bussey shall retire from the Princeton Regional School District effective June 30, 1997. His Notice of Intention to Retire shall be signed, witnessed and delivered to the Board's representative on April 14, 1997. The retirement is subject to the approval of this agreement by the Commissioner of Education;

3. McCray Bussey shall use his accumulated and unused sick days for the period April 15, 1997 through June 30, 1997;

4. The Board shall restore to McCray Bussey the 120 days of pay withheld as a result of his suspension without pay on certification of the tenure charges in August of 1996. The payroll check(s) issued to respondent Bussey shall be net of all appropriate and required withholdings for state and federal income taxes, pension contributions, dues deductions and the like. In addition, the Board shall withhold and apply those annuity and credit union deductions as were previously authorized by Mr. Bussey;

5. McCray Bussey does not waive his charge of discrimination against the Board of Education presently pending before the New Jersey Division on Civil Rights;

6. Upon approval of this agreement by the Commissioner of Education, the Princeton Regional School District Board of Education withdraws the above captioned tenure charges.

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS, P.A.
Attorneys for Petitioner

By: _____
MARK BLUNDA

Dated: April 15, 1997

WILLS, O'NEILL & MELLK
Attorneys for Respondent

By: _____
ARNOLD M. MELLK

Dated: 7/17/97

3c

OAL DKT. NO. EDU 8513-96
AGENCY DKT. NO. 359-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF MC CRAY BUSSEY,	:	COMMISSIONER OF EDUCATION
PRINCETON REGIONAL SCHOOL	:	DECISION
DISTRICT, MERCER COUNTY,	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner cannot be satisfied by the present record that the proposed settlement in this matter meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County*, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification State Board of Education November 2, 1983, affirmed New Jersey Superior Court, Appellate Division, January 30, 1986. The present record contains no such required explanation. Further, there is no indication that the within teaching

staff member was advised of the Commissioner's duty pursuant to *N.J.A.C.* 6:11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. While the Commissioner does not preclude the possibility of settlement in this matter, he must be assured that any settlement is consistent with appropriate standards for setting aside of tenure matters as expressed in *Cardonick, supra.*

Accordingly, the initial decision of the OAL is remanded for revision of the settlement document and expansion of the record consistent with the concerns expressed herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 3, 1997
DATE OF MAILING JUNE 3, 1997

294-97

434-97 R
(294-97)

IN THE MATTER OF THE TENURE	:	
HEARING OF MC CRAY BUSSEY,	:	COMMISSIONER OF EDUCATION
PRINCETON REGIONAL SCHOOL	:	DECISION ON REMAND
DISTRICT, MERCER COUNTY,	:	
_____	:	

AUGUST 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4677-97
AGENCY DKT. NO. 359-8/96
ON REMAND FROM
OAL DKT. NO. EDU 8513-96

BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
McCRAY BUSSEY,
Respondent.

Mark Blunda, Esq., for petitioner (Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: July 11, 1997 Decided: July 11, 1997

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 30, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The settlement is fully consistent and in accordance with the public interest for the reasons expressed in the joint certification of counsel dated July 11, 1997 (also attached hereto.)

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 11, 1997
DATE

Robert Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

July 16, 1997
DATE

D. N. Centanaitis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(201) 643-7000
Attorneys for Petitioner

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STATE OF NEW JERSEY
COMMISSION OF EDUCATION

BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT	:	
Petitioner,	:	OAL Docket No. EDUOA 8513-96 Agency Reference No. 359-8/96
-vs-	:	
McCRAY BUSSEY	:	STIPULATION OF SETTLEMENT
Respondent.	:	

On April 14, 1997, the parties placed on the record before the Honorable Robert Miller, A.L.J., the following terms for a full and final resolution of the above captioned matter, subject to the approval of the Commissioner of Education. The individual parties have acknowledged to the court their understanding of and agreement to these terms and to the fact that the agreement was reached voluntarily. The court has indicated its approval of this resolution.

1. The petitioner, Princeton Regional School District Board of Education (hereinafter "Board"), shall restore the previously withheld contractual salary increments

of McCray Bussey for school years 1994-95, 1995-96, 1996-97. The payroll check(s) issue to respondent Bussey shall be net of all appropriate and required withholdings for state and federal income taxes, pension contributions, dues deductions and the like. In addition, the Board shall withhold and apply those annuity and credit union deductions as were previously authorized by Mr. Bussey;

2. McCray Bussey shall retire from the Princeton Regional School District effective June 30, 1997. His Notice of Intention to Retire shall be signed, witnessed and delivered to the Board's representative on April 14, 1997. The retirement is subject to the approval of this agreement by the Commissioner of Education;

3. McCray Bussey shall use his accumulated and unused sick days for the period April 15, 1997 through June 30, 1997;

4. The Board shall restore to McCray Bussey the 120 days of pay withheld as a result of his suspension without pay on certification of the tenure charges in August of 1996. The payroll check(s) issued to respondent Bussey shall be net of all appropriate and required withholdings for state and federal income taxes, pension contributions, dues deductions and the like. In addition, the Board shall withhold and apply those annuity and credit union deductions as were previously authorized by Mr. Bussey;

5. McCray Bussey does not waive his charge of discrimination against the Board of Education presently pending before the New Jersey Division on Civil Rights;

6. Upon approval of this agreement by the Commissioner of Education, the Princeton Regional School District Board of Education withdraws the above captioned tenure charges.

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS, P.A.
Attorneys for Petitioner

By: _____
MARK BLUNDA

Dated: April 15, 1997

WILLS, O'NEILL & MELLK
Attorneys for Respondent

By: _____
ARNOLD M. MELLK

Dated: 7/17/97

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1997 JUL 11 P 2:21

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(201) 643-7000
Attorneys for Petitioner

STATE OF NEW JERSEY
COMMISSION OF EDUCATION

BOARD OF EDUCATION OF PRINCETON REGIONAL SCHOOL DISTRICT	:	
Petitioner,	:	OAL Docket No. EDUOA 8513-96 Agency Reference No. 359-8/96
-vs-	:	
McCRAY BUSSEY	:	**JOINT CERTIFICATION FOLLOWING REMAND**
Respondent.	:	

Mark J. Blunda, Esq., counsel for the Petitioner, Board of Education of the Princeton Regional School District, and Arnold M. Mellk, Esq., counsel for the Respondent, McCray Bussey, certify as follows:

1. The undersigned counsel of record in this action have represented the parties since its inception and are familiar with the nature of the tenure charges, Respondent's work history, the anticipated duration and extent of this litigation and the specific terms of the settlement placed upon the record before the Honorable Robert Miller, A.L.J. on April 14, 1997, which terms were acknowledged and agreed to by both McCray Bussey and the chief school administrator of the Princeton Regional School District. The undersigned submit this Certification in response to the Commissioner's remand of the matter in order to amplify the record and assist the Commissioner in approving the terms of the settlement.

2. Prior to the start of the 1996-1997 school year, McCray Bussey (hereinafter "Bussey" or "Respondent") had served as a music teacher in the Princeton Regional School District (hereinafter "District") for approximately thirty years and had nearly forty years of total teaching experience. By reason of his years of service and age he is eligible for retirement with full benefits under the Teachers Pension and Annuity Fund.

3. The tenure charges certified to the Commissioner of Education in August of 1996, and the statement of evidence under oath in support thereof, established that in the three school years immediately preceding the filing of tenure charges, Mr. Bussey's increments had been withheld by the District on the grounds of unsatisfactory teaching performance. According to the District's evaluating administrators, Mr. Bussey's teaching performance was not improving to the level necessary to efficiently educate children in Princeton, despite the evaluations, conferences and withholding of his increments. Mr. Bussey disputed these findings and conclusions.

4. It was the District's contention that Mr. Bussey was inadequately teaching music to the children, was causing children to leave rather than join the music program and was habitually and increasingly late for scheduled classes, conferences and submission of lesson plans and related educational materials. Mr. Bussey disputed these claims. The District served him with tenure charges of inefficiency in early 1996 and placed him on a ninety day corrective action plan pursuant to statute.

5. Mr. Bussey was assigned to teach music in the four elementary schools within Princeton. Consequently, four school principals were given the task of implementing and monitoring the ninety day corrective action plan with Mr. Bussey. At the end of the corrective action plan, it was the unanimous conclusion of the four building principals and the superintendent of schools that Mr. Bussey had not shown sufficient improvement in his performance and that the tenure charges

of inefficiency should be presented to the Board of Education and to the Commissioner of Education. The Board of Education after reviewing the statement of evidence under oath and the supporting documentation certified the charges of inefficiency to the Commissioner of Education in August 1996. Mr. Bussey filed an answer generally denying all charges.

6. There is nothing in the tenure charges, nor in the statement of evidence supporting those charges that alleges, in any way, that Mr. Bussey engaged in any type of physical or sexual misconduct with students or engaged in any unbecoming conduct relating to fraud, dishonesty or moral turpitude. The gravamen of the charges is that a teaching staff member with three decades of service (perhaps because of failing health and/or advanced age) has become deficient in his teaching performance so that the children in the music program in the Princeton Regional School District are not receiving the level of instruction required by the state and the local district. Mr. Bussey does not agree with the conclusions of his certified evaluators.

7. The tenure charges and the statement of evidence in support thereof are voluminous. Because of Mr. Bussey's many years of service and the nature of the tenure charges, discovery led the parties to conclude that the tenure hearings before the Administrative Law Judge would require several weeks of testimony followed by post hearing briefs and exceptions to the ALJ's Initial Decision. The parties appeared with their counsel at the Office of Administrative Law on April 14, 1997 to commence the hearings in this matter.

8. As a result of lengthy discussions between the parties, with the assistance of the Administrative Law Judge, the parties reached a settlement which was spread upon the record in open court. The Superintendent of Schools for the Princeton Regional School District and Respondent McCray Bussey were present in the court room, answered questions from counsel and from the court and indicated their understanding of and agreement with the terms of the settlement.

A written settlement agreement was subsequently drafted and executed by counsel. A true copy of same is attached hereto as Exhibit A. In addition, a copy of the tenure charges certified to the Commissioner of Education and filed with this court are attached hereto as Exhibit B.

9. Upon the record in open court and in the body of the written settlement agreement the parties acknowledged that its terms were subject to review and approval by the Commissioner of Education. Consistent with the Cardonick standard, counsel for the school district believes that settlement of this litigation on the terms set forth on the record is in the public interest for the following reasons:

(a) The goal of the Princeton Regional School District is to remove a tenured teaching staff member whose performance, in its judgment, is below the level required and expected by the citizens of Princeton and the State of New Jersey. Settlement of this litigation on the proposed terms achieves that goal with certainty;

(b) A related goal of the Princeton Regional School District is to replace McCray Bussey with a qualified music teacher who will enhance the District's music program and provide a high quality of music instruction to its students. Settlement of this litigation on the proposed terms will achieve that aim;

(c) The financial cost to the Princeton Regional School District and its taxpayers for preparation and litigation of at least two weeks of contested hearings, followed by transcripts, post hearing briefs and exceptions is enormous. Settlement of this litigation on the proposed terms saves the District and the public tens of thousands of dollars in legal fees;

(d) Based upon the nature of the charges (inefficiency) and the length of Mr. Bussey's service in the District, the Board of Education's case and Respondent's case will require the attendance of school District administrators, teaching staff members and support staff to give

testimony. That will not only cost the District in financially due to the hiring of substitutes, it will disrupt the educational process and the administration of the school district. Settlement of this litigation on the proposed terms avoids that disruption;

(e) By reason of his length of service and age, McCray Bussey is eligible for full retirement under TPAF. The settlement allows for that retirement effective July of 1997;

(f) Aside from a restoration of the 120 suspension without pay, the proposed settlement simply allows for payment of Mr. Bussey's salary increments and the unused sick pay provided in the Teacher's Collective Bargaining Agreement;

(g) Settlement of the litigation achieves all of the goals sought by the Board of Education without the cost associated with this expensive litigation and without impugning the dignity of a veteran teacher staff member who will otherwise be forced to confront unpleasant testimony from co-workers and administrators;

(h) Although the Board of Education is convinced that the record and evidence will allow it to prevail in the tenure proceedings, there are never guarantees in litigation. Consequently, settlement on the proposed terms achieves all of the Board of Education's goals without risk;

(i) All of the foregoing benefits to the Princeton Regional School District, its students and its taxpayers are in the public interest of the citizens and taxpayers of the State of New Jersey, as well as the Department of Education. Consequently, settlement of this litigation on the proposed terms is preferable to litigating the case to conclusion to achieve the exact same results.

10. Respondent, McCray Bussey, discussed this matter at length with his counsel, participated in the settlement discussions and was present in the court on April 14, 1997 when the terms were spread upon the record. Mr. Bussey was questioned by counsel and by the court as to his understanding of the terms of the agreement, its consequences and his agreement thereto. He

expressed his assent on the record. In addition, counsel for Respondent Bussey certifies that he explained to Mr. Bussey that New Jersey Regulations provide for the referral of tenure determinations to the State Board of Examiners for possible revocation proceeding. Mr. Bussey expressed his understanding of that proposal.

11. Both counsel for the Board of Education and counsel for the Respondent believe that revocation proceedings will not occur in this case given the nature of the inefficiency charges and the fact that Mr. Bussey, through this agreement is retiring from service pursuant to TPAF. In addition, the Board of Education is aware that should the State Board of Examiners wish to pursue revocation proceedings, the local school district will have the onus of presenting the underlying tenure materials.

The undersigned certify that the foregoing statements are true. Mark J. Blunda, counsel for the Princeton Regional School District, certifies as to the public interest paragraph number 9, but not as to the discussions with Mr. Bussey. Arnold Mellk, counsel for McCray Bussey, certifies to the foregoing and to the discussions with Respondent McCray Bussey, noted in paragraph 10 but not as to the paragraph regarding the Board of Education's view of the public interest.

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
Attorneys for Princeton Regional Schools

Dated: July 11, 1997

By: _____
MARK J. BLUNDA

WILLS, O'NEILL & MELLK
Attorneys for McCray Bussey

Dated: July 11, 1997

By: _____
ARNOLD M. MELLK

OAL DKT. NOS. EDU 4677-97 and EDU 8513-96 (ON REMAND)
AGENCY DKT. NO. 359-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF MC CRAY BUSSEY,	:	COMMISSIONER OF EDUCATION
PRINCETON REGIONAL SCHOOL	:	DECISION ON REMAND
DISTRICT, MERCER COUNTY,	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 21, 1997
DATE OF MAILING AUGUST 21, 1997

295-97

295-97

ESTHER DUES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teaching staff member, claimed the Board violated her tenure and seniority rights by failing to appoint her to the position of Assistant Principal.

Citing *Martucci* and *Picogna*, ALJ concluded that petitioner did not achieve tenure as an assistant principal because she did not achieve tenure under *N.J.S.A.* 18A:28-6(a) as she did not serve for two consecutive calendar years (she served a period of less than two years) and she was not reappointed to the position. Summary decision was granted in favor of the Board; petition was dismissed.

Commissioner adopted findings and determination in the initial decision as his own.

JUNE 6, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11305-96

AGENCY DKT. NO. 412-9/96

ESTHER DUES,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association, attorneys)

Denise P. Coleman, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: March 25, 1997 Decided: April 24, 1997

BEFORE **EDITH KLINGER**, ALJ:

On September 12, 1996, petitioner, Esther Dues, filed a Petition with the Commissioner of Education seeking to compel the Board of Education of the Township of Irvington (Board) to grant her tenure as an Assistant Principal in the school district

(District), with tenure and seniority rights, salary, benefits and emoluments retroactive to September 1, 1996.

On October 18, 1996, the Board filed its answer and on November 1, 1996, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was preheard on February 13, 1997. At that time, respondent stated that it would make a motion for summary decision to dismiss the petition. Further proceedings were deferred pending decision on the Board's motion.

Respondent filed its motion on March 3, 1997. On March 24, 1997, petitioner indicated that she would file no responsive papers, and the record closed on March 25, 1997. The only issue to be decided is whether Dues acquired tenure in the position of assistant principal, pursuant to *N.J.S.A.* 18A:28-6, in the District.

The material facts are not in dispute. They are as follows:

1. Dues was first employed by the District in September 1981 and she is tenured as a teacher.

2. Dues claims that she was promoted to the position of assistant principal in the District effective July 1, 1994, and held the position continuously through June 30, 1996. A resolution of the Board dated August 17, 1994, shows that the effective date of her appointment was actually August 18, 1994. However, as explained below, even if Dues were correct, it would not change the outcome of this matter.

3. In a letter dated March 28, 1996, petitioner was notified by Victor Demming, Board secretary, that her contract as assistant principal was not renewed by the Board for the 1996-97 school year "due to reasons of economy."

4. By letter dated June 24, 1996, received by Dues on June 29, 1996, Demming notified petitioner that she would be reassigned to a teaching position for the 1996-97 school year.

5. In August 1996, the District posted a notice of vacancy for the position of assistant principal.

6. On about August 7, 1996, the District superintendent told Dues that, if she wanted this position, she would have to apply for it. Dues applied but was not appointed.

7. The assistant principal position has always been a twelve-month, or calendar year, position.

It is Dues's contention that she attained tenure as an assistant principal because she served two full school years in that position. Consequently, she argues, the Board violated her tenure and seniority rights when it failed to appoint her to the newly-created assistant principal position in August 1996. In this appeal, she seeks appointment to the position and recognition of her tenure and seniority rights from September 1996.

N.J.S.A. 18A:28-6 provides, in relevant part, that:

> Any . . . teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position . . . , shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years.

Provisions (b) and (c) of the statute do not apply since they only pertain to persons employed during an academic year, not a calendar year. An "academic year," as defined in *N.J.S.A.* 18A:1-1, is "the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation." The assistant principal position is a twelve-month, or calendar year, position.

Based upon the Board's resolution of August 17, 1994, by which she was appointed an assistant principal effective August 18, 1994, Dues did not achieve tenure under *N.J.S.A.* 18A:28-6(a) because she did not serve for two consecutive calendar years. She was appointed by the Board on August 18, 1994, and served until June 30, 1996, a period of less than two years.

However, even if she served in the position for the full two years, she still did not acquire tenure in it. The facts in the instant case are almost identical to those in *Martucci v. Board of Education of the City of Linden*, 96 *N.J.A.R.*2d (EDU) 109, *rev'd*, State Bd. (Dec. 4, 1996); *see also Picogna v. Cherry Hill Bd. of Educ.*, 143 *N.J.* 391 (1996). In *Martucci*, the State Board of Education held that reemployment in the position after the two-year statutory period is necessary in order to support a claim of tenure. It stated that:

> [P]etitioner did not acquire tenure as a principal because, although he served the entire term of his contract, he was not reemployed by the Board as a principal <u>after</u> being employed in that capacity for two years.
>
> [*Martucci, supra*, State Bd. Decision, at 7.]

The State Board explained that:

> [S]ound educational policy supports this result. Were we to hold otherwise, district boards would be forced to terminate the contracts of calendar year employees in order to prevent tenure acquisition. We find no justification for the disruption to the school system that such a result would cause. Nor can we justify the additional expense that would be inevitable in those cases where payment must be made to the employee under the employment contract following his termination while, at the same time, the district would be required to pay for his replacement.
>
> [*Id.* at 8.]

The State Board concluded that Martucci was entitled to return to "his former position at the salary he would have received had he not been promoted together with any increase to which he would have been entitled during the period of his promotion." *Ibid.*

Based upon *N.J.S.A.* 18A:28-6(a) and the State Board's decision in *Martucci*, I **CONCLUDE** that Dues did not acquire tenure as an assistant principal because she was not reappointed to the position after she served in it for two years. She has been returned to her teaching position, presumably with all required adjustments to her salary. I therefore **CONCLUDE** that Dues is entitled to no relief in this matter.

Accordingly, it is **ORDERED** that respondent is entitled to summary decision in this matter, and the petition of Esther Dues is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 24, 1997
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

5/2/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 11305-96
AGENCY DKT. NO. 412-9/96

ESTHER DUES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon an independent review of the within record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that, even accepting, *arguendo*, that petitioner's appointment to the position of Assistant Principal was effective, as she asserts, on July 1, 1994, and that she served continuously in such position through June 30, 1994, petitioner did not acquire tenure in this position pursuant to *N.J.S.A.* 18A:28-6(a) (see *Martucci v. Board of Education of the City of Linden*, 96 *N.J.A.R.* 2d (EDU) 109, rev'd State Board December 4, 1996; also see *Picogna v. Cherry Hill Board of Education*, 143 *N.J.* 391 (1996)) and is, therefore, entitled to no relief in this matter.

Accordingly, the initial decision of the OAL is adopted for the reasons articulated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 6, 1997
DATE OF MAILING JUNE 6, 1997

300-97

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IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF C.L.S.	:	DECISION
_____	:	

JUNE 10, 1997

OAL DKT. NO. EDU 9490-96
AGENCY DKT. NO. DHP-B 58-96

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM	:	COMMISSIONER OF EDUCATION
SCHOOL EMPLOYMENT OF C.L.S.	:	DECISION
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 21, 1997, providing them ten days to submit an explanation for such nonappearance, have been reviewed. The agency previously advised that it would not be represented at OAL. Appellant, however, provided no explanation for his nonappearance. Accordingly, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 10, 1997
DATE OF MAILING JUNE 10, 1997

301-97

DIMITRI OCASAL,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured teaching staff member, alleged the Board violated his tenure rights in removing him from the supervisory position of Facilitator and replacing him with a nontenured teacher. Board contended tenure does not attach to a position compensated by stipend.

ALJ found that petitioner, who possessed the appropriate certification, served in the Facilitator position for over two school years paid by an annual stipend of $3,000. ALJ concluded petitioner was tenured in that position and, therefore, had priority over the nontenured individual appointed. Thus, petitioner had greater entitlement to the Facilitator position than a person without any tenure in a supervisory position. ALJ ordered that the Board pay petitioner the sum of $3,000 as lost compensation for the 1994-95 school year.

Commissioner adopted findings and determination in initial decision and directed the Board to compensate petitioner the sum of $3,000, representing his lost stipend for the 1994-95 school year.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0351-95

AGENCY DKT. NO. 452-11/94

DIMITRI OCASAL,

Petitioner,

v.

ELMWOOD PARK

BOARD OF EDUCATION,

Respondent.

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

Matthew P. DeMaria, Esq., for respondent

Record Closed: March 21, 1997 Decided: May 5, 1997

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

Statement of the Case

This is a suit by a teaching staff member who alleges that the school district violated his tenure rights by terminating his employment as a "facilitator" for the 1994-95 school year. Basically, the issue is whether or not petitioner acquired tenure in a supervisory position. Petitioner Dimitri Ocasal ("Ocasal") contends that he attained

tenure by serving the statutorily-prescribed period in a position requiring a supervisory certification. Respondent Elmwood Park Board of Education ("Board") maintains that tenure does not attach to a position compensated by stipend. Both sides agree that Ocasal is fully qualified for the job and that he was replaced by a nontenured individual.

Procedural History

On November 9, 1994, Ocasal filed a verified petition with the Commissioner of Education ("Commissioner"). The Board filed its answer on December 27, 1994. Subsequently, on January 10, 1995, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for handling as a contested case. In lieu of an evidentiary hearing, the parties submitted a joint stipulation of facts, together with exhibits, on October 19, 1995. Thereafter, the parties filed legal briefs on November 17, 1995. At the request of the OAL, the Board filed a supplemental brief on March 11, 1997. Ocasal did not file any additional papers before the March 21, 1997 closing date.

Findings of Facts

All of the relevant facts are set forth in the written stipulation and joint exhibits to which both parties have agreed. **I FIND**:

Dimitri Ocasal has been employed by the Board as a teaching staff member for thirty-two years. Since September 1966, he has held a New Jersey instructional certificate endorsed as "secondary school teacher of English, Italian and Spanish." The Board acknowledges that he has tenure in the district as a teacher.[1] On September 18, 1991, the Board appointed Ocasal to the ten-month position of "staff

[1] *N.J.S.A.* 18A:28-5(b) confers tenure on all teaching staff members, including teachers, who hold appropriate certificates and serve in the district "for three consecutive academic years, together with employment at the beginning of the next succeeding academic year."

development departmental facilitator" for language arts for the 1991-92 school year.[2] A job description for that title, adopted by the Board on July 17, 1991, requires, among other qualifications, that the facilitator must hold a "supervisory certificate." At the time of his appointment, Ocasal possessed an appropriate administrative certificate endorsed as "supervisor," issued in September 1985.

According to the district's job description, the duties of a staff development departmental facilitator include various supervisory functions, such as "discusses the interpretation of curriculum with teaching staff;" "assists in the selection of textbooks;" "encourages department members in the use of new methods and materials;" and "performs observations of teacher performance in the evaluation process as requested[.]" The parties stipulate that, in his role as facilitator, "petitioner was required to carry out supervisory responsibilities[.]" It may be reasonably inferred that Ocasal performed these extra duties in addition to his regular teaching assignment. In addition to his regular salary as a teacher, Ocasal received a $3,000 stipend for his facilitator services.

During the next two school years (1992-93 and 1993-94), the Board extended Ocasal's appointment to the facilitator title and continued paying him an annual stipend of $3,000. However, the Board did not reappoint him to the facilitator title for 1994-95, although he remained as a full-time teacher. Instead, on August 16, 1994, the Board appointed Ellen Nunn as "facilitator (foreign language/language arts)" for 1994-95 at a $3,000 stipend. Nunn had begun her employment in the district as a teacher on January 2, 1990. She had also served in Ocasal's absence as "acting facilitator" or "facilitator assistant" for May and June 1994. Both parties agree that, at the time of her

[2] The facilitator title is an unrecognized title which required approval of the county superintendent of schools before the Board could make any appointment to that position. *N.J.A.C.* 6:11-3.6 (1986) [recodified as *N.J.A.C.* 6:11-3.3 (1990)]. By memorandum dated July 17, 1991, Acting Bergen County Superintendent Alfred Marbaise authorized the district to use the title "staff development departmental facilitator," but cautioned that any employee who attains tenure under that title will accrue seniority under the recognized legal title of "supervisor."

appointment as Ocasal's successor for 1994-95, "Nunn was not tenured as a supervisor."

After institution of this litigation, the Board reappointed Ocasal to a facilitator position for the 1995-96 school year at a stipend of $3,000. Ocasal's damage claim is limited to the $3,000 stipend that he did not receive in 1994-95.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Ocasal is tenured as a language-arts facilitator and, therefore, had priority over Nunn to that particular supervisory position.

Generally, tenure accrues to teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 81 (1982). Initially, it takes employment for three academic years and one day for a ten-month employee to acquire tenure. *N.J.S.A.* 18A:28-5(b). Any previously-tenured teaching staff member "who is transferred or promoted with his consent to another position" obtains tenure in the new position after employment for only "two academic years in the new position, together with employment in the new position at the beginning of the next succeeding academic year." *N.J.S.A.* 18A:28-69(b). Ocasal had previously achieved tenure as a teacher. Here the stipulated facts show that the facilitator position requires possession of a certificate with a supervisory endorsement, that Ocasal holds such a certificate, and that he performed supervisory duties for more than two academic years.[3] Consequently, he has tenure in the facilitator position and cannot be displaced by a nontenured individual. Since Nunn admittedly had no tenure in a supervisory capacity, Ocasal is entitled to preference "as against a non-tenured applicant with the

[3]A supervisory endorsement is required for staff members "charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." *N.J.A.C.* 6:11-9.3(c).

same certification." *Capodilupo v. West Orange Twp. Bd. of Educ.*, 218 *N.J. Super* 510, 515 (App. Div. 1987), *certif. den.* 109 *N.J.* 514 (1987). *Accord, Bednar v. Westwood Bd. of Educ.*, *221 N.J. Super.* 239 (App. Div. 1987), *certif. den.* 110 *N.J.* 512 (1988). *See also, Rogers v. Highland Park Bd. of Educ.,* 1990 *S.L.D.* 685 (Comm'r May 10, 1990), *aff'd* 1990 *S.L.D.* 691 (St. Bd. Sept. 5, 1990) (departmental chairperson of social studies has superior right over nontenured supervisor to newly-created position of social studies supervisor.)

Although the Board urges that the facilitator position is "analogous to coaching or other extracurricular positions for which a stipend is paid and no tenure accrues," it offers no cases in support of its argument. Moreover the analogy is imperfect, since the job of the facilitator is not merely enhancement of instruction beyond the regular curriculum, but a separate type of supervisory activity for which a different certificate is required. Insofar as the Board implies that tenure is unavailable because facilitators work part-time and are paid by stipend, the law is clear that acquisition of tenure depends on satisfaction of the statutory criteria, not on full-time employment or the district's particular method of compensation, *Spiewak*, 90 *N.J.* at 84.

Additionally, the Board seeks to distinguish *N.J.S.A.* 18A:28-6 on the ground that this statute relates to a "new" position and provides that time spent in such "new" position shall be included in determining tenure and seniority rights in the "former" position. The Board argues that the statute does not apply because Ocasal retained his teaching duties and was not truly transferred to any "new" position. However, the language on which the Board relies was designed to encourage current employees to accept transfers by protecting them against loss of security in their existing positions. Otherwise, a senior employee who accepts a transfer to a new position might lose his place-in-line to a junior employee who continues in the prior position or category. This concept is consistent with the so-called "tacking-on" regulation, which ensures that "[w]henever a person shall move from or revert to a category, all periods of employment shall be credited toward his or her seniority in any or all categories in which he or she previously held employment." *N.J.A.C.* 6:3-5.1(g). Nothing in *N.J.S.A.* 18A:28-6 can be read to suggest that a district employee working simultaneously in two assignments

requiring different certifications should be deprived of tenure in the second position. Certainly Ocasal fits within the literal statutory terms, since he has accepted a transfer to a "new" position and has served in such new position for more than two academic years. There is no special significance to the fact that he divides his time between both responsibilities, rather than devoting full time to one or the other assignment.

In order to resolve the dispute in Ocasal's favor, it is unnecessary to address the troublesome question of the scope of a supervisor's tenure rights. Although several school law decisions hold that a supervisor's tenure extends to subject areas in which he has no prior experience or training, the preferable approach is that a supervisor must demonstrate some basic familiarity with the subject to be supervised. *Compare Herbert v. Middletown Bd. of Educ.*, 1989 S.L.D. 2148 (Comm'r July 25, 1989), *aff'd* 1990 S.L.D. 1759 (St. Bd. Aug. 1, 1990), *aff'd* No. A-318-90T1 (N.J. App. Div. May 22, 1991) (general supervisor has greater right than nontenured employee to appointment as supervisor of special services) with *Eagan v. Old Bridge Bd. of Educ.*, OAL Dkt. No. EDU 7448-82 (Comm'r July 5, 1983), *aff'd* No. A-1706-83T3 (N.J. App. Div. Feb. 4, 1985) (chair of physical education is unqualified to become chair of mathematics department). Recently, the trend in the law has been to uphold reasonable measures by school districts to require adequate qualifications for a particular assignment. Illustratively, in *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358 (1997), the New Jersey Supreme Court ruled that a head of industrial arts tenured under a supervisory endorsement had no claim to a separately-tenurable principal position. Noting that the two positions differed greatly even though both endorsements fall under the administrative certificate, the Supreme Court was reluctant to impose a result that "would promote unsound educational policy." *Nelson,* at 367-368. Similarly, in *Dennery v. Board of Educ.*, 131 *N.J.* 626 (1993), the Supreme Court declared that a guidance counselor's tenure was not transferable to a newly-created class supervisor position requiring the performance of distinctly different duties and tasks. Allowing the district to require dual certification pertaining to both the substantive and supervisory aspects of the job, the Court expressed its reluctance "to interfere with regulatory and administrative judgments of the professionals in the field of education unless those judgments are palpably arbitrary or depart from governing law." *Dennery*, at 642-643.

Fortunately, it is unnecessary to enter the legal thicket of whether Ocasal's tenure as a supervisor extends to subject areas beyond his recognized knowledge and experience. Ocasal possesses appropriate certification as a teacher of English, Italian and Spanish and has already served as a facilitator of language arts for more than the requisite time period. Accordingly, he has greater entitlement to that position than a person without any tenure in a supervisory position.

Order

It is **ORDERED** that the Elmwood Park Board of Education pay to Ocasal the sum of $3,000 as lost compensation for the 1994-95 school year.

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

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

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

May 5, 1997
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/7/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 7 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
J-1	Copy of resolution of the Elmwood Park Board of Education, adopted September 18, 1991
J-2	Copy of annual notice to Dimitri Ocasal, dated September 19, 1991
J-3	Copy of resolution of the Elmwood Park Board of Education, adopted August 25, 1992
J-4	Copy of annual notice to Dimitri Ocasal, dated August 26, 1992
J-5	Copy of resolution of the Elmwood Park Board of Education, adopted August 12, 1993
J-6	Copy of letter to Dimitri Ocasal from Melindo A. Persi, dated August 13, 1993
J-7	Copy of job description for staff development departmental facilitator, approved July 17, 1991
J-8	Copy of administrative certificate of Dimitri Ocasal with supervisory endorsement, issued September 1985
J-9	Copy of instructional certificate of Dimitri Ocasal with endorsement as secondary school teacher of English, Italian and Spanish, issued September 19, 1966

J-10 Copy of letter to Ellen Nunn from Melindo A. Persi, dated August 17, 1994

J-11 Copy of annual notice to Ellen Nunn, dated August 17, 1994

J-12 Copy of memo to Ellen Nunn from Melindo A. Persi, dated May 11, 1994

J-13 Copy of memo to Ellen Nunn from Melindo A. Persi, dated June 30, 1994

J-14 Copy of resolution of the Elmwood Park Board of Education, adopted December 19, 1989

J-15 Copy of memonrandum to Dimitri Ocasal from Wilfred J. Murphy, dated August 18, 1994

J-16 Copy of letter to Dimitri Ocasal from Joseph A. Casapulla, dated September 27, 1995

J-17 Copy of job description for teacher, undated

OAL DKT. NO. EDU 0351-95
AGENCY DKT. NO. 452-11/94

DIMITRI OCASAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ) finding that, contrary to the Board's view, the Facilitator position in question is a tenurable one, and that *N.J.S.A.* 18A:28-6 need not necessarily be read to bar applicability to concurrent appointments, such as in the instant matter.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The Board is hereby directed to compensate petitioner the sum of $3,000, representing his lost stipend for the 1994-95 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 10, 1997 - 11 -
DATE OF MAILING JUNE 10, 1997

302-97

IN THE MATTER OF THE TENURE :

HEARING OF MICHAEL FACCONE, :

STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF JERSEY CITY, : DECISION

HUDSON COUNTY. :

:

SYNOPSIS

State-operated School District certified tenure charges of excessive and chronic absenteeism against respondent mathematics teacher.

ALJ concluded that respondent's chronic and excessive absenteeism warranted his dismissal from his teaching position. ALJ proved by a preponderance of credible evidence that respondent was guilty of said absenteeism, was notified of the problem and did not indicate that his attendance would improve if he were to return to work. Having considered the educational needs of the students, the ALJ found that the absenteeism adversely impacted the District's operations. Respondent was ordered dismissed from his position.

Commissioner adopted findings and determination in initial decision. Commissioner ordered respondent dismissed and directed matter be forwarded to the State Board of Examiners for further appropriate action.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5540-96
AGENCY DKT. NO. 142-4/96

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY,
Petitioner,
v.
MICHAEL FACCONE,
Respondent.

Charlotte Kitler, General Counsel, for petitioner

Nancy Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: March 24, 1997 Decided: May 6, 1997

BEFORE **ELINOR R. REINER**, ALJ:

On April 18, 1996, petitioner, the State-Operated School District of Jersey City, certified charges of chronic and excessive absenteeism against respondent, Michael Faccone, a tenured teacher. Respondent filed an answer on April 23, 1996, denying the charges and alleging that his absences were for legitimate illness or injury, work-related and/or caused by the difficulty respondent had receiving authorization for proper medical treatment from the board of education. Respondent requested that the tenure charges against him be dismissed. The matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, on May 24, 1996, to

the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On July 12, 1996, the matter was assigned to the undersigned judge, and a telephone prehearing conference was scheduled for August 19, 1996. During the telephone prehearing conference, the issues were isolated, and a hearing was scheduled for June 17 and 25, 1997, at the OAL. The matter was subsequently rescheduled and heard on January 6 and 7, 1997. The record closed after the submission of briefs.

Facts

It became clear at the hearing that the pertinent facts were essentially undisputed. They may be summarized as follows:

1. Michael Faccone has a bachelor of arts degree in business from St. Peter's College and is certified to teach business and math.

2. Michael Faccone commenced employment with the Jersey City School District as a full-time teacher on September 1, 1976.

3. Since the time of his initial employment and throughout the course of his employment with the Jersey City School District, Michael Faccone has taught mathematics on the high school level.

4. Faccone was assigned to teach mathematics at Lincoln High School during the 1976-77 school year. He taught mathematics at Academic High School from school year 1978-79 through school year 1982-83, when he was transferred to Dickinson High School. He taught at Dickinson from school year 1983-84 through school year 1990-91, when he was transferred to Snyder High School. He has taught mathematics at Snyder since the 1991-92 school year.

5. The official records of respondent's attendance show the following absences, for personal illness (PI), injuries due to school accident (SA), or personal business (PB):

School Year	Absences	Total Days Absent
1985-86	144 days plus 2¼ hours (SA) 2 days (PI)	146 days plus 2¼ hours
1986-87	97 days (PI)	97 days
1987-88	28 days plus 2¼ hours (PI)	28 days plus 2¼ hours
1988-89	37 days plus 2 hours (PI)	37 days plus 2 hours
1989-90	15 days (PI) 2 days (PB)	17 days
1990-91	16 days plus 4¾ hours (PI) 2 days (PB)	18 days plus 4¾ hours
1991-92	19 days (PI)	19 days
1992-93	23 days plus 4½ hours (PI)	23 days plus 4½ hours
1993-94	34 days (PI) 2 days (PB)	36 days
1994-95	20 days (PI)	20 days
1995-96	105 days (SA) 7 days (PI) 2 days (PB)	114 days until suspended with filing of tenure charges

6. Respondent was given written notices over the course of his years of employment with the district that his attendance needed improvement:

(a) Respondent was advised by Instructional Observation/ Evaluation Report dated June 5, 1990, that his attendance must improve. P-14.

(b) Respondent was advised in an Instructional Observation/ Evaluation Report dated April 17, 1991, that he should be more constant in his attendance. He was informed that occasional absences are disruptive to the continued learning process and that improved attendance on Fridays was paramount. P-15.

(c) Respondent was advised in an Instructional Annual Written Performance Report dated May 17, 1991, that he needed to improve his attendance. P-16.

(d) Faccone was advised by memo dated March 21, 1994, from the principal of Snyder High School that his absences affected the continuity of instruction in his classes and that this was considered an unsatisfactory performance factor. He was advised to include improvement of attendance and timeliness in his professional improvement plan for 1994-95. P-17.

(e) Respondent was advised in an Instructional Annual Written Performance Report dated June 2, 1994, that his attendance needed improvement and that excessive absence and lateness causes discontinuity in the instructional process. P-18.

(f) Respondent was advised by the principal of Snyder High School by memo dated February 10, 1995, that at the mid-year point his absences had exceeded nine. He was told that if this pattern continued a recommendation to withhold his increment might be made. P-19.

(g) In May 1995 respondent was notified that his increment for the forthcoming school year, 1995-96, was being withheld for excessive absenteeism. P-20. Respondent's increment had previously been withheld for the 1989-1990 school year for unsatisfactory ratings. As part of the unsatisfactory rating, he apparently had been advised that his attendance needed improvement. P-13.

(h) Respondent was further advised by letter dated December 11, 1995, that excessive absenteeism affects the students' learning process and that his continued poor attendance would lead to further action by the district. P-22.

7. The last day respondent worked was October 16, 1995. On that date, he reported to the school nurse that he had injured his right knee at work six weeks earlier, the second day of school in September. Also on that day, the principal of Snyder High School held a conference with him to discuss his absences. Respondent was absent from work the next day, October 17, 1995, and absent throughout the remainder of the 1995-96 school year.

Testimony

Denise M. Ryan, a mathematics teacher with over twenty-nine years of experience teaching mathematics on the high school level, has served as chair of the mathematics department at Snyder High School since 1990. Ryan contended that a pattern of absence by a teacher impacts on learning and is apparent in the classroom. If a teacher has frequent absences the teacher cannot carry on the continuity of the instruction method and must go back to "square one"; the teacher loses control. Ryan

evaluated respondent's performance during school years 1993-94 and 1994-95, during which Faccone taught HSPT (remedial classes) and geometry.

In Faccone's final evaluation in 1995, Ryan observed that Faccone's class was hard to control, disruptive, disrespectful and indifferent to Faccone. These problems were due to Faccone's absences; students feel abandoned if a teacher is not with them. She referred to the Instructional Annual Written Performance Report dated June 2, 1994, in which she noted the excessive absenteeism in writing for the first time (P-18). Although Ryan could not recall discussing the report with Faccone, she did recall having had two prior conversations with him during which he agreed that his attendance had to improve. She noted in the professional improvement plan that improved attendance would improve performance, and she reviewed this with him as well.

In her report of observation dated March 23, 1995 (P-23), Ryan noted that Faccone arrived at class late and that his students were disruptive and hard to control. This was a remedial class in which the students needed a lot of help in basics. She observed Faccone get angry and snap at a child, a response that was not called for. Although students usually cooperate with the teacher during an observation, during this particular observation Faccone's students were apathetic. Ryan opined that Faccone's absences formed a pattern and that his performance declined because of his poor attendance. Although he had previously been rated satisfactory, in 1995 respondent was rated as "needs improvement" in most performance factors. Ryan said that Faccone refused to sign the 1995 annual performance report (P-21) and that he was abusive to her; he told her he did not have to "put up with this shit." She opined that Faccone had been treated with respect and had been warned about certain things. He did not react in a judicious manner, and he alleged that he was going to "get them." Ryan tried to talk to him on three occasions to advise him about his attendance, plan book (he refused to leave backup lesson plans) and record book. She said that when he was absent his classes were covered by an assigned substitute or another teacher, but she explained that a substitute teacher would not have the same qualifications.

Substitute mathematics teachers are rare because those with qualifications have full-time jobs.

On cross-examination, Ryan said that she did not remember there being construction in Snyder High School in 1994 and 1995, and she said she had not experienced problems with fumes when the individual classrooms were painted. She admitted that Faccone could have been advised to leave a classroom because of fumes. She acknowledged that a gym floor had been installed, but could not recall the year. She agreed that Faccone had told her that he had a leg injury.

Next to testify was Margaret Oliver, principal of Snyder High School since August 29, 1995. She monitored the attendance of students and staff, and she explained that more than five absences is excessive. Oliver and the vice president of the math department had a conference with Faccone on October 16, 1995, to discuss Faccone's absences and the lack of instructional continuity to the students. Faccone did not dispute the absences and said he would try to improve. He related for the first time that he had injured his knee on the first day of school by lifting a box, which he had been ordered to do. He said he would see the nurse. He did not return to school after the conference, nor did he call Ms. Oliver regarding his absences during the 1995-96 school year. She saw him again the first day of the 1996-97 school year, and for a few minutes when he was suspended. She explained that she certified tenure charges because after researching his other years of employment with the district, she determined that his use of sick time was excessive. She explained that students had lost instruction because most substitutes are not certified to teach math. The students themselves had apparently felt that they were missing out on math instruction, and wrote a letter to this effect (P-24). The parents also complained. Oliver did not recall Faccone complaining about using the stairs at the high school or telling him that if he could not walk from the basement to the fourth floor he could not work in the building; there are elevators.

Michael Faccone testified in his own behalf. He stated that he has two children, born November 17, 1991, and November 8, 1994, respectively. He pays child support

and is responsible for most of their medical bills. He provides transportation for them because their mother does not drive.

Faccone sought to explain his absences. He alleged that prior to June 1985 he was not often absent. He injured his right knee at work in June 1985 when he slipped off a step. He saw the board's doctor and received physical therapy. Although advised that he could return to work, he determined that he was not capable of working because he was still in pain. On the second day of school in September 1985 his knee was still swollen. He was finally allowed to see his own specialist, Dr. Tolentino, who found the problem, and in the beginning of October recommended surgery. Faccone claimed that he could not stand, walk or put pressure on his knee, thus he could not work. Although Faccone's doctor scheduled surgery for November 7, 1985, the board did not authorize the surgery until January 1986. He waited for the authorization at home. The doctor "scoped" his knee and removed the loose bodies, but could not find the tear he believed was causing the pain. After the surgery, respondent was supposed to have physical therapy. The board failed to authorize the requisite physical therapy for one month, causing his muscles to atrophy. He was out the rest of the 1985-86 school year to rebuild and tone his muscles. During the summer of 1986, Dr. Tolentino advised respondent that the cartilage was off the bone and that he needed another surgery. He continued to weight train during the summer months and returned to work in September 1986. His leg was strong but his knee was unstable, and when he moved, the cartilage stuck out of his knee. By the end of January 1986/beginning of February 1987 he had been absent only a few days. By mid-February he was in pain every day and had not received authorization for the second surgery from the board. The doctor finally received authorization, and at the end of February or the beginning of March 1987 respondent had surgery to remove 55 percent of the cartilage in his knee. He was out sick the rest of the 1986-87 school year. By October 1987 of the next school year when his knee began to swell he stayed home; he feared that he would have to go through the whole process again.

Faccone testified that during the 1984-85 school year a fire hazard required elimination of a stairwell in Dickinson High School. The construction work caused fine

cement powder to linger in the air. He complained and they tried to do the work after hours. However, he began to experience allergy symptoms and upper respiratory infections, and was consequently out a lot. In January 1989 he was subjected to a lye spray which burned his throat. In March 1989 he got the flu and was sick through Easter vacation. His knee no longer seemed to be a problem. During the 1989-90 school year he got the flu in late November/early December. During the 1990-91 school year he did not have any particular health problems; he had an occasional cold or stomach virus. In January 1992 he had the flu; in March 1992 he had bronchitis and was out for two weeks. During the 1992-93 school year he had the flu in November and he went to the nurse on December 15 for bronchitis. He was sick through Christmas 1992.

Faccone testified that the 1993-94 school year was one of his worst years, healthwise. He had bronchitis in November, suffered a relapse in December, and had the flu at the end of December. During the 1994-95 school year, his breathing was affected by the construction that was going on at Snyder High School. The lockers were being redone, which required soldering, and they used a dangerous paint. The airborne lead came into his room, and, at his request, his class was moved to the auditorium for two weeks, where there was no chalkboard. He was absent following an incident on November 21, 1994, during which smoke permeated the building, and again after he had a reaction to the strong glue used in redoing the locker room with new pipe. He said he was allergic to "all the stuff."

At the beginning of the 1995-96 school year, Ryan asked the male teachers to help retrieve the math books, which were stacked from floor to ceiling. Faccone climbed on a table and grabbed a box of books. As he stepped down, he felt something burst in his knee. He was not sure that he was injured and continued to work. His foot swelled up and was unstable. Mr. Pekarsky, the vice principal, had a conference with Faccone at the beginning of October regarding Faccone's six days of absence. Faccone told him that he had been injured, that he had been to the doctor (the doctor believed it was a sprain), and that his knee was getting worse. Faccone said that he would try to work. Faccone complained to the administration that he had to

work on different sides of the building and had difficulty walking to the classrooms, and also that hall duty was hard for him. He reported the incident with the books to the school nurse in October. However, in mid-November his problem of walking from room to room was still not resolved. He went out on sick leave on November 17 due to the school accident. The principal told him that it was "convenient" for him to be out for a school accident, and Faccone concluded that he had been called a liar. The board refused to agree that he could see Dr. Tolentino, but he went to Dr. Tolentino anyway. He also agreed to see Dr. Steinway, the doctor the board recommended. Steinway seemed to understand the problem. An MRI showed partial tears of ligaments. Respondent did not agree with Dr. Steinway that it was an old injury. Therapy did not improve the condition, and he asked Steinway to do exploratory surgery. A diagnosis of anterior cruciate ligament was made, and surgery was performed in May 1996. Faccone contended that the surgery should have been authorized prior to that time and that he had to wait for therapy. He was also advised that he would need reconstructive surgery.

Faccone contends that his knee is "shot," making him crippled at forty-five years old, and nobody cares. He was advised that Oliver had ordered that his sick leave be considered personal illness and not a school accident. He believes that the administration has been after him for years and contended that his attendance problem was their fault. They knew that he was going to be out sick, but did nothing to help the students. He said that he is very concerned about his students, and believes that if he has reconstructive surgery, he can still do his job.

On cross-examination, Faccone specified that his knee "popped" on September 6, 1995 (the second day of the school year). He was out sick because of his knee on September 18 and 20. He did not report the accident because he believed it was a sprain and tried to tolerate the situation. He agreed that he had a conference with Oliver, but contended that he had not told Oliver that he would try to improve his attendance. He reported the knee injury to the school nurse as a school accident. He agreed that he had been told to improve his attendance over the years, but said he was not told it was a problem.

Faccone claimed that he told Mr. DeCosta, now head of the math department, about his knee injury first, and two weeks later told Mr. Pekarsky, and then finally told Oliver. The school nurse referred him to Dr. Boylan, who sent him to Dr. Steinway. He had requested authorization to go to Dr. Tolentino, but Tolentino was not approved on the workers' compensation carrier list and the board refused to pay for Faccone's MRI. He received approval to go to Dr. Steinway and had surgery two weeks later. He admitted that Steinway told him that he had had as much treatment as was necessary and that he could return to work. He contended, however, that he was too young to go back to work wearing a brace, and that Steinway finally agreed that he has a legitimate problem. On questioning by this judge, respondent indicated that he could give going back to work a "shot"; he would have to wear a brace and would require additional surgery. He could return to work depending on the results of that surgery. He contended that most of his absences were the board's fault.

Discussion

Petitioner filed tenure charges of chronic and excessive absenteeism against respondent, Michael Faccone, employed by the district as a math teacher. The charges were supported by respondent's attendance records.

The respondent has had knee injuries and numerous bouts with allergies, flu, colds and bronchitis. Respondent argues that most of his absences were attributable to those conditions, especially the knee injuries. There is clearly a question as to whether the respondent's knee problems are under control or able to be controlled by surgery.

N.J.S.A. 18A:6-10, which governs dismissals of tenured teachers such as the respondent, provides in relevant part that:

> No person shall be dismissed or reduced in compensation,
>
> > (a) if he is . . . under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause.
>
> [Emphasis added.]

A survey of the relevant case law indicates that chronic or excessive absenteeism has been found to constitute both "incapacity" and "unbecoming conduct," within the meaning of *N.J.S.A.* 18A:6-10, such as to warrant dismissal from employment. It has also been held that chronic and excessive absenteeism amounts to "just cause" under *N.J.S.A.* 18A:6-10, such as to warrant dismissal from employment. *Trenton Bd. of Educ. v. Williamson*, OAL Dkt. No. EDU 7335-85 (Apr. 14, 1986), *aff'd*, Comm'r of Educ. (May 28, 1986).

In *In re Tenure Hearing of Reilly*, 1977 *S.L.D.* 403, the Commissioner of Education affirmed the dismissal of a teacher, on grounds of incapacity and conduct unbecoming a teacher, whose absences ranged from 5 to 149 days a year over a ten-year period, notwithstanding the claim that most of the absences were in connection with a physical ailment plaguing the teacher. *See also Malley v. Board of Educ. of Pequannock Township*, OAL Dkt. No. EDU 1858-86 (Nov. 19, 1986), *aff'd*, Comm'r of Educ. (Dec. 29, 1986), *aff'd*, State Bd. of Educ. (April 1, 1987); *In re Tenure Hearing of DeKrafft*, 1981 *S.L.D.* 1308, *aff'd*, State Bd. of Educ., 1982 *S.L.D.* 1470, *aff'd*, No. A-4641-81T2 (App. Div. May 4, 1983).

With respect to determining what constitutes chronic or excessive absenteeism, it must be pointed out that the administrative law judge (ALJ) in *In re Tenure Hearing of Sheets*, 1979 *S.L.D.* 790, 798, *rev'd*, 1979 S.L.D. 800, *rev'd*, 1980 *S.L.D.* 1536, held that, "The point at which absenteeism is judged to be chronic falls within the prerogative and discretionary authority of the Board [of Education] subject to a

determination by the Commissioner of Education in accordance with *N.J.S.A.* 18A:6-9 [which provides the Commissioner with jurisdiction to hear and determine all controversies and disputes arising under the school laws]."

The rationale underlying the principle that chronic or excessive absenteeism is conduct which warrants dismissal has been articulated in various ways. The ALJ in *Williamson*, in rather conclusive fashion, held that "[t]here is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process." *Williamson, supra*, OAL Dkt. No. EDU 7335-85 at 4, citing *Angelucci v. West Orange Bd. of Educ.*, 1980 *S.L.D.* 1066.

In *Reilly*, the rationale was more fully set forth by the Commissioner: "Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. . . . The regular contact of the pupils with their assigned teacher is vital to this process." *Reilly, supra*, 1977 *S.L.D.* at 414; *see also Meli v. Board of Educ. of Burlington County Vocational-Technical Sch.*, 1984 *S.L.D.* 906, 913, 919, *aff'd*, 1984 *S.L.D.* 921, wherein the Commissioner concurred with the ALJ that "[c]ommon sense dictates that a teacher's continued absence must, at some point, have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress."

A similar result was reached in *In re Tenure Hearing of Green, State Operated School District of the City of Jersey City*, 1991 *S.L.D.* 1103, 1111, *aff'd*, 1991 *S.L.D.* 1116, wherein the ALJ held that "the conclusion is inescapable that respondent's chronic and excessive absenteeism to so extreme a degree seriously disrupted continuity of the instructional process in her classroom. The degree and the repetitiveness of such absenteeism of itself is sufficient ground for removal."

Moreover, chronic or excessive absenteeism may be found to warrant removal even where the absences in question were for legitimate medical or health reasons. *Malley, supra*, OAL Dkt. No. EDU 1858-86 at 14, referring to *Trautwein v. Board of Educ. of Bound Brook*, No. A2773-78 (App. Div. April 8, 1980), *certif. denied*, 84 *N.J.* 469 (1980); *see also Reilly, supra*, 1977 *S.L.D.* 403, wherein the dismissal was affirmed notwithstanding a claim that the teacher had been suffering from chronic respiratory ailments during most leaves of absence; *Sheets, supra*, 1980 *S.L.D.* 1536, in which the dismissal was affirmed despite the teacher's claim of having suffered from bronchitis, anxiety and depression, and/or hypertension during the periods of absence in question.

In *Angelucci*, a case dealing with the withholding of salary increments on account of chronic or excessive absenteeism, the Commissioner offered an explanation for this seeming indifference to the problems of teachers: "The Commissioner can only sympathize with teachers who suffer from debilitating illness but cannot agree that the continued absence of any teacher has no effect on the pupils. If such be true, the Commissioner is constrained to wonder the need for the presence of the teacher at all, which wonderment reduces to a legal absurdity." *Angelucci, supra*, 1980 *S.L.D.* at 1078; *see also Green, supra*, 1991 *S.L.D.* at 1119, quoting *In re Tenure Hearing of Grossman*, 1972 *S.L.D.* 144, 161, wherein the Commissioner pointed out that while "a school district has a responsibility to teachers who are plagued with illness and have medical problems . . . the overarching responsibility of the Commissioner and the local Board of Education is to the children." In light of the foregoing, it appears that the respondent in the case at bar may not rely on the fact that most of his absences were due to a physiological ailment as an argument in mitigation of the penalty of dismissal.

In sum, excessive or chronic absenteeism of a tenured teacher, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause" within the meaning of *N.J.S.A.* 18A:6-10, so as to warrant dismissal from employment.

I have considered the evidence in the instant case and I am of the view that dismissal is warranted. As pointed out by petitioner, there can be no doubt that respondent's absences from his teaching duties were chronic and excessive. He was absent for virtually the entire 1985-86 school year due to a knee injury suffered at work and absent for an extended period during the 1986-87 school year. His attendance record thereafter reveals a pattern of absences which continued even during the years when his knee was healed and had become strong and sturdy. Respondent's absences from 1987-88 through 1994-95 ranged from a "low" of 17 days to a high of 37 days. In the 1995-96 school year, he was absent on another leave for a reinjury to his knee which occurred on September 6, 1995, but which was not reported to the school nurse until October 16, 1995.

Further, and as pointed out by petitioner, even though most of respondent's absences may be presumed to be due to legitimate causes, they nonetheless had a serious impact upon the students and the instructional process. The testimony of Ms. Ryan and Ms. Oliver indicates the significant deleterious effect of respondent's absences. Clearly, Faccone's absences caused the students to lose continuity in instruction. In fact, respondent's students felt such a loss of instruction in mathematics that they wrote a letter to the principal pleading for a permanent teacher whose attendance would be reliable. Thus, while I believe that Faccone's absences may in fact have been due to his knee problems, allergy problems, etc., the important factor here is the effect of his illnesses and resulting absenteeism on the students. Clearly, since substitute teachers are not required to be certified to teach mathematics, as testified to by petitioner's witnesses, respondent's absences deprived his students of the benefit of his expertise, obviously necessary to their education.

Moreover, it is clear that respondent had been given more than sufficient notice and warning of dissatisfaction with his record of attendance. As pointed out by petitioner, respondent's own testimony at the hearing on his increment withholding for the 1989-90 school year due to unsatisfactory ratings indicates his awareness that one of the reasons for the unsatisfactory ratings was his 97 days of absence in the preceding school year. In the years following that increment withholding, reports of his

classroom observations, annual evaluation reports and memos from the school principal repeatedly noted the need to improve his attendance. He was warned in February 1995 that his increment might be withheld if his pattern of absences continued, and when he nevertheless subsequently took several days of absence for personal illness, his increment was in fact withheld for the 1995-96 school year due to excessive absenteeism. I agree with petitioner that since increment withholding is the most severe action short of dismissal that a school district can take against a tenured teacher, it is absurd to suggest that respondent had not been warned and made aware of the seriousness of his absenteeism problem.

Despite the 1995 increment withholding, respondent showed no improvement in his attendance the next school year. He returned to school on September 5, 1995, and was absent for personal business on September 8, 1995, and again on September 14, 1995. During the next four weeks, he was sporadically absent for personal illness until October 16, 1995, on which date he reported having been injured at work six weeks previously and had a conference with the principal about his absences. He was absent the next day and continuously thereafter. Clearly, he was aware of the concerns of the district and the necessity to improve his attendance. However, his record does not reflect the necessary improvement for the continued success of his students.

Respondent argues that at no time did any of petitioner's agents consider the reasons for respondent's absences. He contends that all of his absences were due to either his work-related knee injuries, the refusal of the board of education to authorize treatment for those injuries, or his allergic reactions to materials being used in construction work at the schools. Respondent contends that the problems of continuity in instruction would not have occurred if petitioner had provided respondent with appropriate medical treatment and a non-toxic atmosphere in which to work. Moreover, respondent contends that he cannot be held responsible for the lack of availability of quality substitute teachers. In sum, respondent blames the district for all of his absences and alleges that his termination is unwarranted.

I must agree with petitioner that respondent's attempt to blame the district for all of his absences is unconvincing and of no help to respondent. I am in agreement that the district was not responsible for most of the absences that respondent mentions. Clearly, the district was not responsible when respondent was absent to transport his children for medical treatment, and the district did not cause his stomach flues and colds. Moreover, the district apparently offered medical treatment to respondent, and cannot be held responsible for his refusal to avail himself of it. Respondent also has not proven to the undersigned judge that his allergies and/or knee problems were caused by petitioner.

In any event, although respondent may very well have been physically and/or medically unable to report to work on many of the days he was absent, the result of those absences cannot be ignored. As noted above, the schools were created not for the benefit of the teachers, but for the benefit of the pupils and the resulting benefit to their parents and the community at large. While I am not indifferent to Faccone's problems, I am compelled to stress that a teacher's purpose is to benefit the pupils. Thus, the effect of Faccone's absences on those pupils must be considered. Clearly, Faccone's effectiveness in providing instruction to his students has been seriously impaired by his poor attendance. Respondent's attendance record shows a pattern of absenteeism that has been long-term, persistent and chronic. Moreover, it should be noted that respondent continues to have pain in his knee; he claims that he still needs surgery and is unsure whether he could presently return to teaching without such surgery. It is merely his hope that with the surgery he would be able to return to teaching.

Based on the above, I believe that Faccone can no longer serve the needs of the district in the necessary manner. Faccone has been unable to improve his attendance in the past, and with a seemingly still unresolved knee problem, there is no indication that his attendance would improve if he were to return to work now. Considering the educational needs of the students, I **CONCLUDE** that respondent's chronic and excessive absenteeism warrants his dismissal.

Order

Based upon the above findings of fact and conclusions of law, I **ORDER** that Michael Faccone be removed from his position as a math teacher, a tenured position, with the State-Operated School District of Jersey City.

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

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

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

May 6, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/9/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

Judi Granick

Denise M. Ryan

Margaret Oliver

For Respondent:

Michael Faccone

List of Exhibits

For Petitioner:

P-1	Teacher Attendance Record for Michael Faccone, school year 1985-86
P-2	Teacher Attendance Record for Michael Faccone, school year 1986-87
P-3	Teacher Attendance Record for Michael Faccone, school year 1987-88
P-4	Teacher Attendance Record for Michael Faccone, school year 1988-89
P-5	Teacher Attendance Record for Michael Faccone, school year 1989-90
P-6	Attendance record for Michael Faccone, Dickinson, school year 1990-91

P-7	Attendance record for Michael Faccone, Snyder, school year 1991-92
P-8	Attendance record for Michael Faccone, Snyder, school year 1992-93
P-9	Attendance record for Michael Faccone, Snyder, school year 1993-94
P-10	Attendance record for Michael Faccone, Snyder, school year 1994-95
P-11	Employee attendance record for Michael Faccone, computer printout, school year 1995-96
P-12	Attendance record for Michael Faccone, Snyder, school year 1995-96
P-13	Decision, *Faccone v. Board of Education of the City of Jersey City, County of Hudson*, 93 *N.J.A.R.*2d (EDU) 502
P-14	Instructional Observation/Evaluation Report for Michael Faccone, dated June 5, 1990
P-15	Instructional Observation/Evaluation Report for Michael Faccone, dated April 17, 1991 (two pages)
P-16	Instructional Annual Written Performance Report for Michael Faccone, dated May 17, 1991 (two pages)
P-17	Memo to Michael Faccone from Jeanne N. Oppel, dated March 21, 1994
P-18	Instructional Annual Written Performance Report for Michael Faccone, dated June 2, 1994 (two pages)
P-19	Memorandum to Michael Faccone from Jeanne N. Oppel, dated February 10, 1995
P-20	Letter to Michael Faccone from Judi Granick, dated May 18, 1995
P-21	Instructional Annual Written Performance Report for Michael Faccone, dated June 6, 1995 (two pages)
P-22	Letter to Michael Faccone from Michael Donahue, dated December 11, 1995

P-23 Instructional Observation Report for Michael Faccone, dated March 23, 1995 (two pages)

P-24 Letter to To Whom it May Concern from Jennifer LaRocque, received November 28 (two pages)

For Respondent:

None

OAL DKT. NO. EDU 5540-96
AGENCY DKT. NO. 142-4/96

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

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the replies thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4. However, in that respondent's exceptions are a verbatim reiteration of his post-hearing arguments before the Administrative Law Judge (ALJ), the Commissioner does not herein recount said arguments.

Upon careful and independent review of the record in this matter, which did not include a copy of the transcript of the hearing before the OAL, the Commissioner concurs with the ALJ that the District has demonstrated by a preponderance of credible evidence that respondent is guilty of excessive absenteeism, and that said absenteeism has adversely impacted its operations. The District has further proven its efforts to fairly notify respondent of his absenteeism problem. However, as the ALJ aptly noted, respondent "***has been unable to improve his attendance in the past, and with a seemingly still unresolved knee problem, there is no indication that his attendance would improve if he were to return to work now." (Initial Decision at p. 17)

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Respondent is terminated from his tenured position as a mathematics teacher in the District as of the date of this decision, and this matter will be forwarded to the State Board of Examiners for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 10, 1997
DATE OF MAILING JUNE 10, 1997

303-97

303-97 SEC

IN THE MATTER OF CAROL SCUDILLO, :

BOARD OF EDUCATION OF THE CITY : COMMISSIONER OF EDUCATION

OF GARFIELD, BERGEN COUNTY. : DECISION

:

JUNE 10, 1997

IN THE MATTER OF	:	Before the
	:	
CAROL SCUDILLO,	:	School Ethics Commission
	:	
Garfield Board of Education, Bergen County	:	Docket No. C14-93
	:	
	:	DECISION

The above matter arises from a petition by the School Ethics Commission to find Carol Scudillo in violation of the School Ethics Act for activity she undertook when she served as a member of the Garfield Board of Education in 1993.

Administrative Law Judge Arnold Samuels fully set forth the procedural history of the case. Thus, the Commission does not need to repeat it herein. However, the Commission adds that after the Administrative Law Judge mailed the decision to the parties and advised them that they had 13 days to file exceptions to the decision, the Commission received timely exceptions from Carol Scudillo. It also received a timely reply to the exceptions from Deputy Attorney General Arlene Lutz. After consideration of the file documents, and the exceptions and replies thereto, the Commission now adopts the initial decision with the modifications discussed below.

The Administrative Law Judge found that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she cast the crucial vote to hire her son-in-law as Superintendent of Schools for the Garfield school district. He stated that she voted in a matter in which "she had a personal involvement that might reasonably be expected to impair her objectivity or independence of judgment" in clear violation of the Act. In arriving at an appropriate penalty for the violation, he noted that the penalties of suspension and removal were moot because the respondent was no longer serving as a board member. However, he noted that the penalties of reprimand and censure could still be imposed. He recommended the more severe penalty of censure.

The Commission's regulations at N.J.A.C. 6:3-9.2 define censure as:

> a formal public action read into the record of the School Ethics Commission to rebuke a school official who has been determined by the Commission to have been in violation of N.J.S.A. 18A:12-21 et seq.

The Commission's regulations further require that if the Commissioner of Education imposes a censure as the appropriate penalty:

> The Commissioner's Resolution of Censure shall be adopted at the Commission's meeting next following the affirmance of the sanction by the Commissioner and shall be

read at the next public meeting of the district board of education following its adoption by the Commission and posted in such places as the board posts its public notices. [N.J.A.C. 6:3-9.19(c)(1)].

Respondent filed exceptions with the Commissioner on April 9, 1997. In those exceptions, respondent argues that the penalty imposed should be a reprimand rather than the censure recommended by the Administrative Law Judge. Respondent argues that she did not receive advice from the board attorney on whether it was appropriate for her to vote on the matter. In addition, she argues that the evidence does not show that she intended to violate the Act.

The Commission notes that the facts do show that respondent abstained from the vote when Mr. Cangiolosi's appointment came before the Garfield Board of Education for appointment as interim superintendent. At that time, it was clear that Mr. Cangiolosi had enough votes to be appointed without respondent's vote. The facts further show that respondent voted to approve Mr. Cangiolosi's appointment as superintendent when he needed her vote. Under these circumstances, the Commission concurs with the Administrative Law Judge's conclusion that censure is the appropriate penalty.

Respondent also cites the School Ethics Commission case, In the Matter of Matilda Touw, SEC Docket No. C16-96, to support her argument that a reprimand would be more appropriate than a censure in her case. The Commission finds the two cases to be very different factually. In Touw, the Commission reprimanded the respondent for having voted for her son's re-employment as head custodian. Her son was on a re-appointment list with many others for board approval. The board had re-appointed him for several years before the vote at issue. Ms. Touw did not cast the deciding vote and the board took only one vote to re-appoint the list. In contrast, Ms. Scudillo voted when the sole item before the board was her son-in-law's appointment as superintendent. There were no other appointments considered simultaneously. Further, as stated previously, respondent abstained on the vote when her son-in-law did not need her vote to be approved, but voted when her vote was crucial to his appointment.

For the foregoing reasons, the Touw case does not support the lowering of the penalty in the present case. Rather, the Commission would recommend a higher penalty than censure if respondent were still on the board. Given the circumstances in the present case, the Commission finds it is imperative that the penalty imposed be made publicly. Ms. Scudillo and the board secretary may be the only persons to know that a reprimand issued against her. Further, she may plan to run for a seat on the board in the future. There should be no question that her conduct was a clear violation of N.J.S.A. 18A:12-24(c) and the general prohibition that board members must avoid conduct which is in violation of the public trust or which creates a justifiable impression among the public that such trust is being violated. N.J.S.A. 18A:12-22(a).

Last, the Commission notes that the Administrative Law Judge sets forth in his statement of the procedural history of this case and his citation of two prior cases of the Commission, that

the Commissioner of Education had affirmed the substantive findings of a violation by the respondent, although he may have mitigated or augmented the penalty. The School Ethics Act sets forth that after the Commission states in writing its findings of fact and conclusions of law, "[t]he Commissioner shall then act on the commission's recommendation regarding the sanction." N.J.S.A. 18A:12-29(c). The Act further sets forth that any appeal of the Commission's determination regarding a violation of this act and of the commissioner's decision regarding the sanction shall be to the State Board of Education in accordance with Title 18A of the New Jersey Statutes. N.J.S.A. 18A:12-29(d). Pursuant to these statutory provisions, the Commissioner of Education's review is limited to the sanction only. He does not make a ruling regarding the Commission's substantive findings of a violation.

DECISION

For the foregoing reasons, the School Ethics Commission adopts the initial decision that Carol Scudillo violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by voting for her son-in-law's appointment as superintendent of schools in her district with the above modifications. The Commission agrees that since the penalties of removal and suspension are moot because Ms. Scudillo no longer sits on the board, the highest penalty that it can impose is a censure. Therefore, the Commission agrees with the Administrative Law Judge's assessment of penalty and recommends that the Commissioner of Education impose a penalty of censure.

This matter shall be transmitted to the Commissioner of Education for action on the Commission's sanction recommendation pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction. The parties must direct their comments to the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Respectfully submitted,

Paul C. Garbarini/dfb

Paul C. Garbarini
Chairperson

Resolution Adopting Decision

In the Matter of Carol Scudillo

School Ethics Commission Docket No. C14-93

Whereas, the School Ethics Commission has considered the decision of the Administrative Law Judge, the briefs on file and the exceptions and reply filed by the parties and has considered the arguments raised by parties in subsequent submissions; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on April 22, 1997

Lisa James-Beavers
Executive Director

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EEC 4868-95

Agency Dkt. No. SEC #C14-93

IN RE CAROL SCUDILLO

Arlene Goldfus Lutz, Deputy Attorney General, for petitioner, School Ethics Commission (Peter Verniero, Attorney General of New Jersey, attorney)

Joseph F. Skinner, Esq., for respondent, Carol Scudillo (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: December 23, 1996 Decided: March 20, 1997

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves an action by the petitioner, School Ethics Commission, to impose sanctions against the respondent, Carol Scudillo, for violation of the "School Ethics Act" (Act), when she served as a member of the Board of Education of Garfield, Bergen County, New Jersey, in 1993.

PROCEDURAL HISTORY

Following the filing of a complaint with the School Ethics Commission (Commission) against the respondent by a citizen of the city of Garfield, the Commission found that Ms. Scudillo had violated the provisions of the School Ethics Act, *N.J.A.C.* 18A:12-21 to -34, as a member of the Garfield Board of Education (Board). The Commission recommended that the respondent be reprimanded and suspended from the Garfield Board for three months.

On March 30, 1994, the Commissioner of Education affirmed the substantive findings of violations by the respondent, but revised the penalty to removal from the position.

The matter was appealed to the State Board of Education, which held, in a decision dated January 4, 1995, that the matter was a contested case, requiring an adjudicatory hearing in accordance with the Administrative Procedure Act (APA. *N.J.S.A.* 52:14B-9(c); *N.J.S.A.* 52:14B-10(a). Without any finding on the merits of the allegations or the penalty, the State Board of Education remanded the case to the School Ethics Commission for transmittal to the Office of Administrative (OAL) for hearing and determination in accordance with the APA, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was filed in the OAL in May 1995.

An initial hearing date, January 8, 1996, was adjourned because of a snowstorm and the closing of State offices. In May 1996, the petitioner filed a motion for summary decision, but in a status conference held on June 3, 1996, the parties seemingly arrived at a mutually satisfactory resolution of the dispute. However, before the School Ethics Commission had an opportunity to consider the settlement, the respondent rejected it. Therefore, counsel filed papers in opposition to the summary decision application in July 1996, and a hearing date was fixed for December 23, 1996.

When the hearing began on December 23, 1996, counsel agreed that no genuine issues of disputed fact existed, and that since both parties had filed briefs, the matter could be treated and decided as if cross-motions for summary decision had been filed.

Therefore, without the need for any testimony, counsel engaged in oral argument on December 23, 1996, and the record closed on that date. An order was entered extending the time for issuance of the initial decision until March 23, 1997.

ISSUES

Two issues are to be decided:

1. Whether the respondent violated the School Ethics Act, *N.J.S.A.* 18A:12-21 to -34.

2. If so, what penalty is appropriate?

FACTS

There are no disputed or contested facts in this matter. The following relevant and material facts have been abstracted from the papers on file:

The respondent, Carol Scudillo, was a member of the Board of Education of the City of Garfield in 1993. At that time, she was also a member of the personnel committee of the Board, which dealt with staffing matters.

The respondent's daughter was a long-term teaching staff member in the Garfield district. In July 1993 and thereafter respondent's daughter was married to Thomas Cangialosi, who was also a long-term teaching staff member in Garfield.

On or about June 1, 1993, the Garfield superintendent of schools resigned from his position. The Board decided to appoint an interim or acting superintendent, pending a search to fill the position permanently.

The personnel committee of the Board consisted of three members, including the respondent. Because of the importance of the position to be filled, both on an interim and a permanent basis, the committee referred the matter to the full Board for discussion and decision.

Two candidates were considered for the interim position, one of whom was Thomas Cangialosi, the respondent's son-in-law.

The full Board consisted of nine members, and the personnel decisions to be made required a majority vote of five. The order of voting placed the respondent in the seventh position on the roster. When the vote was taken to appoint the interim superintendent, the first five members voted affirmatively. The resolution had already been carried with the first five votes, and the respondent abstained from voting when her name was called.

The acting superintendent's appointment was due to expire on September 30, 1993. Thomas Cangialosi and one other person, both of whom possessed the necessary qualifications, were candidates for the permanent position. The Board convened on September 28, 1993, for purposes of voting on and appointing the new, permanent superintendent of schools.

The respondent's son-in-law, Thomas Cangialosi, was nominated for the position. The motion to appoint Mr. Cangialosi was carried with five affirmative votes out of nine. The respondent cast one of the affirmative votes. Two members voted no, one was absent and one was excused. The respondent's vote was one of the five needed by the Board to pass the resolution. The attorney for the Board was present during the voting for both the interim and permanent appointments. The attorney gave

no advice to the respondent relating to the advisability of voting or not voting, and the respondent did not request any such advice. The respondent's son-in-law was appointed to the permanent position.

In October 1993, a citizen of the city of Garfield, Maria Scannella (complainant) filed a complaint with the New Jersey School Ethics Commission alleging that the respondent violated the School Ethics Act by voting to appoint her son-in-law to the position of superintendent of schools. That charge is the sole subject of the instant dispute. A second allegation of the complainant, that Ms. Scudillo had been soliciting sales for her glove business among school employees, was not addressed or pursued by the Commission in its motion for summary decision, and therefore is not an issue to be dealt with or decided in this decision.

The respondent is no longer a member of the Garfield Board of Education. She lost her bid for reelection in April 1995.

LEGAL DISCUSSION

The School Ethics Act, *N.J.S.A.* 18A:12-21 to -34, became effective on April 15, 1992. The Act prohibits conflicts of interest, requires disclosure of financial information, and applies to school officials throughout the state, including elected school board members.

In promulgating this act, the Legislature broadly described the public policy and purpose of the legislation:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.

[*N.J.S.A.* 18A:12-22(a).]

N.J.S.A. 18A:12-24 delineates conduct by school officials that is prohibited by the Act. *N.J.S.A.* 18A:12-24(c) can be applied to this dispute:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The specific inquiry to be addressed, in deciding whether the respondent's vote for her son-in-law violated *N.J.S.A.* 18A:12-24(c), is whether she had a direct or indirect financial or personal involvement that might reasonably have been expected to impair her objectivity or independence of judgment. Any question relating to the "immediate family" portion of the subsection must be answered in the negative, because *N.J.S.A.* 18A:12-23 defines "Member of immediate family" as "the spouse or dependent child of a school official residing in the same household." The respondent's son-in-law does not fit that definition.

The subsection of the Act referred to above does not require proof of prejudice in an action taken by a board member; it merely prohibits activity "that might reasonably be expected to impair his objectivity or independence of judgment." *N.J.S.A.* 18A:12-24(c). *See also N.J.S.A.* 18A:12-22(a), requiring officials to avoid conduct that "creates a justifiable impression among the public that such trust is being violated." Thus, the Act prohibits a broad range of conduct, from conduct that involves direct, intentional financial gain, to conduct which creates a public perception of violation of the public trust.

Since the School Ethics Act was so recently enacted, and the Appellate Courts have yet to decide controversies that have arisen under the Act, other conflict of interest case law can be instructive. The Conflict of Interest Law (*N.J.S.A.* 52:13D-12

et seq.), the Local Government Ethics Law (*N.J.S.A.* 40A:9-22.1 *et seq.*), and the Municipal Land Use Law (*N.J.S.A.* 40:55D-1 *et seq.*) all provide penalties and/or sanctions for employees and officials who act in an official capacity for their personal interests. This case law provides a framework within which the language of the School Ethics Act may be placed.

In *Aldom v. Borough of Roseland*, 42 *N.J. Super.* 495, 503 (App. Div. 1956), the court held that in determining if the public official has breached the public trust, it is not necessary to prove that the public official engaged in fraud, dishonesty, loss to the public or was in fact influenced by his personal interests.

> The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. . . . And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect.
>
> [*Aldom, supra*, 42 *N.J. Super.* at 502.]

The courts have developed general guidelines for determining whether a conflict of interest reaches a threshold which requires action against the official. In the context of a zoning dispute, the New Jersey Supreme Court held that:

> The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case. No definitive test can be devised. The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty.
>
> [*Van Itallie v. Franklin Lakes,* 28 *N.J.* 258, 268 (1958) (citation omitted).]

The Court further noted that "[t]he citizens of a community have a right to expect that a public official in the performance of [her] duty will exercise [her] best judgment unaffected by anything which will inure to [her] personal advantage." *Id.* at 265.

More recently, the Supreme Court reaffirmed the *Van Itallie* test and attempted to clarify it further:

> A commentator has [described] four types of situations that require disqualification: (1) "Direct pecuniary interests," when an official votes on a matter benefiting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.
>
> [*Wyzykowski v. Rizas*, 132 *N.J.* 509, 525-26 (1993).]

The Court also noted that the term "personal involvement" as used in the Local Government Ethics Law (and in the School Ethics Law) instead of "personal interest" might extend the areas of disqualification of public officials. However, the Court did not attempt to construe the terms in its decision. *Id.* at 529.

In analyzing the application of the Act to the facts in the instant case, several other School Ethics Act cases may be instructive. In School Ethics Commission case CO2(c)-93, cited in *Scannella v. Scudillo*, 95 *N.J.A.R.*2d (EDU) 190, 192, the Commission found probable cause where a district board member cast the deciding vote to appoint her employer to a vacant seat on the board, reasoning that there was a financial relationship between the board member and her employer.

Similarly, in *In re Harrison*, 96 *N.J.A.R.*2d (EDU) 553, the Commission held that a new school board member, who voted for an extension for the construction of a new school while he was concurrently a partner in a firm subcontracted as the consulting structural engineer by the architect on the same project, violated *N.J.S.A.* 18A:12-24(c). The Commission found that Harrison's vote "create[d] an impression among the public that he cast this vote in self-interest rather than the interest of the public." 96 *N.J.A.R.*2d (EDU) at 554. The Commission made this determination even though Harrison was new in the position, had not attended the board member training course, had an extremely remote connection to the project, and even sought and received a legal opinion before the vote. *Id.* at 557. The Commissioner of Education adopted the Commission's determination that a violation had occurred, but noted that the mitigating factors, as stated above, would serve to reduce the sanction from public censure to a reprimand.

Furthermore, intent is not a factor. It is not necessary to show that the board member intended to violate the Act or to achieve personal or financial gain. In *Dilzer v. Sweet*, 96 *N.J.A.R.*2d (EDU) 132, the Commission found that a board member who solicited signatures for another candidate from teachers and others at a district school violated *N.J.S.A.* 18A:12-24(b),[1] and recommended a public censure. The Commission acknowledged Sweet's lack of intent and the lack of evidence of coercion, but noted that her act created "a perception that she violated the public trust." 96 *N.J.A.R.*2d (EDU) at 134. Again, the Commissioner of Education relied on mitigating factors to reduce the sanction, but did not reject the Commission's conclusion. *Id.* at 135. Repeating the concept noted in *Harrison*, lack of intent or direct gain may serve to mitigate the sanction applied, but it apparently does not serve as a defense to the violation itself.

---

[1] *N.J.S.A.* 18A:12-24(b) states: "No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others."

The School Ethics Commission has been enforcing the Act strictly. In its written decisions, the emphasis has continually been placed on the public perception of a violation of the public trust. As noted in the cases discussed above, the board member's intent and actual gain, if any, are not dispositive. The statute itself, *N.J.S.A.* 18A:12-22(a), clearly presents the public policy that the Legislature intended to further. Thus, any conduct on the part of a board member which may be interpreted by the public as suspect can be a violation of the Act.

In the instant matter, Ms. Scudillo had the opportunity to cast votes twice to appoint her son-in-law as superintendent of schools. In the first instance, on the vote to name him as acting superintendent, the respondent abstained only after it was clear that he had the votes needed to be appointed. *See* Respondent's Certification dated November 20, 1993. Approximately a month later, Ms. Scudillo voted with the majority to appoint her son-in-law as permanent superintendent. Her vote was needed to carry the motion. Viewed by any member of the public, this conduct would reasonably give rise to speculation that a conflict of interest existed, because Mr. Cangialosi was married to the respondent's daughter, and she presumably had a personal involvement with both her daughter and her son-in-law. This relationship is sufficient to "reasonably be expected to impair [her] objectivity or independence of judgment." *N.J.A.C.* 18A:12-24(c). This was especially true since the Board considered only one other candidate and did not conduct a search outside of the district.

Furthermore, the superintendent of schools, as the chief executive officer of the district, is expected to work closely with and report directly to the Board, thus increasing the possibility of future questionable or preferential conduct. *N.J.S.A.* 18A:17-20(b) defines a tenured superintendent's general powers and duties as follows:

> [The superintendent] shall be the chief executive and administrative officer of the board or boards of education employing him and shall have general supervision over all aspects, including the fiscal operations and instructional programs, of the schools of the district or districts under rules and regulations prescribed by the State board and shall keep himself informed as to their condition and

> progress and shall report thereon, from time to time, to, and as directed by, the board and he shall have such other powers and perform such other duties as may be prescribed by the board or boards employing him.
>
> He shall have a seat on the board or boards of education employing him and the right to speak on all matters at meetings of the board or boards but shall have no vote.

Particularly because the superintendent acts as the chief executive officer of the district, an inseparable relationship exists between the board and him or her. This is not a judgment call or a subjective test. As a member of the Board, Ms. Scudillo was abridged to refrain from any conduct which "creates a justifiable impression among the public that [the public] trust is being violated." *N.J.S.A.* 18A:12-22(a). By voting for her son-in-law for superintendent, the respondent gave the reasonable impression that the public trust might be violated.

Turning to the question of penalty, the Act provides that, following the hearing at the OAL, the School Ethics Commission will determine whether a violation has occurred or whether the complaint should be dismissed. *N.J.S.A.* 18A:12-29(c). If the Commission determines that the conduct is a violation of the Act, "the commission shall, by majority vote, recommend to the commissioner the reprimand, censure, suspension, or removal of the school official found to have violated this act." *Ibid.* The Act and the rules promulgated thereunder do not provide standards for determining the appropriate sanction. However, the regulations include definitions of "censure" and "reprimand":

> "Censure" means a formal public action read into the record of the School Ethics Commission to rebuke a school official who has been determined by the Commission to have been in violation of *N.J.S.A.* 18A:12-21 *et seq.*
>
> . . . .
>
> "Reprimand" as a sanction imposed by the Commissioner upon recommendation of the School Ethics Commission shall consist of a letter from the Commission rebuking a

> school official for having been found to have breached the standards of conduct prescribed by *N.J.S.A.* 18A:12-21 *et seq.*
>
> [*N.J.A.C.* 6:3-9.2.]

To date, no known cases have been decided which provide examples of penalties imposed on officials who no longer hold the office or position. The Local Government Ethics Law provides for fines of $100 to $500 for appointed or elected officials found guilty of ethics violations. *N.J.S.A.* 40A:9-22.10. In addition, disciplinary action, including removal, suspension and demotion, may be taken against appointed officers or employees who violate the Local Government Ethics Law. *N.J.S.A.* 40A:9-22.11. The Conflict of Interest Law, covering State officers and employees, provides for similar fines for ethical violations, along with suspensions of up to one year. *N.J.S.A.* 52:13D-21(i). In addition, conduct which is determined to constitute a willful and continuous disregard of the provisions of the act or of a code of ethics may be sanctioned by removal from office and disqualification from public office for up to five years.

Since neither the School Ethics Act itself nor the case law provides guidance for determining the appropriate sanction, once a board member has left office, comments by administrative law judges or the School Ethics Commission that have accompanied several penalty recommendations are indicative of the Commission's view of the purpose to be served by imposing sanctions. For example, in *Sweet, supra*, 96 *N.J.A.R.*2d (EDU) at 134, in recommending censure, the Commission stated: "The Commission wants it known that such actions violate the School Ethics Act." In *Irvington Municipal Council v. Steele*, 95 *N.J.A.R.*2d (EDU) 123, 131, the Commission reasoned that suspension of a board member and public censure of a board was appropriate, because "[I]n Irvington, the public perception is that politics prevails as usual . . . ." Again, in *Harrison, supra*, 96 *N.J.A.R.*2d (EDU) at 555, the Commission recommended censure, because "[t]he public should be aware that the Commission will not allow such a situation to exist."

Comparing Ms. Scudillo's conduct to that of other individuals disciplined under the Act, the penalty of sanction, suspension or removal from office would be in keeping with the Commission's past actions. Censure or reprimand has been imposed in addition to suspension or removal. However, in the instant matter the respondent remained in her position for more than one and one-half years after the vote that constituted the violation charged. She completed her term and was not re-elected. Therefore, imposition of a sanction such as suspension or removal is moot.

However, an analysis of Ms. Scudillo's conduct leads to a conclusion that under the circumstances, her vote to appoint her son-in-law as superintendent of a school district is certainly more serious than the *Sweet* and *Harrison* cases. The respondent appointed a person with whom she had a personal involvement to the highest position in the district. Furthermore, the superintendent of schools is expected to work closely with the Board, thus increasing the possibility of future questionable conduct. It is also noted that the respondent abstained from voting when the temporary appointment was made after a majority vote had already been cast. On the other hand, when the time came for the more important vote for the permanent appointment, Ms. Scudillo did vote, and she cast the fifth and deciding affirmative vote. Therefore, public censure, as defined in *N.J.A.C.* 6:3-9.2, is the appropriate sanction.

CONCLUSIONS

Based on the foregoing, it is **CONCLUDED** that the respondent violated *N.J.S.A.* 18A:12-24(c). She acted in her official capacity in a manner in which she had a direct or indirect financial or personal involvement that might reasonably be expected to impair her objectivity or independence of judgment. Under the circumstances, her conduct created a justifiable impression among the public that the public trust was being violated.

It is also **CONCLUDED** that the sanction of public censure is most appropriate.

ORDER

It is therefore **ORDERED** that the petitioner's application for summary decision is granted, and the respondent's cross-motion is denied.

It is further **ORDERED** that the Commission should sanction the respondent by issuance of a public censure for violation of *N.J.S.A.* 18A:12-24(c).

I hereby **FILE** my initial decision with the **SCHOOL ETHICS COMMISSION** and with the **COMMISSIONER OF EDUCATION**. Pursuant to *N.J.S.A.* 18A:12-29, the School Ethics Commission has jurisdiction to determine whether a violation of the School Ethics Act occurred. If it concludes that the conduct constitutes a violation of the School Ethics Act, it shall recommend an appropriate penalty to the Commissioner of Education. The Commissioner of Education shall issue the final decision in this matter.

The recommendations of this decision as to whether the conduct constitutes a violation of the School Ethics Act may be adopted, modified or rejected by the **SCHOOL ETHICS COMMISSION**. If the School Ethics Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision.

If the School Ethics Commission determines that a violation has occurred, it shall issue a written decision recommending to the Commissioner of Education an appropriate penalty and shall forward the record, including this recommended decision and its decision, to the Commissioner of Education. The Commissioner of Education may subsequently render a final decision as to the appropriate penalty. If the Commissioner of Education does not render a final decision within forty-five (45) days of its receipt of this initial decision, and unless such time period is otherwise extended, the recommended decision of the School Ethics Commission shall become the final decision.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SCHOOL ETHICS COMMISSION**, **DEPARTMENT OF EDUCATION, CN 500, Trenton, NJ 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 26, 1997
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

March 26, 1997
DATE

SCHOOL ETHICS COMMISSION

Mailed to Parties:

MAR 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EEC 4868-95
COMMISSION DKT. NO. C14-93
AGENCY DKT. NO. 140-4/97

IN THE MATTER OF CAROL SCUDILLO,	:	
BOARD OF EDUCATION OF THE CITY	:	COMMISSIONER OF EDUCATION
OF GARFIELD, BERGEN COUNTY.	:	DECISION
	:	

The record of this matter, the decision of the Office of Administrative Law (OAL), and the decision of the School Ethics Commission adopting the decision of the OAL, including the recommended penalty of censure, have been reviewed. This matter comes before the Commissioner to impose a sanction upon respondent, member of the Garfield Board of Education, based upon the findings of fact and conclusions of law of the OAL and the Commission that she violated the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.*, by voting to hire her son-in-law as superintendent of schools. Upon issuance of the decision of the School Ethics Commission, respondent was accorded thirteen days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent's comments were filed in accordance with such timeline.

Respondent's comments are a verbatim recitation of her exceptions to the initial decision of the Administrative Law Judge (ALJ) filed with the School Ethics Commission. In that such arguments were fully considered by the Commission in reaching its determination, and in that the Commissioner concurs, for the reasons clearly articulated in the Commission's decision, that these arguments are unpersuasive in support of a mitigated penalty in this matter, respondent's comments are not reiterated herein.

Upon a thorough review of the entire record herein, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter.*

IT IS HEREBY ORDERED that Carol Scudillo be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* In making the within determination, the Commissioner was mindful that the penalties of removal and suspension were unavailable as potential sanction options in that respondent is no longer a sitting board member.

JUNE 10, 1997
DATE OF MAILING JUNE 10, 1997

304-97

304-97

M.S.A. AND H.A., on behalf of minor child, H.A.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY, AND BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

JUNE 11, 1997

OAL DKT. NO. EDU 10355-96
AGENCY DKT. NO. 441-10/96

M.S.A. AND H.A., on behalf of minor child, H.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY, AND BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 11, 1997
DATE OF MAILING JUN E 11, 1997

305-97

305-97

SUSAN COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 12, 1997

OAL DKT. NO. EDU 12571-95
AGENCY DKT. NO. 366-9/95

SUSAN COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 12, 1997
DATE OF MAILING JUNE 12, 1997

306-97

306-97

LOIS ZABRISKIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 12, 1997

OAL DKT. NO. EDU 6467-96
AGENCY DKT. NO. 228-6/96

LOIS ZABRISKIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 12, 1997
DATE OF MAILING JUN E 12, 1997

307-97

307-97

LINDA PERROTTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 12, 1997

OAL DKT. NO. EDU 7651-94
AGENCY DKT. NO. 282-7/94

LINDA PERROTTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 12, 1997

315-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SIANO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF NORTH BERGEN,	:	DECISION
HUDSON COUNTY,	:	

SYNOPSIS

Board certified tenure charges for chronic absenteeism and other just cause against respondent custodian.

ALJ concluded that the Board proved by a preponderance of credible evidence the tenure charges against respondent. ALJ found that respondent had been notified of his problem of excessive absenteeism but failed to rectify it, adversely affecting the students and staff. ALJ ordered respondent's dismissal from employment.

Commissioner adopted findings and determination in initial decision as his own and directed that respondent be terminated from his position as of the date of this decision.

JUNE 13, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7951-96
AGENCY DKT. NO. 298/7/96

NORTH BERGEN BOARD OF EDUCATION, HUDSON COUNTY,
Petitioner,
v.
JOHN SIANO,
Respondent.

Keith J. Roberts, Esq., for petitioner
(Giblin & Giblin, attorneys)

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

Record Closed: February 15, 1997 Decided: April 1, 1997

BEFORE **ELINOR R. REINER**, ALJ:

On or about July 22, 1996, petitioner North Bergen Board of Education certified charges of chronic and excessive absenteeism against respondent John Siano, a tenured custodian employed by the district. On August 12, 1996, respondent filed an answer denying the charges and requesting that the tenure charges be dismissed. An amended answer was filed on August 15, 1996. On August 19, 1996, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on August 22, 1996, and a telephone prehearing conference was scheduled for September 24, 1996. During the prehearing conference, the issues were isolated and a hearing was scheduled for December 10, 11 and 16, 1996, at the Office of Administrative Law. The matter was ultimately heard on December 11, 16, and 18, 1996. Witnesses who testified and exhibits marked into evidence are listed in the attached appendix.

Facts

The essentially undisputed facts may be summarized as follows:

1. On December 4, 1989, respondent was hired by the North Bergen Board of Education as a custodian. Respondent became tenured in that capacity on or about March 4, 1990.

2. Respondent was a union member with contract terms embodied in a collective bargaining agreement effective July 1, 1992, through June 30, 1994 (P-1), and a successor agreement dated July 1, 1994, though June 30, 1997 (P-2).

3. Pursuant to both contracts, employees receive 12 days of paid sick leave each year, cumulative from year to year. In addition, an employee who is ill for 3 days or more might be required to submit a doctor's certificate certifying such illness. The school physician may examine an employee who is absent for a period of more than one week by reason of illness. Pursuant to the contract, sick leave is defined as "absence from post or duty because of personal disability due to illness or injury (non-job related) or as a result of medical documented contagious disease in the employee's immediate household." Any employee who exhibits a pattern of sick leave may be required by the Board to submit a physician's written

statement certifying his/her disability. Abuse of sick time is cause for disciplinary action. In addition, the contract specifies that in the event of any extended verified illness which goes beyond accumulated sick leave, an employee may be granted additional sick time, by Board approval at varying rates. The contract further specifies that if it is necessary for an employee to be absent or late he/she must notify the school at the earliest practical time, but in no event shall this notification be later than sixty minutes before he/she is scheduled to report to work. In addition, except in case of emergency, an employee who is absent for 2 consecutive days or more and who does not notify the school shall forfeit pay for those days.

4. Respondent was absent in excess of 300 days from the 1992-93 school year through the 1995-96 school year (P-3; P-4).

5. More particularly, during the 1992-93 school year, respondent was absent in excess of 50 days.

6. During the 1993-94 school year, respondent was absent in excess of 14 days.

7. During the 1994-95 school year, respondent was absent in excess of 170 days.

8. During the 1995-96 school year, respondent was absent in excess of 90 days.

9. Concerns about Siano's attendance and its disruptive influence on the ability to provide appropriate custodial services dates back to the 1991-92 school year. By memo dated May 26, 1992, Vincent Ascolese, assistant superintendent of business, wrote to John Siano indicating that they expected to receive a call the morning of the day when reporting illness.

Ascolese's memo further advised Siano that if he was out for 3 consecutive days they expected to receive a doctor's note. Ascolese informed Siano that he had used his 10 sick days for the year and that they would watch his absences for a continued pattern. P-8.

10. By letter dated November 4, 1992, Robert J. Dandorph, principal at the John F. Kennedy School, wrote to Vincent Ascolese complaining of Siano's atrocious attendance. Siano was copied on the letter. P-9.

11. By letter dated December 14, 1992, Carmine E. Pellechio, vice principal of John F. Kennedy School, wrote to Vincent Ascolese, indicating that since the last communication, dated November 4, 1992, Siano had continued his atrocious attendance and total disregard for Board policy, which requires an employee to call the Board when he or she is going to be absent. Pellechio indicated that Siano had not called to inform the Board of his absence, creating scheduling problems at night, and that the building was not properly cleaned for six nights. He indicated that prior discussions with Siano had been to no avail. P-10.

12. On or about December 15, 1992, Siano signed a memorandum to all maintenance and custodial personnel acknowledging receipt of the Board's policy for absenteeism and an employee's obligation to submit a doctor's certification when ill for 3 days or more and to call the school at least sixty minutes before the employee's scheduled report time.

13. By letter dated March 23, 1993, Principal Dandorph wrote to Ascolese complaining about Siano's continuing atrocious attendance and total disregard of the Board policy requiring that he call the Board when he is going to be absent. Dandorph further stated that the third floor of the school was a mess, that the constant substitutes for Siano's position were not adequate, and that teachers and parents were unhappy about the situation. P-11.

14. By memo dated March 25, 1993, John Kanzler advised John Duffy, Board secretary, that Siano had exceeded his sick and personal days for the 1993 school year with absences in every month since September 1992. He further indicated that the Board did not have a home address or telephone number for Siano. P-37.

15. By memorandum dated July 12, 1994, from Vincent Ascolese to Siano (P-13), respondent was notified of three improper actions that he took. He was advised that:

    a) On July 5, 1994, he punched in at 7:01 a.m. but no one was able to locate him until 10:40 a.m.
    b) On July 8, 1994, he took an unauthorized vacation day.
    c) On July 11, 1994, he punched in at 7:16 a.m. but left the premises to get a quart of milk. He had not returned as of 3:00 p.m. He was advised to discuss these situations with Ascolese.

16. By memorandum dated July 29, 1994, Siano was notified by Ascolese of his failure to follow the Board policy requiring him to call in sick before the start of his work shift on July 25, 26, 27 and 28. P-14.

17. By memorandum to Siano dated September 25, 1995, Siano was notified by Mike Duffy, assistant supervisor of custodians, of his failure to either show up for work for his new job assignment at John F. Kennedy School or call in sick on September 25, 1995. Siano was notified of the policy regarding calling in when absent or late. P-21.

18. By memo dated October 10, 1995, Duffy notified Siano about his failure to call into the switchboard when he was to be out sick. The memo indicated that this was the second time Siano had ignored this directive;

he had been spoken to when he failed to call in on September 25, 1995. P-22.

19. On December 8, 1995, Duffy wrote to John Siano informing him that he had an "alarming number of days out." (He was out 7 days from September 1995.) He indicated that when an employee is out an excessive number of days the building morale suffers. P-23.

20. A notice to all maintenance and custodial personnel was posted February 7, 1996. It advised, among other things, that everyone must call in when not reporting for work and it set forth the number to call. In addition, it advised that anyone not reporting for work on two consecutive days who did not call in would be written up. John Siano's name appeared next to those instructions. P-15.

21. By memorandum dated February 26, 1996, from Ascolese, Siano was notified of the procedures for reporting his absence and of work performance deficiencies. He was told that his duty is to protect the health and safety of the students by providing them with a clean atmosphere in which to be educated. P-16.

22. By letter to Siano dated February 26, 1996, John Duffy informed Siano that his attendance record needed improvement. He was advised to seek any medical attention that he required to improve his attendance record. Improvement in his attendance would avoid further action. P-19.

23. By memorandum dated April 18, 1996, to Ascolese, Duffy advised his supervisors of Siano's absenteeism. (Duffy indicated that Siano had used 17 sick days as of September 1995.) Duffy further notified his supervisors that Siano's attendance deficiency was taking a toll on the cleanliness of the building. P-25.

24. By memorandum dated April 24, 1996, to Ascolese, Duffy indicated that Siano had missed 21 days of work due to sick days since September 1995. Duffy again indicated that Siano's use of sick time was starting to take a toll on the cleanliness of the building, and he sought a review of Siano's past attendance. P-27.

25. By memorandum dated May 15, 1996, Duffy informed Ascolese that Siano had called in sick at 2:08 p.m., in direct violation of the contract. He reiterated that Siano's absences were having a negative effect upon morale in the building. Since he did not have a working telephone number for Siano, he could not contact Siano in the event of an emergency. P-26.

26. By memorandum dated May 20, 1996, Duffy informed Ascolese that Siano did not show up for a meeting and did not come to work on May 17, 1996. He pointed out that this followed a long pattern of not calling in when he did not show up for work. He stated that on 6 occasions he had to make the proper arrangements to cover Siano's floor at the last moment. He noted that he had instructed Siano not to return to work without a doctor's note for the 6 consecutive days out. P-28.

27. By memorandum dated May 17, 1996, Ascolese wrote to Siano indicating that Siano had missed a personnel conference which Siano had requested to discuss his frequent absenteeism. The memo stated that Siano failed to show up for conferences on May 10 and 17, 1996. P-17.

28. On May 21, 1996, Duffy completed an evaluation of Siano. He stated that Siano's attendance had hurt building morale. The evaluation has the notation, "not available for interview." P-18.

29. By memorandum dated May 30, 1996, Duffy wrote to Ascolese regarding Siano's failing to call in when out sick on May 29, 1996. This constituted the 34th day he had been out since 1995 and the 8th time that Siano had not called in. P-29.

30. By memorandum dated May 31, 1996, Duffy advised Ascolese that Siano neglected to call in when he was out on May 29 and 30, 1996. He indicated that Siano had been out sick 33 days and that the other custodians were complaining about the extra work they were required to do as a result of these absences. P-30.

31. By memorandum dated June 3, 1996, Duffy informed Ascolese that Siano had neglected to call in when he was out on May 29, 30 and 31, 1996. Noting that the contract provides that when an employee is absent for 2 consecutive days or more and does not notify the school he shall forfeit pay for those days, he requested that the Board enforce its policy in regard to Siano. He indicated that this failure to call in constituted the third in a row, "not counting the eight separate instances previous." P-31.

32. By memo dated June 4, 1996, Ascolese advised Siano that as of May 31, 1996, he had used up all his sick days and accumulated vacation. He indicated that Siano would not receive any compensation until he returned to work. Siano would not be allowed to return to work until he furnished Duffy with his home address and a telephone number so the Board could contact him. P-20.

33. On June 26, 1996, respondent was notified that tenure charges had been filed against him. They were scheduled for consideration on July 17, 1996. P-32.

34. On July 17, 1996, the Board of Education voted to certify tenure charges against respondent. P-33.

35. By letter dated June 29, 1996, Ausberto McKinney, M.D., advised Michael Duffy that he had examined Siano. McKinney found no abnormalities or evidence of a herniated disc. P-34.

Testimony

Vincent Ascolese, petitioner's assistant superintendent of business, testified that all custodians report indirectly to him. He explained that custodians are responsible to clean the buildings and maintain the interiors of the schools. They do light maintenance and report dangers. He stated that it is a very important position. There are safety concerns, and a classroom which is not clean creates a bad educational environment. A custodian's attendance record is very important. If a custodian is out, the district must pay other custodians to cover the area, and if the district cannot find anyone to take overtime, another custodian will have to do the cleaning, which destroys morale. In addition, the overtime man does not do the same job as the regularly scheduled custodian in the area, who has built a relationship with the teachers.

Ascolese indicated that he is responsible for maintaining the custodial records, and he explained the manner in which attendance is recorded. Familiar with Siano's records, he opined that to miss over 300 days in the past four academic years was not a very good attendance record. He said that he sent memorandums to Siano from 1992 on, and also spoke with Siano on nine or ten occasions. Siano usually said that he would improve, but there was no sustained improvement despite the warnings.

More particularly, Ascolese stated that during the 1993-94 year Siano's attendance and work habits did not improve. He spoke to Siano regarding the situations outlined in his memorandum of July 12, 1994 (P-13), but Siano's explanations were not in conformity with the proper procedure. His attendance did not improve when he was transferred to another school. Ascolese added that Siano

reported a back injury and was on worker's compensation disability for the better part of the 1994-95 school year.

The witness explained the importance of an employee notifying the Board of his address. Siano had moved on four occasions and did not notify the Board, consequently there was a problem locating him. In May or June 1996 Siano was not appearing for work and they had great difficulty finding him. Ascolese further stated that Siano would either fail to come to meetings or would show up at the incorrect time. He believed that Siano was not at the personnel conference regarding his evaluation in May 1996, and he did not know if the evaluation had been presented to Siano.

On cross-examination, Ascolese was questioned as to certain days of alleged absences that were unaccounted for on the absentee records. He agreed that Siano had told him that he had a back problem during the period of time he claimed he had a work-related injury. His worker's compensation claim is still being litigated. Siano advised Ascolese that he had problems, and Ascolese told Siano to correct them. Siano only specifically mentioned his back. Ascolese said that Siano was sent to the hospital on two occasions and was examined by Dr. McKinney. He said that Siano's increment had not been withheld and that personal memorandums would not have been put on the bulletin board. Ascolese recalled that he spoke to Siano with a representative regarding Siano's absenteeism. On redirect-examination, he stated that attendance for May 1996 was recorded and that Siano was off the payroll as of June 3, 1996. He indicated that the compensation days were not recorded on P-3 and P-4.

Next to testify was John Kanzler, supervisor of custodians for ten and one-half years. He supervised Siano from December 4, 1989, to September 17, 1994. He had concerns regarding Siano's attendance and his failure to call in from the inception of his employment, and he made Siano aware of his concerns through memorandums, conversations on the job and meetings with him at his home at various different addresses. Siano's response was that he was sick, and had to go to the hospital.

Kanzler testified specifically about the milk incident described in P-13. He noted that Siano did not have permission to leave his employment that day. Siano always said he would do a better job the following week, but that did not occur. There was no improvement, and in fact the attendance problem worsened.

Kanzler testified concerning the impact of Siano's behavior. He said that he could not contact him, despite checking eight or nine addresses, and was thus unable to give him certain information. The other custodians had to do a portion of Siano's work, which created a big problem over time. It affected the morale of the other custodians, and the school principals expressed concerns that certain portions of the buildings were not getting cleaned. Kanzler further recalled that he would see Siano in the morning, but Siano would not show up for work at night. On cross-examination, Kanzler said that he asked Siano for his address many times, and when he asked, Siano told him. Siano was out of work in the summer of 1994, and Kanzler could not find him. He did not know that Siano had alleged that he had been hurt on the job until December 11, 1996, although the policy is to notify your supervisor, and he did not know that Siano had a worker's compensation case.

Michael Duffy, assistant supervisor of elementary custodians since September 20, 1995, was in charge of supervising Siano. He testified to the importance of snow removal and the stress that poor attendance of one custodian places on other custodians. On nine occasions he wrote memorandums to Siano, and he met with Siano on five occasions prior to that. He indicated that he personally handed P-21 to Siano. Siano said that he had not seen the resolution transferring him, but Duffy stated that the resolution had been posted in the boiler room for the five or six days prior to the transfer. Siano indicated that he would do "better" with his attendance, but he did not improve. At one point Duffy had a problem locating Siano because his telephone number wasn't working. Siano said that he would give Duffy a working phone number, but he never did. A fellow custodian told Duffy where Siano lived.

Duffy indicated that Siano was not available for his evaluation, since he was not at work. Siano did not work or call on June 11, 1996, but was present on June 12, 14

and 17, 1996, when Duffy sent him to Dr. McKinney. There was a union meeting on June 18, 1996, and Siano said he would improve his attendance. Siano did not notify Duffy of his absences from June 18, 1996, to July 28, 1996. Duffy served him personally with charges on July 28, 1996, at which time Siano told Duffy he had just come from compensation court. Siano called in on July 28, 1996, and said he would not be in until August 8, 1996.

On cross-examination, Duffy indicated that Siano basically was not at work during May 1996. In regard to Siano's absence of September 25, 1995 (P-21), Duffy stated that Siano was supposed to report to the new worksite. Duffy was not sure if Siano showed up at the old worksite (he called the custodian's room two times and there was no answer), and agreed that Siano's attendance record did not reflect an absence for September 25, 1995. Duffy did not talk to Siano before he wrote the memorandum (P-21), but he talked to him when he came back to school. Siano said he had not been notified of the change, but the resolution had passed and Duffy believed Siano had seen it.

In further testimony, Duffy stated that he did not send P-25 through P-31 to Siano. Due to the legal nature of those memorandums, the Board attorney would have sent them to Siano. He believed that the Board attorney, Joseph Ryglicki, sent the memorandums to Siano. Ascolese also may have sent some of them. However, Duffy alleged that he had conversations with Siano regarding the substance of those memorandums. He further testified to several dates that appeared in his memorandums, but not on the Board record. After June 18, 1996, he could not locate Siano to find out why he was absent; his telephone numbers were disconnected. Advised in mid-June that Siano was in the hospital with hemorrhoids, Duffy went to the hospital to see Siano, but was advised that he had been released. Duffy went to the address given to him, and he handed the charges to Siano's roommate.

Next to testify was Dr. Ausberto McKinney, a medical doctor since 1967. He finished his training in 1975 as a doctor of medicine and has been in private practice since 1975. He completes medical examinations for North Bergen. He first examined

Siano on June 17, 1996, and prepared a report (P-34). He asked Siano to provide written documentation regarding his problem, but Siano failed to do so. McKinney received a note which indicated that Siano was out of work for back pain (a sprain) on certain days. Of import, McKinney completed a full medical examination of Siano and found nothing wrong with him, and nothing to prevent him from working.

John Siano, assigned to various schools during his tenure at North Bergen, sought to explain his numerous absences over the years. He alleged that during the 1992-93, 1993-94, 1994-95 and 1995-96 school years he had allergies. (His lips swelled and he had hives.) He may also have had the flu during 1992-93, and during that school year or 1993-94, he fractured his collarbone and was out of work for six to eight weeks. In July 1994 he injured his back (his worker's compensation claim is pending) and was out sick until January 15, 1995. After he returned to work, he got backaches every two or three months and was in the hospital in traction two times that year. He alleged that his absences from July 1994 to January 1995 and in March 1995, May 1995 and June 1995 were all compensation days. His back went out at the beginning of the 1995-96 school year, and he was out for surgery in June.

Siano also testified that he did not recall receiving various memos testified to by petitioner's witnesses. More particularly, he did not recall receiving P-8, did not recall a conversation in May 1992 with Ascolese regarding bringing in a doctor's note if ill, and did not recall a conversation with Ascolese regarding his number of absences. He did not recall receiving P-9, and did not have a recollection of the complaint in the letter. (He contended that he was not supposed to work on election day.) Petitioner alleged that he had not received P-10, and that neither Vice Principal Pellechio nor his supervisor met with him regarding his attendance in 1992-93. He did not receive P-11, nor did he recall a discussion with Principal Dandorph in March 1993 regarding his attendance. He did not receive P-12 and could not recall any discussions regarding where he lived. He claimed that he notified the Board as to where he lived, and did not receive any letters in March 1993 from Board attorney Joseph Ryglicki regarding his work status. He indicated that he did not receive P-13, did not have discussions with Vincent Ascolese regarding his work performance in July 1994, and did not know about

the substance of the memo. He had no idea that there was a problem with him and was not aware of a July 12, 1994 meeting.

Siano testified that he did not receive a copy of P-14, but he admitted that he had a meeting with Vincent Ascolese and John Kanzler regarding calling in. He explained that no one was at the switchboard prior to 9:00 a.m., and he was advised to call when it opened. He alleged that in the summer of 1994 he called in and said that he would be out an entire week. He was not told that this was improper. He admitted that he received a memo sent to all maintenance and custodial personnel which all custodians had to sign. He contended that the handwriting in the margin was not his and that there were no meetings with John Duffy or Vincent Ascolese at this time regarding his attendance. He could not recall receiving P-16 or having meetings with Vincent Ascolese regarding phoning in his absences, and said he was not advised that he had received letters regarding his work habits. He alleged that he had not requested meetings, was not aware of various meetings to take place in May 1996 (P-17), and did not participate in any discussions in May 1996 with Vincent Ascolese regarding his not showing up for meetings.

In regard to the evaluation dated May 21, 1996 (P-18), Siano admitted that the evaluation conference took place and that he was advised that he was absent a great deal. He had no opportunity to respond, and he did not sign the evaluation. He had never received prior evaluations. He alleged that he had not received a letter dated February 26, 1996, regarding absence from work (P-19 or P-20). Siano said he had given Mike Duffy his address before Duffy asked for it. He placed his name and address on the board in April 1996 and then wrote it down for Duffy in June 1996. Siano admitted that he received P-21, but he explained that he had not shown up for work at John F. Kennedy School on the date he was supposed to because he was not notified of his transfer from North Bergen High School to John F. Kennedy until 6:00 p.m. on September 25, 1995, because the custodial supervisor of the high school had forgotten to give the transfer notice to him. Thus, he finished the day at North Bergen High School and began to work at Kennedy on September 26, 1995. He had no discussion with Mike Duffy regarding not being at Kennedy on September 25.

In further testimony, Siano claimed that he did not receive P-22 or P-23, and that he had no discussions with Mike Duffy in October 1995 or December 1995 regarding calling in or his attendance. There was no disciplinary action taken against him. He admitted that he received a handwritten note from Mike Duffy dated January 24, 1996, and that he had received notes from Mike Duffy since Duffy was appointed. Siano opined that Duffy had a vendetta against him; Duffy would only provide him with a broken vacuum cleaner. Duffy did not tell him about any "problem" with the main hall, nor did Siano have any discussion with Duffy regarding the late sign-in notice. Siano did not receive P-25, and he could not recall discussions or meetings with Duffy, Ascolese or Ryglicki regarding his attendance in April 1996. He claimed he had not received P-26, P-28, P-29, P-30 and P-31. He had no discussions with Duffy in May 1996 regarding a failure to call in absences (P-26), and referring to P-29, P-30 and P-31, he claimed that he had called in his absence (he could not recall the first date of the absence) and said he would be out until further notice. In addition, he claimed that since the 1992-93 school year he has had no meetings with Ascolese, Kanzler, John Duffy or anyone else regarding the reasons he was absent.

On cross-examination, Siano admitted that he was a member of the union, but he believed that he had not received a copy of the contract until three years after he began his employment. Although he agreed that there is a policy regarding calling in sick and doctors' notes, he did not believe the policy required him to call in every day he was going to be absent. He contended that he followed the policy by calling in on the first day of the sickness and advising that he would be out the whole week. Although he admitted that his signature appeared on P-7, he contended that he handed in doctors' notes only if he was out for over 3 days; he had no copies of those notes. He said that he was not made aware of his excessive absenteeism through a formal conversation, but he agreed that Mike Duffy had indicated to him that he had used his sick and vacation days. Kanzler did not have a discussion with him or question him regarding attendance. He agreed that it is important to come to work and that missing time affects the school, but he contended that a back injury and allergy problems prevented this. He admitted that he had no back injury in 1992-93 and 1993-94. He

acknowledged his sick and personal day entitlement, but recalled only being docked one day, and claimed that no one talked to him regarding his sick time.

In further testimony, Siano agreed that he had not always notified the school of where he was living. He contended that he let them know where he was living before they had to look for him, and that Kanzler came to his home at two different addresses. He admitted that he received P-36, but claimed he received it two weeks after the date of the letter. He received P-37, but he could not remember if the statements in it were true. He admitted that he had received notification from Kanzler regarding his absences, but contended that he was out due to health problems.

On redirect examination, Siano referred to P-37 and claimed that he did not have a discussion with Kanzler regarding his absences or where he lived. He saw Kanzler once every two months, and notified the Board where he was living. Referring to P-36, he indicated that he called the Board between December 16 and January 19 and left a message that he would be out until further notice. He was not sure if Ascolese received the message. On recross-examination, Siano claimed that he had no other employment from 1989 to the present. He further stated that he called the Board in June 1996. Before he went to the hospital in June 1996, he advised the switchboard. He also told his girlfriend to call, but was not sure if she had.

Discussion

It is well-settled that excessive absenteeism may constitute grounds for the removal or suspension of a tenured employee. The Commissioner of the Department of Education, adopting this position, has stated that he would not hesitate to dismiss a tenured employee for chronic, persistent absenteeism, even when there is no charge of illegitimate use of sick leave. *Toms River Bd. of Educ. v. Marsden*, OAL Dkt. No. EDU 1188-84 (Aug. 26, 1985), *modified and aff'd*, Comm'r of Educ. (Oct. 10, 1985), *aff'd*, State Bd. of Educ. (Nov. 4, 1987). However, the Commissioner conditioned dismissal in such instances upon a demonstration by the board that it has attempted to correct

the pattern of absenteeism and that such efforts failed to elicit any change. *Ibid.* The *Marsden* case involved a teacher who exhibited an excessive absenteeism problem over a period of seven years. The board filed tenure charges against Marsden citing unbecoming conduct and chronic absenteeism as grounds for her dismissal. In deciding that the teacher's absences did not warrant dismissal, the administrative law judge (ALJ) noted that the record failed to show that the board took any corrective action to improve the teacher's pattern of excessive absenteeism. The Commissioner adopted the ALJ's decision.

The sheer number of a teacher's absences may warrant dismissal from her tenured position. In *Newark Board of Education v. Marshall*, OAL Dkt. No. EDU 10126-83 (July 3, 1984), *aff'd*, Comm'r of Educ. (Aug. 20, 1984), Marshall was a tenured teacher with a chronic absenteeism problem. The board filed tenure charges alleging, among other things, abuse of sick leave, physical incapacity, and excessive absenteeism.

During her tenure at the school, Marshall exhibited a pattern of excessive absenteeism. She was absent 184 days during the 1982-83 school year, 30 days during the 1981-82 school year, and 63 days during the 1980-81 school year. Her high rate of absenteeism during the 1982-83 school year was apparently due to her full-time attendance at law school. Her attendance at law school occurred without the knowledge and approval of the school board. The ALJ dismissed the teacher because of her excessive absenteeism and her deliberate failure to inform the board of her attendance at law school.

It is axiomatic that a tenured teacher must be available to teach on a consistent basis if the teacher is to provide the quality of services that the school board and students have come to expect. The Commissioner has stated:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by

> extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling.
>
> [*In re Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, Hudson County*, 1977 *S.L.D.* 403, 414.]

Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic programs. The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experience in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teachers is vital to this process.

However, it is evident that this rationale should not be strictly applied to a tenured member of the custodial staff. While a custodian plays an important role in the day-to-day operation of a school, he or she does not have a direct impact on the learning experiences of the students. It is the educational benefit resulting from a close relationship between the teacher and students that mandates a teacher's regular classroom attendance. Consequently, a custodian should not be held to the same attendance requirements as a classroom teacher.

A tenured public school custodian may not be removed or suspended from his position without justification. The suspension or dismissal of a tenured custodian is permitted if he has committed "neglect, misbehavior or other offense." *N.J.S.A.* 18A:17-3. In addition, since a custodian is a tenured employee, he could also be dismissed or suspended on the grounds of "inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A.* 18A:6-10.

It appears that while excessive absenteeism is a basis for the dismissal of a tenured custodial employee, a single charge of excessive absenteeism is generally not sufficient grounds for dismissal. *Trenton Bd. of Educ. v. White*, OAL Dkt. No. EDU

8408-86 (March 17, 1987), *adopted*, Comm'r of Educ. (May 1, 1987). White was a tenured custodian who was dismissed due to his long history of excessive absenteeism. His pattern of absenteeism spanned a four-year period. He was absent 31½ days during the period July 1985 to March 1986; 57 days during the period July 1984 to June 1985; 86½ days during the period July 1983 to June 1984; and 27 days during the period September 1982 to June 1983.

Because of this pattern of absenteeism, the board gave the custodian 90 days to correct his inefficiencies and absenteeism. Despite the notification, the custodian failed to correct his inefficiencies and excessive absenteeism during the 90-day period. Consequently, the board filed tenure charges against the custodian seeking his dismissal. After a hearing, the ALJ determined that dismissal of the custodian was justified due to his inefficiency and excessive absenteeism which were not corrected during the 90-day period.

In another custodian tenure case, the Commissioner stated that excessive absenteeism of a custodian which causes an adverse impact on the education process is sufficient grounds for dismissal. *Passaic Bd. of Educ. v. Viani*, 92 *N.J.A.R.*2d (EDU) 76. The board sought to dismiss a custodian based solely on the number of his absences. The Commissioner noted that although the number of absences was excessive, an additional showing of aggravating circumstances was necessary to warrant dismissal of a tenured custodian. The board may demonstrate aggravating circumstances by showing the "extent of harm such performance of a custodial employee has on the provision of a thorough and efficient education in '[a]dequately equipped, sanitary and secure physical facilities . . .'." *Id.* at 79, quoting *N.J.S.A.* 18A:7A-5(f).

State-Operated School District of Paterson v. Watson, 93 *N.J.A.R.*2d (EDU) 362, which involved charges of excessive absenteeism and insubordination against a tenured custodian, entailed a factual scenario similar to that of the instant matter. In *Watson*, I concluded that dismissal was warranted because Watson was notified of his problem of excessive absenteeism and failed to rectify it. Watson's failure to call in

and his excessive absenteeism inconvenienced the school and jeopardized the health and safety of the students and staff. The dismissal was affirmed by the Commissioner, who referred to the pattern of absenteeism over a protracted period of time and the repeated warnings and opportunities to improve given Watson by the district. Despite knowledge of the detrimental impact upon the efficient custodial operations of his school, the absence pattern continued.

With this backdrop, the Commissioner concluded as follows:

> The Commissioner finds it particularly troubling that irrespective of the District's clear policy requiring employees to notify the school of intended absences so that their necessary duties could be covered by other custodial staff, [Watson] failed to call in and report his absence on 19 occasions between July 1, 1991, and March 10, 1992.
>
> The Commissioner recognizes the position occupied by a school custodian as an important one
>
> > [a] school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the schoolhouse and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties.*** *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170, at 178.
>
> and she finds that the conduct of [Watson] established by the record falls far below the standard of dependability and responsibility which his position requires. His behavior demonstrates a total lack of concern for his duty to help assure that the students and staff of his school are provided with adequately equipped, sanitary and secure physical facilities, thus jeopardizing the health and safety of these individuals. Although he received repeated warnings over an elongated period of time to correct his deficiencies, [Watson] remained unwilling or unable to conform his conduct to the requirements of his position.
>
> [93 *N.J.A.R.*2d (EDU) at 367 (reference to exhibit omitted).]

In the present case, respondent was absent more than 300 days from the 1992-93 school year through the 1995-96 school year. More particularly, respondent was absent in excess of 50 days during the 1992-93 school year, in excess of 14 days during the 1993-94 school year, in excess of 170 days during the 1994-95 school year, and in excess of 90 days during the 1995-96 school year.

Petitioner contends that Siano's dismissal is warranted due to his excessive absences and his failure to call in as required. Petitioner argues that despite numerous written and oral warnings, respondent's attendance and compliance with Board policy never improved. Petitioner further claims that respondent's absences and failure to call in as required had a detrimental impact on the school. In support of its claim, petitioner states that respondent's absences made it difficult to keep the building clean and also affected the morale of the custodial staff.

As stated by petitioner, respondent does not deny the number of absences alleged or the fact that on various occasions he failed to properly call in. Respondent would have this tribunal conclude that he did not receive much of the documentation notifying him of his excessive absenteeism and failure to call in and that he had not been properly warned of this. He explained his more than 300 absences over a four-year period as being due to numerous physical ailments. Respondent believes that the Board's actions are unjustified because of the existence of these numerous physical ailments.

I have considered the testimony and evidence in this matter and am persuaded by the testimony and evidence presented by petitioner. I found the testimony and evidence presented by petitioner to be credible and worthy of belief and to the contrary of respondent's allegations. The evidence supports the conclusion that from 1991-92 there were concerns about Siano's attendance and his consequent inability to provide appropriate custodial services. The evidence demonstrates that numerous memos were sent by the administration from school year 1992-93 through school year 1995-96 advising and warning Siano that his absenteeism was excessive, atrocious, and would not be tolerated. He was informed both verbally and in writing on numerous occasions

of his failure to notify the school and thereby follow Board policy if he was going to be absent. He was advised that his absences were negatively affecting the maintenance of the school and the morale of the custodial staff, and thus jeopardizing the proper functioning of the school. The extensive documentation and testimony substantiate that these issues were discussed with Siano via many memos, letters and conversations. He was further advised of the requirements of attendance by virtue of notices, as well as the contract in effect during the applicable period of time. The instructions and advice given to Siano came from several sources, including Vincent Ascolese, John Kanzler, John Duffy and Michael Duffy.

The overwhelming evidence substantiates the fact that the administration was more than patient with Siano's excessive absenteeism and failure to call in to report absences. Although Siano would indicate, when confronted, that his attendance would improve, he failed to make any substantive changes in his attendance practices. Clearly, respondent was aware of the procedures regarding the taking of sick leave. He had been warned and counseled on numerous occasions about his absences and failure to call in, although respondent would have this tribunal believe that he was not so advised. Moreover, although respondent argues that he was out due to illness and as a result of a worker's compensation claim, he cannot explain the numerous absences which are on his record or his failure to call in to report absences as required. While it may be that he was ill on certain occasions, he failed to provide any medical testimony or documentation that each of his absences was due to a physical ailment. He has not produced the requisite doctors' notes to support his claim that his absences were for medical reasons. Petitioner's evidence substantiates that there was nothing prohibiting respondent from working. In fact, he was examined by Dr. Ausberto McKinney, who saw nothing wrong with respondent which would prevent him from working.

Clearly, respondent's failure to report to work or notify the school of his absences cannot be excused. Moreover, as pointed out by petitioner, sanctions can be imposed even if certain of the absences were shown to be medically legitimate. Respondent acknowledged the negative effect of excessive absenteeism, and it is clear

that his excessive absences and failure to call in inconvenienced the custodial staff and the school. His actions jeopardized the health and safety of the students and the staff by making it difficult to keep the facilities clean and operate the school in a reasonable manner.

In sum, petitioner has shown by a preponderance of the believable evidence that respondent engaged in a pattern of excessive absenteeism and failure to call in that amounted to insubordination. Respondent was warned and counseled about his absenteeism and insubordination problem on numerous occasions. Despite the efforts of petitioner to inform respondent of the problem and persuade respondent to correct the problem, the pattern of absenteeism and failure to call in continued. In addition, petitioner has demonstrated that respondent's absences and failure to call in had an adverse impact on the functioning of the school. Respondent's absences adversely affected the school's ability to provide sanitary, clean and secure facilities as required, and created a morale problem for the other custodial staff. That being so, respondent's absences jeopardized the health and safety of the students and staff. *Viani, supra*, 92 *N.J.A.R.*2d (EDU) at 79. Therefore, since petitioner has met its burden of proof on the charges of excessive absenteeism and failure to call in, dismissal of respondent is warranted notwithstanding his tenure. *Ibid.*; *see also In re Tenure Hearing of Dwight Hayes, School District of the Township of South Brunswick*, 1990 *S.L.D.* 1512; *Watson, supra*, 93 *N.J.A.R.*2d (EDU) 362.

Conclusion

Based upon the above discussion and findings of fact, I **CONCLUDE** that petitioner has proven by a preponderance of the believable evidence the tenure charges against respondent of excessive absenteeism. Petitioner has shown that respondent was notified of his problem of excessive absenteeism but failed to rectify it. Respondent's failure to call in and his excessive absenteeism adversely affected the students and staff. I further **CONCLUDE** that respondent's actions warrant dismissal from his employment with petitioner.

Order

For the foregoing reasons, it is **ORDERED** that the tenure charges are sustained, respondent's appeal is denied, and respondent is dismissed from his employment with petitioner.

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

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

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

April 4, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

April 4, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

Vincent Ascolese

John Kanzler

Michael Duffy

Dr. Ausberto McKinney

For Respondent:

John Siano

List of Exhibits

For Petitioner:

P-1	Agreement between the North Bergen Board of Education and the North Bergen Education Association for the period of July 1, 1992, through June 30, 1994
P-2	Agreement between the North Bergen Board of Education and the North Bergen Education Association for the period of July 1, 1994, though June 30, 1997
P-3	Record of absence for John Siano for 1989-90, 1990-91, 1991-92, 1992-93 and 1993-94
P-4	Record of absence for John Siano for 1994-95, 1995-96, and 1996-97
P-5	Record of personal days for John Siano for 1994-95 and 1995-96

P-6	Record of personal days for John Siano for 1989-90, 1990-91, 1991-92, 1992-93 and 1993-94
P-7	Memo to all maintenance and custodial personnel from John Duffy and Vincent Ascolese, dated December 15, 1992
P-8	Memo to John Siano from Vincent Ascolese, dated May 26, 1992
P-9	Letter to Mr. Ascolese from Robert J. Dandorph, dated November 4, 1992
P-10	Letter to Mr. Ascolese from Carmine E. Pellechio, dated December 14, 1992
P-11	Letter to Mr. Ascolese from Robert J. Dandorph, dated March 23, 1993
P-12	Memorandum to Leo Getoni from Vincent Ascolese, dated March 23, 1993
P-13	Memo to John Siano from Vincent Ascolese, dated July 12, 1994
P-14	Memo to John Siano from Vincent Ascolese, dated July 29, 1994
P-15	Memo to all maintenance and custodial personnel from John Duffy and Vincent Ascolese, dated February 7, 1996
P-16	Memo to John Siano from Vincent Ascolese, dated February 26, 1996
P-17	Memo to John Siano from Vincent Ascolese, dated May 17, 1996
P-18	Confidential evaluation for John Siano, dated May 21, 1996
P-19	Letter to John Siano from John J. Duffy, dated February 26, 1996
P-20	Memo to John Siano from Vincent Ascolese, dated June 4, 1996
P-21	Memo to John Siano from Mike Duffy, dated December 25, 1995
P-22	Memo to John Siano from Mike Duffy, dated October 10, 1995
P-23	Memo to John Duffy and Vincent Ascolese from Mike Duffy, dated December 8, 1995
P-24	Handwritten letter to John Siano, dated January 24, 1996

P-25	Memo to Vincent Ascolese, John Duffy and Joe Ryglicki, Esq., from Mike Duffy, dated April 18, 1996
P-26	Memo to Vincent Ascolese, John Duffy and Joe Ryglicki from Mike Duffy, dated May 15, 1996
P-27	Memo to Vincent Ascolese, John Duffy and Joe Ryglicki from Mike Duffy, dated April 24, 1996
P-28	Memo to Vincent Ascolese, John Duffy and Joe Ryglicki from Mike Duffy, dated May 20, 1996
P-29	Memo to Vincent Ascolese, John Duffy and Joe Ryglicki from Mike Duffy, dated May 30, 1996
P-30	Memo to Vincent Ascolese, John Duffy and Joe Ryglicki from Mike Duffy, dated May 31, 1996
P-31	Memo to Vincent Ascolese, John Duffy and Joe Ryglicki from Mike Duffy, dated June 3, 1996
P-32	Letter to John Siano from John J. Duffy, dated June 26, 1996 (two pages)
P-33	Letter to John Siano from John J. Duffy, dated July 22, 1996 (three pages)
P-34	Letter to Michael Duffy from Ausberto McKinney, M.D., dated June 29, 1996
P-35	Letter to Michael Duffy from Ausberto McKinney, M.D., dated June 29, 1996
P-36	Letter to John Siano from John J. Duffy, dated January 4, 1995
P-37	Memo to John J. Duffy from John Kanzler, dated March 25, 1993

For Respondent:

R-1	Work certificate for John Siano, dated April 23, 1996
R-2	Memo to To Whom it May Concern from Dr. Anthony R. Scarpello, dated June 7, 1996, and May 29, 1996
R-3	Memo to To Whom it May Concern from Dr. Anthony R. Scarpello, dated June 12, 1996

R-4	Report of accident for employee John Siano, dated July 29, 1994
R-5	Employer's first report of accidental injury or occupational illness, dated August 2, 1994
R-6	Resolution regarding John Siano, certification of tenure charges, dated July 17, 1996 (three pages)
R-7	Memo to To Whom it May Concern from Richard A. Boiardo, M.D., regarding John Siano, undated
R-8	Memo regarding John Siano from R. A. Boiardo, dated August 29, 1995
R-9	Memo from Dr. Boiardo, dated May 21, 1996

OAL DKT. NO. EDU 7951-96
AGENCY DKT. NO. 298-7/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SIANO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF NORTH BERGEN,	:	DECISION
HUDSON COUNTY,	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4. However, in that these exceptions are a verbatim reiteration of respondent's post-hearing arguments before the Administrative Law Judge (ALJ), the Commissioner does not herein recount said arguments.

Subsequent to the expiration of the exception and reply period provided by *N.J.A.C.* 1:1-18.4, yet prior to issuance of the decision herein, respondent filed a motion to compel the restoration of his salary payments, retroactive to April 1, 1997. The Board was thereafter provided an opportunity to file a response to said moving papers. In that no response was filed by the Board, the Commissioner's determination, below, is rendered on the basis of respondent's moving papers. Respondent alleges that, subsequent to the issuance of the initial decision by the OAL on April 8, 1997, the Board denied him his regular salary checks for the pay periods ending April 15, 1997 and April 30, 1997, which denial "***constitutes clear defiance of State law***." (Respondent's Motion at pp. 1, 4) Respondent argues that "[o]nce the statutorily

authorized time for a suspension without pay has expired, there is no authority whatsoever for the Board to withhold an employee's salary." (*Id.* at pp. 3, 4) Thus, respondent seeks an order compelling the Board to restore his salary, effective April 1, 1997,* and further seeks interest, pursuant to *N.J.A.C.* 6:24-1.16, inasmuch as respondent avers that the Board's action in denying his salary was taken in bad faith.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the Board has readily demonstrated by a preponderance of credible evidence that respondent is guilty of excessive absenteeism, and that said absenteeism has adversely impacted the operations of the District. The Board has further proven its efforts to fairly notify respondent of his absenteeism problem and has given him the opportunity to correct the deficiency; however, respondent has failed to improve his attendance.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Respondent is terminated from his tenured position as a custodian in the Board's school system as of the date of this decision. The Commissioner further determines, however, that, based on the clear language of *N.J.S.A.* 18A:6-14, respondent is due retroactive earned salary payments, together with emoluments, from April 1, 1997 until the date of the decision herein. The Commissioner declines to award respondent interest in conjunction with said retroactive salary payments.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Respondent argues that he has not received a salary since March 31, 1997. (Respondent's Motion at p. 1)

JUNE 13, 1997
DATE OF MAILING JUNE 13, 1997

318-97

RIDGEWOOD EDUCATION ASSOCIATION, ELAINE HIGGINS AND ANN HOVAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

JUNE 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12492-95

RIDGEWOOD EDUCATIONAL ASSOCIATION, ELAINE HIGGINS AND HOVAN,
Petitioners,
v,
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY
Respondent.

Gregory T. Syrek, Esq., for petitioners
(Bucceri and Pincus, attorneys)

Peter Schultz, Esq., for respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Record Closed: May 7, 1997 Decided: May 8, 1997

BEFORE: **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF CASE

This case was transmitted to the Office of Administrative Law (OAL) on December 29, 1995 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

May 9, 1997
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

5/14/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

SETTLEMENT AGREEMENT

IN THE MATTER OF: RIDGEWOOD EDUCATION ASSOCIATION, ELAINE HIGGINS AND ANN HOVAN,

PETITIONERS,

V.

RIDGEWOOD BOARD OF EDUCATION,

RESPONDENT.

OAL DOCKET NO. EDU 04706-92N, on remand, EDU 12492-95

The Ridgewood Education Association (hereinafter referred to as the "Association"), located at Willard School, 601 Morningside Road, Ridgewood, NJ 07450-1399, Elaine Higgins (hereinafter referred to as "Higgins") residing at 417 Sheffield Road, Ridgewood, NJ 07450 and Ann Hovan (hereinafter collectively referred to as "Hovan"), residing at 160 Claremont Road, Ridgewood, NJ 07450 and The Ridgewood Board of Education (hereinafter referred to as "the Board") hereby agree to the following terms in full and final settlement of all claims brought or which could have been brought in the matter of the RIDGEWOOD EDUCATION ASSOCIATION, ELAINE HIGGINS and ANN HOVAN v. RIDGEWOOD BOARD OF EDUCATION, bearing OAL Docket No. EDU 04706-92N, on remand, OAL Docket No. EDU 12492-95 and in the matter of Ridgewood Education Association v. Ridgewood Board of Education, bearing New Jersey Public Employment Relations Commission No. CO-H-93-69:

1. The Association, Higgins and Hovan (hereinafter collectively referred to as "Petitioners") hereby dismiss with prejudice the above-captioned Petition to the Commissioner of Education that is pending before the Office of Administrative Law;.

2. The Ridgewood Education Association ("Association") shall withdraw with prejudice its unfair practice charge against the Board which bears Public Employment Relations Commission Docket No. CO-H-93-69. Said withdrawal shall take effect upon the Board of Education's retraction of the policy referred to in paragraph number 3 hereof;

3. The Board will retract those portions of Ridgewood Board of Education Policy No. 4123 which limit contracts for supplemental teachers to not more than two consecutive years. This policy will be retracted within thirty (30) days of the date of execution of this agreement by all parties.

4. The School District will notify the Association of vacancies which occur in supplemental teacher positions by forwarding to the Association a copy of the job posting for any such vacancy.

5. Supplemental teachers whose employment contracts have been nonrenewed pursuant to the aforesaid policy shall be permitted to apply for vacant teaching positions which may arise subsequent to the ratification of this agreement by the Board. All applicants for said positions will be considered in the normal course of the applicant review process.

6. All claims for relief in the above referenced action and any and all claims for backpay by or on behalf of any supplemental teacher who may have been affected by the aforesaid policy are hereby waived.

7. The terms of this agreement are subject to formal ratification by the Board. The undersigned representatives hereby acknowledge that they are duly authorized to execute this Agreement.

8. The parties acknowledge that they fully understand the terms of this Agreement and the duties and obligations enumerated herein.

9. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument in writing executed by the parties.

10. This Agreement and the provisions it contains shall not serve to establish any precedent or practice as between an employee of the Board and the Board, and the Board reserves its right to exercise its discretion on a case-by-case basis.

11. This Agreement shall be subject to the laws of the State of New Jersey.

RIDGEWOOD BOARD OF EDUCATION

By: _____

Dated:

PETITIONERS
RIDGEWOOD EDUCATION ASSOCIATION

By: Lee Kapes
LEE KAPES, PRESIDENT

Date: 4/16/97

Elaine Higgins
ELAINE HIGGINS

Date: 4/16/97

Ann L Hovan
ANN HOVAN

Date: 4/18/97

OAL DKT. NOS. EDU 12492-95 and EDU 4706-92
AGENCY DKT. NO. 222-5/92

RIDGEWOOD EDUCATION ASSOCIATION, ELAINE HIGGINS AND ANN HOVAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record of this matter and the initial decision incorporating a stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.* The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

* It is noted that Term 7 of the Settlement Agreement specifies that such agreement is contingent upon "formal ratification by the Board." Because agency approval renders this settlement a final decision pursuant to *N.J.A.C.* 1:1-19.1(c)2, accord to its terms by all necessary parties must be accomplished prior to the Commissioner's approval. In that the record of this matter indicates that Board approval of the agreement was achieved in late April, the Commissioner determines that approval of the settlement can be granted.

JUNE 17, 1997
DATE OF MAILING JUNE 17, 1997

319-97

ANNA RODRIGUEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9817-95
AGENCY DKT. NO. 327-8/95

ANNA RODRIGUEZ.,
Petitioner,
v.
ELIZABETH BOARD OF EDUCATION,
Respondent.

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett, attorneys)

Tamara Burke, Esq., for respondent,
(Murray, Murray & Corrigan, attorneys)

Record Closed: May 7, 1997 Decided: May 9, 1997

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on September 8, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 9, 1997
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/14/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

BERGMAN & BARRETT
Michael T. Barrett, Esq.
9 Tamarack Circle
Skillman, New Jersey 08558
(609) 921-1502
Attorney (s) for Plaintiffs

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
MAY 7 10 56 AM '97

Plaintiff ANA RODRIGUEZ vs. Defendant ELIZABETH BOARD OF EDUCATION	BEFORE THE COMMISSIONER OF EDUCATION Civil Action Docket No.: EDUOR 09817-95N ***STIPULATION OF DISMISSAL***

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice ~~(without prejudice)~~ and without costs against either party.

Dated:

Tamara Burke
Tamara Burke, Esq
Attorney (s) for Defendant (s)

Dated: 4-17-97

Michael T. Barrett, Esq.
Attorney (s) for Plaintiff (s)

BERGMAN & BARRETT

ATTORNEYS AT LAW

9 TAMARACK CIRCLE
MONTGOMERY KNOLL
U. S. HIGHWAY 206 NORTH
SKILLMAN, NEW JERSEY 08558

(609) 921-1502

MAILING ADDRESS:
P. O. BOX 1273
PRINCETON, NEW JERSEY 08542

TELECOPIER # 609-683-0288

EDWARD J. BERGMAN
MICHAEL T. BARRETT (N.J & PA. BARS)

March 14, 1997

The Honorable Kenneth R. Springer
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Anna Rodriguez v. Bd. of Ed., City of Elizabeth
OAL Docket Number: EDUOR 09817 -95 N

Dear Judge Springer:

This letter will confirm my March 14, 1997 telephone conversation with your chambers wherein I advised that the above matter has been fully and finally setlled.

The Board has already resolved to reinstate the days. I will forward to Your Honor a copy of the actual resolution upon my receipt.

Respectfully,

BERGMAN & BARRETT

Michael T. Barrett

MTB.ars
cc: Tamara Burke, Esq.

OAL DKT. NO. EDU 9817-95
AGENCY DKT. NO. 327-8/95

ANNA RODRIGUEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Commissioner finds that although the ALJ characterized the initial decision as a settlement, in that no settlement terms were included in the document signed by the parties and appended to the decision,* this matter shall, instead, be considered a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Rather, the parties signed a Stipulation of Dismissal, dated April 17, 1997.

320-97

320-97

ANTHONY GRASSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

JUNE 18, 1997

OAL DKT. NO. EDU 7905-96
AGENCY DKT. NO. 286-7/96

ANTHONY GRASSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 18, 1997
DATE OF MAILING JUNE 18, 1997

321-97

MARGUERITE GUARISCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JUNE 18, 1997

OAL DKT. NO. EDU 9800-95
AGENCY DKT. NO. 296-7/95

MARGUERITE GUARISCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 18, 1997
DATE OF MAILING JUNE 18, 1997

322-97

322-97

O.U.L., on behalf of minor grandchildren, C.H.L. and D.I.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND ALAN W. SUGARMAN,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

JUNE 18, 1997

OAL DKT. NO. EDU 7571-96
AGENCY DKT. NO. 183-5/96

O.U.L., on behalf of minor grandchildren, C.H.L. and D.I.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND ALAN W. SUGARMAN,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 18, 1997
DATE OF MAILING JUNE 18, 1997

324-97

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNIE HARRELL,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ASBURY PARK, MONMOUTH COUNTY.	:	
	:	

JUNE 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 255-97

AGENCY DKT. NO. 599-12/96

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Petitioner,

v.

DONNIE HARRELL,

Respondent.

Kathleen Smallwood-Johnson, Esq., for petitioner (Hill Wallack, attorneys)

Thomas W. Cavanaugh, Jr., Esq., for respondent (Chamlin, Rosen, Cavanaugh & Uliano, attorneys)

Record Closed: May 23, 1997 Decided: May 29, 1997

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 15, 1997, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein. [1]

[1] Settlement agreement incorrectly captions this matter as Donnie Harrell v. Asbury Park Board of Education.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 28, 1997
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/3/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 5 1997
DATE

Barbara A Harnak
OFFICE OF ADMINISTRATIVE LAW

ej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1997 MAY 23 A 9:51

CHAMLIN, ROSEN, CAVANAGH & ULIANO
A Professional Corporation
268 Norwood Avenue
P.O. Box 38
West Long Branch, New Jersey 07764
(908) 229-3200

ATTORNEYS FOR DONNIE HARRELL

IN RE: DONNIE HARRELL

Asbury Park High School District, Monmouth County.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

OAL DOCKET NO.:
EDUTH 00255-97S

AGENCY REF. NO. 599-12/96

Civil Action

STIPULATION OF SETTLEMENT

This matter having come before the Office of Administrative Law pursuant to the filing of tenure charges against the Respondent on October 22, 1996; and,

WHEREAS, the Asbury Park High School District Board of Education (hereinafter referred to as "Board") has determined to withdraw the aforementioned charges based upon a proposed settlement of the controversy as set forth herein, the parties do hereto, through their counsel, execute the following Stipulation and request that the charges be withdrawn by the Office of Administrative Law as a result of the following findings.

1. Donnie Harrell is a licensed and certificated teacher who is in his seventh year of employment with the Asbury Park Board of Education. He has served throughout this time as a music teacher and held that position at the Asbury Park High School at the time of the events related herein.

2. On or about October 22, 1996, charges were filed against Mr. Harrell alleging misconduct and sexual harassment, and on December 16, 1996, the Asbury Park Board of Education voted to certify the tenure charges to the Commissioner of Education. The charges were sent to the Office of Administrative Law on January 22, 1997.

3. The charges which were filed and later certified were the product of a Statement of Evidence executed by Patricia A. Desmond, Vice Principal of Curriculum and Instruction at the Asbury Park High School. The Statement of Tenure Charges was executed by James H. Mundy, Ed.D., the Superintendent of Schools. Neither of the above administrators had any direct knowledge nor had they made personal observations of the facts referenced in the charges. The only first party evidence given was by a student, who was the alleged victim of the allegations. Despite the fact that various other witnesses were mentioned in the charges, at no time did the student complainant produce corroboration from any alleged witnesses.

4. The investigation of the Board charged that, based upon the statement of the student, the teacher had committed unbecoming conduct between November of 1995 and February of 1996, but no explanation was ever provided as to why the student had not notified the administration of the school until September of the next school year regarding the allegations.

5. In the Statement of Evidence and Statement of Position, Mr. Harrell, under oath, vigorously denied any and all of the material allegations made by the student and challenged her

credibility. The only allegation he admitted to was giving her a ride on several occasions, either home or to the doctor, as a courtesy.

6. Criminal charges were submitted to the Monmouth County Prosecutor's Office and the matter was presented to a grand jury, which declined to find probable cause in connection with the presentation. The matter was investigated by the Division of Youth and Family Services during October of 1996, but despite their investigation, they have not recommended prosecution of the charges nor even rendered a final report.

7. Subsequently, the Board of Education considered the facts that a no bill was returned on the criminal charges; it did not have a final determination from DYFS to substantiate any of the charges and that it received information that the student in question had previously made similar charges against other adults and recanted those charges at a later date. The Board therefore requested that the teacher return to his position, which he did on February 25, 1997.

8. As a result of the foregoing, the parties have agreed that the matter should be resolved by dismissing the tenure charges. The Petitioner has agreed, as a result of having placed himself in the position of transporting the student on several occasions without any other persons present, in violation of Board policy, to accept a one-year incremental denial. The Board has also agreed to restore his back pay for the time encompassed by the 120-day suspension period, or the portion thereof that actually took effect, and further agrees they will restore him to

the proper step and grade on the salary chart the year following the loss of increment hereinabove referred to.

9. The Board has determined that it cannot successfully prosecute this matter for the reasons set forth above and both parties ask the Commissioner of Education to approve the settlement.

The parties have agreed, therefore, that based upon the foregoing and other considerations, the matter should be resolved by way of a mutual agreement between the parties, and a resolution has been adopted by the Asbury Park Board of Education to withdraw the tenure charges presently pending in the matter hereinabove referenced, and effectuate the settlement in accordance with the conditions contained herein, contingent upon approval by the Office of Administrative Law and the Commissioner of Education.

THOMAS W. CAVANAGH, JR., ESQ.
CHAMLIN, ROSEN, CAVANAGH & ULIANO
Attorney for Respondent

KATHLEEN SMALLWOOD JOHNSON, ESQ.
HILL WALLACK
Attorney for Petitioner

Dated: May 14, 1997

LAW OFFICES

CHAMLIN, ROSEN, CAVANAGH & ULIANO

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MAILING ADDRESS:
P.O. BOX 38
WEST LONG BRANCH, N.J. 07764

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1997 JUN -2 A 10:37

May 28, 1997

Hon. Steven C. Reback
Office of Administrative Law
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625

Re: Donnie Harrell v. Asbury Park Board of Education
OAL Docket No. EDUTH 00255-97S
Agency Ref. No. 599-12/96
Our File No. 29124

Dear Judge Reback:

It is my understanding that Ms. Smallwood Johnson has forwarded to you a fully executed Stipulation of Settlement in the above named matter.

I would like to supplement the record with the enclosed Resolution adopted by the Asbury Park Board of Education on May 20, 1997.

Very truly yours,

THOMAS W. CAVANAGH, JR.

TWC/mmc
encl.
cc: Kathleen Smallwood Johnson, Esq.

Post-It® Fax Note 7671	Date 5/20	# of pages ▶ 1
To K. S. Johnson	From D. Mylchreest	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 609-987-2455	Fax #	

BOARD OF EDUCATION
LAKE AVENUE
ARK, NJ 07712
(908) 775-2663, EXTENSION 233
FAX: (908) 988-7315

CERTIFICATE

I, Dora E. Mylchreest, Board Secretary of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, **HEREBY CERTIFY** that the foregoing annexed extract from the Executive Session Minutes of a meeting of the governing body of the Board of Education duly called and held on May 14, 1997 and has been compared by me with the original minutes as officially recorded in my office in the Executive Session Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

Board Members Present: Mr. Bond, Mrs. Cooke, Mr. Fantini, Mr. Moor, Mr. Neal, Mr. Young, Mr. Famularo, Vice President and Mrs. Solomon, President

On the Matter of Mr. Donnie Harrell, Mr. Peterson presented the following Resolution for the Board's consideration:

WHEREAS, the Asbury Park Board of Education has reviewed the Settlement Agreement regarding Mr. Donnie Harrell, and

WHEREAS, the Board has directed the return of Mr. Harrell to the classroom and the withholding of his increment for the 1997-98 school year only, and

WHEREAS, the Board does not wish to pursue tenure charges,

The Board hereby approves the Settlement Agreement.

The Board Members present discussed the settlement terms and there was consensus to support the adoption of this Resolution.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the School District this 20th day of May 1997.

Dora E. Mylchreest
Board Secretary/Business Administrator

OAL DKT. NO. EDU 255-97
AGENCY DKT. NO. 599-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNIE HARRELL,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ASBURY PARK, MONMOUTH COUNTY.	:	
	:	

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

Based upon such review, the Commissioner must reject the terms of accord because there is no indication that the teacher was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6(a)1, to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. The State Board has ruled in *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846, that such disclosure should be part of any agreement which results in loss of position.

Accordingly, the instant settlement is rejected and remanded to the Office of Administrative Law for further action consistent with this determination.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 18, 1997
DATE OF MAILING JUNE 18, 1997

323-97

323-97 E

H.K. AND A.K. ON BEHALF OF MINOR CHILD, I.K.,	:	
PETITIONERS	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

JUNE 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 4723-97
AGENCY DKT. NO. 207-6/97

H.K. AND A.K. ON BEHALF OF MINOR CHILD, I.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT,
Respondent.

Stuart Surick, Esq., for petitioners

Russell Weiss, Jr., Esq., for respondent (Carroll & Weiss, attorneys)

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

Petitioners seek an order reversing the decision of the West Windsor-Plainsboro Board of Education that I.K. not be graduated from West Windsor-Plainsboro High School on Tuesday, June 17, 1997, based on excessive absence and failure to accumulate the minimum credits required. As emergent relief, they request:

1. The Board's decision denying credit for Physical Education, Creative Cooking and Catering, Resource Center and Writing Laboratory be reversed;

2. I.K. be given credit for American Studies II because of his diagnosed learning disabilities and the failure of the school to implement his IEP;

3. I.K. be graduated with his class on June 17, 1997, and

4. Compensatory and punitive damages, attorney's fees and costs of suit.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law, with a request for expedited hearing, pursuant to *N.J.S.A.* 52:14F-1 through -13. The judge received the petitioners' papers on June 13, 1997, and the respondent's on June 16, 1997. The matter was heard on June 16, 1997, at the Office of Administrative Law, Trenton. For the reasons that follow, the motion is **DENIED**.

Upon opening the record, the parties stipulated that the academic credits, with the exception of Physical Education, no longer are in dispute. It is further stipulated that I.K. was absent from his Physical Education class on twenty-one days in the 1996-97 school year.

I.K. testified that he is a seventeen-year-old senior at West Windsor-Plainsboro High School. He has been in the district for two years. He has been classified as perceptually impaired (PI) since the early grades. This classification followed him to West Windsor-Plainsboro.

Excessive absence in Physical Education is his problem. He learned after going on a trip in March that Physical Education attendance was a problem. Prior to this, his mother told him "a couple of times" that she had spoken to the school about his attendance, but "everything's fine." He had no discussions with his guidance counselor or with his case manager concerning his Physical Education class attendance.

The witness had conferences with his case manager about his American Studies course, but not attendance. The high school vice principal told him nothing about attendance problems. He had no reason to believe that going to Cancun at the same time as the senior class trip to Florida would be a problem. He says he spoke to several teachers about it and they expressed no

reservations. The only call to the home that I.K. is aware of concerned attendance at the senior prom.

In the 1996-97 school year, the witness suffered many illnesses. He also suffered from a deep depression. He began psychological treatment in his junior year for this problem. When he was most affected, the condition made him slow and uninterested in what was going on about him. Attendance at school was difficult. He continued in therapy until February 27, 1997. As a coping strategy, the witness "stepped aside" when problems appeared overwhelming. He would go to a "safe place." The witness explained that stepping aside meant going home. "Stepping aside" correlated with his class cuts. However, he did not cut any Physical Education classes. Days on which he missed Physical Education classes were days on which he was absent from school.

The witness failed American Studies in the first semester of his senior year. He knew he had low grades. He was denied prom attendance and felt bad about it. He "tuned out."

The witness also stated he had no idea that a trip to Cancun while the senior class was on a trip to Florida would in any way cost him academic credit.

The witness stated, "I went to school as much as possible," during the senior year.

The witness learned after the Cancun trip that there was a problem. His mother had had conversations with administrators at least a couple of times. The witness received a student handbook, but states he does not use it. He does not read bulletin boards. He spoke with the vice principal five or six times during his senior year. Some of those meetings occurred before his trip to Cancun. He usually saw the vice principal because of cutting classes. The vice principal did not explain to him the school policy concerning attendance.

The witness recalls serving in-school suspensions. He received a letter after his fifth class cut and spoke to the vice principal, Mr. Fogas. His parents told him that they had spoken to the vice principal and his parents told him everything was fine. He believed them.

A.K. testified. She is the mother of I.K. He was diagnosed early with learning problems and repeated his first grade. He went to a private school for his elementary grades. He was also tutored at home. In junior high school, his program was a combination of mainstream classes and resource room time.

The family decided to move to West Windsor before I.K.'s junior year. The parents met with the child study team (CST). The parents also met with a history teacher who noticed a learning problem. The IEPs for 1995-96 and 1996-97 were introduced as Exhibits J and L, respectively. Exhibit K was the October 1995 educational re-evaluation.

The witness testified extensively about illnesses I.K. has suffered over the years and equally extensively concerning his educational problems and bouts of depression.

When CST testing indicated that I.K. was "high on the depression scale," the parents asked the CST to recommend therapists. The parents chose one from a list of recommended persons.

In February 1996, I.K. was seeing his therapist at least once per week. He was also referred to a psychiatrist in New York City who, according to the mother, used the term "borderline psychotic." A medication was prescribed. I.K. stopped taking the medication in February 1997.

The period December 1996-January 1997 was marked by severe problems. I.K. was moody and angry. In March and April, the parents noted some improvement. I.K. had a girlfriend and appeared happier, at least until he could not attend the prom. He also suffered several physical illnesses.

A.K. stated that she received notices from the school concerning I.K.'s attendance. She received what is known as a five-day absence letter dated October 18, 1996, from the assistant principal. She believes she called and spoke to the assistant principal. However, she did not

discuss the letter with I.K.; "it was only five absences." Because I.K. was absent only because he was ill, she saw no reason to upset him (Exhibit W).

The witness also received a letter dated December 4, 1996. This is called a ten-day letter. It states clearly, "Should his absences exceed eighteen (18), [I.] may be in jeopardy of losing credit for the year."

The witness called the assistant principal and told him that I.K. had been ill and that the absences were "real." A.K. stated there was no explanation of attendance policy offered to her other than what was in the letter. She is sure there was no mention of a conference with school personnel (Exhibit U).

The parents received a letter dated February 10, 1997, which stated

> As stated in the letter sent to you when [I.] reached ten (10) days of absence in at least one of his classes, it has now become necessary to schedule a meeting with the Attendance Review Board. . . . For your records, a copy of his attendance is attached.
>
> Please contact me upon receipt of this letter at . . . so a conference may be scheduled.

Despite the fact that A.K. spoke with the assistance principal, she claims there was on conference. She told the assistant principal that I.K. was really ill. The assistant principal did not request a meeting (Exhibit R).

I.K. was in Cancun, Mexico, with three other West Windsor-Plainsboro pupils while the senior class was on its annual trip to Florida. At the same time, the parents received a letter dated March 19, 1997, which stated

> As stated to you when [I.] reached the fifth (5) tenth (10) and fifteenth (15) day of absence in at least one of his classes, it has now become necessary to inform you of [I.'s] eighteenth (18) day of absence in one of those classes. In compliance with our

> attendance policy, the next absence will result in a loss of credit for the class. (Exhibit S)

According to the witness, this told her that I.K. was at the limit. One more absence and he would lose credit. She assumed the trip to Cancun would not be counted as absence because most of the senior class was on the class trip.

A.K. called the assistant principal. He stated that the in-school suspensions were imposed for cutting classes. The witness could not recall if she told the assistant principal that I.K. was in Cancun. If she had known of the attendance problem, she would not have allowed him to go on the trip. She thought it was class vacation time. The witness did not call the school, as she said she always had, when I.K. would be absent or when she received a letter from the school. In this instance, the school called them.

After the witness received the ten and fifteen-day letters, she spoke to I.K., trying to be "conversational." She said words to the effect that we just have to watch this. I.K. indicated to her no conversation with any school person concerning attendance. There was no mention of a problem with the Cancun trip before the trip. Because of his excessive absences, I.K. was denied attendance at the prom.

The parents met with the vice principal and the full Attendance Review Board. Prom attendance, nevertheless, was denied.

The witness does see a purpose to a school attendance policy and agrees the school has a right to require a minimum number of days of attendance. Exhibit Q states that, if I.K.'s absences exceed eighteen, he may be in jeopardy. To her, use of "may be" is not definite, she is a positive person so, to her, "may be" is positive. The witness did not ask the assistant principal if illnesses were excused or excusable. However, Exhibit W, the letter of October 18, 1996, clearly states

> While it is understandable that a student may be absent, you should know that all absences except the following are chargeable to your child's attendance record:

. state approved religious holidays
. school approved homebound instruction
. suspension
. legal holiday
. school sponsored activities.

Should you have any questions, please feel free to contact me at . . ., so that we may discuss this further.

The witness stated that she told I.K. she received letters from the school about attendance, but she did not want "to bother" I.K. about it. He was in a major depression. She did not want to create any stress on him or drag him down.

The trip to Cancun was a month in the planning. While I.K. was away, the parents received the fifteen-day letter dated February 10. It never occurred to A.K. that the trip could affect I.K.'s attendance. She stated that I.K. told her a little about the school trip to Florida. No matter where he went, she believed, he would be out of school for three days. When asked how the witness knew that the Florida trip constituted an excused absence, her response was that she wasn't counting and that she wasn't thinking about what was legal or not legal. I.K. simply told her, "the seniors are going away." According to the witness, she learned at the Review Board meeting, for the first time, that the days of the Florida trip were not vacation days.

The assistant principal at West Windsor-Plainsboro High School testified. The Board policy is to require a minimum of 162 days attendance in each year-long course. This means that up to eighteen days can be excused. If eighteen days of absence is exceeded, the pupil is placed temporarily in a no-credit status. A review is then done. After review, a decision is reached concerning the award of credit, or not.

Attendance policies are clearly stated in the student handbook, which each pupil is obliged to read. Attendance policies are reviewed at the beginning of school assembly. Guidance counselors know and discuss the policies. The policies are referred to at least six times per year on the school's electronic message board. Attendance is reported on report cards.

The witness spoke with I.K. approximately nine times throughout the year. At least four or five of these discussions were about attendance.

In a typical meeting following a cut of classes by I.K., he would schedule a meeting. The standard operating procedure was to pull up the pupil's attendance and academic records on the computer while the pupil was present.

In some or all of these meetings, the witness told I.K. the attendance policy. The computer showed when letters went out warning of the consequences of more than eighteen days' absence.

Attendance is monitored. The five-day notice is generated, when appropriate, and copies are sent to him, the guidance counselor and, if the pupil is a special education pupil, the case manager.

The ten-day letter calls for a meeting of the student, parents and guidance counselor. The guidance counselor in this case had a telephone conference with A.K.

After the fifteen-day notice, parents usually make contact. The attendance policy is clearly restated. The consequences are stated. The right to an appeal to the Review Board is stated. In the present case, after the fifteen-day letter, he spoke with A.K. He has spoken to her at least four times. All absences are chargeable. The only excusable absences are the five categories listed above.

The witness spoke with I.K.'s guidance counselor. She knew of I.K.'s ten-day letter because I.K. often dropped in to talk with her. The assistant principal also stated that no one contacted him about the pupil's trip to Cancun before the trip occurred.

The guidance counselor had more than fifteen conferences throughout the year with I.K. At least one was about attendance, following the ten-day letter. There was a telephone conference with A.K. about the same time.

The Attendance Review Board did not meet after the fifteen-day letter. The witness told A.K. of her right to a meeting with the Board, but she declined. The witness explained to A.K. what would be entailed. The witness explained to A.K. that absences for illness count. There was at this time, however, no discussion of the Cancun trip.

Seniors not on the class trip are expected to attend school on regular school days.

DETERMINATION AND ORDER

The petitioner argues that denial of graduation, concededly a privilege, would in the present case be irreparable harm. I.K. is prone to depression. These circumstances, particularly the concern of the parents, should be a consideration and the first letter (Exhibit W) should not be given more emphasis.

I.K. had only six absences in the second semester. However, three of those were days he was in Cancun and were unexcused absences. His total of absences is now twenty-one, three over the limit.

A.K. and H.K. were focusing on I.K., not the school's policies. They wouldn't do something knowingly to jeopardize I.K.'s graduation. I.K. has had to work hard, even struggle, to pass his academics. He should be praised for his effort. He did not understand the consequences of the trip to Cancun.

The district counters that it is not in business to deny things to children. It must have standards, expressed in reasonable policies, to carry out the responsibilities placed upon it by the State. The district has done this.

There has been no failure to inform here. Nor is there irreparable harm. Mere nonattendance at a graduation ceremony is not irreparable harm. I.K. has a summer school option and still can receive a diploma before September. Most importantly, in other cases, policies with a lower than eighteen-absence threshold have been sustained.

Irreparability of Harm

As the Board correctly notes, a party seeking emergent relief must satisfy the standards in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner has consistently found that denial of attendance at graduation exercises does not constitute irreparable harm. The case law is remarkably consistent that attendance at graduation ceremonies is a privilege, not a right. That privilege may be withheld in the interest of maintaining an orderly and efficient school system. *See, e.g., S.M. v. Woodbury Township Board of Education*, 1973 *S.L.D.* ___ (June 21) (unpublished) and *M.P. v. Hackettstown Board of Education*, 96 *N.J.A.R.*2d (EDS) 210.

To the extent the petitioners rely on *R.D. v. Willingboro Board of Education*, 95 *N.J.A.R.*2d (EDS) 190, I **FIND** and **CONCLUDE** that the decision therein was specific to the facts therein. That decision forms no precedent.

The denial of a privilege, as opposed to denial of a right, creates no irreparable harm. Denial of attendance at graduation exercises is, therefore, not irreparable harm.

Although the law is well-settled and the petitioners cannot show irreparability of harm, the other standards will be addressed in the interests of a full discussion.

Immediacy of Harm

This element cuts in the petitioners' favor. The matter was heard some thirty hours before the scheduled graduation exercises. It must thus be conceded that immediacy is present. This element alone, however, does little for the petitioners' case.

Likelihood of Success on the Merits

The Legislature and the State Board of Education have given wide compass to local boards of education in creating policies and rules governing attendance, grades and the withholding of privileges. Grades may not be used for punitive purposes. *See, e.g., Wetherell*

and Carnivale v. Burlington Township Board of Education, 1978 *S.L.D.* 794. By the same token, there is nothing in case law that says a board of education cannot enforce an attendance policy and count absences. The purpose of requiring attendance is in support of sound educational principles. As the Commissioner noted in *Wheatley v. Burlington City Board of Education*, 1974 *S.L.D.* 851, regular attendance is a requirement for course mastery, regardless of the reasons for absence.

In today's case, although the parents claim no one explained the attendance policies to them, I **FIND** that there was ample notice, specifically, the letter of December 4, 1996, from the assistant principal which clearly stated

> Should his absences exceed eighteen (18), [I.] may be in jeopardy of losing credit for the year. (Exhibit Q)

After this, any ignorance of attendance problems constitutes willful blindness. The petitioners cannot demonstrate a substantial likelihood of success on the merits.

Balancing of the Hardships

The petitioners argue that the Board would suffer no harm if their prayer for relief is granted. According to the petitioners, the facts in this matter are unique. The reported decisions, however, indicate otherwise. The hardship I.K. will suffer consists of attending summer school and of satisfying the requirements for physical education. The hardship befalling the Board, if the petitioners were successful, would be significant. Challenges to application of sound Board policy could fairly be expected to increase. In short, a finding for the petitioners here would erode Board authority. Even if considered in the light most favorable to the petitioners, the Board must prevail on this element.

In consideration of the foregoing, the motion for emergent relief is **DENIED** for the reasons stated. It is so **ORDERED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

17 JUNE 1997
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

ml

OAL DKT. NO. EDU 4723-97

EXHIBITS

A	Letter of April 17, 1997, from K. Fogas
B	Letter of April 21, 1997, request appeal to Attendance Review board
C	Letter of May 6, 1997, denying appeal
D	Letter of May 7, 1997, request appeal to Attendance Review Board decision to Carr
E	Undated letter from Carr re: appeal
F	Letter to Dr. Schaller to request appeal of decision by Carr
G	Letter of June 3, 1997, denying appeal
H	Letter of June 4, 1997, to LAM
I	Letter of June 9, 1997, to LAM
J	1995-96 Individualized Education Plan
K	October 1995 educational re-evaluation
L	1996-97 Individualized Education Plan
M	Letter of Dr. Saltstein re: illnesses
N	Note from Dr. Saltstein re: illness excuse
O	Letter from Eliot B. Garson, Ph.D.
P	School Attendance Policy (pp. 10-13)
Q	Ten-day notification letter
R	Fifteen-day notification letter
S	Eighteen-day notification letter
T	Letter of April 25, 1997, from Johnson
U	Letter of May 9, 1997 from Stewart
V	Report of Dr. Alexander

OAL DKT. NO. EDU 4723-97
AGENCY DKT. NO. 207-6/97

H.K. AND A.K. ON BEHALF OF MINOR CHILD, I.K.,	:	
PETITIONERS	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter and the Order on Motion for Emergent Relief of the Office of Administrative Law (OAL) have been reviewed.

Upon careful and independent review, the Assistant Commissioner concurs with the Administrative Law Judge (ALJ) that petitioners have failed to meet the standards for granting emergent relief set forth in *Crowe v. DeGoia*, 90 *N.J.* 126 (1982). Accordingly, the recommended Order of the ALJ denying petitioners' Motion for Emergent Relief is adopted for the reasons well expressed therein. This matter shall proceed to determination on the merits of petitioners' remaining claim regarding credit for physical education classes.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER*

* It is noted that N.J.S.A. 18A:4-34c authorizes each assistant commissioner to hear and determine controversies and disputes which may arise under school laws, or the rules of the state board, or of the commissioner.

JUNE 17, 1997
DATE OF MAILING JUNE 17, 1997

324-97

616-97 R
(324-97)

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNIE HARRELL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
ASBURY PARK, MONMOUTH COUNTY.	:	
_____	:	

NOVEMBER 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4858-97

AGENCY DKT. NO. 599-12/96

(REMAND OF EDU 255-97)

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Petitioner,

v.

DONNIE HARRELL,

Respondent.

Kathleen Smallwood-Johnson, Esq., for petitioner (Hill Wallack, attorneys)

Thomas W. Cavanaugh, Jr., Esq., for respondent (Chamlin, Rosen, Cavanaugh & Uliano, attorneys)

Record Closed: October 20, 1997 Decided: October 20, 1997

BEFORE **STEVEN C. REBACK**, ALJ:

This matter (remand of OAL Docket No. EDU 255-97) was transmitted to the Office of Administrative Law (OAL) on June 23, 1997; the original settlement being rejected by the Commissioner of the Department of Education.

The parties have agreed to an Amended Stipulation Of Settlement and have prepared same indicating the terms thereof, which is attached and fully incorporated herein.

1. The parties have voluntarily agreed to the amended settlement as evidenced by their signatures or their representatives' signatures.

2. The amended settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this amended settlement agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the amended settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

10/20/97

DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

10/22/97

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 23 1997

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

ej

CHAMLIN, ROSEN, CAVANAGH & ULIANO
A Professional Corporation
268 Norwood Avenue
P.O. Box 38
West Long Branch, New Jersey 07764
(908) 229-3200

ATTORNEYS FOR DONNIE HARRELL

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1997 OCT 14 A 10:04

IN RE: DONNIE HARRELL

Asbury Park High School District, Monmouth County.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

OAL DOCKET NO.:
EDUTH 00255-97S

AGENCY REF. NO. 599-12/96

Civil Action

AMENDED STIPULATION OF SETTLEMENT

This matter having come before the Office of Administrative Law pursuant to the filing of tenure charges against the Respondent on October 22, 1996; and the parties having executed an original Stipulation of Settlement, which was approved by the Honorable Steven C. Reback on May 28, 1997; and the Commissioner of Education having rejected the terms of the settlement due to the absence of an indication that the teacher was advised of the Commissioner's duty, pursuant to N.J.A.C. 6:11-3.6(a)(1), to refer tenure determinations to the State Board of Examiners for possible revocation of certificate, and the parties having addressed the comments of the Commissioner of Education and the omission in this Amended Stipulation of Settlement, same is re-submitted for consideration in connection therewith;

WHEREAS, the Asbury Park High School District Board of Education (hereinafter referred to as "Board") has determined to withdraw the aforementioned charges based upon a proposed settlement of the controversy as set forth herein, the parties do hereto, through their counsel, execute the following Stipulation and request that the charges be withdrawn by the Office of Administrative Law as a result of the following findings.

1. Donnie Harrell is a licensed and certificated teacher who is in his seventh year of employment with the Asbury Park Board of Education. He has served throughout this time as a music teacher and held that position at the Asbury Park High School at the time of the events related herein. During his tenure of service in Asbury Park, he has never been disciplined in any formal fashion, nor reprimanded or even charged with the type of conduct contained in the charges referenced herein.

2. On or about October 22, 1996, charges were filed against Mr. Harrell alleging misconduct and sexual harassment, and on December 16, 1996, the Asbury Park Board of Education voted to certify the tenure charges to the Commissioner of Education. The charges were sent to the Office of Administrative Law on January 22, 1997.

3. The charges which were filed and later certified were the product of a Statement of Evidence executed by Patricia A. Desmond, Vice Principal of Curriculum and Instruction at the Asbury Park High School. The Statement of Tenure Charges was executed by James H. Mundy, Ed.D., the Superintendent of Schools. Neither of the above administrators had any direct knowledge nor

had they made personal observations of the facts referenced in the charges. The only first party evidence given was by a student, who was the alleged victim of the allegations. Despite the fact that various other witnesses were mentioned in the charges, at no time did the student complainant produce corroboration from any alleged witnesses.

4. The investigation of the Board charged that, based upon the statement of the student, the teacher had committed unbecoming conduct between November of 1995 and February of 1996, but no explanation was ever provided as to why the student had not notified the administration of the school until September of the next school year regarding the allegations.

5. In the Statement of Evidence and Statement of Position, Mr. Harrell, under oath, vigorously denied any and all of the material allegations made by the student and challenged her credibility. The only allegation he admitted to was giving her a ride on several occasions, either home or to the doctor, as a courtesy.

6. Criminal charges were submitted to the Monmouth County Prosecutor's Office and the matter was presented to the grand jury, which declined to find probable cause in connection with the presentation. The matter was investigated by the Division of Youth and Family Services during October of 1996, but despite their investigation, up to and including the date of this Stipulation, the Division has not recommended prosecution on the charges nor even rendered a final report.

7. Subsequently to the filing of the charges, the Board of Education considered that a no bill was returned on the criminal charges; that it did not have a final determination from DYFS to substantiate any of the charges and that it had received information that the student in question had previously made similar charges against other adults and recanted those charges at a later date. The Board therefore requested that the teacher return to his position, which he did on February 25, 1997. Since his return, there have been no incidents nor problems associated with him, consistent with his prior record of service to the District, which commenced in 1991-92, during which time the Petitioner was never reprimanded nor disciplined.

8. As a result of the foregoing, the parties have agreed that the matter should be resolved by dismissing the tenure charges. The Petitioner has agreed, as a result of having placed himself in the position of transporting the student on several occasions without any other persons present, in violation of Board policy, to accept a one-year incremental denial. The Board has also agreed to restore his back pay for the time encompassed by the 120-day suspension period, or the portion thereof that actually took effect, and further agrees they will restore him to the proper step and grade on the salary chart the year following the loss of increment hereinabove referred to.

9. The Board has determined that it cannot successfully prosecute this matter for the reasons set forth above and both parties ask the Commissioner of Education to approve the settlement.

10. The Petitioner has been advised and is aware of the duty of the Commissioner of Education pursuant to N.J.A.C. 6:11-3.6(a)(1) to refer tenure determinations to the State Board of Examiners to consider the possible suspension or revocation of his certificate. The aforementioned disclosure which is required by In re Cardonick is herein made a part of the Amended Stipulation of Settlement and the execution of this Amended Stipulation of Settlement by the Petitioner is evidence of the fact that he is aware of the referral referenced above. If the State Board of Examiners acts as a result of the referral, the procedure set forth in N.J.A.C. 6:11-3.6(a)(1) shall be followed, and the new matter will commence with the issuance of an Order to Show Cause pursuant to the aforementioned regulation, which also provides the Petitioner an opportunity to respond and contest such charges as more particularly set out therein.

The parties have agreed, therefore, that based upon the foregoing and other considerations, the matter should be resolved by way of a mutual agreement between the parties, and a resolution has been adopted by the Asbury Park Board of Education to withdraw the tenure charges presently pending in the matter hereinabove referenced, and effectuate the settlement in accordance with the conditions contained herein, contingent upon

approval by the Office of Administrative Law and the Commissioner of Education.

THOMAS W. CAVANAGH, JR., ESQ.
CHAMLIN, ROSEN, CAVANAGH & ULIANO
Attorney for Respondent

KATHLEEN SMALLWOOD JOHNSON, ESQ.
HILL WALLACK
Attorney for Petitioner

DONNIE HARRELL

Dated: October 3, 1997

Post-it® Fax Note 7671	Date 5/20	# of pages ▶ 1
To K. S. Johnson	From D. Mylchreest	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 609-987-2455	Fax #	

BOARD OF EDUCATION
LAKE AVENUE
ARK, NJ 07712
(908) 775-2663, EXTENSION 233
FAX: (908) 988-7315

CERTIFICATE

I, Dora E. Mylchreest, Board Secretary of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, **HEREBY CERTIFY** that the foregoing annexed extract from the Executive Session Minutes of a meeting of the governing body of the Board of Education duly called and held on May 14, 1997 and has been compared by me with the original minutes as officially recorded in my office in the Executive Session Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

Board Members Present: Mr. Bond, Mrs. Cooke, Mr. Fantini, Mr. Moor, Mr. Neal, Mr. Young, Mr. Famularo, Vice President and Mrs. Solomon, President

On the Matter of Mr. Donnie Harrell, Mr. Peterson presented the following Resolution for the Board's consideration:

WHEREAS, the Asbury Park Board of Education has reviewed the Settlement Agreement regarding Mr. Donnie Harrell, and

WHEREAS, the Board has directed the return of Mr. Harrell to the classroom and the withholding of his increment for the 1997-98 school year only, and

WHEREAS, the Board does not wish to pursue tenure charges,

The Board hereby approves the Settlement Agreement.

The Board Members present discussed the settlement terms and there was consensus to support the adoption of this Resolution.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the School District this 20th day of May 1997.

Dora E. Mylchreest
Board Secretary/Business Administrator

OAL DKT. NOS. EDU 4858-97 and 255-97 (ON REMAND)
AGENCY DKT. NO. 599-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNIE HARRELL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
ASBURY PARK, MONMOUTH COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 24, 1997
DATE OF MAILING NOVEMBER 24, 1997

328-97

328-97

CAROL VOORHEES, ELIZABETH L. CHAU, MARY OLSEN AND SANDY LEVY,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF NORTHFIELD, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning food service workers alleged the Board violated statutory sick leave provisions of *N.J.S.A.* 18A:30-2 and 30-3, in denying petitioners their accumulated sick leave rights when it established a new contract with them.

ALJ found that notwithstanding that the Board advised petitioners in or about June 1996 that their respective employment positions had been terminated and that petitioners collected unemployment insurance benefits over the summer months of 1996 until they commenced employment duties in September 1996, the fact remains that petitioners were "steadily employed" by the Board prior to June 1996 and their employment extended to the 1996-97 school year. For all intents and purposes, petitioners' employment was uninterrupted for sick leave purposes. (*Upper Township*) ALJ entered summary decision on behalf of petitioners and ordered that petitioners be credited with the accumulated sick leave time earned prior to June 30, 1996.

Commissioner adopted findings and determination in initial decision as his own.

JUNE 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NOS. EDU 10001-96,
10002-96, 10003-96 AND 10004-96
(CONSOLIDATED)

AGENCY DKT. NOS. 457-10/96,
458-10/96, 458-10/96 AND 459-10/96

CAROL VOORHEES, ELIZABETH L. CHAU, MARY OLSEN AND SANDY LEVY,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NORTHFIELD, ATLANTIC COUNTY,

Respondent.

Carol Voorhees, Elizabeth L. Chau, Mary Olsen and Sandy Levy, petitioners, *pro se*

Salvatore Perillo, Esq., for respondent (Perskie, Nehmad & Perillo, attorneys) (Richard S. Mairone, Esq., on the brief)

Record Closed: April 30, 1997 Decided: May 6, 1997

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, food service employees with the Board of Education of the City of Northfield (Board), allege, among other things, that the Board violated the statutory sick leave provisions of *N.J.S.A.* 18A:30-2 and *N.J.S.A.* 18A:30-3, in denying petitioners their accumulated sick leave rights when it established a new contract with petitioners.

The matters were transmitted to the Office of Administrative Law (OAL) for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 and consolidated. A prehearing conference was held on February 7, 1997, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey, at which, among other things, the parties agreed that there were no material facts in dispute. It was further agreed that the parties would cross-move for summary decision, pursuant to *N.J.A.C.* 1:1-12.5. The last submission was received by the undersigned on April 30, 1997, which constitutes the close of the hearing record.

ARGUMENTS OF THE PARTIES

THE BOARD'S POSITION

STATEMENT OF FACTS

The Board was compelled, as a result of budgetary shortfalls, to examine every aspect of its budget in the preparation of the 1996-1997 budget. The Board identified as an area of potential savings the cafeteria operations which, in past years, had generated a substantial deficit. The Board, in an attempt to deal with its budgetary needs, explored establishing a relationship with Mainland Regional High School ("Mainland"), the high school of which Northfield is a sending district. The relationship with Mainland would result in Mainland preparing the food for the cafeteria and then taking the responsibility to employ and supervise the cafeteria workers. Based upon discussions with Mainland, it became clear that the Board could save substantial sums of money by participating in this inter-governmental relationship.

In anticipation of the implementation of the program with Mainland, the Northfield cafeteria school workers, including the petitioners in this case, were notified that their one-year employment contract (1995-1996) was terminated as of June 30, 1996 and would not be renewed for the 1996-1997 school year. This action resulted in the cafeteria workers being terminated. In fact, several cafeteria workers, including the petitioners, applied for and received unemployment benefits. The Board paid the petitioners eight weeks of unemployment compensation for the summer of 1996. The Board paid the following amounts to the petitioners:

Petitioner Voorhees:	$1,576
Petitioner Levy:	$1,624
Petitioner Olsen:	$1.976
Petitioner Chau:	$1,224

In an attempt to ease the transition to the new relationship with Mainland, the Board, through its administration, met with the cafeteria workers involved, including the petitioners, and explored the possibility of hiring them for a one-year term at a reduced salary. Ultimately, petitioners entered into an employment contract with the Board on August 12, 1996, which provided, among other things, that the petitioners would receive a maximum of ten days sick leave during the term of the contract, *i.e.*, September 1, 1996 through June 30, 1997.

The petitioners agree that they received the statutorily required ten days sick leave per year. However, the petitioners contend on this appeal, despite the fact that their contracts were terminated and they applied for and received unemployment benefits, that the accumulated sick time which they received in prior years of employment with the Board must be accumulated. As will be set forth more fully below, it is respectfully submitted that the petitioners' claims are without merit and that the Board is not required to allow the petitioners to accumulate sick time for the period prior to their termination.

LEGAL ARGUMENT

POINT I

SUMMARY DECISION IS APPROPRIATE IN FAVOR OF THE BOARD, AS THERE ARE NO GENUINE ISSUES OF MATERIAL FACT WHICH WOULD PRECLUDE JUDGMENT AS A MATER OF LAW

A party may seek summary decision at any time after the case is determined to be contested. *N.J.A.C.* 1:1-12.5.

In the instant matter, there are no genuine issues of material fact which would preclude the Court from entering judgment as a matter of law. It is undisputed that the Board was experiencing financial difficulties and was required to examine all areas of potential savings, including the cafeteria operation. Additionally, the arrangement the Board made with Mainland for the preparation of the cafeteria food, as well as the responsibility to employ and supervise the cafeteria workers, was an example of an inter-governmental venture to effectuate cost savings. It is also not in dispute that the petitioners were notified that their one-year employment contracts were terminated as of June 30, 1996, and that they would not be renewed for the 1996-1997 school year. Likewise, it is clear that the petitioners applied for and received unemployment benefits, which were paid by the Board. Lastly, there is no dispute that the petitioners entered into an employment contract with the Board which provided for a maximum of ten sick days as mandated by *N.J.S.A.* 18A:30-2. There is no mention in the employment contract of any accumulated sick time.

The petitioners now seek to ignore the plain language of the employment contract which provides for ten days sick time and does not provide for any accumulation of sick time from prior years. The petitioners seek to rewrite the contract to provide a benefit to them which was not included in the employment contract. As will be set forth in Points II and III, the petitioners' position is contrary to the statutory requirements governing sick leave and general principles of contract law.

In light of the above, this matter is ripe for summary decision. *See*, *N.J.A.C.* 1:1-12.5; *Matter of RoGros Recycling Corp.*, 226 *N.J. Super.* 343 (App. Div. 1988) *cert. denied* 113 *N.J.* 638.

POINT II

THE PETITIONERS ARE NOT ENTITLED TO ACCUMULATED SICK LEAVE PURSUANT TO THE APPLICABLE STATUTORY LAW

N.J.S.A. 18A:30-1 *et seq.* governs sick leave for school district employees. *N.J.S.A.* 18A:30-2 provides:

> All persons holding any office, position, or employment in all local school districts, . . . of the state who are *steadily employed* by the Board of Education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, . . . shall be allowed sick leave with full pay for a minimum of 10 school days in any school year. (emphasis added)

N.J.S.A. 18A:30-3 then provides:

> If any such person requires at any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

Moreover, *N.J.S.A.* 18A:30-3.1 provides when accumulated sick leave rights are preserved:

> The accumulative sick leave rights of the employees in any high school or junior high school or other school terminated by the creation of a regional district shall be recognized and preserved by the Regional Board of Education whenever said former employees of the united districts shall be employed, or have been employed, by the Regional Board of Education.

N.J.S.A. 18A:30-3.2 provides a discretionary mechanism for a Board of Education to credit employees with unused sick leave:

> Whenever a Board of Education employs any person who has an unused accumulation of sick leave days from another school district in New Jersey, the employee Board *may grant, not later than the end of the first year of employment, part or full credit therefor. The amount of any such credits shall be fixed by Resolution of the Board uniformly applicable to all employees and subject to the provisions of this chapter.*

Thus, the statutory scheme provides school district employees with certain mandatory benefits as well as other benefits which are strictly discretionary with the Board in regard to sick leave and the accumulation of same. First, all school employees must be allowed sick leave with full pay for a minimum of ten school days in any school year. It is without question that the petitioners in this case have been granted the mandatory sick leave allowance pursuant to *N.J.S.A.* 18A:30-2. Second, the accumulation of sick leave is only permitted when a school employee is "steadily employed by the Board of Education or they are protected by tenure in their position." *See, N.J.S.A.* 18A:30-3. In the instant mater, the petitioners are not "steadily employed" or "protected by tenure." The petitioners were clearly terminated from their positions on June 30, 1996, and did not have any reasonable expectation of future employment at that time. The best evidence of that is the fact that the petitioners sought and received unemployment benefits after they were terminated. Petitioners made their claim on or about June 30, 1996, and received unemployment compensation for eight consecutive weeks, beginning in July and ending in August. In August 1996, the petitioners were rehired, long after they applied for and were granted unemployment benefits, based upon a written employment contract which was executed by the individual petitioners and the Board. At the time of the termination, the petitioners had no reasonable expectation of returning to employment with the Board. Accordingly, it is respectfully submitted that the termination of petitioners from employment renders the provisions of *N.J.S.A.* 18A:30-3 inapplicable to the petitioners, as they were not "steadily employed" by the Board. This is corroborated by the fact that the petitioners applied for and received unemployment benefits following their notice of termination on June 30, 1996.

A review of the other pertinent provisions of the sick leave statutory scheme, namely, *N.J.S.A.* 18A:30-3.1 and -3.2, leads to the conclusion that the petitioners are not entitled to accumulative sick leave in the instant matter. The petitioners cannot make a claim that they were terminated by the creation of a regional district which would, in that case, mandate that the Board allow them to accumulate their sick time. *See, N.J.S.A.* 18A:30-3.1. A better analogy is found in *N.J.S.A.* 18A:30-3.2 which provides that a Board has the discretionary authority to allow an employee from another school district in the State of New Jersey to accumulate unused sick leave days. However, there is nothing in the statute which mandates that the Board provide the accumulated unused sick leave in the situation where a Board hires an employee from another school district in New Jersey who has accumulated unused sick leave from its previous employer. The statute leaves it entirely up to the Board whether they will permit the accumulation of the unused sick leave. In the instant matter, the Board made a decision to hire the petitioners after they were terminated and after petitioners applied for and received unemployment compensation. The Board made a decision, which they were permitted to do under the statutory scheme of *N.J.S.A.* 18A:30-1 *et seq.* to not include any provisions in the contract to grant the petitioners' accumulated sick leave from their prior employment. The Board, of course, did comply with the provisions of *N.J.S.A.* 18A:30-2 by allowing the petitioners full pay for up to ten school days during the term of the contract. Accordingly, the petitioners' complaint must be dismissed.

POINT III

PETITIONERS' COMPLAINT MUST BE DISMISSED AS IT IGNORES THE LANGUAGE OF THE EMPLOYMENT CONTRACT FOR THE 1996-1997 SCHOOL YEAR

It is a basic rule of contract construction that the "polestar of construction" is the intention of the parties. *Kearny PBA Local No. 21 v. Town of Kearny*, 81 *N.J.* 208, 221 (1979). In *Jacobs v. Great Pacific Century Corp.*, 104 *N.J.* 580, 586 (1986), the New Jersey Supreme Court stated:

> As always, in the quest for the intention of the parties to the contract, the "attending circumstances, including practices and custom, may serve to clarify the common intention of the parties." But the judicial interpretative function is to consider what was written, in the entire context of the circumstances under which it

> was written, and to accord the language a rational meaning in keeping with the express general purpose.

In *Communication Workers v. Monmouth County Board*, 96 *N.J.* 442, 452 (1984), the New Jersey Supreme Court stated:

> The polestar of contractual interpretation is the intent of the parties. The starting point in ascertaining that intent is the language of the contract. It is also permissible to shed further light on the parties' intent, to consider and examine the circumstances that existed when the contract was made. However, once the parties' intent is determined on the basis of the evidence available, that intent may not be disregarded to create a new or better contract or to add to, subtract from, modify, or alter any terms of the agreement.

The beginning point in the analysis of determining the intent of the parties is to examine the circumstances that existed when the contract was made. It is clear that the petitioners were terminated from their position as cafeteria workers due to the budgetary constraints which the Board was experiencing. The Board opted to enter negotiations with Mainland for the preparation of the cafeteria food and the employment of the cafeteria workers. At the time that the petitioners were terminated, there was no reasonable expectation of continuing employment with the Northfield School District (the "District"). This fact was further evidenced by the petitioners' choice to seek and ultimately obtain unemployment benefits following the notice of termination. Thus, at the time that the petitioners entered the new contract with the Board for the 1996-1997 school year, the petitioners were not employed by the Board and had no reasonable expectation of continued employment with the District.

Additionally, the language in the new contract for 1996-1997 expressly made mention of the petitioners' rights to sick leave, *i.e.*, the petitioners were only given ten days of paid sick leave. This was all that was required under the applicable statutory provisions. If the Board so chose, it could have provided for the accumulation of unused sick leave from prior employment periods. *See* Point II. However, the contract did not so provide. As our Supreme Court has noted, a contracting party cannot disregard the intent of the parties to create a "new or better

contract." *See*, *Communications Workers v. Monmouth County Board*, 96 *N.J.* at 452. Thus, the petitioners' complaint must be dismissed with prejudice.

PETITIONERS' POSITION

COUNTER STATEMENT OF FACTS

Petitioners Mary Olsen, Carol Voorhees, Elizabeth Chau and Sandra Levy have been long term employees of the Board, they each have been assigned to work in the food service program. Each year of their employment they worked from September through school closing in June. Each year they were granted ten sick days in accord with the provisions of *N.J.S.A.* 18A:30-2. Each year sick leave days not used were carried over and accumulated for later use as per the provisions of *N.J.S.A.* 18:3-3.

In the spring of 1996 the petitioners were notified that their employment would be terminated as of June 1996. The petitioners applied for and received unemployment benefits for July and August 1996. The Board did not contest these applications or payments which it had a right to do.

In August 1996, the Board issued contracts to the petitioners for the period September 1, 1996, through June 30, 1996. This contract provided for ten sick days but did not provide for use of the previously accumulated sick leave during the 1996-97 school year.

LEGAL ARGUMENT

I. THE APPLICABLE STATUTORY AND CASE LAW REQUIRE THAT THE PETITIONERS ARE ENTITLED TO ACCUMULATED SICK LEAVE CREDIT DURING THE 1996-97 SCHOOL YEAR

The Board argues that the statutory scheme provides school district employees with certain mandatory benefits as well as other benefits which are strictly discretionary with the Board in regard to sick leave and the accumulation of same.

The Board further cites *N.J.S.A.* 18A:30-2 and emphasizes that this statute requires that persons who are steadily employed in school districts shall be allowed sick leave with full pay for a minimum of ten school days in any school year. In its statement of the facts, the Board asserts that the petitioners entered into an employment contract with the Board on August 12, 1996, which includes ten days of sick leave during the term of the contract. The Board goes on to say, "The Petitioners agree that they received the statutorily required 10 days' sick leave per year." (Board brief, pp. 2 & 3)

The Board further cites *N.J.S.A.* 18A:30-3 which provides for the accumulation and later use of sick leave days not currently used. Both *N.J.S.A.* 18A:30-2 and 3 place an affirmative obligation upon the Board as employer and allows no discretion on the part of the Board.

The Board then cites *N.J.S.A.* 18A:30-3.1 and -3.2 which petitioners submit are not relevant to the facts of this case.

The Board maintains that the petitioners in the instant case are not "steadily employed" or "protected by tenure." The evidence presented is that the employees sought and received unemployment benefits for the months of July and August 1996.

Petitioners submit that the issue of the petitioners' application for and collection of unemployment benefits is not dispositive of this issue.

While the case law on the interpretation of the phrase "steadily employed" in *N.J.S.A.* 18A:30-2 is not extensive, what does exist is clear in its meaning. In *DeGrott v. Board of Education of Passaic County*, 13 *N.J.A.R.* 438, the Commissioner and the State Board of Education affirmed the determination of the administrative law judge (ALJ) when he concluded that coaching duties did not constitute steady employment because they were not "regular or continuous employment for the entire school year or the entire academic year." *DeGrott, Ibid.* 448.

In the instant case, the petitioners have always been employed for a full academic year including the 1996-97 academic year.

In *Schwartz v. Dover Public Schools*, 180 *N.J. Super.* 222 (App. Div. 1981), the court determined an issue of prorated sick leave for new employees and in doing so defined the term "steadily employed." The court held that: "It is more likely that the Legislature was contemplating regular, full time employees and did not contemplate employees who are hired for less than a full school year. Employees who work a full school year are guaranteed 10 days of paid sick leave." *Schwartz, Ibid.*, p. 227.

In the instant case, each of the petitioners have worked full school years for each year of their employment including the 1996-97 school year.

Attached to this statement is a copy of *Upper Township Education Association on behalf of Christine Argoe, et al. v. Board of Education of Twp. of Upper*, 93 *N.J.A.R.*2d (EDU) 45 (1992) in which the above citations from *DeGrott* and *Schwartz* are taken and which further defines the concept of "steadily employed."

In *Upper Twp.*, the specific issue was whether an employee was entitled to accumulate prior unused sick leave. The employee has been employed by the Board in several positions from September 1987 through late January 1991. She was not employed from February through June 1991. When she was reemployed in September 1991, the Board did not recognize her previously accumulated sick leave allowance. The ALJ determined and the Commissioner of Education concurred that employment in forty-five out of fifty possible months or ninety percent of the time equaled steady employment.

The ALJ went on to say:

> In addition, the intent of the statute is to reward long term, faithful employees. It serves no other purpose. Pelz is a long term faithful employee. She accepted every position offered to her during the five years. She accepted a temporary appointment as a resource room long term substitute in 1990, then returned to her position as

> an aide when that appointment expired. She is entitled to the protection of the statute. A contrary result would deprive the statute of its full force and effect. A parsimonious school board could regularly lay off long term faithful employees at four (4) or five (5) year intervals and save accumulated sick time. Such a plan could also backfire when the practice was recognized for what it is, an attempt to circumvent the statute. Many employees would utilize sick leave to the fullest extent possible so that they would not lose it; thereby requiring the Board to employ extra people for the contingency. *Upper Twp., Ibid.* (p. 45)

It looks to us that the ALJ had this Board in mind when he put these words together.

The petitioners have had no break in service. Within the context of *Upper Twp.*, the petitioners have worked fifty out of fifty months or one hundred percent of the time. If ninety percent qualifies as steady employment, one hundred percent cannot be any less.

II. THE ISSUE IS A MATTER OF LAW NOT OF CONTRACT INTERPRETATION

The Board argues that the employment contract signed by the petitioners for the 1996-97 school year contains provision for ten sick days for the petitioners but not for the previously accumulated leave and that the contract controls this situation.

Petitioners submit that in the absence of a controlling statute, the Board would be correct. In the face of *N.J.S.A.* 18A:30-2 and 3 it is not. In *State v. State Supervisory Employees Assn.*, 78 *N.J.* 54, 80-82 (1978), the court preempted negotiations over a term and condition of employment if such matter is covered by a statute or regulation which speaks in the imperative. While the issue before that court was raised in a collective bargaining context, the holding applies to all public employees which includes the petitioners. *N.J.S.A.* 18A:30-2 and 3 speak in the imperative. Their provisions may not be modified by a contract.

III. THE BOARD'S OBLIGATION TO GRANT TEN SICK DAYS FOR THE 1996-97 SCHOOL YEAR ASSUMES AN OBLIGATION TO RECOGNIZE PRIOR ACCUMULATED SICK LEAVE DAYS

The Board has recognized its obligation to grant petitioners ten sick leave days for the 1996-97 school year:

> . . . The petitioners were only given 10 days of paid sick leave. This was all that was required under applicable statutory provisions. (Board brief, p. 8)

N.J.S.A. 18A:30-2 and 3 must be read together, they are to be read ". . . as a unitary and harmonious whole, in order that each may be fully effective." *Clifton v. Passaic County Board of Taxation*, 28 *N.J.* 411, 421 (1958). Accord *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969); *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301, 309 (App. Div. 1969) as cited in *Woodbridge Twp. Fed. of Tchrs. v. Bd. of Ed. Twp. of Woodbridge* and *Woodbridge Twp. Sch. Adm. Assn. v. Bd. of Ed. Twp. of Woodbridge*, 1974 *S.L.D.* 1201.

In *Woodbridge*, the Commissioner quotes extensively from *King v. Bd. of Ed. Borough of Woodcliff Lake*, 1972 *S.L.D.* 449 in reviewing the legislative history of sick leave for school employees:

> "The original enactment of P.L. 1941, c.142 granted certain provisions of sick leave to '***teachers, principals and supervising principals***.' The title of this act was changed by P.L. 1952, c.237 to provide sick leave benefits for teachers, principals, assistant superintendents and superintendents***." A general revision of this law was accomplished by the enactment of P.L. 1954, c.188, which extended the scope of these sick leave benefits to "***certain persons in the public schools of this State." The statement attached to this legislation enunciated two purposes of this bill, the second being "***to extend the coverage of the law to include all persons steadily employed by board of education." The language of the specific 1954 statute, *N.J.S.A.* 18:13-23.8 (now 18A:30-2) clearly provides that the act applies to "all persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or

> who are protected by tenure in their office, position, or employment under the provisions of this or any other law***."
>
> Further amendments and additions were made to this basic act by P.L. 1956, c.58, permitting the granting of sick leave above the minimum of ten days; P.L. 1958, C.150, allowing additional sick leave days above the minimum of ten to accumulate, but limiting the annual accumulation of such unused days to fifteen; P.L. 1959, c.175, providing for leave with pay for injury arising out, and in the course, of the performance of duties, for up to one calendar year; P.L. 1960, c.53, protecting the accumulated sick leave of employees who continue employment after a regional school district is created; P.L. 1960, c.54, providing similar protection for employees of public schools which consolidate; P.L. 1961, c.35, permitting local school boards to hire teachers with accumulated sick leave from other school districts within the same county and transfer such leave; and P.L. 1967, c.177, broadening the transfer of accumulated sick days for new employees from any other school district within the State.

The Commissioner's conclusion was stated in *King, supra,* as follows:

> . . . Thus the thirty-year history of this legislation discloses a consistent legislative purpose to broaden the scope of beneficiaries, and no instance of restrictive language to permit any limitation of the designated beneficiaries at the discretion of local boards of education. Therefore, the Commissioner finds no authority in the controlling statute of N.J.S.A. 18A:30-1 et seq. to permit such a limitation. Sick leave provisions adopted by a local Board of Education pursuant to the statutes, ante, must apply to all persons as defined by N.J.S.A. 18A:30-2. (1972 S.L.D. at 455)

In the instant case, it is the intent of the Board to restrict and limit this benefit to petitioners in contravention to the intention of the law as interpreted by the Commissioner.

The recognition of the granting of ten sick days under *N.J.S.A.* 18A:30-2 brings with it the obligation to recognize the availability for use of all previously accumulated sick leave under the provisions of *N.J.S.A.* 18A:30-3.

The petitioners qualify for sick leave under the provisions of *N.J.S.A.* 18A:30-2 because they have been steadily employed as defined in the statute. This benefit is a statutory right of the employees which may not be altered by any discretionary action of the Board and cannot be affected by the terms of any contract between an individual and the Board. The recognition of sick leave entitlement under *N.J.S.A.* 18A:30-2 carries with it the right to use of previously accumulated sick leave under the provisions of *N.J.S.A.* 18A:30-3. The statutes and applicable case law supports the position of the petitioners. The petition must be sustained and an order must be issued directing that the Board recognize the availability for use by the petitioners of all previously accumulated sick leave days.

THE BOARD'S RESPONSE

The Board's Reply Brief has been reviewed and considered. It will not be repeated here.

DISCUSSION AND CONCLUSIONS

Pursuant to *N.J.A.C.* 1:1-12.5(b) summary decision may be rendered when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a mater of law." In the analogous area of summary judgment, it has been recognized by the courts that a summary judgment "is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause, which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion shows not to present a genuine issue of material fact requiring disposition at trial." *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 64, 74 (1954).

It has been held that mere assertions and allegations in the pleadings are insufficient to defeat a motion for summary judgment. *Ocean Cape Hotel Corporation v. Masefield Corporation*, 63 *N.J. Super.* 369, 383 (App. Div. 1960). Instead, when a movant establishes

certain facts, one who opposes the motion has a duty to come forward with any controverting facts. *Heljon Management Corp. v. DiLeo*, 55 *N.J. Super.* 306, 313 (App. Div. 1959).

Recently, the New Jersey Supreme Court re-examined the standards applied to summary judgment motions. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). The Court in *Brill* emphasized that "where the party opposing summary judgment points only to disputed facts that are 'of an insubstantial nature' " the proper disposition is summary judgment. *Id.* at 541.

I **CONCLUDE**, therefore, that the instant matter is ripe for summary decision.

The threshold issue to be determined is whether this is a matter of statutory dimension or whether it sounds in contract. It is clear that the "Commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws." *N.J.S.A.* 18A:6-9.

As the State Board of Education (State Board) stated in *Poole v. BOE of the Passaic County Reg. Sch. Dist. No. 1*, 1978 *S.L.D.* 1039-1040:

> It is well settled that the Commissioner's jurisdiction does not extend to controversies arising under other laws, as for example pension or taxation acts, even though a school district may be a party to the controversy. *Reilly v. Board of Education of Camden*, 127 *N.J.L.* 490 (Sup. Ct. 1941); *Board of Education of Fair Lawn v. Mayor and Council of Fair Lawn*, 143 *N.J. Super.* 259 (Law Div. 1976). Furthermore, where questions purely of law are involved, the initial jurisdiction of the education authorities is not exclusive, but concurrent with that of the courts. *Borough of Matawan v. County Board of Taxation*, 51 *N.J.* 291 (1969); *Silverman v. Board of Education of Millburn*, 143 *N.J. Super.* 253 (Law Div. 1975).

It continued to say, at 1040, that:

> The Legislature vested the Commissioner with authority to decide controversies arising under the school laws in order that he might

> better meet his "overriding responsibility to make certain that the terms and policies of the school laws are being faithfully effectuated." *Booker v. Board of Education of Plainfield*, 45 *N.J.* 151, 175 (1965); *Laba v. Newark Board of Education*, 23 *N.J.* 364, 381-384 (1957); *In re Masiello*, 25 *N.J.* 590, 605-607 (1958). . . .

See also, Salley v. BOE City of Newark, 1984 *S.L.D.* 1714-1718, 1720.

Here, the Board raises two defenses; *i.e.*, (1) that it is cloaked with discretion in its application of employee unused sick leave under *N.J.S.A.* 18:20-3.2 and, (2) that this controversy sounds in contract. Addressing the later defense first, there is no question the Commissioner lacks jurisdiction over contract disputes. *Poole, supra; Salley, supra.* To the extent that the parties herein have entered into a contract for the 1996-97 school year, the Commissioner is compelled to refrain from comment. The statutory implications concerning *N.J.S.A.* 18A:30-2 to -3.2 are, however, viable before the Commissioner.

The statute, at *N.J.S.A.* 18A:30-2, provides as follows:

> *All persons holding* any office, position, or *employment in all local school districts*, regional school districts or county vocational schools of the state *who are steadily employed by the board of education* or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, *shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.* (emphasis supplied)

There is neither question nor doubt that petitioners have been employed by the Board and that they enjoyed steady employment each school year from September until June. *Upper Township Ed. Asso., supra.* There is no dispute that during the course of their employment, petitioners were allowed a minimum of ten sick leave days per year.

N.J.S.A. 18A:30-3 provides, in toto, as follows:

> If any such person requires at any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year *shall* be accumulative to be used for additional sick leave as needed in subsequent years. (emphasis supplied)

Each of the statutory provisions contain the word "shall" with regard to the Board's obligations and responsibilities. Our State Supreme Court has addressed the construction of statutes where the statute contains the words "shall" and "may." In *Harvey v. Essex County Board of Freeholders*, 30 *N.J.* 381 (1959), the Court said:

> In determining whether a statute is mandatory or directive regard shall be had to the purpose and intent of the Legislature. Mr. Justice Heher in *Leeds v. Harrison*, 9 *N.J.* 202, 213 (1952) stated:
>
> > "May" is a permissive and not an imperative verb which is to be given its natural and ordinary meaning, barring a clear contextual indication of a different usage. The question is essentially one of legislative intent, to be gathered from the nature and object of the statute considered as a whole; and in that inquiry public and individual rights are sometimes factors to be regarded.
>
> The word "may" is ordinarily permissive or directory, and the words "must" and "shall" are generally mandatory. *Id.* at 391.

Similarly, the Court said, in *Union Terminal Cold Storage Co. v. Spence*, 17 *N.J.* 162 (1954), that:

> In determining whether an act is imperative and mandatory or merely directory there is a presumption that the word "shall" (such word appears in this statute) is used in an imperative and not a directory sense, and while this presumption is not a conclusive one it can only be overthrown by something in the character of the legislation or in the context which will justify a different meaning. (Citations omitted) *Id.* at 166.

In both instances the quoted sections of the statutes contain and use the word "shall." As a matter of statutory construction, there is a presumption that the word "shall" appearing in a statute is used in the mandatory or imperative sense and not in a directory sense. The word "may," however, is used in a permissive and directory sense.

With respect to the legislative intent of the sick leave statutes under Title 18A, the petitioners properly cite the *King, supra,* matter where the Commissioner laid out the scope and purpose of the Legislature in its enactment and amendments of the statutes. The stated purpose of the Legislature is to broaden the scope of the benefits rather than to restrict or limit the benefits at the discretion of the Board. *King*, at 455.

The Board's attempt to use *N.J.S.A.* 18A:30-3.2 to provide it with wide discretion is misplaced. That statute only provides a local board of education the discretion to grant or not grant, unused accumulated sick leave days from another New Jersey school district where the new employee had accumulated sick leave days pursuant to *N.J.S.A.*18A:30-3 with the former employing board of education. There is nothing in *N.J.S.A.* 18A:30-3.2 which provides the Board the discretion to withhold accumulated sick leave days earned and credited pursuant to *N.J.S.A.* 18A:30-3.

Notwithstanding that the Board advised petitioners in or about June 1996 that their respective employment positions had been terminated and that petitioners collected unemployment insurance benefits over the summer months of 1996, the fact remains that the petitioners were employed by the Board and commenced their employment duties in September 1996 for the 1996-97 school year. For all intents and purposes, petitioners' employment was uninterrupted for sick leave purposes. *Upper Township, supra.*

I **CONCLUDE**, therefore, that petitioners were "steadily employed" by the Board prior to June 1996, and that their employment extended to the 1996-97 school year. *N.J.S.A.* 18A:30-2.

I **CONCLUDE** that each of the petitioners had accumulated sick leave time pursuant to *N.J.S.A.* 18A:30-3 and that such accumulated sick leave time is required to be credited in their present employment.

ORDER

Accordingly, it is **ORDERED**, consistent with the above, that petitioners be credited with the accumulated sick leave time earned prior to June 30, 1996.

Therefore, summary decision is hereby entered on behalf of petitioners and the Board's motion for summary decision is **DENIED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 6, 1997
DATE

Leland E. Law Jr.
LILLARD E. LAW, ALJ Barbara S. Tylutki ALJ

Receipt Acknowledged:

5/9/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NOS. EDU 10001-96, 10002-96, 10003-96 and 10004-96 (Consolidated)
AGENCY DKT. NOS. 457-10/96, 458-10/96, 458-10/96 and 459-10/96

CAROL VOORHEES, ELIZABETH L. CHAU, MARY OLSEN AND SANDY LEVY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NORTHFIELD, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that petitioners are entitled to summary judgment based on the provisions of applicable law. See *N.J.A.C.* 1:1-12.5 and *N.J.A.C.* 6:24-1.13. See, also, *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995), and *Judson, supra.* The Commissioner finds that the ALJ correctly characterized the intent of *N.J.S.A.* 18A:30-2 and -3, and related case law, in determining that the Board must restore petitioners' accumulated sick leave time. It is herein reiterated that these provisions of statute may not be modified by contract.

The Commissioner further notes that although petitioners collected unemployment benefits for eight weeks, this does not thwart their entitlement to accumulated sick leave time

where, as here, they were steadily employed and there was, in effect, no break in service from the previous year. As was explicated in *Upper Township, supra*,

> [a] contrary result would deprive the statute [*N.J.S.A.* 18A:30-3] of its full force and effect. A parsimonious school board could regularly lay off long term faithful employees at four (4) or five (5) year intervals and save accumulated sick time. (*Id.* at 46)

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL, hereby entering summary judgment in favor of petitioners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 20, 1997
DATE OF MAILING JUNE 20, 1997

330-97

C #330-97
SB # 64-97

IN THE MATTER OF THE DISTRIBUTION :
OF ASSETS AND LIABILITIES UPON :
DISSOLUTION OF THE UNION COUNTY : STATE BOARD OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT : DECISION
NO. 1, UNION COUNTY. :

Decided by the Commissioner of Education, June 20, 1997

For the Petitioner-Appellant, James P. Granello, Esq.

For the Respondent-Respondent Mountainside Borough, Post, Polak, Goodsell & MacNeill (Charles R. Church, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Union County Regional High School District No. 1, Schwartz, Simon, Edelstein, Celso & Kessler (Lawrence S. Schwartz, Esq., of Counsel)

For the Respondent-Respondent Kenilworth Borough, Thomas A. Vitale, Esq.

For the Respondent-Respondent Board of Education of Mountainside, David B. Rubin, Esq.

For the Respondent-Respondent Board of Education of Berkeley Heights, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Springfield, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Respondents-Respondents Garwood Borough and Board of Education of Garwood, DeCotiis, Fitzpatrick & Gluck (Agnes I. Rymer, Esq., of Counsel)

Nov. 5, 1997

For the Respondent-Respondent Board of Education of Clark, Kenny, Gross & McDonough (Douglas J. Kovats, Esq., of Counsel)

For the Respondent-Respondent Township of Springfield, Krevsky, Silber & Brown (Bruce H. Bergen, Esq., of Counsel)

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

November 5, 1997

Date of mailing NOV 07 1997

331-97

331-97

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Synopsis

Petitioning Board seeks determination as to responsibility for providing educational services to a classified student. Respondent Board moved for summary decision, pursuant to *Cherry Hill Board of Education v. Board of Education of Haddonfield.* ALJ found circumstances of *Cherry Hill* to be distinguishable, and denied respondent's motion.

Commissioner adopted the initial decision.

JUNE 23, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING SUMMARY DECISION
OAL DKT. NO. EDU 12292-95
Agency Dkt. No. 438-11/95

MAHWAH TOWNSHIP BOARD OF EDUCATION
Petitioner,
v.
RAMAPO-INDIAN HILLS REGIONAL BOARD OF EDUCATION,
Respondent.

Mark G. Sullivan, Esq., for petitioner
(Sullivan & Sullivan, attorneys)

Allan P. Dzwilewski, Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, attorneys)

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

STATEMENT OF CASE

The petitioner in this matter seeks a determination as to the responsibility for providing educational services to J.E., a classified student.

The respondent has moved for summary decision pursuant to *N.J.A.C.* 1:1-12.5.

This matter is related to the special education case, *J.E. v. Mahwah Board of Education*, OAL Docket No. EDS 11287-95, which was transmitted to the Office of Administrative Law on or about September 28, 1995. It was assigned to the undersigned Administrative Law Judge. Shortly thereafter, by letter of October 5, 1995, the Mahwah Board of Education (Mahwah) advised the Director of Special Education for the Ramapo-Indian Hills School District (Ramapo-Indian Hills) that Mahwah believed that J.E. was residing with his mother in Franklin Lakes which is within the Ramapo-Indian Hills regional district. Mahwah advised that a classification meeting was scheduled for October 16, 1995.

No response was made to that letter and counsel for Mahwah made a motion before the Office of Administrative Law to compel joinder of the Ramapo-Indian Hills Regional Board of Education as an indispensable party or, in the alternative, for an order "binding the said Ramapo-Indian Hills Regional School Board of Education to the results of the outcome of the within matter determined either by judgment, order or settlement."

In his October 16, 1995 letter to the Administrative Law Judge, counsel for Ramapo-Indian Hills submitted objections to the motion. By letter of October 31, 1995, the Administrative Law Judge, *inter alia*, addressed that motion, noting that:

> The determination of which school district may be responsible for the education of a child is a matter within the purview of the Department of Education. An order by an Administrative Law Judge in a special education matter is not reviewable by the Commissioner of Education.
>
> The relief sought by Mr. Sullivan, on behalf of the respondent, Mahwah Board of Education, may be requested of the Department of Educaion which may refer the matter to the Office of Administrative Law (OAL) as an education matter, with the right of final decision reserved to the Commissioner.

On November 9, 1995, Mahwah filed a petition with the Department of Education seeking an order to have Ramapo-Indian Hills assume responsibility of the education

for J.E., to reimburse Mahwah for his educational expenses and the expenses of the special education matter.

Ramapo-Indian Hills did not participate in the special education matter. Following hearings on October 18, 1995, November 13, 1995 and November 27, 1995, the parties arrived at a settlement of the matter which was approved by the Administrative Law Judge on April 9, 1996.

On March 25, 1997, the Office of Administrative Law received from respondent, Ramapo-Indian Hills, a motion and supporting papers for summary decision. Petitioner, Mahwah, submitted its brief in opposition, received April 7, 1997.

The motion for summary decision relies upon *Cherry Hill Board of Education v. Board of Education of Haddonfield*, 96 *N.J.A.R.* 2d (EDU) 1032.[1] In that case, there was a settlement by which a pupil, J.G., a classified student was sent by Cherry Hill to a residential placement, after which his father moved from Cherry Hill to Haddonfield without notifying Cherry Hill. The father did later notify Haddonfield. The issue was the responsibility for tuition during the period of the move from Cherry Hill until the time that Haddonfield became aware of the move.

The Commissioner of Education concurred with the decision of the Administrative Law Judge that the central issue was a contract dispute and that the Commissioner has no jurisdiction to decide issues relating to a contract.

DISCUSSION

Although there was a settlement in the related special education matter giving rise to the present dispute, the events leading up to that disposition and the circumstances of the instant parties are significantly different than those in *Cherry Hill*.

[1] The Final Decision was issued September 23, 1996. An appeal to the State Board of Education is pending.

Shortly after the special education matter was filed, Mahwah became aware that the pupil may, in fact, be living with his mother in Franklin Lakes. Mahwah attempted to have the cognizant school district, Ramapo-Indian Hills, intervene by motion, which was denied, and by invitation, which was declined.

Thereafter, Mahwah fully participated as a party in the matter. Following three days of hearing, and after extensive discussion among the several parties, the matter was resolved by a detailed settlement agreement.

In *Cherry Hill*, Judge Campbell stated "[t]he state has a strong public policy in favor of settlements." [citations omitted]. *at* 1034. Such policy would not be served should the holding in *Cherry Hill* be applied to facts similar to the instant matter. In special education cases in which a respondent school district believes another school district, not a party, may be responsible for the education of the classified student, such respondent school district would be disinclined to settle any matter lest it be barred from seeking reimbursement from the district wherein the child is domiciled.

Ramapo-Indian Hills assiduously avoided participation in the special education matter, knowing that Mahwah had reason to believe that the pupil may have been domiciled within the district served by Ramapo-Indian Hills. Under those circumstances, the rationale of *Cherry Hill* does not bestow upon Ramapo-Indian Hills an unwarranted benefit of a settlement which Mahwah entered in good faith in the belief it served the educational needs of a J.E., a classified student.

ORDER

It is **ORDERED** that respondent's motion for summary decision be and is **DENIED**.

This order denying partial summary decision is being submitted under *N.J.A.C.* 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If Commissioner does not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 9, 1997
DATE

Sebastian Gaeta
SEBASTIAN GAETA, JR., ALJ

5/14/97
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

MAY 15 1997
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

OAL DKT. NO. EDU 12292-95
AGENCY DKT. NO. 438-11/95

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge for the reasons expressed therein. Respondent's motion for summary decision is denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 23, 1997
DATE OF MAILING JUNE 23, 1997

332-97

DANIEL L. WOODSIDE,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Synopsis

Following tenure proceedings brought by the Board (*In the Matter of the Tenure Hearing of Daniel Woodside, School District of the City of Elizabeth, Union County*, Decision dated April 19, 1993) wherein the Board and Woodside entered into a settlement agreement, petitioner seeks salary payments pursuant to *N.J.S.A.* 18A:6-14.

ALJ found that the Appellate Division's decision to uphold the settlement agreement resolves the instant dispute. As per the terms of the agreement, petitioner is not entitled to any salary payments from the Board beyond June 30, 1993, the date on which he agreed to resign. Thus, the ALJ dismissed petition.

The Commissioner adopted the initial decision.

JUNE 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12016-93
AGENCY DKT. NO. 354-10/93

DANIEL L. WOODSIDE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Daniel L. Woodside, petitioner, *pro se*

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

Record Closed: March 26, 1997 Decided: May 7, 1997

BEFORE **ELINOR R. REINER**, ALJ:

On or about October 29, 1993, petitioner, Daniel L. Woodside, filed a petition of appeal with the Commissioner of Education for salary payments pursuant to *N.J.S.A.* 18A:6-14. By letter dated November 4, 1993, respondent filed a letter in answer to the petition. After additional correspondence, this matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14-1 to -13. The matter was assigned to the undersigned judge on January 7, 1994, and a prehearing conference was scheduled for March 31, 1994. During the conference, the parties agreed that this matter should be placed on

the inactive list until the determination of petitioner's appeal by the Appellate Division of the Superior Court (Dkt. No. A-1077-93T3). Mr. Woodside confirmed this request by letter dated March 31, 1994, and respondent consented by letter dated April 8, 1994. When additional motions were thereafter filed by petitioner, I scheduled oral argument on the issue of whether this matter should properly be placed on the inactive list, pursuant to *N.J.A.C.* 1:1-9.7. On May 23, 1994, the date scheduled for oral argument, the parties agreed that the matter should be placed on the inactive list pending resolution of the same issue in the Superior Court proceeding. I signed an order dated May 31, 1994, to that effect.

The Appellate Division has made its determination, and the instant matter is ripe for consideration. On February 28, 1997, respondent moved to dismiss petitioner's petition for salary payment. On March 7, 1997, petitioner filed an answer requesting back pay and the return of his teaching certificate. Respondent filed a reply, received March 24, 1997, and on March 26, 1997, petitioner responded thereto.

The facts are essentially undisputed. They are as set forth by respondent and may be summarized as follows. The Elizabeth Board of Education (Board) hired Dr. Daniel Woodside as a teacher in its school district effective September 1, 1987. On or about May 14, 1992, the Board filed and certified tenure charges against Woodside, pursuant to allegations of corporal punishment and inappropriate physical intervention with students. Hence, the Board suspended Woodside without pay, effective May 15, 1992. Tenure hearings regarding this matter were held at the Office of Administrative Law, and on November 19, 1992, I ordered the Board to resume salary payments to Woodside pursuant to *N.J.S.A.* 18A:6-14. Since Woodside's suspension after certification had exceeded 120 days without a final determination rendered, the law required the Board to resume salary payments effective September 12, 1992.

On February 9, 1993, while the case was still being heard, Woodside and the Board entered into a settlement agreement which provided that the Board would pay Woodside's full salary until June 30, 1993, after which Woodside would resign/retire and surrender his teaching certificate. I engaged Woodside in an extensive colloquy to

ensure that he understood the settlement and freely and voluntarily consented to its terms. I recommended the settlement to the Commissioner of Education for approval pursuant to an Initial Decision/Settlement.

Woodside subsequently filed exceptions to the Initial Decision, seeking to repudiate the settlement. On April 19, 1993, the Commissioner rejected the settlement and remanded the matter for rehearing. On October 6, 1993, the Board appealed the Commissioner's decision to the State Board of Education. The State Board reversed the Commissioner. It held that the February 9, 1993 settlement entered into by the Board and Woodside was valid. Woodside appealed the State Board decision to the Superior Court of New Jersey, Appellate Division, Union County.

On October 15, 1993, while Woodside's appeal was still pending before the Appellate Division, Woodside filed the instant petition for salary payments before the Commissioner of Education. He stated that: (1) *N.J.S.A.* 18A:6-14 mandates that the Elizabeth Board continue paying him until the State Board reversed the Commissioner on October 6, 1993, thereby blocking his case from going to trial; and (2) *N.J.S.A.* 18A:6-14 mandates paying him during appeal to the appellate court.

As stated above, by agreement of both parties I ordered placement of Woodside's petition for salary payment on the inactive list for three months, or until a decision was rendered by the Superior Court.

On October 27, 1994, the Appellate Division upheld the State Board's ruling that the settlement agreement of February 9, 1993, between Woodside and the Board was valid and that Woodside's resignation from the Board was effective on June 30, 1993, as agreed upon. The court specifically stated:

> Woodside's sworn testimony consistently shows that he completely understood the terms of the agreement and entered into it voluntarily. Therefore, Woodside's argument that the Elizabeth Board used *N.J.S.A.* 18A:6-14 to "commit

> grand theft of two months pay" from him is clearly without merit. *R.* 2:11-3(e)(1)(E).
>
> Woodside's contention that he should continue to be paid until resolution of the case is also clearly without merit. *R.* 2:11-3(e)(1)(E). One of the stipulations in the settlement agreement upheld by the State Board was that Woodside's resignation was effective June 30, 1993. Therefore, Woodside is no longer entitled to payment because he is no longer an employee of the Board.
>
> [No. A-1077-93T3 at 5-6.]

It is clear that the instant appeal is resolved by the Appellate Division's determination. Woodside is not entitled to any salary payments from the Board beyond June 30, 1993. As a result of the Appellate Division's determination, Woodside's petition for salary payment beyond June 30, 1993, must be dismissed.

Moreover, and as stated by respondent in its reply letter dated March 21, 1997, petitioner's request for an order for back pay and the return of his teaching certificate must be dismissed. Clearly, the back pay issue was resolved by the Appellate Division decision of October 27, 1994, and Woodside's surrender of his teaching certificate was part of the settlement agreement that was affirmed by the Appellate Division. Nothing set forth in petitioner's papers warrants relief from the terms of that agreement.

In sum, I **CONCLUDE** that the Appellate Division's determination renders the instant appeal by petitioner moot. It is hereby **ORDERED** that Woodside's petition for salary payments pursuant to *N.J.S.A.* 18A:6-14 is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 7, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/14/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 1997
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

al

DANIEL L. WOODSIDE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

OAL DKT. NO. EDU 12016-93
AGENCY DKT. NO. 354-10/93

DANIEL L. WOODSIDE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner again repudiates the agreement which he entered into on February 9, 1993, essentially contending that he was blackmailed by the Board of Education, whose actions, along with those of the Administrative Law Judge (ALJ) resulted in a "criminally corrupted settlement." (Petitioner's Exceptions at p. 4) Petitioner, therefore, asserts that he is entitled to back pay until October 17, 1994, the date of the Appellate Court's decision in the prior tenure matter. (*Id.*) Finally, petitioner avers that, inasmuch as the State Board of Examiners has not yet taken any action with respect to his certificate, he has retained said certificate and should be permitted to do so. (*Id.*)

In response, the Board contends that petitioner's exception arguments "*** are irrelevant because he has voluntarily agreed to waive his tenure rights as well as surrender his

teaching certificate [in] return for salary payments that ended on June 30, 1993." (Board's Reply at pp. 1, 2) Thus, the Board urges that this matter be dismissed.

Upon careful and independent review of the record in this matter, the Commissioner concurs that the within Petition of Appeal is properly dismissed. As the ALJ aptly noted, it is clear that the decision rendered by the Appellate Division as to the validity of the settlement agreement entered into by petitioner and the Board necessarily resolves the within dispute, since petitioner is deemed to have resigned from the Board on June 30, 1993, and is entitled to no compensation beyond that date.

As to petitioner's teaching certificate, the Commissioner notes that the pertinent term of the agreement signed by both parties provides that:

> Dr. Woodside voluntarily relinquishes all teaching licenses and certificates for the appropriate action, if any, by the State Board of Examiners. *** (*In re Woodside*, Decision dated April 19, 1993, Agreement at p. 3, paragraph 4)

The agreement also makes clear that petitioner resigned his position, as of June 30, 1993, "***with the expressed intention of retiring, thereby concluding his teaching career." (*Id.* at pp. 2, 3, paragraph 2)

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. This matter shall be forwarded to the State Board of Education for action as it deems appropriate pursuant to *N.J.A.C.* 6:11-3.6, and petitioner, in accordance with the agreement, *supra*, shall thereupon cooperate fully with any such proceedings. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 23, 1997
DATE OF MAILING JUNE 23, 1997

334-97

334-97 SEC

IN THE MATTER OF MARK CONNOLLY,	:	
WEST MILFORD BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, PASSAIC COUNTY.	:	DECISION
	:	

JUNE 23, 1997

IN THE MATTER	:	BEFORE THE SCHOOL ETHICS COMMISSION
OF	:	
	:	Docket No.: C15-96/C26-96
MARK CONNOLLY,	:	Consolidated
West Milford Board of Education	:	
Passaic County	:	DECISION

PROCEDURAL HISTORY

This matter arises from two complaints filed by Leroy Gearl and Steven Brandt against Mark Connolly, a member of the West Milford Board of Education. Leroy Gearl filed his complaint on May 8, 1996. Mr. Brandt filed a complaint on August 15, 1996. The complaints alleged, in pertinent part, that Mr. Connolly violated various provisions of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., in connection with his wife's employment application with the West Milford school district.

When Mark Connolly received the complaint of Steven Brandt, he asked that the complaints be consolidated. The Commission consented to his request. Thus, the Commission accepted the answer to Mr. Gearl's complaint as the answer to the complaint of Mr. Brandt.

The Commission heard testimony from witnesses at its meeting on February 25, 1997. It tabled a decision on the case at the public meeting. At the April 8, 1997, special meeting of the Commission, the Commission concluded that there were no material issues of fact that needed resolution at an evidentiary hearing. The Commission then adopted a decision finding probable cause to credit some of the allegations in the complaint of Leroy Gearl. Specifically, the Commission found probable cause to credit the allegations in paragraphs one, four and five of the complaint, which state the following:

> 1) Mr. Connolly was a member of the Personnel Committee that consisted of three board members. Mr. Connolly should have removed himself from that Committee when his wife was being considered for a teaching position in the West Milford school district.
>
> 4) When the motion for the hiring of Mr. Connolly's wife failed, Mr. Connolly solicited the school board attorney for a legal opinion on how to bring the resolution back to the floor for a new vote.
>
> 5) After getting the legal opinion, Mr. Connolly then called the one school board member who would be able to bring it back to the floor for a vote. When this

member told Mr. Connolly he would not agree with this, Mr. Connolly proceeded to berate and make slanderous remarks to this board member.

The Commission did not find probable cause to credit the allegations in the complaint of Steven Brandt although his complaint was also based on Mrs. Connolly's application for employment. The wording of the complaint was such that the allegations were either not supported by the record, or if supported, could not sustain a finding of probable cause of an ethics violation. Accordingly, the Commission dismissed the allegations in his complaint as set forth in the Commission's probable cause letter of April 8, 1997.

The Commission invited Mr. Connolly to submit in writing his position as to why his actions do not constitute a violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act. The Commission further directed that if Mr. Connolly is of the opinion that there are material facts in dispute, he shall set forth those facts and explain why they are material to the disposition of the case. It also invited Mr. Connolly to include his position on the appropriate sanction in the event that the Commission finds a violation. The Commission received his written statement on May 13, 1997.

Mr. Connolly's affidavit in answer to the complaint of Leroy Gearl set forth the following responses to the three allegations in which the Commission found probable cause:

1) Mark Connolly was a member of the Personnel Committee when the superintendent presented his wife's name to the committee for review on September 25, 1995. He states that the committee consisted of four rather than three members: Mr. Duffy; Mrs. Nobis; Mrs. Shoemaker and himself. At the Committee meeting in question, Mrs. Touw was present in Mrs. Shoemaker's place. He did not leave the room but sat quietly listening to the discussion. He answered only one question posed by Mrs. Touw. The Committee approved his wife 2-1, with Mrs. Touw voting against it and him abstaining.

4) After the board failed to appoint his wife, he asked then board counsel, J. Rothchild, whether the board could bring the motion back before the full board for another vote. Mr. Rothchild informed him that only someone who voted against the motion or who did not vote could bring the motion back for another vote.

5) Since Mr. Maglio was not present at the board meeting, Mr. Connolly asked him to consider bringing the motion back for another vote. Mr. Maglio informed him that he would not and began to scream at him for even asking such a thing since Mr. Connolly had not supported him for board president. The conversation then ended.

Last, Mr. Connolly states that Mr. Gearl filed the complaint out of revenge because he lost so badly in the April 1996 election to candidates whom Mr. Connolly supported. He believes that the fact that Mr. Gearl filed the complaint in May 1996, seven months after the events he alleges constitute violations of the Act, supports his theory. He urges the School Ethics Commission to find the complaint to be frivolous.

FACTS

The Commission finds the following material facts to be undisputed. Mrs. Connolly first became a substitute teacher in West Milford in special and regular education in August 1995. Soon after she became a substitute, she was called by Howard Heller, Director of Special Services, and asked to be a long-term substitute. She accepted the position and served as a long-term substitute in the resource center. On September 25, 1995, the Personnel Committee met to discuss, among other appointments, the appointment of Susan Connolly to be a resource room teacher. Mr. Connolly was a member of the Personnel Committee at that time and attended the meeting as such. When the Committee discussed his wife's appointment, Mr. Connolly recused himself from the discussion, but did not leave the room. He did not add to the discussion, except to answer a question that another member of the committee asked him.

Before the full board voted on the appointment, Mr. Connolly made several board members aware that his wife's appointment was going to be considered at the meeting on September 26, 1995. He did not suggest to them how they should vote. Before the meeting, Mr. Connolly asked Mr. Gearl how he was going to vote on his wife's appointment. Mr. Connolly attended the executive session of the board at which his wife's appointment was discussed on September 26, 1995. He did not participate in the discussion. When the matter came before the full board, Mr. Connolly abstained from voting on his wife's appointment.

After the motion to appoint his wife failed, Mr. Connolly consulted the board attorney as to how the agenda item could be brought back before the board for a re-vote. The board attorney informed him that only a person who had voted against the motion or had not voted could ask to have the matter returned to the agenda. Mr. Maglio was the only board member who had not attended the September 26, 1995, meeting. Mr. Connolly called Mr. Maglio to determine whether he would consider bringing his wife's appointment back to the board for a re-vote. Mr. Maglio refused to do so. At the October 10, 1995, meeting, Mrs. Connolly spoke to the board and charged it with not basing its vote on her qualifications, but on Mr. Connolly's membership on the board. Mr. Connolly also spoke to the board regarding the board's failing to appoint his wife. He also mentioned that the board had hired or promoted other board members' relatives while they were in office.

After Mrs. Connolly failed to get the position as resource center teacher, she continued serving as a long-term substitute. The board never brought back the motion to hire her as a teacher for a re-vote. In April 1996, Mrs. Connolly applied for another resource center position that had opened. She received an interview, but was not recommended because her experience was not in high school, but in middle school. In July 1996, she applied to be a part-time resource center teacher in the middle school. The board appointed her to this position with all members in favor, except Mrs. Touw who voted against it, and Mr. Connolly who abstained.

ANALYSIS

As set forth above, the Commission found probable cause to credit the allegations in paragraphs one, four and five that respondent violated the School Ethics Act. The Commission dismissed the remaining paragraphs for lack of probable cause. The issue is thus whether respondent violated the Act when he remained in the Personnel Committee meeting when his wife was being discussed, when he asked the attorney how to bring the motion to hire his wife back to the floor or when he called Mr. Maglio to ask him to consider bringing the motion back for a re-vote.

Mr. Connolly defends his actions in his written statement in response to the finding of probable cause. Therein, Mr. Connolly states that he has attended Personnel Committee meetings when other board members' relatives were discussed hired and promoted. However, at no time did board counsel advise these board members that they should leave the room. Thus, he thought refraining from discussion was sufficient. He adds that he would have left the room if he was aware that by remaining he may be in violation of the School Ethics Act. Regarding paragraph four, he adds that he did inquire for legal advice as to how to bring the vote on his wife back to the floor. He adds that he would expect that the board attorney would have advised him that it was a violation for him to do so. He states that this all began because of an attack on his wife. He feels that he should have the same right as any member of the general public to ask for advice. Last, regarding paragraph five, he denies berating or slandering Mr. Maglio or anyone else. However, he admits to calling the fellow board member and asking him to consider bringing the resolution back to the table.

N.J.S.A. 18A:12-24(c) of the School Ethics Act provides:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The initial question, therefore, is whether Mr. Connolly's continued attendance at the meeting of the Personnel Committee was "acting in his official capacity" in a matter in which he and his spouse had a financial and personal involvement. Mr. Connolly does not argue that he and his spouse have a direct financial and personal involvement in her getting a full time job with the board that might reasonably be expected to impair his objectivity. He correctly abstained on the vote, which shows that he acknowledges the involvement. The Commission finds that Mr. Connolly did not have to resign from the Personnel Committee altogether because his wife was being considered for an appointment with the board. However, by remaining in the room when she was being discussed, he was acting in his official capacity in a matter in which he had a financial and personal involvement. The committees of the board meet in private and thus, are not subject to public scrutiny. Thus, when the Personnel Committee makes its recommendation to appoint Susan Connolly and the minutes show Mr. Connolly as having been present for the entire meeting, the public may view the recommendation with suspicion and mistrust. His mere presence may be viewed as a hindrance to a critical review of the candidate's credentials by the

committee. It may create a chilling effect on the committee's speech by virtue of the fact that any board member who dares to speak against the candidate's qualifications is viewed as personally attacking Mr. Connolly. Indeed, that appears to be exactly what happened in this instance. Mr. Connolly took offense at Mrs. Touw's question regarding how long she had been serving as a substitute and it began a bitter dispute between the two that clearly continues to this day.

The Commission does not find the fact that counsel never advised respondent that he could not sit in the Personnel Committee's discussion of his wife to prevent the Commission from finding a violation. The Commission only considers the effect of inadequate or nonexistent legal advice in determining penalty. Furthermore, there is no evidence that he sought such advice regarding sitting in on the personnel committee. For the foregoing reasons, the Commission concludes that respondent violated N.J.S.A. 18A:12-24(c) when he continued to sit in on the personnel committee meeting when it was discussing his wife's appointment.

The Commission agrees with the respondent that it should not find him in violation of the Act for asking the board attorney how to bring the motion to appoint his wife back to the floor. If respondent had taken no further action, the Commission would not be able to find that he violated the Act on the facts of this case. However, Mr. Connolly acted on that advice and contacted the one board member who did not cast a vote for the purpose of soliciting him to bring the motion back to the floor. Although Mr. Connolly denies soliciting a vote for his wife, he did attempt to have Mr. Maglio bring the motion up for a re-vote. The only reasonable explanation for his doing so is that he hoped that the outcome of the motion would be different on a re-vote. The Commission concludes that he contacted Mr. Maglio as a fellow board member when he called him at home to get him to take the action in support of his wife. By doing so, he fully involved himself in the process of his wife's hiring and took on the role of advocate instead of impartial and neutral observer that the Act requires. It does not matter that he did not succeed in his efforts to have the motion brought back to the floor. The Commission concludes that by his call to Mr. Maglio, he acted in his official capacity in a matter in which he and his spouse had a financial and personal involvement that might reasonably be expected to impair his objectivity in violation of subsection (c).

DECISION

For the foregoing reasons, the School Ethics Commission finds that respondent Mark Connolly violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when he sat in on the Personnel Committee's discussion of his wife's appointment. He violated it again when he called Mr. Maglio and asked him to consider bringing his wife's appointment up for a re-vote after the motion had failed. He should have accepted the defeat of the resolution and taken no further action. Instead, he became fully involved in actions to get his wife hired in the position. This was clearly acting in his official capacity in a matter in which he and his spouse had a personal and financial involvement that might reasonably be expected to impair his objectivity or independence of judgment in violation of subsection c.

Regarding penalty, Mr. Connolly has set forth several factors that he would like for the Commission to consider. First, he states that he was not trying to influence the hiring of his wife,

but simply responding to personal attack. Second, he states that if he had received adequate legal advice, he would have refrained from the actions upon which the Commission has found probable cause. Third, he compares his case to In the Matter of Matilda Touw, C16-96, in which the Commission reprimanded a board member for voting on her son's reappointment as assistant head custodian. He concedes that her case is not the same, but submits that he never voted for or solicited votes for Susan Connolly.

In response to Mr. Connolly's suggested mitigating factors, the Commission first notes that its investigation did not reveal that he or his wife was personally attacked by any board member. Rather, he viewed questions about his wife's qualifications as a personal attack, which provides a reason that he should not have been present during the discussion. In any event, even a personal attack would not justify his interference in the outcome of his wife's employment application. Regarding the second mitigating factor, the Commission has accepted a lack of legal advice as a factor to mitigate a penalty. However, here, Mr. Connolly did not seek any advice, except how to get the matter back on the agenda. The Commission cannot find that lack of legal advice, when it was not requested, mitigates a penalty in the same way that incorrect legal advice may. Last, Mr. Connolly suggests that he should receive the same penalty as Mrs. Touw because he never solicited votes for Susan Connolly. The Commission has found that Mr. Connolly involved himself in the board's consideration of his wife's hiring in a way that created more public distrust than Mrs. Touw's single vote during a public meeting. The Commission has already found that Mr. Connolly's call to Mr. Maglio was an attempt to solicit a vote for his wife, albeit after the motion had already failed. He committed two violations of the act and his actions were not in view of the public. For this reason, his actions are subject to a greater penalty than the letter of reprimand Mrs. Touw received.

Considering the foregoing, the Commission recommends that the Commissioner of Education impose a penalty of censure for Mr. Connolly's two violations of N.J.S.A. 18A:12-24(c) of the School Ethics Act. The Commission believes that such a penalty adequately disciplines Mr. Connolly for the two violations and considers the defenses raised by Mr. Connolly. Last, such a penalty indicates that this is a serious violation of which the public should be aware.

Upon adoption of this decision by a formal resolution of the School Ethics Commission, the matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625-0500, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision -- C15-96/C26-96

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents and testimony given in support thereof; and

Whereas, the Commission concluded at its meeting of April 8, 1997, that there was probable cause to credit the allegations in the complaint that respondent violated the School Ethics Act; and

Whereas, the Commission placed the reasons for its decision in a letter to the parties dated April 8, 1997, and invited Mr. Connolly to prepare a written statement in response setting forth why the Commission should not find him in violation of the School Ethics Act; and

Whereas, the Commission has concluded that Mr. Connolly violated N.J.S.A. 18A:12-24(c) of the School Ethics Act for the reasons stated in a proposed decision; and

Whereas, the Commission has reviewed the proposed decision of its staff finding Mr. Connolly in violation and recommending that the Commissioner of Education impose a penalty of censure; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on May 27, 1997.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 213-6/97

IN THE MATTER OF MARK CONNOLLY,	:	
WEST MILFORD BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, PASSAIC COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. No comments were filed by respondent.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter, in view of the Commission's determination that a violation of the School Ethics Act occurred which is sufficiently serious to warrant the imposition of censure as it is defined at *N.J.A.C.* 6:3-9.19(c)1.*

Accordingly, IT IS HEREBY ORDERED that Mark Connolly be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The determination of the Commission as to violation of the Act is not reviewable by the Commissioner herein, pursuant to *N.J.S.A.* 18A:12-29(c). Therefore, this decision is limited to a review of the recommended penalty and its implementation.

JUNE 23, 1997
DATE OF MAILING JUNE 23, 1997

335-97

335-97

HUDSON COUNTY TRANSPORT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning bus company, which was awarded pupil transportation contracts under bid for school year 1993-94, contended that respondent assessed penalties against it in an arbitrary, unreasonable, and discriminatory manner. Petitioner further alleged that respondent wrongfully withheld trip assignments which it was entitled to receive.

ALJ dismissed the petition. Although decisions to change trip request forms to alter bus types occurred, ALJ concluded that the changes were not based on political affiliations of petitioner's agents but were based, in part, on considerations of distance, additional space and pupil needs, and in part, on personal dislike and the contentious relationship between the parties' agents. The ALJ further concluded that petitioner had a valid contract with the District, and that petitioner was estopped from challenging the District's action by laches, and by its apparent acquiescence in the claimed violation of those rights.

The ALJ further found it reasonable to inspect vehicles based on certain conditions but concluded that use of the Branham book, which was not accessible to vendors, was unreasonable and that the District, through its transportation coordinator, acted arbitrarily, capriciously, and in bad faith in using the Branham book to determine if petitioner's vehicles complied with weight specifications. Additionally, the ALJ ruled that the District properly cited petitioner for infractions for late arrivals but directed the transportation department to review its records for calculation errors and adjust them, if appropriate. The ALJ concluded that the violation penalty schedule of the District is comparable with local standards and, thus, is not arbitrary, capricious and unreasonable. Neither was petitioner entitled to damages, which cannot be awarded by the Commissioner.

Commissioner adopted the ALJ's decision with modification. Commissioner concurred that petitioner was not entitled to the relief it sought, but set aside two conclusions of the ALJ and modified the penalty recalculation directive. Commissioner found that the ALJ, in directing recalculation, had erroneously applied a prior year's penalty schedule rather than the applicable schedule from 1993-94. Commissioner further determined that the record did not demonstrate that any personal dislike that may have existed between the parties' personal agents specifically influenced the District's decisions in changing bus types for certain trips or in using the Branham book to determine vehicle weight. However, the Commissioner did find the latter action to be arbitrary and unreasonable, and accordingly admonished the District and directed it to reform its policies and procedures so that weight standards are henceforth applied uniformly by all staff to all vehicles.

JUNE 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8493-94
Agency Docket No. 327-8/94

HUDSON TRANSPORT
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Dennis McGill, Esq., for petitioner

Patricia A. Taylor, Assistant General Counsel, for respondent
(**Charlotte Kitler**, General Counsel)

Record Closed: September 9, 1996 Decided: April 24, 1997

BEFORE **MUMTAZ BARI-BROWN**, ALJ

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner, Hudson County Transport (HCT), was awarded pupil transportation contracts under bid for school year 1993-94. Petitioner contends that respondent, the State Operated School District of Jersey City, Hudson County (District) assessed penalties against the company for alleged violations in an arbitrary, unreasonable, and

discriminatory manner. Petitioner also alleged that the District wrongfully withheld trip assignments to which it was entitled to receive.

The matter was transmitted to the Office of Administrative Law (OAL) on September 1, 1994, as a contested case pursuant to *N.J.S.A.* 52:14B-1-15 and *N.J.S.A.* 52:14F-1-13. During eighteen hearing dates, the parties presented 21 witnesses. At the conclusion of the hearing, the parties had several settlement conferences before Arnold Samuels, ALJ, but did not settle the case. Thereafter, the parties filed post hearing briefs. The record closed on September 9, 1996. The forty-five (45) day statutory period within which to file the initial decision with the Department of Education expired on October 24, 1996. Based on the administrative law judge's voluminous case load, hearing schedule, and the complex and voluminous record consisting of more than 600 multi-paged documents, four extensions of time to complete the initial decision were granted. *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8. The date for filing the Initial Decision is April 24, 1997.

ISSUES

The issues are as follows:

1. Whether the District wrongfully withheld assignments from petitioner, *e.g.,* field trips, and if so, was the conduct discriminatory and did it constitute a breach of contract?

2. Whether the District's penalty procedure and the penalties assessed against petitioner are unreasonable, excessive or have been misapplied.

3. Is petitioner entitled to dismissal of the violations, reimbursement of penalties, attorneys fees and costs?

REVIEW OF EVIDENCE

FIELD/ATHLETIC TRIPS

Alan Manzo, Vice President of HCT, testified that in school year 1993-94, HCT was awarded the contract for weekday field trips starting before 2:30 p.m. for daily athletic trips occurring after school, and for weekend athletic trips occurring before 5:00 p.m. Prior to school year 1993-94, petitioner was the low bidder for these trips which also included 100 to 200 field trips to New York City. However, in school year 1993-94, petitioner received no assignments for the field/athletic trips to New York City. Instead, the field/athletic trips to New York City were awarded to Academy Bus Tours (Academy), HCT's competitor,.

Alan Manzo also claimed that Rita "Chickie" Damico, a District employee in the transportation department, informed him that Janet Gaita, transportation coordinator, was advised by Stan Wojek, an employee of the State Board of Education, that it was "illegal" for (yellow) school buses to leave the state and that only 'transit' type buses should be used for field trips to New York City. Notwithstanding several telephones calls to Gaita, Manzo maintained that she would not return his calls nor did she respond in writing. Under cross-examination, Manzo acknowledged that Gaita was on medical leave during part of the school year. However, in April or May 1994, he discussed the matter with Wojek who denied making the statement. Manzo learned that other vendors were awarded those assignments and used coach buses for trips out-of-state.

Robert Murden, athletic director at Synder High School, testified that before school year 1992-93 he attended a meeting with the athletic coaches and Janet Gaita. He recalled a discussion about the use of school buses traveling out of New Jersey. Murden has used school buses and coach buses for athletic trips to Pennsylvania and New York.

Terence Matthews, Principal at Ferris High School, testified that during a meeting with the athletic director, they were advised not to use school buses for travel out of New Jersey. Generally, Matthews initiated the trip request forms and requested the type of bus, *e.g.,* school bus or coach, based on the particular trip, safety, comfort and cost.

Carolyn Scott Nelson, coordinator of academic services, administered a program for pupil trips to Lincoln Center in New York. Nelson did not receive any directives about what type of buses must be used for out-of-state trips. However, she requested and received large transit type buses because they were more comfortable. Neither Murden, Matthews nor any other District employee presented by petitioner received a written directive that school buses could not leave New Jersey or that transit or coach type buses were required to be used for trips out-of-state.

Janet Gaita, employed with the District for 18 years, has held the position of transportation coordinator for 16 years. Gaita was on medical leave for school year 1992-93, from February 1991 to February 1992, and from October 1993 to March 1995. While on medical leave, her duties were administered by Dr. Konick. However, Gaita did perform minimum work from home.

Gaita denied telling her staff or HCT that vendors were prohibited from using school buses for out-of-state trips. She explained the regular bidding process and bus assignment used by the District for field and athletic trips. The vendors' bids include the vehicle type to be supplied, *e.g.*, school bus, coach bus. Bidders also submit hourly rates for the basic four hours athletic trips and five hours field trips, and hourly overtime rates. After the contracts are awarded, the District distributes to its administrative personnel a list of vehicles/bus types owned by vendors. Generally, school administrators initiated the transportation request form. Thereafter, the form is

filed with the transportation department which would secure the vehicle from the appropriate vendor.

Trips Awarded Upon Oral Bid

Alan Manzo testified that prior to school year 1993-94, HCT and the District agreed to a minimum price for pupil transportation for four hours athletic trips and five hours field. In school year 1993-94, the District eliminated the minimum price contracts and requested emergency quotes from vendors for athletic trips of less than four hours and field trips of less than five hours.

Joann Gilman, District Finance Director, testified that in September 1993 she reviewed the District's expenses. She inquired about the District's costs for field and athletic trips. The records indicating that the District spent $500.00 for a two hour field trip led Gilman to conclude that the District's agreement to pay a minimum cost for local trips were fiscally unsound. Indeed, vendors were paid for a fixed rate for a five hours field trip although the actual trip was two hours. Concerned that the an audit would disclose poor financial management, Gilman discussed the matter with Gaita. Thereafter, the District eliminated minimum payments for athletic and field trips of less than four and five hours.

Gaita awarded all athletic trips projected for 3½ hours and field trips projected for 4½ hours to HCT and Laidlaw Transit, Inc., (Laidlaw), the vendors who were initially awarded contracts on the bids. The remaining shorter trips were served by Hudson County Vo-Tech pursuant to the contract or awarded by emergency oral bid. Emergency bids required telephone quotes on hourly rates from three vendors. Each of the affected vendors, Laidlaw, Academy, and HCT, were notified of the change and participated in the oral bidding process. Under objection, HCT eventually submitted oral bids and was awarded 1079 of 1272 athletic trips and 854 of 1323 field trips during the 1993-94 school year.

Use of Non Compliant Vehicles

Alan Manzo testified that in prior years the bids for 36 passenger routes were awarded to HCT, Laidlaw, and Savon Bus companies without problems. For school year 1993-94, HCT was held to the strict application of the specifications while the transportation department allowed Laidlaw to use buses which did not comply with "local" regulations. For example, although the regulations required that buses not exceed 26 feet from bumper to bumper, Manzo claimed that Laidlaw used 36 passenger Genesis buses that were 26 feet and 3 inches. He further claimed that the Genesis buses did not comply with the regulations requiring the engine be located in front of the windshield, and that the entrance doors be located behind the front wheels. Manzo also claimed that HCT was held to strict compliance with the specifications for vehicle types as designated by the Department of Motor Vehicles and Department of Education. Although he informed the District's inspectors that Laidlaw's vehicles did not comply with the specifications, Gaita approved the use of the buses.

Gaita explained that the Department of Education used alphabetical designations for school bus vehicles, such as Types A, B, C, and D. The Department of Motor Vehicles designated the same school buses numerically: Types I, and II. (R-559). Types I and II were defined in the 1993-94 specifications. (J-3). In August 1993, the District issued an addendum which removed the Department of Education's bus diagram from the specifications. *Ibid.* Also, the District amended the specifications for Type I and II buses, *e.g.,* 36 passenger buses and the required weight for S-2 cars. Gaita maintained that the addendum intended to clarify any confusion caused by the designations used by the Departments of Education and Motor Vehicles. The local specifications for 36 passengers buses remained the same for capacity (34 to 39 passengers), wheelbase (no greater than 194 inches), and length (no longer than 26 feet from front bumper to rear bumper). Also, the addendum noted that vendors should

be guided by Federal, State and local regulations. Gaita believed that the Genesis buses met the required length.

George Errico, Christos Genes, and Janet Gaita measured the Genesis buses used by Laidlaw. George Errico, senior transportation inspector has been employed by the District for 22 years. Gaita is his immediate supervisor. Errico is also employed by Academy Bus Co. but does not participate in the inspection of their vehicles. Errico informed Gaita that Manzo had complained that the length of the Genesis buses did not comply with specifications. Errico reinspected the buses and conceded that the location of the doors and the engine did not comply with the specifications. He acknowledged that Laidlaw was permitted to use the Genesis buses. Errico also testified that HCT used Thomas Buses, a flat nose 36 passenger bus whose engine was located behind the windshield.

Christos Genes was employed by the District as a transportation inspector. After the vendors were awarded a contract, Errico and Genes inspected the vehicles to assure that they complied with the bid specifications. Genes measured the Genesis buses after Manzo complained that they did not comply with the specifications. Genes acknowledged that the Genesis buses did not comply with the specifications because its engine and doors were located behind the windshield and wheels. Genes also testified that HCT used Thomas buses which were similar to the Genesis bus. The Thomas bus' engine is located behind the windshield and its doors are located in front of the wheels.

James Folkes, Director of Operations for Laidlaw, special ordered the Genesis bus to comply with the local specifications. For example, the number of seats were modified from 45 seats to fit the 39 passenger requirement. The Genesis buses were equipped to shorten the length of the bumpers by three inches. Therefore, he believed that the vehicle complied with the District's 26 feet specification.

S-2 CARS:

Alan Manzo testified the District failed to provide notice to vendors that for school year 1993-94 the bid specifications had increased the required weight of the S-2 cars. An S-2 car was defined as a four door sedan vehicle weighing more than 3,500 lbs.. The bid specifications also provided that the Branham Automobile Reference Book was to be used by the contractors in determining which vehicle will be accepted by the Jersey City Public schools.

Manzo requested a copy of the Branham book from the District but was not given a copy. However, Inspector Genes informed him that according to the Branham Book, vehicles owned by HCT, a Dodge Caravan, a Dodge Reliant, and a Dodge Aries, could not be used to transport pupils. Manzo maintained, however, that other vendors were allowed to use S-2 cars which did not comply with specifications.

Gaita acknowledged that in 1993-94 the District's transportation department changed the specifications to require that S-2 cars weight more than 3,500 lbs. Gaita also conceded that the Branham Book was not useful to determine if the vendor's vehicles met the required specifications. Therefore, some exceptions were made and the District waived the Branham book as a standard for all vendors.

Errico acknowledged that for school year 1993-94, the bid specifications increased the weight requirement for S-2 cars for safety reasons. The new specifications required that the vendor provide four door sedans weighting more than 3,500 lbs. Thus, for example, a seven seat van would not be in compliance. Errico also acknowledged that the Branham Auto Reference Book was not helpful in inspecting the vehicles. Thus, he used the District's Policy Manual, the Motor Vehicle Regulation, the bid specifications, and the regulations promulgated by the Department of Education. Errico was also familiar with NADA, the official Used Car Guide, Eastern Edition, April 1995. P-560. Errico acknowledged that under NADA, vehicles used by

Winsale, the Cutlass Sedan, weighted 2,958 lbs. However, NADA was not used as a guide to determine the weight for S-2 vehicles. Errico also acknowledged that he inspected a 1989 Chevrolet vehicle registered to Winsale, the car weighed less than 3,500 lbs. P-562.

Errico further acknowledged that although vehicles owned by Winsale were inspected on or about August 30, 1993, title to the vehicle was dated September 28, 1993. P-561. Errico explained, however, the grace period permitted for the vendor to obtain all the documents to the vehicle. Errico believed that it was reasonable to inspect a vehicle without a Bill of Sale so long as the vendor had the appropriate documents by the beginning of school. Errico further disclosed that the decision to remove routes was determined by Dr. Konick, District Superintendent. The decision to reject vehicles was determined by Gaita. Errico believed that neither HCT or Winsale lost routes based on non-compliance of its vehicles.

Louis Ricco, President of A&A Charter Services Bus Co., was also awarded transportation contracts by the District. Ricco recalled the changes in the S-2 weight specifications. He was aware that the District used the Branham Book to check weight specifications, but never received a copy or saw the book. He also recalled that the violations issued to his company between February and May 1993 would often be delivered at the end of the school year in June.

Penalties

Alan Manzo disputed many of the violations issued by the transportation department for alleged infractions and complained that the District failed to follow its own written policies. For example, when an alleged infraction occurred, the driver should have been issued a copy of the violation and a confirming copy sent to the vendor within seven days. Instead, the cumulative violations shown in Exhibit P-260 to P-441 were not issued to the driver. Indeed, HCT received a packet of violations on

August 3, 1993. Manzo claimed that when he spoke to Errico about the matter, he was directed to call Gaita. Alan Manzo also complained to the transportation department about the lack of a procedure to contest the penalties assessed against HCT.

Manzo also protested against the District's policy in collecting the fines from the vendors. HCT's revenues were about $175,000 per month less $12,000 for fines. The District deduced the penalty from the vendor's contract amount. Manzo claimed that he was forced to sign the addendum accepting the terms of the agreement under duress or pay $100 per day penalty. Indeed, he wrote several letters contesting the penalty procedure.

Manzo also disputed many violations issued to HCT for being late. Manzo maintained that his drivers always performed a test drive of the route after they have been awarded the contract. Often, the bus arrived at the student's home on time, but the student was not ready. Consequently, HCT was fined for arriving late to school. Manzo also testified that the District refused to acknowledge other mitigating circumstances such traffic jams, lack of parking space, or arriving a few moments before school recessed. Manzo also asserted that the District's penalty schedule was two and three times greater than other school districts and thus, excessive. His complaints to the transportation department were ignored and his requests for a departmental hearing were denied.

Alan Manzo disputed the penalties for violations regarding Route 713 and the emergency bid for the Route E 713. The bids were opened on August 23 and read aloud before those in attendance including HCT, Laidlaw and District employees, Errico and Rita Damico. Two vendors, HCT and Laidlaw, bid on the route. P-450. HCT's bid was lower than Laidlaw's bid. *Ibid.* Laidlaw asked whether an aid was required for the route. The question was referred to the legal department. On August 25, Gaita informed the bidders that route 713 was being rejected based on a discrepancy in bidding. Thereafter, the District took emergency telephone quotes on route 713.

Manzo asked why the prior bid was rejected and whether an aid was required on the route. He maintained that the District did not respond to either of his questions. HCT bid $148 on the route plus $35 for an aide if one was necessary and began the route without an aide.

Charles Trefurt is the principal of P.S. #8, a grade K through 8 school consisting of 1350 students and two special education classes. In school year 1993-94, HCT was awarded the contract for route 444. Petitioner used two vans to transport the students who were enrolled in the special education classes. Trefurt recalled that because the vans were constantly late the pupils became upset. Trefurt instructed a teacher's aide to prepare the violation forms and obtain the bus driver's signature.

Trefurt identified the violations forms which were completed under his directive. He candidly testified that often the aide had difficulty obtaining the driver's signature. Either the driver would refuse to sign the violation or the aide was helping the children from the bus into the school building. Under cross examination, Trefurt conceded that several of the violation forms may be inaccurate regarding whether the driver was late less than or more than fifteen minutes.

Marvin Strynar is the principal of P.S. #36, a grade K through 8 school consisting of approximately 850 students. In school year 1993-94, about 120 pupils were bused daily from their school to his building for bi-lingual instruction. Often, buses driven by HCT arrived to school late. Late arrivals impact student instruction, cause children to miss the breakfast program, and interfere with the duties of the aides. Strynar identified the signatures on the violation forms as those authorized by him to complete the documents. However, the bus drivers employed by HCT refused to sign for receipt of the violations. Strynar acknowledged that at times the driver had difficulty locating a parking space for the bus. However, on other occasions, although parking space was available the driver chose not to park. Instead, he discharged the students from mid-street.

Angela Bruno is the principal of P.S. #11, a grade K through 8 bi-lingual magnet school consisting of approximately 1100 students. In school year 1993-94, she too experienced problems of late pick-ups or no arrivals by HCT. Bruno often spoke with HCT directly about the late buses. Bruno conceded that she did not give the violations to the bus driver. Instead, she sent them to the transportation department.

FINDINGS OF FACT

1. In school year 1993-94, HCT was awarded the contract to provide pupil transportation for four hours athletic trips and five hours field trips. HCT's charged a fixed rate for the for four hours athletic and five hours field trips.

2. In school year 1993-94, the District eliminated minimum payments for athletic and field trips of less than four and five hours.

3. The District requested emergency quotes from vendors for athletic trips of less than four hours and field trips less than five hours.

4. Each affected vendor, Laidlaw, Academy, and HCT, were notified of the change and participated in the oral bidding process.

5. HCT submitted oral bids and was awarded 1079 of 1272 athletic trips and 854 of 1323 field trips during the 1993-94 school year.

6. In school year 1993-94, petitioner received no assignments for the field/athletic trips to New York City.

7. Prior to school year 1993-94, petitioner was the low bidder for many trips to New York City.

8. The District permitted Laidlaw to use Genesis buses for pupil transportation.

9. The engine and doors on Genesis buses used by Laidlaw were located behind the windshield.

9. The bumpers on the Genesis buses were adjustable within three inches.

10. The bid specifications required that the transportation department use the Branham Automobile Reference Book to determine the weight of the vehicle to be used by the Jersey City Public schools.

11. The Branham Book was selectively used to determine whether the weight of S-2 vehicles met the bid specifications.

12. Other school districts have comparable violation penalty schedules as those applied by the District.

DISCUSSION AND CONCLUSIONS

The crux of this proceeding is petitioner's claim that Janet Gaita, the District's transportation coordinator, personally disliked Allen Manzo, President of HCT. In its initial brief, petitioner does not assert that it was subjected to discriminatory treatment based on the political affiliations of Allen Manzo. Rather, petitioner maintains that Janet Gaita's personal dislike for Manzo motivated her to discriminate against HCT and its owners by "favoring their rivals in bidding, awarding, administration and implementation of their contracts." Petitioner's Initial Brief at 2.

Moreover, Gaiter violated regulations and laws pertaining to advertising, bidding, awarding, and administering contracts for pupil transportation. Petitioner also avers

that Gaita has "constantly violated said authorities and operated her department guided by her own ego and personal preferences, favoring and rewarding the people she liked, while discriminating against, harassing and punishing those she did not like." *Id.* at 24. Petitioner submits that only substantial monetary sanctions will motivate respondent to reform and urges this tribunal "not to let the opportunity pass" to award petitioner the requested damages and interest, without mitigation." *Ibid.*

Discrimination

Allen Manzo, Sr. has been in the bus transportation business since 1920 and he formed HCT in 1977. He has also held several elected and appointed political positions in Jersey City. He testified that Gaita was also politically active in Jersey City and described their relationship as "political adversaries". Manzo also testified about several incidents which fostered the rivalry and discord between he and Gaita. For example, Gaita asked him to speak to former Mayor McCann about appointing Gaita's father to the Jersey City Commission Sewer Authority. After Manzo refused Gaita's request, his business began to change. Manzo also testified that Gaita stalked him and while both were present in a local restaurant she attacked him with a butter knife and threw a glass at him. Manzo maintained that the District selectively issued fines against HCT after he "fell out" with Gaita.

I have considered Allen Manzo's testimony that respondent discriminated against HCT based on the political activities of Janet Gaita and her personal dislike towards him. Claims of discrimination based on political affiliation have been addressed by the court and the Commisioner and thus, can be used as a guide in reviewing petitoner's claim of discrimination. Traditionally, political motivated dismissals have involved retaliation against employees because of their involvement with the Democratic or Republican parties. Discrimination based on political association in employment matters requires that the employee prove 1) that the employee works for a public agency in a position that does not require political

affiliation, 2) that the employee maintained an affiliation with the political party, and 3) that the employee's political affiliation was a substantial or motivating in the adverse employment decision. If the employee demonstrates these events, the employer may avoid a finding of liability by demonstrating by a preponderance of the evidence that it would have made the same decision even in the absence of the protected affiliation. *Robinson v. Fiore*, 62 *F.*3rd, 596, 599 (3rd Cir. 1995). Intra-party disputes have also been considered by the courts within the spear of political affiliation. *Ibid.*

Factionalism can give rise to a claim of inappropriate retaliation. *In Caputo v. Board of Education of Union City*, 1988, SLD. 1815, reversed, State Board of Education, 1990, SLD, 1694, petitioner alleged retaliation for his political activities after he was not rehired as a football coach. The ALJ found that the failure to rehire petitioner was based on his efforts in a school board election on behalf of a group named CARE, an organization that unsuccessfully challenged the Alliance Civic Association which controlled the school board. The State Board recognized that political affiliation can apply when a nonpartisan group controls the board. However, the State Board reversed the finding of retaliation because the facts did not support the conclusion that political affiliation was the reason for the board's action. *See also Dearden v. Board of Education of the City of Trenton*, 1990, SLD, 1391, aff'd State Board of Education, 1991, SLD 2536 (Petitioner's position was improperly abolished when the basis for the abolition was the Mayor's comment that Dearden was a "political hack.").

Patronage dismissals based on intra-party political affiliation, personality or philosophical differences also have been recognized by the New Jersey courts. *See Battaglia v. Union County Welfare Board,* 88 *N.J.* 48, 1981, Cert. denied, 556 U.S., 965, 102 S.Ct. 2045, 72 L.Ed.2, 490, 1992. Nevertheless, the allegations of retaliatory discrimination based on political affiliation must be carefully scrutinized. Although the court applied political affiliation protection to intra-party disputes, it also expressed concern that disputes among public officials of every nature would be characterized as

"political" in an attempt to bring an action for alleged constitutional violations or to seek a remedy for dismissals for poor performance. *Robinson v. Fiore, supra.* 62 *F.* 3d 596,

Here, neither Allen Manzo nor Janet Gaita claim affiliation to any political party or faction within the same political party. They do not dispute, however, being political adversaries or their dislike for one another. Indeed, Gaita counters that for many years, Allen Manzo has engaged in a course of abusive behavior and harassment towards her and the employees in the transportation department. For example, in correspondence to District employees, Manzo alleged that an employee, Robert Roggenstein, "was involved with organized crime". Respondent's Initial Brief at 10. Additionally, a local newspaper article revealed that Louis Manzo, Allen Manzo's brother and the former Chief Health Inspector for Jersey City, alleged that Manzo and the former mayor attempted to draw up a "black list" of city health employees who did not support the mayor during the last election campaign. Manzo denied the allegations but acknowledged that Roggernstein and Gaita were political rivals. R-119.

At the hearing, I had the opportunity to closely observe Janet Gaita, Allen Manzo and his son Alan Manzo. Alan Manzo's demeanor, posture and tone of voice during his testimony about specific incidents and past communications with Gaita reflected antagonism and repugnance. Similarly, during Gaita's testimony, her demeanor towards Allen and Alan Manzo showed intense dislike. She claimed that during many of their discussions, Alan Manzo had used derogatory language commonly associated with overweight persons.

In a letter dated October 6, 1993, Gaita wrote Alan Manzo about his abusive behavior towards the transportation staff.

> Dear Mr. Manzo, Jr.
>
> On September 24, 1993, Mr. Christos Genes, Inspector, wrote several violations pertaining to your company.
>
> At about 3:10 P.M. that day, while I was standing by Mr. Genes' desk, he received a phone call from you and held the phone away from

> his ear so I could hear what was said. What I heard was extremely upsetting to me since I heard you refer to Mr. Genes as a FAT F__K, as well as other obscenities.
>
> Approximately a half-hour later, you called once again, and according to Mr. Genes, allegedly threatened his life. Your alleged statement to him was "If you give me any more violations, they will be reading your last rights by next week."
>
> As I have told you in the past, I will not tolerate the constant abuse of the transportation staff by you or any member of your company.
>
> ***
>
> If these actions continue, I will have no choice but to ask the J.C. public Schools to take some form of legal action against you and your company. [R-125]

I am persuaded by Manzo's overall demeanor that his conduct towards Gaita and the transportation staff was abusive and hostile.

The doctrine of unclean has been applied to deny reappointment to teachers who obtained their positions through political patronage *North Bergen Federal Teachers v. Board of Education of the Township of North Bergen*, 1978, SLD, 218, *modified*, State Board of Education, 1978, SLD, 250, *aff'd,* Appellate Division, 1980, 522, cert. denied, 84 *N.J.* 444, (1980). The same principle applies to persons seeking relief from an administrative tribunal. *North Bergen Federation of Teachers, super.* at 250. Thus, I have also considered petitioner's conduct.

Respondent argues that HCT's claim that it was held to specifications while other vendors were not held to the same standard are a mere reiteration of the arguments which were rejected by the ALJ in the previous decision, *Hudson County Transport, Inc. v. State-Operated School District of Jersey City*, 92 *N.J.A.R.* 2d (EDU)

636. Based on the result of the previous case, respondent urges this tribunal to dismiss petitioner's arguments in this matter.

In the prior matter, HCT challenged the District's decision to rescind the transportation contracts which had been awarded under bid to HCT by the former Jersey City school board. The contract specifications required the vendor to provide 36 passenger buses. The contracts were awarded although HCT had not specified in its proposal the vehicle it would provide. Since its creation in 1977, HCT has provided transportation services to the Jersey City school system. As it did in past years, HCT supplied 54 passenger buses rather than the required 36 passenger buses. In October 1998, the school system became the State-Operated School District of Jersey City. Christos Genes attempted to inspect the 36 passenger buses and was informed by HCT that they were unavailable. *Ibid.* Judi Granick, state executive assistant to the District superintendent, directed that the contracts not be awarded to HCT and that the routes be rebid. *Ibid.* Thereafter, on September 6, 1989, Gaita informed Allen Manzo that the contracts would be canceled because HCT did not meet the specifications for 36 passenger buses. "Nevertheless, the pupil transportation contract was signed by Hudson County Transport on August 23, 1989, and was signed by the president of the Board on September 14, 1989." *Id.* at 637. After the state takeover, the District rescinded the contract and directed the director of transportation to rebid the routes served by HCT. The routes were awarded to Laidlaw. In December 1989, HCT filed a complaint against the District seeking damages for alleged breach of contract.

The administrative law judge concluded that the contracts awarded to HCT violated the laws and regulations governing public school contracts and this, was an *ultra* vires act by the Board. Further, the ALJ rejected HCT's argument that "that it was entitled to the award of an illegal contract because such contracts had been awarded illegally in the past." *Hudson County Transport, Inc. v. State-Operated School District of Jersey City*, 92 *N.J.A.R.* 2d (EDU) 636, 639.

FIELD/ATHLETIC TRIPS

Petitioner maintains that the reason Gaita consistently favored other vendors over HCT was her personal dislike for Allen Manzo. For example, in school year 1993-94, HCT was awarded the contract for trips requiring 54 passenger buses and Academy was the sole bidder and awarded the contract for trips requiring transit and coach buses.[1] In previous years, HCT had regularly used school buses to transport pupils to New York City. However, HCT recieved no assignments for such trips in 1993-94. Petitioner alleged that Janet Gaita determined that school buses could not leave the state and that only 'transit' type buses should be used for field trips to New York City. Thus, the trips to New York were awarded to Academy. Although Academy's performance bond was based on anticipated revenues of $25,000.00, it billed the District for $85,457.00. This amount represented 120 extra trips and 180 more buses than anticipated. Petitioner submits that it should have received the extra trips and revenues paid to Academy. Petitioner calculated the total amount owed from the District at $56,654.48, plus interest. Petitioner's Initial Brief at 5.

Petitioner has the burden of proof by a preponderance of the credible evidence. *Atkinson v. Parsekian* 37 *N.J.* 143 (1962). The term "burden of proof" refers to the "burden of persuasion". The burden of persuasion entails more than merely producing evidence to establish a state of equilibrium with respect to whether a certain fact exists. This tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." *Jackson v D.L. & W.R.R.,* 111 *N.J.L.* 487, 490 (E. & A. 1933). One factor to consider to determine the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v Salimone,* 19 *N.J. Super.* 600, 608 (App. Div. 1952). In an

[1] Transit and Coach buses are commonly used for public transportation and bus tours.

administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Tp. v Murdoch,* 73 *N.J. Super.* 511 (App. Div. 1962). Thus, I have carefully reviewed the evidence to determine if the testimony contains "inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." *In re Perone,* 5 *N.J.* 514, 521-522 (1950).

Janet Gaita denied Alan Manzo's claim that she was advised by an employee of the State Board that it was "illegal" for school buses to leave the state and that only 'transit' type buses should be used for field trips to New York City. The credibility of testimony presented by Janet Gaita, Allen Manzo, and Alan Manzo regarding transportation matters have been undermined by their contentious relationship and the mutual hostility between Gaita and the Manzos. However, the record reflects that school administrators, *e.g.,* principals and teacher, initiated the trip request forms and indicated the number of passenger space required. Generally, the teachers had no preference for vehicle type and left the decision to the transportation department. However, some administrators and teachers requested coach buses for lengthy trips, additional space for sports equipment and the special needs of the students.

Although no written directive was issued prohibiting the use of school buses for out of state trips, Robert Murden credibly testified that a discussion about the use of school buses for trips to New York had occurred at a meeting which he attended with athletic coaches and Gaita. He recalled, however, using school buses and coach buses for trips to New York and Pennsylvania. Terence Matthews also provided credible testimony that during a meeting he and the athletic director were advised not to use school buses for out of state trips.

Further, the record reflects that HCT was deleted as vendor on several trip request forms for athletic trips to New York and the trip was awarded to Academic Bus. P-574b, P-576b. Other trip request forms show that changes were made to the "vehicle type" category. The request for a "school bus" and "54 passenger bus" had been

deleted and the words "coach" and "coach only since out of State" had been inserted. Petitioner submits that the transportation department deliberately made these changes to deny HCT from receiving assignments.

Based on the above, I **CONCLUDE** that the transportation department discouraged the use of school buses for trips out side New Jersey. I **CONCLUDE** the transportation department changed several trip request forms for athletic trips to New York by deleting the request for a "school bus" and inserting the term "coach" bus. I **CONCLUDE** that the changes resulted in HCT not being assigned trips out side of New Jersey. I **CONCLUDE** that the decisions to change the bus type were not based on the political affiliations of Allen and Alan Manzo. Rather, the decisions were made by Janet Gaita and based in part on considerations of distance, additional space, and pupil needs. I further **CONCLUDE** that the decisions were based in part on Janet Gaita's personal dislike of Allen and Alan Manzo and their contentious relationship.

Trips Awarded Upon Oral Bid

In school year 1993-94, HCT was awarded 74 athletic trips of less than four hours and 94 field trips of less than five hours for a minimum rate of $189.00. Petitioner's Initial Brief at 7. Petitioner asserts that before the transportation department determined to eliminate a minimum price for athletic trips of less than four hours and field trips less than five hours it breached the contract with HCT by awarding a "good number of oral bids" to other vendors. Petitioner's Initial Brief at 6. HCT also asserts that the field and athletic trip were anticipated, not emergencies. Except for the hours involved, the services supplied pursuant to the oral bid were the same as those supplied under the bid awarded through advertisement. *Id.* at 8. Petitioner submits that the District had no legal justification to award oral contracts to HCT's competitors. Petitioner calculates the damages for "diverted illegal oral contracts" at $7,182.00 plus interest. (38 buses at $189.00 per bus). *Ibid.*

The record reflects that for school year 1993-94, HCT was awarded the contract to provide pupil transportation for four hours athletic trips and five hours field trips for a minimum rate. The District eliminated minimum payments for the trips after the finance director reviewed the costs and determined that the transportation department's agreement to pay a minimum coast for trips were too costly.

I **CONCLUDE** that HCT had a valid contract with the District provide pupil transportation for athletic trips and field trips which included a minimum charge for the for four hours athletic and five hours field trips.

I am persuaded, however, by respondent's argument that HCT did not act within a reasonable time to assert its claim against the District. Laches is an equitable doctrine that applies when there has been an inexcusable delay in enforcing a known right which results in prejudice to the other party. *Hansen v. Janitschek*, 57 *N.J. Super.* 418 (App. Div. 1959), rev'd, 31 *N.J.* 545 (1960); *Auciello v. Stauffer*, 58 *N.J. Super.* 522 (App. Div. 1959). Laches is not imputed to one who has no knowledge or means of acquiring knowledge of facts giving rise to the cause of action. *Heagen v. Borough of Allendale*, 42 *N.J. Super.* 472 (App. Div. 1956); *Kohler v. Barnes,* 123 *N.J. Super.* 69 (Law Div. 1973). The burden of proof is on the party asserting laches to show that the other party's inexcusable delay caused it prejudice. *Enfield v. FWL, Inc.,* 256 *N.J. Super.* 502 (Ch. Div. 1991) aff'd, 256 *N.J. Super.* 466, (App. Div. 1992) certif. den., 130 *N.J.* 9 (1992).

Respondent demonstrated that HCT was notified of the District's determination to eliminate minimum bids. Although Manzo made objections to the transportation department about the revised bidding, petitioner took no action to bring this matter before the Commissioner on an emergent basis. Instead, HCT submitted oral bids to provide transportation field and athletic trips on an hourly rate. Thereafter, HCT was awarded 1079 of 1272 athletic trips and 854 of 1323 field trips during the 1993-94 school year. Laidlaw had also provided specific performance on the oral contracts

awarded for 1993-94. Then in August 1994, HCT filed the present matter before the Commissioner and alleged that the District's action was discriminatory, contrary to the regulations, and a breach of contract.

I therefore **CONCLUDE** that petitioner is estopped by latches from challenging the District's action and its apparent acquiescence in the claimed violation of those rights has operated as a waiver.

Use of Non Compliant Vehicles

Petitioner contended that the District allowed Laidlaw to use buses which did not comply with "local" regulations. Specifically, the regulations required that Type C vehicles not exceed 26 feet from bumper to bumper, the engine be located in front of the windshield, and the that the entrance doors be located behind the front wheels. Laidlaw used 36 passenger Genesis buses that were "two inches longer than 26 feet." Petitioner's Initial Brief at 20-21. Petitioner asserted that the additional two inches may have been inconsequential, but the locations of the engine behind the windshield and the front wheels behind the entrance door were significant infractions. *Ibid.*

Further, petitioner asserted that the "local" regulations differed from State regulations,

> "so that the Respondent's attempt to eliminate the limitations of Type I to the State Board's Type C buses, where a Motor Vehicle Department Type I vehicle was called for, was not accomplished in July of 1992 by removing the reference to an attached diagram [P-546-M], which was referred to in the addenda [sic] P-548a and 549, while still keeping paragraph 18 and the 36 passenger bus language in the specification intact, since it still required all vendors to be guided by 'Federal, State and Local Regulations'"

Petitioner's Initial Brief at 21. Moreover, the District's use of the State's specifications after the bidding occurred in July 1992 and the addendum issued on August 19, 1993 did not eliminate local specifications language contained in paragraph 18. P-548a, P-

549. Thus, petitioner submits that "[t]he addendum language, if intended to eliminate the descriptions as well, was not precise or clear enough for all to comprehend that intention." *Ibid.* Petitioner acknowledged, however, that the District recently issued "clear ad precise" bid specifications. *Ibid.*

Further, petitioner asserted that the District favored its competitor, Laidlaw, by providing "advanced information". Indeed, Laidlaw ordered 11 Genesis, Type D, buses the following year. Additionally, for school year 1993-94, the District increased its 36 passenger bus routes from 23 to 45 routes. Laidlaw was the "only bidder on 25 of them." *Id.* at 22. Petitioner claimed other incidences of differential treatment. For example, the District held HCT to "the letter of the specification" but permitted other vendors to use vehicles which did not comply to specifications. The District also allowed other vendors to submit their vehicles for inspection after the awards were announced.

Alan Manzo acknowledged, however, that HCT owned only enough buses to fulfill its contract awarded by the District. Also, he conceded that HCT would have had to purchase approximately 45 additional buses which had to be ordered months in advance to fulfill the contract awarded to Laidlaw. However, petitioner submits that although Genesis buses were used on routes for which Laidlaw was the sole bidder, HCT was "2nd for at least one route". The District's failure to award this route to HCT resulted in lost revenues of $42,840.00 plus interest. *Ibid.*

Errico and Genes credibly testified that each had inspected the Genesis bus. They conceded that the locations of the of the engine behind the windshield and the front wheels behind the entrance door did not comply with regulations.

Advertised bids for pupil transportation contained regulations for vehicles used by vendors to transport pupils. Local school boards were permitted to make reasonable variations to the state's specifications. The District's specifications required

that all vehicles meet the regulations specified by local, state and districts rules. "No substitute of requested vehicles will be accepted." J-3. Local school boards must not ignore infractions which compromise the safety of passengers and the public.

I **CONCLUDE** that the length of the Gensis bumpers substantially complied with the specifications. Indeed, Laidlaw special ordered the vehicles to conform to the correct seating and to adjust the bumpers. I **CONCLUDE** that the location of the engine and front wheels on Genesis bus did not comply with regulations. I **CONCLUDE** that the District permitted Laidlaw to transport pupils in buses which did not comply to specifications.

Petitioner contended that the District permitted Winsale Bus Co. (Winsale), to use non-complying S-2 cars. *N.J.A.C.* 6:21-9.2(c) provides that small vehicles which have a gross vehicle weight rating (GVWR) of less than 3,000 lbs. shall not be used after January 2, 1992. GVWR is the value specified by the manufacturer as the maximum loaded weight of the vehicle. *N.J.A.C.* 6:21-9.2(c). The District's 1993-94 route specifications allowed the use of four door sedan type cars weighing more than 3501 lbs. The specifications also provided that in determining which vehicle will be accepted, the contractor should be guided by the Branham Automobile Reference Book. J-13.

In contrast, the local specifications do not refer to the vehicle's GVWG or loaded weight, "but simple [sic] requires a vehicle weight over 3501 lbs." Petitioner's Initial Brief at 23. Petitioner asserts that the District did not produce the Branham book after several requests, but permitted a "favored" vendor, Winsale, to use vehicles weighing less than 3,000 lbs. Petitionern submits that under the NADA book "nearly all" vehicles used by HCT's competitor, Winsale, were less than 3500 lbs.

Further, petitioner alleges that that the favored treatment towards Winsale was shown by the District's inspection of vehicles prior to title being transferred to the

vendor. *Ibid.* Indeed, the District inspected Winsale's vehicles on August 30, 1993, 28 days before title was transferred to the vendor on September 28, 1993. P-557, P-561b, P-569b. Petitioner submits that two S-2 car routes, route 617 and route 621 should have awarded to HCT, the lowest bidder, not Winsale, the favored vendor. Consequently, petitioner lost revenues of $69,300.00.

Respondent's assertion that the Braham book was waived to as a standard to all vendors is not supported by the record. Respondent's Initial Brief at 9. Louis Ricco, President of A&A Charter Bus Co. was aware that the District used the Branham Book to check weight specifications, but never received a copy or saw the book. Inspector Errico candidly testified that the Branham book was cited but not useful to verify the weight of the S-2 cars. Thus, he used other reference sources such as the District's policy manual, state and department regulations and the bid specifications. He was personally familiar with the NADA book but did not use this source for inspections. Errico also acknowledged that he inspected vendor vehicles before title was transferred to the owner.

The courts and the Commissioner have repeatedly held that a board of education's decision is entitled to a presumption of correctness, and its decision will not be set aside unless there is a clear showing of abuse of discretion or error. *Thomas v. Morris Tp. Bd. of Educ.*, 89 *N.J. Super.* 327 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 40 (App. Div. 1962); *Quinlan v. North Bergen Bd. of Educ.*, 73 *N.J. Super.* 40 (App. Div. 1962); *McMillan v. South Orange-Maplewood Bd. of Educ.*, 1977 *S.L.D.* 137; *Ricco v. Bloomfield Bd. of Educ.*, OAL Dkt. No. EDU 8111-84 (May 16, 1985), *adopted,* Comm'r of Educ. (July 8, 1985). Accordingly, the Commissioner will not interfere with local school boards and the management of their school districts unless they exercised their discretion unreasonably, arbitrarily, capriciously, or in bad faith.

An arbitrary and capricious act has no rational basis. Arbitrary and capricious action by an administrative body is willful and unreasoned action without consideration of and in disregard of circumstances. *Bayshore Sewerage Co. v. Dep't of Environmental Protection*, 122 *N.J. Super.* 184, 199 (Ch. Div.). An abuse of discretion occurs when a decision is not premised upon consideration of all relevant factors, is based upon a consideration of irrelevant or inappropriate factors, or amounts to clear error in judgment. *State v. Bender,* 80 *N.J.* 84, 93 (1979). Bad faith "contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will." *Lustrelon, Inc. v. Prutscher,* 178 *N.J. Super.* 128, 144 (App. Div. 1981).

Based on the whole of the record, I **CONCLUDE** that it was reasonable to inspect vehicles made available to the District prior to the transfer of title so long as the proper documents were produced for inspection prior to the use of the vehicle by the vendor.

I **CONCLUDE** that the Branham book was not accessible to vendors and its use to disqualify petitioner's vehicles was unreasonable. I **CONCLUDE** that the District through its transportation coordinator, Janet Gaita, acted arbitrarily, capriciously, and in bad faith in using the Branham book to determine if HCT's vehicles complied with weight specifications.

Penalties

Petitioner contends that the District's penalty assessment is excessive compared with school districts. Petitioner also asserts that it was overcharged for violations and contests penalties assessed for arriving late. Specifically, petitioner asserts that the District issued duplicate violations to cover the same incident. P-494, P-431, P-504. Thus, the additional assessment was unreasonable. Petitioner also objects to the District's failure to produce a witness to substantiate the violations shown in P-469 through P-545. Thus, petitioner submits that it should be reimbursed for the double

routing incident "of an additional rebate of $309 and a total of $6,659 plus interest for unsustained violations." Petitioner's initial brief at 15.

Manzo acknowledged receiving copies of an addendum regarding violations for late arrivals. The penalties were deducted from the contract price. P-260A. The documents show the date of the infraction, the complaint, and the amount deducted. Additionally, fines were issued to HCT for improper boarding and departing, lack of fire extinguishers, lack of two-way radio and double routing were included. For school year 1992-93, the total fines were $12,598 for late arrival and $1,530 for other infractions for April and May 1993

Manzo also claimed that in school years 1992-93 and 1993-94, there was a change in the penalty schedule. In 1992-93, the penalty changed from 1/3 to 1/2 and in 1993-94, there was a 100% penalty. In its brief, petitioner states that for 1992-93, all violations were assessed at 1/2 the daily route cost. This amount, however, is contrary to the contract penalty schedule which provides that noncompliance will result in nonpayment of 1/3 the daily rate for the a.m. bus run, morning violations, and nonpayment of the daily rate for p.m. bus runs in the afternoon. After five specification violations, the penalty for violation #6 and thereafter shall result in nonpayment of 1/2 of the daily rate for a.m. and/or p.m. bus run. P-546.

Petitioner submits that it was assessed for 153 individual penalties as the 1/2 daily rate "86 exceeded the 6+ rule, leaving 67 penalties, if sustained, that will over penalize by 1/6 of the routes daily rate." Petitioner urges that the violations be reversed because the District failed to submit the appropriate addendum to the county superintendent within 30 days and did not follow its own due process procedure of forwarding the violation to the vendor within seven days of the infraction. Thus, the penalty amount of $14,139 should be returned to petitioner with interest. *Ibid.*

Respondent argues that the violation penalty schedule is not arbitrary, capricious or unreasonable. Further, respondent denies that it's conduct towards petitioner was arbitrary, capricious, unreasonable or disparate. The violation and penalty schedules are set forth in the contract. During the bidding process, questions arose concerning the requirement of an aide on route E713. HCT was awarded the contract but did not confirm whether an aide was required until it began to receive violations.

I have considered petitioner's disputes regarding the penalties assessed for violations. Route 713 was a shuttle run from the school to the occupational center and transported students in grades 8 through 12. I reject Manzo's claim that he was not aware whether any of the students were handicapped and required an aide. At the bidding for route 718, questions were asked whether an aide was required on the bus. The District did not respond in the affirmative or negative but stated that it would refer the matter to its legal department.

HCT is vendor who had done business with the Jersey City school district for many years and believed it was entitled to the continued business it had recieved in the past. Indeed, in the prior proceeding HCT sought to maintain the same status had it had previously held before the state takeover. The ALJ found, however, no merit in HCT's argument that it was entitled to the award of contracts because such contracts had been awarded the past. *Hudson County Transport, Inc., supra* at 639. Moreover, HCT was familiar with the bidding process and the nature of many pupil routes. For example, Manzo testified that several areas in Jersey City had narrow roads which created access problems for the buses. Thus, it can reasonably be concluded that the vendor should have sought clarification about the requirements of an aide. Indeed, Hudson submitted a quote with and without an aide. Consequently, I **CONCLUDE** there is no merit to petitioner's argument that it was wrongfully assessed penalties for violations of Route E-713.

With regard to fines for late arrivals, credible testimony was provided by several school principals that HCT was often late in transporting its students. Moreover, school administrators such as Trefurt and Strynar credibly testified that HCT's drivers refused to sign the violation forms at the cite. Thus, I **CONCLUDE** that the District properly cited HCT for infractions of late arrivals. However, I direct the transportation department to review its records for calculation errors. If appropriate, adjustments shall be made to reflect the contract penalty of 1/3 the daily rate for the first five violations committed on the a.m. bus run, morning violations, and nonpayment of the daily rate for p.m. bus runs in the afternoon. After five violations, the penalty for violation six and thereafter shall result in nonpayment of 1/2 of the daily rate for a.m. and/or p.m. bus run. P-546.

With regard to the reasonableness of the District's violation penalty schedule, the record reflects that the violation penalty schedule of other local school districts such as Newark Board of Education, Union County Educational Services Commission, Essex County Educational Services Commission, Rutherford Board of Education and South Bergen Jointure Commission are comparable to the Jersey City school district. R-7, R-8, R-9, R-10- R-11.

Therefore, I **CONCLUDE** that the violation penalty schedule of the State-Operated School District of Jersey City is comparable with local standards and thus, it is not arbitrary, capricious or unreasonable.

I reject petitioner's assertion that the District's failure to provide a departmental hearing on the violations was a denial of due process. No statue or regulation provides for departmental hearings. *N.J.S.A.* 18A:6-9 provides that the Commissioner shall determine controversies and disputes arising under school law or under the rules of the State Board of Education of the Commissioner of Education. *Hudson County Transport, Inc. v. State-Operated School District of Jersey City*, 92 *N.J.A.R.* 2d (EDU) 635, 636. Accordingly, I **CONCLUDE** that the Commissioner and therefore, the OAL is the

appropriate tribunal for an impartial hearing regarding the assessment of contract violations.

Damages

I **CONCLUDE** that HCT is not entitled to nor eligible for monetary damages. The education statue, *N.J.S.A.* 18A:6-9, grants the Commissioner jurisdiction to hear and determine controversies and disputes arising under the school law or under the rules of the State Board of Education or the Commissioner of Education. *Hudson County Transport, Inc. v. State-Operated School District of Jersey City*, 92 *N.J.A.R.* 2d (EDU) 635, 639. Accordingly, the Commissioner and therefore, the OAL have jurisdiction over bidding disputes arising under the Public School Contracts Law. However, an ALJ's jurisdiction does not extend to the awarding of damages to an aggrieved party. "[A]bsent an express grant, administrative agencies do not have the power to exercise or perform a judicial function and may not determine damages, award a personal money judgment or promulgate an order requiring a pecuniary reparation or refund." *John S. Slowinski v. City of Trenton,* 92 *N.J.A.R.* 2d (BRC) 71, 72; *see also Hudson County Transport, Inc.* supra. at 636. (The ALJ concluded that Commissioner had jurisdiction over school transportation contract disputes which fall under the education statute but did not have jurisdiction to award money damages for breach of contract.). Similarly, an ALJ's jurisdiction does not extend to the granting of attorney's fees. *Balsey v. North Hunterdon Reg. High Sch.,* 225 *N.J. Super.* 221 (1988).

I have considered and find no merit to the remainder of petitioner's arguments. Accordingly, I **CONCLUDE** that the petitioner is entitled to no relief in this matter.

ORDER

It is hereby **ORDERED** that the petition of Hudson's County Transport be **DISMISSED WITH PREJUDICE**.

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

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

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

April 24, 1997
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

5/9/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Louis Ricco
Allen Manzo
Robert Dietz
Francis X. Dooley
Cosmo G. Mendolla
Robert Murden
Christo Genes
Charles Cooper, Jr.
Robert Roggenstein
Terence S. Matthews
Carolyn Scott Nelson
Deane Pallitto
Jackie Resal
George Errico
Alan Manzo

For Respondent:

William J. Murphy
Charles Trefurt
Marvin Strynar
Janet Gaita
Joann Gilman
Angela Bruno

Exhibits:

J-1 thru J-17	1993-94 Bid Proposals (Athletic Events).
J-2a thru J-2q	1993-94 Bid Proposals (Fiedl Trips).
J-3a thru J-3m	1993-94 Bid Proposals (To and From School Regular and Special Education Transportation and Shuttles).

P-1 thru P-173	Requisition Forms, Jersey City Public Schools.
P-174 thru P-178	Photographs of Genesis Buses.
P-179a thru P-179i	Vehicle Inspection Reports.
P-180	Letter from Melindo Persi to Alan Manzo, dated November 16, 1989.
P-181	Letter from A. L. Manzo to Victor Demming, dated July 20, 1992.
P-182	Letter from Victor R. Demming to Alan Manzo, dated July 22, 1992.
P-183 thru P-184	Letter from Janet M. Gaita to Alan Manzo, dated September 9, 1992.
P-185	Letter from Janet M. Gaita to Alan Manzo, dated September 10, 1992.
P-186	Letter from O. Reyes to Manzo, dated October 16, 1992.
P-187	Letter from Janet M. Gaita to Alan Manzo, dated August 25, 1993.
P-188a thru P-188d	Letter from Janet M. Gaita to Alan Manzo, dated September 1, 1994.
P-189a thru P-189b	Correspondence from Janet Gaita to A. Manzo.
P-190 thru P-190l	Field Trips and Athletic Events.
P-191	Letter from Alan Manzo to Dennis McGill, dated September 22, 1993.
P-192	Letter from Janet Gaita to Alan Manzo, dated October 14, 1993.
P-193	Letter from Alan Manzo to Dennis McGill, dated December 15, 1993.

P-194a thru P-252b	Requisition Forms, Jersey City Public Schools.
P-253 thru P-259	*No Documents Submitted (Reserved Numbers)*
P-260a thru P-260f	List of Violations/Penalty.
P-261 thru P-262	*No Documents Submitted (Reserved Numbers)*
P-263 thru P-441	School Violations Forms.
P-442a thru P-452a	Correspondence on Hudson County Contracts.
P-452b thru P-452c	School Vehicle Violations Forms.
P-453a thru P-459a	Contract Addendum.
P-460	Copy of Newspaper Article, dated December 7, 1993.
P-461	Memorandum from Jersey City Public Schools to Mr. Acacella regarding 1993-94 Transportation Contracts.
P-462a thru P-462c	Public Transportation Contracts.
P-463a thru P-468	Documents (Jersey City Public Schools).
P-469 thru P-496	School Violations Forms.
P-497 thru P-500b	Hudson County Transport/Jersey City Public Schools Documents.
P-501	Copy of Envelope.
P-502 thru P-545	School Violations Forms.

P-546a thru P-546n	New Jersey Public Schools Bid Packet.
P-547	Bid Packet of July 14, 1992.
P-548a thru P-548b	Addendum to Bid Packet of July 14, 1992.
P-549	Memorandum to All Vendors regarding Chapter
P-550a thru P-550j	Requisition Forms, Jersey City Public Schools
P-551a thru P-558	Inspection Forms.
P-559	Policies and Procedures for Pupil Transportation.
P-560a thru P-570a	Copies of Various Documents.
P-571 thru P-578	Requisition Forms, Jersey City Public Schools.
P-579 thru P-602	Affidavit of James P.Folkes (with attachments) and various Documents.
R-1	Letter from Alan Manzo to Jersey City Public Schools, dated March 16, 1994.
R-2	Letter from Alan Manzo to Jersey City Public Schools, dated April 27, 1994.
R-3	Letter from Alan Manzo to Jersey City Public Schools, dated May 2, 1994.
R-4	Letter from Alan Manzo to Jersey City Public Schools, dated May 3, 1993.
R-5	Letter from Alan Manzo to Jersey City Public Schools, dated May 11, 1994.

R-6	Letter from Alan Manzo to Jersey City Public Schools, dated June 10, 1994.
R-7	Bid Proposals.
R-8	Standard Specifications for Union County Coordinated Special Education and Vocational School Transportation.
R-9	Essex County Educational Services Commission Bids.
R-10	Standard Specifications for Rutherford Board of Education.
R-11	Standard Specifications for South Bergen Jointure Commission/Special Education.
R-12 thru R-99	School Vehicle Violations Forms.
R-100	Memorandum from Liz George to Vendors regarding Processing and Notification of Violations.
R-101a thru R-102s	Pupil Transportation Reports.
R-103	Memorandum from Janet M. Gaita to All Vendors regarding Transportation Bid.
R-104	Transportation Department Emergency Quotes for Emergency Routes.
R-105a thru R-105b	Pupil Transportation.
R-106	Letter from Janet M. Gaita to Mr. L. Acocella, dated September 2, 1993.
R-107	Jersey City Public Schools Action Form.
R-108a thru R-108b	Pupil Transportation Contract.
R-109	Memorandum from W.J. Murphy to Janet Gaita, dated September 29, 1993.

R-110	Letter from Alan Manzo to Jersey City Public Schools, dated September 30, 1993.
R-111a thru R-111b	Letter from Janet Gaita to Alan Manzo, dated October 14, 1993.
R-112a thru R-112b	Contract Checklist with Certified Receipt.
R-113	Letter from Janet Gaita to Dennis L. McGill, dated August 17, 1993.
R-114	Activity Report.
R-115	Memorandum from Janet Gaita to All Vendors, dated August 19, 1993.
R-116	Attendance Records of George Errico, 1993-1994.
R-117	Letter from Allen Manzo to Franklin Williams, dated May 26, 1998.
R-118	Letter from Chester Kaminski to Hudson County Transport (with attachments), dated July 12, 1988.
R-119	Newspaper Article, Hudson Dispatch.
R-120	Diagram of Genesis Bus.
R-121	Memorandum from Janet Gaita to All Vendors, dated September 22, 1993.
R-122 thru R-123	Old School Vehicle Violations Form New School Vehicle Violations Form
R-124	Bill of Sale.
R-125	Letter from Janet Gaita to Alan Manzo, Jr., dated October 6, 1993.
R-126 thru R-134	Violations Forms.s

OAL DKT. EDU 8493-94
AGENCY DKT NO 327-8/94

HUDSON COUNTY TRANSPORT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the respondent District in conformance with *N.J.A.C.* 1:1-18.4. No exceptions or replies were filed by petitioner.

Respondent initially concurs with the finding that petitioner is entitled to no relief on its claims. However, it takes exception to two conclusions reached by the Administrative Law Judge (ALJ) in the course of the initial decision, averring that these are not supported by the evidence in the record. Specifically, respondent seeks that the Commissioner strike and delete the conclusion of the ALJ that respondent's decisions to change the bus type on trip request forms from "school bus" (furnished by petitioner) to "coach bus," were based in part on Janet Gaita's personal dislike of Allen Manzo, President of Hudson County Transport and his son, Alan Manzo, and their contentious relationship. (Exceptions at p. 3) It bases such contention on the fact that all of petitioner's claims related to pupil transportation contracts in 1993-94, a time period when Ms. Gaita was not even present at work to administer the transportation department of the District. (Exceptions at pp. 3-4) Further, respondent purports that such finding "***appears to have been clouded by the personally abusive behavior of the Manzos toward Ms. Gaita and her staff, in the time period preceding Ms. Gaita's medical leave,

and Ms. Gaita's dislike of their conduct." (Exceptions at p. 5) It asserts that a supervisor's dislike of personal abuse of her staff does not translate into personal motivation or vindictiveness in making decisions on school business. (Exceptions at p. 6)

Respondent further objects to the finding that, 'the District, through its transportation coordinator, acted arbitrarily, capriciously and in bad faith in using the Branham book to determine if HCT's vehicles complied with weight specifications.' (Exceptions at p. 7, citing to Initial Decision at p. 25)

Consequently, respondent asserts that the ALJ assumed bad faith on the part of Ms. Gaita without basis and contrary to the proscription of *Miller v. Passaic Valley Water Commission,* which holds that, "the good faith of public officials is to be presumed.***" 259 *N.J. Super.* 1, 14 (App. Div.) certif. den., 130 *N.J.* 601 (1992). (Exceptions at p. 8)

Additionally, respondent notes that the ALJ's directive to recalculate penalties and make any necessary adjustments was erroneously based on the penalty schedule included in the 1992-93 bid specifications, when the year at issue was 1993-94 and an entirely different schedule was operative and applied by the District.

Upon a careful and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ that petitioner is not entitled to the relief it seeks. However, the Commissioner also finds it appropriate to set aside the two conclusions specified in respondent's exceptions and to amend the order regarding recalculation of penalty. With regard to recalculation of penalties, it is clear from the record that the applicable schedule is, in fact, that included in 1993-94 bid specifications as contended by the District, so that no recalculation appears necessary based on the ALJ's application of 1992-93 standards. With regard to the changing of bus types specified on trip request forms from "school bus" to "coach bus," the record as presented demonstrates that distance, additional space, and pupil needs were respondent's considerations in making such changes. It does not, however, demonstrate that any personal dislike that may have existed between the parties' personal agents specifically influenced the District's decisions, so as to find such decisions to have been made in bad faith. Likewise, with regard to the Branham book being used to determine vehicle weight, the record reveals no specific basis upon which the Commissioner can conclusively infer bad faith on the

part of the respondent for application of these standards to petitioner's vehicles.* However, the Commissioner does find the record of this matter sufficient to support the ALJ's conclusion that such action was arbitrary and unreasonable, and, accordingly, the Commissioner admonishes the District and directs it to reform its policies and procedures to scrupulously ensure that, henceforth, such standards as it adopts for determining acceptable vehicle weight are applied uniformly by all staff to all vehicles.

ACCORDINGLY, the Commissioner adopts the initial decision of the Office of Administrative Law, as modified herein, as the final decision in this matter and dismisses the Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* No transcripts of the hearing were provided in the instant matter.

JUNE 23, 1997
DATE OF MAILING JUNE 23, 1997

338-97

OAL DKT NO EDU 5660-96
AGENCY DKT NO 129-4/96

KENNETH T. TUCKER, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, nontenured custodian, challenged his transfer from the day to the night shift in March 1993, and his removal from employment in November 1993. He alleged that respondent Board violated the Open Public Meetings Act in connection with his transfer, breached his rights under his employment contract, and engaged in a conspiracy to conceal its actions and falsify public documents.

ALJ found that Commissioner lacked subject matter jurisdiction over the instant matter and therefore, dismissed the case. Insofar as the petition sought a contractual remedy for breach of the collective bargaining agreement, those issues were properly raised in the arbitration proceeding previously initiated by petitioner. Moreover, the Commissioner lacks jurisdiction to decide any claim that a Board engaged in a criminal "conspiracy" to violate petitioner's rights. Thus, ALJ found that the Open Public Meetings Act violation remained alone. In that the Commissioner possesses only incidental jurisdiction to decide such questions, as there must first be a primary dispute arising under school laws, the Commissioner cannot assert jurisdiction over the instant appeal.

Commissioner adopted the findings and determination in initial decision as his own.

June 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5660-96
AGENCY DKT. NO. 129-4/96

KENNETH T. TUCKER, JR.,
Petitioner,
v.
GLEN RIDGE
BOARD OF EDUCATION,
Respondent.

Kenneth T. Tucker, Jr., *pro se*

Mark J. Blunda, Esq., for respondent,
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: April 15, 1997 Decided: May 9, 1997

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

Statement of the Case

This is an appeal to the Commissioner of Education ("Commissioner") brought by a school custodian challenging his transfer from the day to the night shift in March 1993 and his removal from employment in November 1993. Basically, petitioner Kenneth Tucker alleges that respondent Glen Ridge Board of Education ("Board") violated the Open Public Meetings Act in connection with his transfer, breached his

rights under the employment contract, and engaged in a conspiracy to conceal its actions and falsify public documents.

Respondent Board has filed motion papers to dismiss the petition or, in the alternative, for summary decision, based on four separate grounds: (1) petitioner is time-barred under the ninety-day rule, *N.J.A.C.* 6:24-1.1, from filing a petition with the Commissioner; (2) petitioner's Open Public Meeting Act claim was filed beyond the forty-five day period allowed by statute, *N.J.S.A.* 10:4-6; (3) petitioner's allegations of discrimination were filed beyond the 180-day statute of limitations set forth in the Law Against Discrimination, *N.J.S.A.* 10:5-18; and (4) petitioner's cause of action is barred by *res judicata* and the single controversy doctrine.

For the reasons which follow, Mr. Tucker's petition will be dismissed for lack of jurisdiction, without reaching the various timeliness issues.

Procedural History

Mr. Taylor filed his original petition with the Commissioner on April 8, 1996 and his amended petition on April 15, 1996. The Board filed its answer and affirmative defenses on May 3, 1996. Subsequently, on June 3, 1996, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

On March 17, 1997, the Board served a copy of its notice of motion, together with supporting certification and brief, on Mr. Tucker.[1] Mr. Tucker filed opposing papers, together with tapes of a related hearing before the Division on Civil Rights on April 7, 1997. Thereafter, the Board filed a reply on April 15, 1997.

[1] Initially, the Board had filed this motion with the OAL on August 1, 1996. Due to confusion over whether or not Mr. Tucker was properly served with the motion papers, the OAL directed that the moving papers be refiled so that the motion could be decided on its merits.

Findings of Fact

All of the facts necessary for disposition of this motion are undisputed. From the pleadings, certifications and exhibits, I **FIND** the following facts:

Kenneth Tucker started working as a custodian for the Glen Ridge public school district on July 13, 1992. In or about March 1993, the school administration changed Mr. Tucker's assignment from the day shift to the night shift. Apparently the Board held a discussion about the transfer of Mr. Tucker during an executive session which proceeded its regular meeting on March 2, 1993. In testimony given at a related civil rights proceeding on January 30, 1996, Dr. Nell Sanders, a building principal in the district, stated that the Board met on March 2, 1993 and discussed the transfer of Mr. Tucker "among many items of business."[2] Minutes for the regular board meeting on March 2, 1993 make no mention of any formal resolution approving the transfer. Mr. Tucker contends that he received no advance notice that the Board would consider his transfer at its March 2 meeting and that he first learned of the Board's possible discussion of his transfer at the civil rights hearing on January 30, 1996.

Eight months later, on November 2, 1993, the Board voted to terminate Mr. Tucker's employment for cause. A letter from the Board, dated November 3, 1993, enumerates several reasons for this action, including: "falsification of employment application; unsatisfactory work performance; insubordination; unbecoming and subversive conduct; [and] failure to correct conduct and attitude after prior warnings." While there is some dispute whether this letter was hand-delivered to Mr. Tucker, he admits that he was orally informed of his dismissal on November 3, 1993.

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[2] Transcript of Recorded Proceedings in *Tucker v. Glen Ridge Bd. of Educ.*, OAL Dkt. No. CRT 12195-93 & CRT 8747-94 (Jan. 30, 1996) at p. 128, lines 6 to 13. Later in her testimony, Dr. Sanders clarified that she wasn't actually at that particular meeting, but that the Board's standard operating procedure is to approve a transfer "in open session." Transcript, at p. 134, line 13

After his transfer and ultimate dismissal, Mr. Tucker instituted a series of complaints before various courts, administrative agencies and public bodies arising out of the same or similar events. In late November and early December, he and the Glen Ridge Education Association on his behalf filed multiple grievances under the collective bargaining agreement regarding, among other items, his work assignments, termination and alleged violation of the Open Public Meetings Act. When the grievances were denied at the superintendent and board level, the parties agreed to submit their dispute to binding arbitration conducted by an arbitrator appointed by the Public Employment Relations Commission. Due to a dispute among Mr. Tucker, his attorney and the Association, the scheduled arbitration was adjourned without date.

Meanwhile, on March 8, 1993, Mr. Tucker filed a complaint with the Division on Civil Rights alleging, among other things, discrimination in his transfer from the day to the night shift. After his termination, Mr. Tucker filed a companion complaint with the Division of Civil Rights on February 7, 1994, alleging unequal treatment and retaliatory discharge for filing his earlier complaint. Both civil rights cases were referred to the OAL for consolidated hearings before Administrative Law Judge Elinor Reiner, which commenced in July 1995 and are still ongoing. It was in the course of these hearings that Mr. Tucker purportedly first learned that the Board had met on March 2, 1993 to discuss his transfer.

Additionally, Mr. Tucker has brought separate courses of action against the Board in the Superior Court of New Jersey, Law Division, Essex County. On October 31, 1994, Mr. Tucker filed his first complaint, designated Dkt. No. ESX-L-14363-94, in which he accused the Board of breach of contract, invasion of privacy, defamation and gross negligence. By order entered on January 6, 1995, Superior Court Judge Stephen E. Mochary granted summary judgment dismissing Mr. Tucker's complaint "with prejudice."

Again, in 1994, Mr. Tucker filed a second Superior Court complaint, designated Dkt. No. ESX-L-14087-94, contending that the Board's conduct had violated the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 to -8. Judge Edward M.

Kirby denied the Board's summary judgment motion on November 22, 1996 and that matter is currently pending before the Superior Court.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Commissioner lacks subject matter jurisdiction.

Insofar as the petition seeks a contractual remedy for breach of the collective-bargaining agreement, those issues are properly raised in the arbitration proceeding previously initiated by Mr. Tucker. Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel. *East Brunswick Bd. of Educ., v. Twp. Council of East Brunswick*, 48 *N.J.* 94, 102 (1966). Many disputes involving terms and conditions of employment may be resolved by binding arbitration if the agreement so provides, without resort to the Commissioner. *N.J.S.A.* 34:13A-5.3. *South Orange-Maplewood Educ. Ass'n v. South Orange Bd. of Educ.*, 146 *N.J. Super.* 457, 462 (App. Div. 1977). While the Commissioner has primary interest in matters concerning major educational policy or matters controlled by the school laws, the Commissioner's special expertise "would not significantly further the interpretative process as to the intended meaning of the parties' agreement." *Englewood Bd. of Educ. v. Englewood Teachers Ass'n*, 64 *N.J.* 1, 8 (1973); *Newark Teachers Union v. Newark Bd. of Educ.*, 149 *N.J. Super.* 367, 372 (Ch. Div. 1977). If provision is made for binding arbitration of contractual issues, recourse for their resolution must be by that means and not to the Commissioner. *Red Bank Bd. of Educ. v. Warrington*, 138 *N.J. Super.* 564, 572 (App. Div. 1976).

Moreover, the State Board of Education has frequently recognized that the Commissioner lacks jurisdiction to decide contractual disputes. Illustratively, in *Larsen v. Piscataway Bd. of Educ.*, OAL Dkt. No. EDU 1445-81 (Jan. 7, 1982), adopted by Comm'r of Educ. (Feb. 18, 1982), rev'd by State Bd. (Oct. 6, 1982), the State Board overturned an award to a school custodian suing to recover damages resulting from

wrongful termination of his employment contract. Holding that the Commissioner should not have decided the case, the State Board ruled that "a controversy over the interpretation or enforcement of an employment contract . . . does not come within the orbit of [N.J.S.A. 18A:6-9]." (at page 2). Similarly, in *Rainer's Dairies v. Collingswood Bd. of Educ.*, 1967 *S.L.D.* 260 (St. Bd. Sept. 6), the State Board ruled that the Commissioner's control over school cafeterias does not vest him with jurisdiction to decide a contract claim brought by a milk supplier against a board of education. *See also, Padukow v. Jackson Twp. Bd. of Educ.*, 1968 *S.L.D.* 263, 264 (St. Bd. April 3), wherein the State Board declared that "the exercise of the Commissioner's expertise should be limited to matters directly bearing upon education and withheld in purely commercial matters." In our own case, Mr. Tucker has invoked the grievance procedure contemplated by the collective bargaining agreement and already has an adequate remedy for any breach of the contractual language.

Of course, the Commissioner lacks jurisdiction over any claim of criminal "conspiracy" to violate Mr. Tucker's rights. Article III of the New Jersey Constitution of 1947 embodies the separation of powers doctrine, which prohibits the executive branch of government from exercising any of the powers belonging to the judicial branch. *N.J. Const.* art III, §1. Jurisdiction over criminal matters is a judicial function vested exclusively in that branch of government. *See Wright v. Plaza Ford*, 164 *N.J. Super.* 203 (App. Div. 1978). Generally, all indictable offenses must be prosecuted in the Superior Court, Law Division. *R.* 3:1-5. Administrative agencies are not authorized to punish for criminal misconduct. *Cresse v. Parsekian*, 81 *N.J. Super.* 536 (App Div. 1963), *aff'd* 43 *N.J.* 326 (1964).

Even if petitioner's conspiracy count is liberally construed to set forth a tort claim for damages, *see, e.g., Pitak v. Bell Atlantic Network Servs., Inc.*, 928 *F. Supp.* 1354, 1368 (D.N.J. 1996), the proper place for bringing such cause of action would be the judicial system. Tort actions against boards of education are cognizable in a court of competent jurisdiction, rather than before the Commissioner. *Jackson v. Hankinson*, 51 *N.J.* 230 (1968). *Titus v. Lindberg*, 49 *N.J.* 66 (1967). Accordingly, in *D.K. v. Clifton Bd. of Educ.*, 93 *N.J.A.R.* (EDU) 71, 74 (Comm'r Nov. 20, 1992), the Commissioner

remarked that redress for injury to a student caused by willful conduct or negligence of another student "must be pursued through the tort process."

That leaves the alleged Open Public Meetings Act violation as the only claim left.[3] Despite the literal language of *N.J.S.A.* 10:4-15 that any action by a public body not conforming to the Act is reviewable by the Superior Court, the Appellate Division has ruled that the Commissioner possesses "incidental jurisdiction" to decide such questions "as they relate to controversies under the school laws." *Sukin v. Northfield Bd. of Educ.*, 171 *N.J. Super.* 184, 187 (App. Div. 1979). Like pendent jurisdiction in the federal courts, incidental jurisdiction requires the existence of a proper underlying claim to which the Commissioner's ancillary powers can attach. Subsequent agency decisions have consistently held that there must first be a primary dispute arising under the school laws before the Commissioner can exercise incidental jurisdiction to decide an Open Public Meetings Act question. *Hamilton Twp. Bd. of Educ. v. Fraleigh*, 93 *N.J.A.R.* 2d (EDU) 538 (Comm'r June 14, 1993); *Rovello v. Boyle*, 93 *N.J.A.R.* 2d (EDU) 313 (Comm'r March 15, 1993). Since Mr. Tucker's remaining claim is unaccompanied by any legitimate educational dispute, the Commissioner cannot assert "incidental jurisdiction" over the subject matter.

Order

It is **ORDERED** that the Board's motion to dismiss the petition is granted.

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

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[3]A generous reading of the amended petition fails to reveal any allegation of racial discrimination, except in connection with the contract claim. Although Mr. Tucker could (and arguably should) have originally filed his discrimination complaint with the Commissioner, he elected to file such complaint with the Division on Civil Rights. Now that the parties have engaged in lengthy hearings before the Division on Civil Rights, principles of comity and administrative efficiency dictate that the Commissioner abstain from relitigating the identical issues. *Hinfey v. Matawan Reg. Bd. of Educ.*, 77 *N.J.* 514 (1978).

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

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

May 9, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5/14/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT NO EDU 5660-96
AGENCY DKT NO 129-4/96

KENNETH T. TUCKER, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were filed on an untimely basis and, therefore, such exceptions and the replies submitted thereto are not considered herein.[1]

Upon a careful and independent review, the Commissioner determines to affirm the decision of the ALJ finding that the Commissioner lacks subject matter jurisdiction to review the instant matter for the reasons expressed therein.

Accordingly, the Commissioner affirms the initial decision of the Office of Administrative Law and dismisses the petition of appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] Petitioner's exceptions, which generally reiterate arguments previously raised before the ALJ and object to the ALJ's handling of certain procedural aspects of the instant case, were due no later than May 28, 1997. However, in that they were received by the Bureau of Controversies and Disputes on June 4, 1997, and in that there was no indication by petitioner that they were timely filed prior to his own hand-delivery of same on June 4, 1997, they will not be considered pursuant to *N.J.A.C.* 1:1-18.4(a).

June 24, 1997
Date of Mailing, June 25, 1997

339-97

339-97 SEC

IN THE MATTER OF CRAIG P.	:	
HEARD, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF ROXBURY,	:	DECISION
MORRIS COUNTY.	:	
_____	:	

JUNE 27, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
CRAIG P. HEARD,	:	
Roxbury Board of Education	:	
Morris County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Craig P. Heard was elected to serve a three-year term on the Roxbury Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Craig P. Heard to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Heard replied that he could not attend the October 22, 1997 session because of a business emergency or the March 15, 1997 session because he was called away on businessand became too ill to make the return flight in time for the session, but that he planned to attend the June 6-8, 1997 training session; and

WHEREAS, the Commission notified Mr. Heard that the Commission would discuss this matter at its May 27, 1997 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Mr. Heard has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1996 to April 1997 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, Mr. Heard could have attended one of the many other sessions offered between October and March; and

WHEREAS, the Commission finds that if Mr. Heard fails to attend the June session as he has set forth, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Craig P. Heard violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a reprimand if he attends the June session, but removal from the board if he does not attend the June 6-8, 1997, training session.

Dated: May 27, 1997

Paul C. Garbarini, Chairperson

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 27, 1997.

Lisa James-Beavers, Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Ljb/tmgres2.doc

IN THE MATTER OF CRAIG P.	:	
HEARD, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF ROXBURY,	:	DECISION
MORRIS COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 27, 1997, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission that he could not attend the October 22, 1997 session due to a business emergency, and he could not attend the March 15, 1997 session because he was unexpectedly called away on business and later became ill and could not make the return flight in time for the session, but that he planned to attend the June 6-8, 1997 training program; and

Whereas, the Commission voted on April 22, 1997, to recommend reprimand of the above-named Board member if he attends the June 6-8, 1997 training session and, removal

from the board if he fails to attend the June training session, in accordance with State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending either reprimand or removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed that the above-named board member has, in fact, attended the June 6-8, 1997 training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission, but declines to issue a reprimand to the above-named board member, finding suspension to be the appropriate penalty in this instance; now therefore

IT IS ORDERED that a one-meeting suspension be imposed on the above-named Board member, to be effective for the next regularly scheduled meeting of the board.

COMMISSIONER OF EDUCATION

340-97

340-97 SEC

IN THE MATTER OF BARBARA	:	
DELUCA, BOARD OF EDUCATION	:	
OF THE BOROUGH OF AUDUBON	:	COMMISSIONER OF EDUCATION
PARK, CAMDEN COUNTY.	:	DECISION
	:	

JULY 2, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
BARBARA DeLUCA,	:	
Audubon Park Board of Education	:	
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Barbara DeLuca was elected to serve a three-year term on the Audubon Park Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" before their election and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Barbara DeLuca to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. DeLuca replied that she did not attend the January session for which she was scheduled because she had to work and that she attends school on Saturdays until November, but she would attend "as soon as possible"; and

WHEREAS, the Commission notified Ms. DeLuca that the Commission would discuss this matter at its May 27, 1997 meeting, that she had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Ms. DeLuca's response does not provide an adequate explanation of why she failed to attend training within the year allowed by law in light of other sessions offered before March; and

WHEREAS, Ms. DeLuca has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 1996 to April 1997 constitutes a violation of N.J.S.A. 18A:12-33; and

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Barbara DeLuca violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of removal from the board.

Dated: May 27, 1997

Paul C. Garbarini, Chairperson

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 27, 1997.

Lisa James-Beavers, Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Ljb/trng97.doc

IN THE MATTER OF BARBARA	:	
DELUCA, BOARD OF EDUCATION	:	
OF THE BOROUGH OF AUDUBON	:	COMMISSIONER OF EDUCATION
PARK, CAMDEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 27, 1997, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member replied that she did not attend the January session for which she was scheduled because she had to work and that she attends school on Saturdays until November, but she would attend "as soon as possible;" and

Whereas, the Commission voted on May 27, 1997, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute,

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

JULY 2, 1997
DATE OF MAILING JULY 2, 1997

341-97

341-97

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

JUNE 27, 1997

PETER VERNIERO
Attorney General of New Jersey
Attorney for Respondent, New Jersey
Department of Education
R.J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: John K. Worthington
Deputy Attorney General
(609)633-2643

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET Nos. EDUOT-04547-96S
EDUOT 08393-96S

BOARD OF EDUCATION OF ASBURY PARK,	)	
Petitioner,	)	Civil Action
v.	)	Stipulation of Settlement
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,	)	
Respondent.	)	

Petitioner, Asbury Park Board of Education, and Respondent, State of New Jersey, Department of Education, have mutually agreed to settle the above-captioned matter, with Peter Verniero, Attorney General of New Jersey, by John K. Worthington, Deputy Attorney General, appearing on behalf of Respondent, New Jersey Department of Education, and Robin S. Perry, Esq., appearing on behalf of Petitioner, Asbury Park Board of Education, the parties hereby agree to settle the above captioned matter, which arose after an audit was conducted by the New Jersey Department of Education, Office of Compliance, of Petitioner's State School Aid

received for 1992-1993, 1993-1994, and 1994-1995 school years, upon the following terms;

1. Petitioner will repay the Department of Education $418,832 in State Aid overpaid to petitioner for the 1992-1993, 1993-1994, and 1994-1995 school years. For the 1992-1993 school year, petitioner will repay $165,746 in State Aid. For the 1993-1994 school year, petitioner will repay $104,701 in State Aid. For the 1994-1995 school year, petitioner will repay $148,385 in State Aid.

2. The reimbursement of State Aid detailed in paragraph one will be as follows: in the 1996-1997 school year, the petitioner is repaying $165,746 in State Aid for the 1992-1993 school year through reductions by the Department in the State Aid payments that petitioner is to receive during the 1996-1997 year; in the 1997-1998 school year, the Department will recover the $104,701 in State Aid from the 1993-1994 school year and the $148,385 in State Aid from the 1994-1995 school year, totaling $253,086, from the State Aid payments petitioner is to receive during that year.

3. The Department agrees to consider a hardship application with regard to the $253,086 to be collected in the 1997-1998 year pursuant to the terms of the April 18, 1997 letter from Mike Azzara, Director of Finance, New Jersey Department of Education, to Dr. James H. Mundy, Superintendent of Schools, Asbury Park Public Schools (Attached hereto), if petitioner chooses to file such an application. Pursuant to the terms of the April 18,

1997 letter of Mike Azzara, any such hardship application must be filed by May 3, 1997 with the County Superintendent of Schools. The County Superintendent will then make a recommendation and a final determination will be made by Mike Azzara as to whether the application will be granted. If the application is granted, the $253,086 to be repaid for 1993-1994 and 1994-1995 school years will be collected by the Department pursuant to the determination of Mike Azzara, Director of Finance. If the application is denied, the entire $253,086 will be collected from the State Aid payments petitioner is to receive in 1997-1998.

4. It is further agreed that petitioner's petition will be dismissed with prejudice.

Robin S. Perry, Esq.
For Petitioner,
Board of Education
of the City of Asbury Park

DATED: 5/1/97

John K. Worthington
Deputy Attorney General
For Respondent,
New Jersey Department
Of Education

DATED: 4/30/97

OAL DKT. NO. EDU 8393-96
AGENCY DKT. NO. 130-4/96

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record and appended stipulation of settlement, returned by the Office of Administrative Law, have been reviewed. In that the agency has approved the terms of the settlement, the stipulation shall be deemed the final decision on this matter pursuant to *N.J.A.C.* 1:1-19.1(d).

COMMISSIONER OF EDUCATION

JUNE 27, 1997
DATE OF MAILING JUNE 27, 1997

342-97

342-97

THERESA M. CASTAGLIUOLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF THERESA M. CASTAGLIUOLO, BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY	:	
AND	:	
IN THE MATTER OF WILDWOOD CREST BOARD OF EDUCATION AND THERESA M. CASTAGLIUOLO.	:	

SYNOPSIS

Petitioning tenured secretary filed simultaneously with the Commissioner and the Public Employment Relations Commission (PERC), seeking relief under the terms of a previously signed settlement and alleging retaliation and harassment. Board of Education subsequently filed tenure charges of insubordination, dereliction of duty and neglect. Matters were consolidated and predominant interest was found to be with the Commissioner due to the primacy of the tenure matter.

ALJ found that, prior to hearing, petitioner had resigned from employment with the Board and was receiving a pension. ALJ found entire matter to be mooted by this action.

Commissioner concurred with ALJ's findings and conclusions as to the matters under his jurisdiction and noted PERC's concurrent review of the matter before it.

JUNE 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSOLIDATED CASES

THERESA M. CASTAGLIUOLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,

Respondent.

OAL DKT. NO. EDU 8577-95

AGENCY REF. NO. 329-8/95

AND

IN THE MATTER OF THE TENURE HEARING OF THERESA M. CASTAGLIUOLO, BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,

OAL DKT. NO. EDU 927- 96

AGENCY REF.55-2/96

AND

IN THE MATTER OF WILDWOOD CREST BOARD EDUCATION AND THERESA M. CASTAGLIUOLO,

OAL DKT. NO. PRC 149-97
PERC AGENCY NO. CI-96-8

Richard Press, Esq., for Theresa Castagliuolo (Press & Long, attorneys) **and**

Arnold Mellk, Esq., for Theresa Castagliuolo, (Wills, O'Neill & Mellk, attorneys)

Russell Lichtenstein, Esq., for Wildwood Crest Board of Education, (Cooper, Perskie, April, Niedelman, Wagenheim & Levenson, attorneys)

Record Closed: May 1, 1997 Decided: May 1, 1997

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 15, 1995, the petitioner, Theresa M. Castagliuolo filed petitions simultaneously with the Commissioner of Education, OAL Docket. No. EDU 8577-95, and with the Public Employment Relations Commission (PERC), OAL Docket No. PRC 149-97.

On February 3, 1996, the Wildwood Crest Board of Education (Board) filed tenure charges with the Commissioner, OAL Docket No. EDU 927-96.

An Order determining predominant interest was filed on October 25, 1996 and the matters were consolidated by Order dated February 19, 1997.

Prior to the hearing date, petitioner Castagliuolo moved for an Order compelling the Board to pay petitioner Castagliuolo her full salary on the 121st day of her suspension pursuant to *N.J.S.A.* 18A:6-14. During the ensuing exchange of documents it became apparent that petitioner

Castagliuolo had retired from her position effective January 1, 1996 and has been receiving her pension ever since. The Motion to Compel salary payments was withdrawn.

As a result of petitioner Castagliuolo's retirement effective January 1, 1996, the tenure charges are moot. *In the Matter of the Tenure Hearing of Carol Scherr, School District of the Borough of South Plainfield.* 95 *N.J.A.R.* 2*d.* (EDU) 97.

The Commissioner, in his Final Decision in the *Scherr* matter, *supra.* pgs. 99-100, points out that the "employment relationship between *(Scherr)* and the charging district has been severed, ... by ..... *(Scherr's)* own actions."

It is therefore logical and by implication it follows, that petitioner Castagliuolo's petition to restore her to a former secretarial position and her petition charging retaliation are also moot.

I therefore **DISMISS** the petitions filed herein.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration and the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION and** the **PUBLIC EMPLOYMENT RELATIONS COMMISSION,** which by law are authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION and THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** do not not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION AND THE CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, at 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625 and 495 West State Street, CN429, Trenton, New Jersey 08625, respectively,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/1/97
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

5/15/97
DATE

DNA
DEPARTMENT OF EDUCATION

Receipt Acknowledged:

5/15/97
DATE

Millicent A Howell
PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mailed to Parties:

MAY 19 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

CONSOLIDATED CASES
OAL DKT. NO. EDU 8577-95, EDU 927-96 and PRC 149-97
AGENCY REF. NO. 329-8/95, and 55-2/96 and PERC Agency No. CI 96-8

THERESA M. CASTAGLIUOLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF THERESA M. CASTAGLIUOLO, BOARD OF EDUCATION OF THE BOROUGH OF WILDWOOD CREST, CAPE MAY COUNTY	:	
AND	:	
IN THE MATTER OF WILDWOOD CREST BOARD OF EDUCATION AND THERESA M. CASTAGLIUOLO.	:	

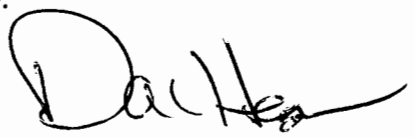
The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. It is herein noted that on June 9, 1997, petitioner attempted to submit "exceptions" on her own behalf in this matter. Such submission was apparently filed without the knowledge or consent of her attorney, nor was there any indication that it had been served on opposing counsel. Additionally, in that, pursuant to *N.J.A.C.* 1:1-5.1, a party to administrative proceedings may choose one of several options with respect to her representation and that, because petitioner elected throughout the course of the instant proceedings to be represented by counsel, absent notification to the Bureau of Controversies and Disputes that she is no longer represented by an attorney, petitioner's exceptions in the circumstances herein, will not be considered by the Commissioner.*

* In that petitioner's exceptions would have been due no later than June 2, 1997, thirteen days from the mailing date pursuant to *N.J.A.C.* 1:1-18.4, they would have been untimely filed in any event.

Upon review, the Commissioner concurs with those findings and conclusions in the initial decision which fall under the Commissioner of Education's jurisdiction. The Commissioner further notes that he has confirmed that this matter is being decided concurrently by the Public Employment Relations Commission (PERC) with regard to issues specific to that agency.

Accordingly, for the reasons expressed therein, the Commissioner adopts those portions of the initial decision which are under his jurisdiction as his final decision in this matter.

IT IS SO ORDERED.



ASSISTANT COMMISSIONER OF EDUCATION*

* It is noted that *N.J.S.A.* 18A:4-34c authorizes each assistant commissioner to hear and determine controversies and disputes which may arise under school laws, or the rules of the state board, or of the commissioner.

JUNE 30, 1997
DATE OF MAILING JULY 1, 1997

343-97

343-97

ZENA MITCHELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teaching staff member appealed District's determination to withhold her 1995-96 employment and adjustment increments, based on unsatisfactory teaching performance during the 1994-95 school year.

ALJ found that evidence did not support District's action, and that, instead, the then-Board of Education based its actions on bad faith evaluations conducted in retaliation for petitioner's having criticized district programs and filed discrimination complaints.

Commissioner affirmed decision of the ALJ, noting that findings turned largely on credibility determinations which the Commissioner found no basis to disturb.

JUNE 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11049-95

AGENCY DKT. NO. 292-7/95

ZENA MITCHELL,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Keith Roberts, Esq., for petitioner (Giblin & Giblin, attorneys)

Gregory G. Johnson, Esq., for respondent

Record Closed: April 10, 1997 Decided: May 13, 1997

BEFORE **MARIE P. SIMONELLI**, A.L.J.:

STATEMENT OF THE CASE

Petitioner, Zena Mitchell (Ms. Mitchell), appeals the decision of respondent, State-Operated School District of the City of Newark, Essex County (the District), to withhold her 1995-96 salary employment increment and adjustment increment pursuant to *N.J.S.A.* 18A:29-14. The District based its decision on Ms. Mitchell's alleged unsatisfactory teaching performance during the 1994-95 school year.

PROCEDURAL HISTORY

On July 21, 1995, Ms. Mitchell filed a Petition. The District filed an Answer to Petition on September 8, 1995. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on September 20, 1995, for a hearing.

The OAL held a hearing on June 7, September 30, and October 18, 1996, and January 8 and 9, 1997. The record closed on April 10, 1997, after the submission of all posthearing briefs.

FACTS

Having heard the witnesses and reviewed the exhibits, I **FIND** the following **FACTS**:

Ms. Mitchell began working for the District on January 30, 1989, as an elementary school teacher at the Peshine Avenue School (Peshine). From 1989 to 1995, the Peshine administration assigned Ms. Mitchell to teach six different grades as follows: (1) January 1989 to June 1989, seventh grade; (2) 1989-90 school year, sixth grade; (3) 1990-91 school year, fifth grade; (4) 1991-92 and 1992-93 school years, fourth grade; (5) 1993-94 school year, second grade; (6) 1994-95 school year, fourth grade, and (7) 1995-96 school year, kindergarten.

Ms. Mitchell experienced great difficulty in being assigned to teach different grades every year. It was difficult for her to prepare to teach every September because she had to use new textbooks and new materials and she had to move into new classrooms. She could not use lesson plans and materials that she had developed for the prior grades she had taught and this became a severe disadvantage for her. Ms. Mitchell complained to Peshine's administrators about being assigned to different grades every year. She further complained that Peshine's administrators were discriminating and retaliating against her in changing her teaching assignments every year because she had spoken out many times at faculty meetings about problems with Peshine's reading program and about the lack of textbooks, supplies and materials. She also had spoken out at those faculty meetings about the poor educational system at Peshine and that Peshine's educational system essentially set students up for failure.

After receiving no response to her complaints of discrimination and retaliation, in August 1994, Ms. Mitchell filed her first Civil Rights Complaint. In November 1994, Ms. Mitchell filed an Amended Complaint adding the allegation of retaliation. After Ms. Mitchell filed her first Civil Rights Complaint, Peshine's administrators began to aggressively evaluate her immediately upon the start of the 1994-95 school year. For the first time in all of her years at Peshine, Ms. Mitchell's began receiving unsatisfactory evaluations from these administrators. The Peshine administrators gave Ms. Mitchell unsatisfactory evaluations during the 1994-95 school year largely because they claimed that she allegedly could not control or discipline her class.

During the summer of 1994, the Peshine administration put together a roster of students to be assigned to Ms. Mitchell for the 1994-95 school year. The administration again changed Ms. Mitchell's grade level and assigned her to teach a fourth grade class of about 22 students. Ms. Mitchell had great difficulty teaching this class because 17 students were below grade level in reading, math and language. One student was reading at the first grade level, 14 were reading at the second grade level, 3 were reading at the third grade level and only 2 were reading at the fourth grade level. The students reading below fourth grade level had great difficulty using fourth grade textbooks. They, therefore, had great difficulty learning and sometimes acted out in frustration. Although Ms. Mitchell had asked Peshine's administrators for different textbooks that these students could read and understand, the administrators ignored her request and demanded that she use the fourth grade textbooks. Although she tried to make adjustments, it was extremely difficult for her students to learn because they simply could not read the textbooks. In addition, Ms. Mitchell had an insufficient number of textbooks for her students to use. The students had to share textbooks and this caused further learning problems. Peshine's administrators also ignored Ms. Mitchell's request for additional textbooks.

To make matters worse, several of Ms. Mitchell's students were disruptive and had very serious disciplinary problems. Other teachers who testified at the hearing described Ms. Mitchell's class as "the class from hell" and as an extremely difficult class to control and teach. One teacher, Phyllis Hunter-McLeod (Mrs. McLeod), even admitted that, despite her 22 years of teaching experience, she would have had great difficulty controlling this class. She also testified that she observed the disruptive students in Ms. Mitchell's class and that they were abusive and disrespectful to Ms. Mitchell. Another teacher, Judith Ann Lupo (Ms. Lupo), described Ms.

Mitchell's class as "stacked" with students who had disciplinary or educational problems and who needed help. Patricia D. George (Ms. George), a security guard, testified that she constantly was called to Ms. Mitchell's classroom to remove disruptive students because Ms. Mitchell was concerned about the safety of her other students and herself. Whenever Ms. George went to Ms. Mitchell's classroom, she observed the same students fighting, arguing, pushing, cursing and throwing things around. She also observed a student threaten Ms. Mitchell on one occasion. Ms. George further testified that she continued to have disciplinary problems with these particular students after they no longer were in Ms. Mitchell's class.

Ms. Mitchell took many steps to try to control and discipline the disruptive students in her class. When these students did not respond, she then attempted to communicate with their parents. She also reported her difficulties to Peshine's administrators. Ms. Mitchell also submitted 152 Discipline Referral Forms, several Child Study Team Referral Forms and several Guidance Referral Forms. Peshine's administrators either did not respond to Ms. Mitchell or they did very little to assist her with these difficult students. They merely removed some of these students from Ms. Mitchell's class and placed them into another class. In short, Ms. Mitchell received no support from Peshine's administrators in dealing with these very difficult students.

With respect to the disciplinary policy at Peshine, Ms. Lupo testified that it was nonexistent. The Peshine administration did very little about disciplinary problems and it did not follow-up in disciplinary referrals. In fact, when Ms. Lupo had asked the administration for help with a difficult student, the administration ignored her. Another teacher, Mark Leslie Leibowitz (Mr. Leibowitz), testified that the administration did nothing when he submitted Discipline Referral Forms. He also received no support from the Child Study Team or the Guidance Department. Finally, another teacher, Paul J. Urso (Mr. Urso), testified that he did not even bother to submit Discipline Referral Forms because they were a waste of time and the administration did nothing. He also testified that the Peshine administration did not take discipline problems seriously during the 1994-95 school year and that it left the teachers on their own to handle disciplinary problems. Mr. Urso also corroborated that "the deck was stacked against Ms. Mitchell" because there was an inordinate number of students with disciplinary problems in her class. He concluded that Ms. Mitchell's difficulty with her class stemmed from the above and not from any poor teaching or unsatisfactory performance on her part.

Mr. Urso also testified that he has been teaching at Peshine for 30 years and has served as a mentor to other teachers. During the 1994-95 school year, he visited Ms. Mitchell's classroom on many occasions. Despite the disciplinary problems Ms. Mitchell was having, her classroom was one of the most talked about rooms in the school. It was nicely decorated and other teachers tried to copy it. Ms. Mitchell prided herself on the neatness and appearance of her classroom and it always was in excellent shape. Mr. Urso also observed Ms. Mitchell effectively teaching her students using many learning tools, some of which she had purchased or made herself. Mr. Urso testified that Ms. Mitchell always tried to teach her class despite being disrupted by certain students. He also stated that Ms. Mitchell was a dedicated teacher and she always got to school early and left late.

Mr. Urso's description of his observations of and dealings with Ms. Mitchell, as well as the testimony of other witnesses about Ms. Mitchell's teaching abilities, are in sharp conflict with the unsatisfactory evaluations she received during the 1994-95 school year which portray her as a very poor teacher. It is as if they are talking about two different people. What is not in conflict, however, is that prior to the 1994-95 school year, and prior to filing her discrimination Complaints, Ms. Mitchell never received an unsatisfactory evaluation and she never had difficulties controlling or disciplining any class.

DISCUSSION AND CONCLUSION

Under *N.J.S.A.* 18A:29-13, a board has the power to give annual increments. An award of an annual increment is not a matter of statutory right. Rather, *N.J.S.A.* 18A:29-14 permits a board to withhold an increment "for inefficiency or other good cause". An annual increment "is in the nature of a reward for meritorious service" and is "subject to annual evaluation of teacher performance". *North Plainfield Education Association v. Board of Education*, 96 *N.J.* 587, 593-594 (1984).

A board has the statutory authority to establish the criteria by which it evaluates the performance of a teacher. A Board's determination that a teacher has not satisfactorily performed and is, thus, not entitled to an annual increment will not be overturned unless it is found to be arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board*

of Education, 60 *N.J. Super.* 288, 294 (App. Div. 1960). There must be a reasonable basis for the board's conclusion. *Id.* at 295. It is Ms. Mitchell's burden of proving unreasonableness. *Id.* at 297.

In the present case, the District determined that Ms. Mitchell would not receive an annual increment for the 1995-96 school year because of her alleged unsatisfactory teaching performance during the 1994-95 school year. The undersigned is convinced by the evidence presented in this case that Ms. Mitchell did not perform unsatisfactorily and that her unsatisfactory evaluations were arbitrary and done in bad faith. The undersigned places particular importance on the testimony of the witnesses presented by Ms. Mitchell. That testimony has convinced the undersigned that the Peshine administrators were out to get Ms. Mitchell because of her criticism of the reading and educational programs at Peshine and because she had filed discrimination Complaints. The Peshine administration assigned Ms. Mitchell to the "class from hell" which was "stacked" with students with disciplinary and educational problems. The Peshine administration also did nothing to help Ms. Mitchell with those students, they did not enforce any disciplinary policies with respect to those students, and they completely ignored her requests for assistance, for textbooks and for other teaching materials. It is clear to the undersigned from all of the evidence presented in this case that the Peshine administration acted in bad faith is giving Ms. Mitchell unsatisfactory evaluations during the 1994-95 school year.

By reason of the foregoing, I **CONCLUDE** that the District improperly withheld Ms. Mitchell's salary increment and adjustment increment for the 1995-96 school year. I further **CONCLUDE** that Ms. Mitchell has proved that the District's decision was arbitrary, without rational basis and induced by improper motive.

ORDER

Therefore, I **ORDER** that the District's decision to withhold Ms. Mitchell's salary increment and adjustment increment for the 1995-96 school year be and hereby is **REVERSED**. I further **ORDER** Ms. Mitchell's Petition be and hereby is **GRANTED** and the District shall restore her 1995-96 increment.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 13, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

5/16/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

For Petitioner:

Tina Buonopane, Basic Skills Teacher at Peshine

Gladys Fredereck, Recreational Leader with City of Newark

Mark Leslie Leibowitz, Elementary School Teacher at Peshine

Judith Ann Lupo, Eliminator School Teacher at Peshine

Phyllis Hunter-McLeod, Special Education Teacher at Peshine

Zena Mitchell, petitioner

Paul J. Urso, Elementary School Teacher at Peshine

For Respondent:

Daniel C. Fabrizio, Elementary School Teacher at Peshine

Kathryn Gadson, Vice-Principal at Peshine

Ezequiel Garcia, Principal at Peshine

Patricia D. George, Security Guard at Peshine

Suzanne M. Kane, Music Teacher at Peshine

Benigno Santiago Principal of Franklin Avenue School

Mae Williams, Elementary School Teacher at Peshine

Exhibits

P-2	Student Discipline Policy
P3A	Ms. Mitchell's Personal Log
P-3B	Ms. Mitchell's Personal Log
P-4A	Discipline Referral Forms (50)
P-4B	Discipline Referral Forms (49)
P-4C	Discipline Referral Forms (51)
P-5	Memo, dated March 18, 1995, from Ms. Mitchell to Ms. Gadson
P-6	Notice of Pre-Observation Conference, dated October 12, 1994

P-7	Informal Observation/Visitation Check List, dated October 12, 1994
P-8	Memo, dated October 17, 1994, from Ms. Mitchell to Ms. Gadson
P-9	Memo, dated November 2, 1994, from Ms. Mitchell to Ms. Gadson
P-10	Letter, dated November 2, 1994, from Ms. Mitchell to Charles Meadows
P-11	Memo, dated November 3, 1994, from Ms. Mitchell to Ms. Gadson
P-12	Memo, dated November 17, 1994, from Ms. Mitchell to Ms. Gadson
P-13	Memo, dated December 16, 1995, from Ms. Mitchell to Ms. Gadson
P-14	Informal Observation Report, dated March 19, 1996
P-15	Guidance Referral Form, dated January 5, 1995
P-16	Basic Skills Improvement Program, dated September 28, 1994
P-17	Communication Records
P-18	Student Grade Level Records
P-19	Letter, dated May 25, 1994, from Raquel Y. Liggon to Ms. Mitchell
P-20	Division on Civil Rights Pre-Interview Information, dated April 1994
P-21A	EEOC Discrimination Complaint, dated August 10, 1994
P-21B	EEOC Discrimination Complaint, dated December 6, 1994
P-21C	Letter, dated March 19, 1996, from Toni Ann Hindsman to Ms. Mitchell
P-22	Request for Assistance, dated October 17, 1994
P-23	Request for Assistance, dated March 21, 1995
P-24	Request for Assistance, dated September 29, 1994
P-25	Request for Assistance, dated March 27, 1995
P-28	Teacher Annual Evaluation Report, dated October 20, 1989
P-29	Teacher Observation Report, dated May 28, 1990
P-30	Teacher Observation Report, dated May 10, 1991
P-31	Teacher Annual Evaluation Report, dated June 19, 1992
P-32	Teacher Observation Report, dated March 1, 1993
P-33	Teacher Observation Report, dated November 23, 1994
P-34	Letter, dated March 28, 1995, from Richard A. DiPatri to Ms. Mitchell
P-35	Letter, dated March 7, 1995, from Ms. Mitchell to Leo F. Klagholz
P-36	Stanford Achievement Test Scores
P-37	Division on Civil Rights Discrimination Complaint, filed December 12, 1994
P-38	Division on Civil Rights Complaint, filed May 1, 1995

P-39	Lesson Chart
P-40	Memo, dated November 21, 1994, from Ms. Gadson to Ms. Mitchell
R-1	Memo, dated September 27, 1994
R-2	Memo, dated September 27, 1994
R-3	Teacher Observation Report, dated October 13, 1994
R-4	Teacher Observation Report, dated January 25, 1995
R-5	Teacher Observation Report, dated March 23, 1995
R-6	Memo, dated March 24, 1995, from Mr. Garcia to Charles Meadows
R-7	Letter, dated May 8, 1995, from Connie Caponegro to Ms. Mitchell
R-8	Teacher Annual Evaluation Report, dated June 7, 1995
R-9	Administrative Visitation/Observation Daily Log
R-10	Informal Observation/Visitation Check List, dated October 12, 1994
R-11	Memo, dated October 4, 1994, from Ms. Gadson to Ms. Mitchell
R-12	Notice of Pre-Observation Conference, dated October 12, 1994
R-13	Teacher Job Description
R-14	Memo, dated February 10, 1995, from Ms. Gadson to Ms. Mitchell
R-15	Memo, dated February 10, 1995, from Ms. Gadson to Ms. Mitchell
R-16	Memo, dated November 15, 1994, from Ms. Gadson to Ms. Mitchell

OAL DKT. NO. EDU 11049-95
AGENCY DKT. NO. 292-7/95

ZENA MITCHELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of respondent, State-operated School District of the City of Newark were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions object to the Administrative Law Judge's (ALJ) conclusion that it improperly withheld petitioner's increment. In this connection, respondent contends that the ALJ erroneously failed to properly credit documentary evidence it presented and testimony proffered by its witnesses. Respondent presents a recapitulation of testimony advanced by each of its witnesses which, it contends, establishes that petitioner's performance for the 1994-95 school year was far below par, thereby, justifying the withholding of her increment. Respondent argues that this conclusion is inevitable despite the "many excuses" presented by petitioner "to deflect attention from her poor teaching skills." (Respondent's Exceptions at p. 10)

Upon an independent and comprehensive review of the within record, which included transcripts of only 3 of the 5 days of hearings conducted in this matter[1] , the Commissioner concurs with the findings and conclusion of the ALJ that petitioner has met her burden of establishing that the District's action[2] in withholding her salary increment for the 1995-96 school year was unreasonable and as such, this increment must be restored.

The Commissioner is unpersuaded by the exception arguments advanced by respondent. Although this matter turns, to a great extent, on the credibility of witnesses and the weighing of evidence, the Commissioner is satisfied, based on the record as a whole, that the ALJ appropriately measured conflicts, inconsistencies, potential biases, and plausibility of content in deciding which testimony to credit in reaching the factual findings and conclusions herein. It is noted that credibility determinations of the finder of fact, who observed the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them upon review of the hearing transcripts. Notwithstanding that the only transcripts contained in the record were those of the testimony of respondent's witnesses, review of these, along with the balance of the record before him, provides the Commissioner with no basis for overturning the ALJ's credibility determinations. Additionally, the Commissioner recognizes, as did the ALJ, that prior to filing her discrimination complaint in August 1994, petitioner had never received an unsatisfactory evaluation nor identified as having difficulty controlling or disciplining any class.

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[1] Hearings in this matter were conducted on June 7, 1996, September 30, 1996, October 18, 1996, and January 8 and 9, 1997. Transcripts covering hearing dates of June 7, 1996, September 30, 1996, and January 9, 1997 were submitted with respondent's exceptions.

[2] It is noted that the record reflects that the action at issue herein was taken on May 7, 1995 by the Newark Board of Education. The State-operated District became the respondent in this matter by virtue of the State takeover of the district which occurred on July 12, 1995.

Accordingly, the initial decision of the OAL is affirmed for the reasons articulated therein. The State-operated District of the City of Newark is hereby ordered to restore petitioner's increment for the 1995-96 school year which was improperly withheld.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION*

* It is noted that *N.J.S.A.* 18A:4-34c authorizes each assistant commissioner to hear and determine controversies and disputes which may arise under school laws, or the rules of the state board, or of the commissioner.

JUNE 30, 1997
DATE OF MAILING JULY 1, 1997

344-97

344-97

THOMAS M. WEIR AND THE PATERSON EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER 0F EDUCATION
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured teacher, asserted State Operated District violated *N.J.S.A.* 18A:37-2.1 in adopting its expulsion policy and in failing to convene a proper expulsion hearing against a student who assaulted him. Petitioner contends that the express language of statute requires that expulsion hearings be conducted by the Board of Education which now exists in the District pursuant to *N.J.S.A.* 18A:7A-48, rather than by the State District Superintendent.

ALJ concluded that, in a State Operated District, all the duties and powers of the previous Board of Education are vested in the State Superintendent. Therefore, conduct of the expulsion hearing contested by petitioner was appropriate, as was the manner in which the District's expulsion policy was adopted.

Commissioner affirmed findings and conclusions of initial decision.

JUNE 30, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1746-96

AGENCY DKT. NO. 416-10/96

THOMAS M. WEIR,

AND THE PATERSON EDUCATION ASSOCIATION,

Petitioners,

v.

THE STATE OPERATED SCHOOL DISTRICT OF

THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri & Pincus, attorneys)

Louis M. Flora, General Counsel, the State Operated School District of Paterson, for respondent

Record Closed: April 9, 1997 Decided: May 13, 1997

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on February 20, 1996. A telephone prehearing conference scheduled to be conducted on May 13, 1996 subsequently was adjourned and the case was placed on the inactive list. See N.J.A.C. 1:1-9.7. Ultimately, following informal telephone conferences with counsel, it was agreed that the matter could be decided by cross-motions for summary decision based upon a joint stipulation of facts. Those papers now have been filed and the following is my initial decision.

JOINT STIPULATION OF FACTS

As noted above, counsel have submitted a joint stipulation of facts which will be marked "Court Exhibit 1". The facts to which the parties have stipulated are as follows:

1. Petitioner, Thomas M. Weir, is a tenured teaching staff member employed by the Respondent, the State-Operated School District of the City of Paterson (hereinafter "the District").

2. Petitioner, Paterson Education Association, is the majority representative for all teaching staff and various staff and various staff members employed by the District.

3. Thomas M. Weir was assaulted by Korey Marche, then a student at School No. 24 in the Paterson School District, on May 22, 1995.

4. Thomas M. Weir and the Paterson Education Association filed a petition alleging a violation of *N.J.S.A.* 18A:37-1 by Respondent on October 20, 1995.

5. On January 30, 1996, the District filed an Answer.

6. Petitioner, Paterson Education Association, was a party to three (3) separate petitions concerning Paterson teachers who had been assaulted and seeking to have the Commissioner order the State Operated School District of Paterson to enforce 18A:37-2.1. The cases were, in order of filing, *Garrity, et al v. Board of Education of the State Operated School District, Passaic County*, OAL Docket No. EDU 9876-94; *Berger, et al v. The State Operated School District of the*

City of Paterson, OAL Docket No. EDU 11722-95, and the subject case.

7. On June 13, 1996, the matter was placed on the inactive list for six months because the student was in a residential placement subject to the jurisdiction of the juvenile justice system and the District was formulating a policy and guidelines to address student assaults. The *Berger* case was held in abeyance pending the decision in the *Garrity* case. The subject case, the *Weir* case, was likewise put on the inactive list pending the release of the assailant from custody and the formulation of policy and guidelines by Respondent Paterson to address student assaults. See J-4 (Order or inactivity and supporting letters).

8. On August 23, 1996, Louis Flora wrote to the Principal of School No. 24 directing him not to re-admit Korey Marche without a hearing (J-1).

9. Counsel for Petitioners was given the opportunity to review the policy and the guidelines that had been written as directed by the Commissioner in *Garrity* under the agreements supporting the Order of Inactivity in this case. (See J-4 Order of Inactivity and enclosures).

10. While Petitioner's counsel did not fully agree that the policy and guidelines were appropriate, no action was taken by Petitioner's counsel to appeal the Order in the *Garrity* case.

11. In September 1996, the District adopted a policy regarding assaults by pupils upon District staff and Board Members (J-2). Petitioner's counsel was provided with the policy and regulations, as approved by the Department of Education, in September of 1996.

12. During the course of the Respondent's defense of the subject case, it offered to Petitioner's counsel a hearing of the case against the student upon his attempted return to the District. See J-5 (letter of June 4, 1996).

13. On September 13, 1996, a disciplinary hearing was held by Dr. Emmajean Stepherson, Assistant Superintendent of Schools. In the subject case, Petitioner's counsel was permitted to attend the hearing conducted by Dr. Stepherson on September 13, 1996 under the policy and guidelines adopted.

14. On September 17, 1996, Dr. Stepherson issued her report and decision (J-3).

15. Neither the Petitioner's counsel nor any petitioner expressed any dissent or alleged any deficiency concerning the proceeding held on September 13, 1996 until Petitioner's counsel's letter of 1/7/97 to ALJ Weiss (J-6).

16. By letter of 1/13/97, counsel for Respondent replied to the 1/7/97 letter of Petitioner's counsel (J-7).

17. During the course of the litigation of the *Garrity* case, the *Berger* case, and the subject case, certain statutory revisions occurred concerning *N.J.S.A.* 18A:37-2.1 - 18A:37-12, and sections of *N.J.S.A.* 18A:7A-34 through *N.J.S.A.* 18A:7A-52.

18. Respondent, State Operated School District of Paterson, has been under State operation since August of 1991. (Court Exhibit 1)[1]

DISCUSSION

After this matter was restored to the active list in January 1997 I asked counsel to address three separate issues in their cross-motions as follows: (1) was the school district's policy pertaining to suspension and/or expulsion of pupils in compliance with the requirements of the education statutes; (2) are petitioners' claims barred by the doctrine of collateral estoppel; and (3) are petitioners' claims barred by the doctrine of waiver? The memoranda submitted by petitioners do not appear to address the last two issues. Since they are in the nature of separate defenses, they were addressed by the Board.

The position taken by petitioners is straightforward, to wit: *N.J.S.A.* 18A:37-2.1 expressly provides that in circumstances involving an alleged assault by a pupil upon a teacher the hearing to be provided to the pupil must be conducted by the board of education itself. Thus, even though the school district in this case is a State-Operated school district, since it was in its sixth year of such operation in 1996-97 there is now a locally elected Board which is entitled to vote on matters brought before it by the district superintendent for a vote. See, *N.J.S.A.* 18A:7A-48. Petitioners therefore maintain that: (1) the policy adopted in September 1996 (J-2) should have been reviewed by the Board; and (2) the hearing conducted on September 13, 1996 should have been conducted by the Board.

[1] References to various "J" documents cited in the Joint Stipulation will be discussed, as needed, *infra*. I should also note that the case had been placed on an "inactive" status between June 1996 and January 1997 as the parties were attempting to reach an amicable resolution. When that proved not to be possible the case was restored to the active list.

For its part, of course, the respondent takes a distinctly different view of the matter. According to it, the provisions of *N.J.S.A.* 18A:37-2.1 do not, in the circumstances of this case, diminish the authority of the State District Superintendent or his designee to conduct suspension or expulsion hearings. I agree.

On its face, of course, the statute appears unambiguously to provide that suspension/expulsion proceedings should be conducted before the local board. Thus, in *Garrity, supra,* 96 *N.J.A.R.* 2d (EDU) 567, the Commissioner ordered the respondent to comply with the provisions of *N.J.S.A.* 18A:37-2.1. *See,* 96 *N.J.A.R.* 2d (EDU) at 576. However, Garrity did not address the specific issue before me in this case, for regardless of *N.J.S.A.* 18A:37-2.1, since the respondent is a State Operated School District the requirements of the Public School Education Act of 1975 govern its operation and the provisions of the Act must be considered with respect to the analysis of any other education statutes. My review of the Act points inexorably to the conclusion that what occurred in this case was appropriate. Thus, all of the authority and powers previously vested in the local board are transferred to the Superintendent of the State Operated School District, and all of the district's activities are conducted by and under the Superintendent's supervision. *See, N.J.S.A.* 18A:7A-15.1; 7A-35(a); 7A-46(b). *See*, also, *N.J.S.A.* 18A:7A-35(e) and 7A-38(b) and 7A-35(f). Therefore, since under the Act all the duties and powers of the local board are to be exercised by and under the control of the Superintendent, where, as here, suspension/expulsion hearings are held by the Superintendent or his or her duly appointed designee, such action becomes the equivalent of the local hearing under *N.J.S.A.* 18A:37-2.1.

Although the respondent's policy for suspension/expulsion hearings was approved by the Department in September 1996 there was no specific reference to who actually was responsible for conducting the hearing. In this case, of course, the hearing was conducted by Dr. Stepherson, Assistant Superintendent of Schools. Petitioners' counsel was permitted to attend the hearing (J-4) and at no time prior to, or at the hearing, was any objection raised with respect to the propriety of Dr. Stepherson acting as the hearing entity rather than the local board, nor any challenge lodged to whether or not she had proper authority to so act. Thus, I must assume: (a) that the

authority to conduct the hearing properly was delegated under *N.J.S.A.* 18A:7A-42(b); and (2) that, in any event, any objection to such a delegation on procedural or other grounds was waived.

Having reached these conclusions there is no reason for me to address the "collateral estoppel" issue. Clearly, given the contents of the Joint Stipulation of Facts and the applicable statutory authority cited herein, the actions taken by respondent in this case were proper and met all of the requirements of *N.J.S.A.* 18A:37-2.1. Thus, the petition is ordered **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500,**

Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 13, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

5/16/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Exhibit List

C-1 Joint Stipulation of Facts with attachments J-1 through J-7.

OAL DKT. NO. EDU. 1746-96
AGENCY DKT. NO. 416-10/96

THOMAS M. WEIR AND THE PATERSON EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a comprehensive review of the within record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge (ALJ) that, given the parties' Joint Stipulation of Facts and the applicable statutory provisions, the actions taken by the District under the circumstances of this matter were appropriate and fully satisfied the requirements of *N.J.S.A.* 18A:37-2.1.

Accordingly, the initial decision of the OAL is affirmed for the reasons clearly stated therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION*

* It is noted that *N.J.S.A.* 18A:4-34c authorizes each assistant commissioner to hear and determine controversies and disputes which may arise under school laws, or the rules of the state board, or of the commissioner.

JUNE 30, 1997
DATE OF MAILING JULY 1, 1997

345-97

345-97

S.J. AND Z.J., on behalf of minor child, S.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 1, 1997

OAL DKT. NO. EDU 9731-96
AGENCY DKT. NO. 371-8/96

S.J. AND Z.J., on behalf of minor child, S.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 30, 1997, providing them ten days to submit an explanation for such nonappearance, have been reviewed. The parties having indicated that they intended for this matter to be withdrawn, it is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 1, 1997
DATE OF MAILING JULY 1, 1997

348-97

348-97 SEC

IN THE MATTER OF THE	:	
REVEREND JOHN G. BRYANT,	:	COMMISSIONER OF EDUCATION
PLEASANTVILLE BOARD OF	:	DECISION
EDUCATION, ATLANTIC COUNTY.	:	
	:	

JULY 3, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
REV. JOHN G. BRYANT,	:	
Pleasantville Board of Education	:	
Atlantic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, John Bryant was elected to serve a three-year term on the Pleasantville Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" before their election and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing John Bryant to Show Cause why he had not attended training up until that time; and

WHEREAS, Rev. Bryant replied that he was previously unable to attend training due to scheduling conflicts with his job responsibilities, but is currently enrolled and plans to attend the June 6-8, 1997 training session; and

WHEREAS, the Commission notified Rev. Bryant that the Commission would discuss this matter at its May 27, 1997 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Rev. Bryant has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1996 to April 1997 constitutes a violation of N.J.S.A. 18A:12-33; and

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Rev. John Bryant violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of reprimand if he attends the June 6-8, 1997, session, but removal from the board if he fails to attend the June session.

Dated: May 27, 1997

Paul C. Garbarini, Chairperson

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 27, 1997.

Lisa James-Beavers, Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Ljb/trng97.doc

IN THE MATTER OF THE	:	
REVEREND JOHN G. BRYANT,	:	COMMISSIONER OF EDUCATION
PLEASANTVILLE BOARD OF	:	DECISION
EDUCATION, ATLANTIC COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 26, 1997 the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member provided to the Commission an answer noting that he was unable to attend the March 15, 1997 training session due to scheduling conflicts arising from work obligations but that he planned to attend the June 6-8, 1997 training program, and;

Whereas, the Commission voted on May 27, 1997, to recommend reprimand of the above-named Board member for failure to timely attend training sessions in violation of State

statute if he attends the June 6-8 training session, with removal from the Board if he fails to attend the June training session, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending either reprimand or removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed that the above-named Board member has, in fact, attended the June 6-8, 1997 training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission, but declines to issue a reprimand to the above-named Board member finding suspension to be the appropriate penalty in this instance; now therefore

IT IS ORDERED that a one-meeting suspension be imposed on the above-named Board member, to be effective for the next regularly scheduled meeting of the Board.

COMMISSIONER OF EDUCATION

JULY 3, 1997
DATE OF MAILING JULY 3, 1997

349-97

349-97 SEC

IN THE MATTER OF FRANK KELLY,	:	
MULLICA TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, ATLANTIC COUNTY.	:	DECISION
	:	

JULY 3, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
FRANK KELLY,	:	
Mullica Township Board of Education	:	
Atlantic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Frank Kelly was elected to serve a three-year term on the Mullica Township Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" before they are elected and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Frank Kelly to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Kelly replied that he could not attend the seven scheduled sessions because of family commitments, but that he promised to attend the first available training session that comes about; and

WHEREAS, the next available session that the New Jersey School Boards Association offers is the June 6-8, 1997 session; and

WHEREAS, the Commission notified Mr. Kelly that the Commission would discuss this matter at its May 27, 1997 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Mr. Kelly has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1996 to April 1997 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, Mr. Kelly's response does not provide an adequate explanation of why he failed to attend the required training session for the year allowed by law; and

WHEREAS, the Commission finds that if Mr. Kelly fails to attend the June session as he has set forth, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Frank Kelly violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a reprimand if he attends the June session, but removal from the board if he does not attend the June 6-8, 1997, training session.

Dated: May 27, 1997

Paul C. Garbarini, Chairperson

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 27, 1997.

Lisa James-Beavers, Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF FRANK KELLY,	:	
MULLICA TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, ATLANTIC COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 26, 1997 the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member provided to the Commission an answer noting that he was unable to attend the seven training sessions scheduled between April 1996 and April 1997 due to family commitments but that he planned to attend the next training program offered, and;

Whereas, the Commission voted on May 27, 1997, to recommend reprimand of the above-named Board member for failure to timely attend training sessions in violation of State statute if he attends the June 6-8 training session, with removal from the Board if he fails to

attend the June 6-8, 1997 training session, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending either reprimand or removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed that the above-named Board member has, in fact, attended the June 6-8, 1997 training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission, but declines to issue a reprimand to the above-named Board member finding suspension to be the appropriate penalty in this instance; now therefore

IT IS ORDERED that a one-meeting suspension is imposed on the above-named Board member, to be effective for the next regularly scheduled meeting of the Board.

COMMISSIONER OF EDUCATION

JULY 3, 1997
DATE OF MAILING JULY 3, 1997

350-97

350-97 SEC

IN THE MATTER OF STEPHAN LYNCH, :

HACKENSACK BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

BERGEN COUNTY. : DECISION

:

JULY 3, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
STEPHAN LYNCH ,	:	
Hackensack Board of Education	:	
Bergen County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Stephan Lynch was elected to serve a three-year term on the Hackensack Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" before their election and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Stephan Lynch to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Lynch replied and the superintendent replied on Mr. Lynch's behalf that Mr. Lynch could not attend the March 15, 1997, session for which he was scheduled due to a death in the family but that he would sign up for the next available session on June 6-8, 1997; and

WHEREAS, the Commission notified Mr. Lynch that the Commission would discuss this matter at its May 27, 1997 meeting, that he had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Mr. Lynch has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1996 to April 1997 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, Mr. Lynch's response does not provide an adequate explanation of why he failed to attend training within the year allowed by law in light of other sessions offered before March; and

WHEREAS, the Commission finds that if Mr. Lynch fails to attend the June session as he has set forth, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Stephan Lynch violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a reprimand if he attends the June session, but removal from the board if he does not attend the June 6-8, 1997, training session.

Dated: May 27, 1997

Paul C. Garbarini, Chairperson

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 27, 1997.

Lisa James-Beavers, Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF STEPHAN LYNCH,	:	
HACKENSACK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 26, 1997 the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member provided to the Commission an answer noting that he was unable to attend the March 15, 1997 training session due to a death in the family but that he planned to attend the June 6-8, 1997 training program, and;

Whereas, the Commission voted on May 27, 1997, to recommend reprimand of the above-named Board member for failure to timely attend training sessions in violation of State statute if he attends the June 6-8 training session, with removal from the Board if he fails to

attend the June training session, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending either reprimand or removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has confirmed that the above-named Board member has, in fact, attended the June 6-8,1997 training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission, but declines to issue a reprimand to the above-named Board member finding suspension to be the appropriate penalty in this instance; now therefore

IT IS ORDERED that a one-meeting suspension be imposed on the above-named Board member, to be effective for the next regularly scheduled meeting of the Board.

COMMISSIONER OF EDUCATION

JULY 3, 1997
DATE OF MAILING JULY 3, 1997

351-97

351-97 SEC

IN THE MATTER OF	:	
WILLIAM G. MENNEN, IV,	:	COMMISSIONER OF EDUCATION
SOMERSET HILLS BOARD OF	:	DECISION
EDUCATION, SOMERSET COUNTY.	:	
	:	

JULY 3, 1997

IN THE MATTER OF	:	
WILLIAM G. MENNEN, IV,	:	COMMISSIONER OF EDUCATION
SOMERSET HILLS BOARD OF	:	DECISION
EDUCATION, SOMERSET COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(I), on March 25, 1997, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission by affidavit dated April 11, 1997 that he had registered to attend the training program held on March 15, 1997 but was, ultimately, required to be out of state on business on that date; and

Whereas, the Commission voted on May 27, 1997, to recommend reprimand of the above-named Board member if he attends either of the training sessions scheduled for June 1997, or removal from the board if he fails to attend either of these sessions, in accordance with State

statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education received notice from the above-named Board member, and has confirmed with the Board, that the above-named Board member resigned from his position as a Board member on June 23, 1997; and

Whereas, the Commissioner of Education has carefully considered the record and the decision of the School Ethics Commission, and, having done so, he declines to issue a reprimand in view of the Board member's resignation; now therefore

IT IS ORDERED that the above matter be dismissed as moot.

COMMISSIONER OF EDUCATION

JULY 3, 1997
DATE OF MAILING JULY 3, 1997

35297

352-97

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

JULY 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1591-97

AGENCY DKT. NO. 420-9/96

IN THE MATTER OF THE TENURE HEARING OF BETTE JOHNSON, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY

Charlotte Kitler, General Counsel, for petitioner

Gail Oxfeld Kanef, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: May 14, 1997 Decided: May 15, 1997

BEFORE **MARIE P. SIMONELLI**, A.L.J.:

Petitioner brought charges against respondent for chronic absenteeism. Petitioner sought dismissal of respondent from her tenured position as an elementary school teacher.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on February 4, 1997. The OAL scheduled a hearing for May 1 and 2, 1997.

At the hearing, the parties agreed to settle this matter. On May 14, 1997, they submitted the attached Stipulation of Settlement which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5/15/97
DATE

MARIE P. SIMONELLI, A.L.J.

5/21/97
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

MAY 22 1997
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MAY 14 11 17 AM '97

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OAL Docket No. EDUTH-01591-97
Agency Ref. No. 420-9/96

IN THE MATTER OF THE TENURE HEARING OF

BETTE JOHNSON

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY

STIPULATION OF SETTLEMENT

This Stipulation incorporates the terms of a Settlement Agreement reached by the parties and stated on the record of proceedings before Administrative Law Judge Marie Simonelli on May 1, 1997.

WHEREAS, the respondent Bette Johnson has been employed as a full-time elementary school teacher with the Jersey City School District since October 18, 1992; and

WHEREAS, the District filed charges with the Commissioner of Education on September 17, 1996, to terminate employment of Ms. Johnson for chronic and excessive

absenteeism; and

WHEREAS, the respondent Bette Johnson was not suspended with the filing of tenure charges but remains on the District's employment rolls as absent from work without pay; and

WHEREAS, the parties have agreed to resolve the matter without the expense of time and resources in further litigation and without any payment of monies by the District to the respondent; and

WHEREAS, the respondent Bette Johnson testified under oath before the Administrative Law Judge on May 1, 1997, that she clearly understood the terms of the settlement agreement, that she entered into the settlement agreement voluntarily without any pressure or duress, and that she was advised and understood that the Commissioner of Education had to approve the settlement agreement and that the Commissioner could refer the matter to the State Board of Examiners for possible revocation of her teaching certificate; and

WHEREAS, the parties believe that it serves the public interest to end respondent's employment with the District in a amicable manner;

NOW, THEREFORE, the parties have agreed to the following terms of settlement:

1. The respondent Bette Johnson agrees to resign from employment with the Jersey City School District, effective on the date of the Commissioner of Education's approval of this settlement agreement.

2. The respondent Bette Johnson will not resume her position during the period while this settlement agreement is pending action by the Commissioner of Education and will not receive any salary payments from the District during said period of time.

3. The petitioner Jersey City School District accepts the respondent's tendered resignation, and agrees to withdraw tenure charges bearing the OAL Docket Number EDUTH-01591-97 and the Agency Reference Number 420-9/96.

4. This settlement agreement entails no salary payments or other expenditures by the District to the respondent.

FOR THE PETITIONER
JERSEY CITY SCHOOL DISTRICT:

Charlotte Kitler
General Counsel
State-Operated School District
of Jersey City

DATED: 5/9/97

FOR THE RESPONDENT
BETTE JOHNSON

Balk, Oxfeld, Mandell & Cohen
Attorneys for Respondent
By: Gail Oxfeld Kanef, Esq,

DATED: 5-5-97

OAL DKT. NO. EDU 1591-97
AGENCY DKT. NO. 420-9/96

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

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 7, 1997
DATE OF MAILING JULY 7, 1997

353-97

353-97

BARBARA OXFELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 7, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 802-96

AGENCY DKT. NO. 60-2/96

BARBARA OXFELD,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner

James P. Granello, Esq., for respondent

Record Closed: May 8, 1997 Decided: May 19, 1997

BEFORE **BARBARA A. HARNED**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 29, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

5/19/97
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

5/22/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

OAL DKT. NO. EDU 802-96S
AGENCY DKT. NO. 60-2/96

STIPULATION OF SETTLEMENT

BARBARA OXFELD,
Petitioner,

v.

BOARD OF EDUCATION
OF NEW BRUNSWICK,
MIDDLESEX COUNTY,
Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
MAY 8 1 22 PM '97
RECEIVED

The parties agree to resolve the above matter as follows:

1. The New Brunswick Board of Education shall rehire Barbara Oxfeld, effective July 1, 1997 and place her in an appropriate supervisory position which requires a supervisor endorsement.

2. This position will be for a period of ten (10) months plus three (3) weeks. The salary for the 1997-98 school year shall be $66,200 (MA+30 guide) multiplied by a ratio of 1.1, multiplied by a ratio of 1.075, plus an additional service increment of $1425 (25 years) in accordance with the agreement between the Board of Education and the New Brunswick Leadership Association for a total of $79,707.

3. This relief shall be prospective only.

4. Upon approval of the settlement by the New Brunswick Board of Education, the Office of Administrative Law and the Commissioner of Education, the petition shall be withdrawn with prejudice.

5. This agreement will only become effective when it is approved by the Commissioner of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

DATED:

Barbara Oxfeld, Petitioner

for the New Brunswick Board of Education

OAL DKT. NO. EDU 802-96
AGENCY DKT. NO. 60-2/96

BARBARA OXFELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 7, 1997
DATE OF MAILING JULY 7, 1997

355-97

355-97

IN THE MATTER OF THE TENURE :

HEARING OF WILLIAM MORALES, :

BOARD OF EDUCATION OF THE CITY :

OF TRENTON, MERCER COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Respondent is a tenured teacher employed by the Trenton Board of Education. The Board filed tenure charges against Morales alleging conduct unbecoming a teacher based on accusations that he showed photos of partially nude women to students, made sexually suggestive and offensive comments to students, used profane language, and made inappropriate gestures.

Based on the evidence presented at the hearing, the ALJ concluded that respondent manifested poor judgment but that the Board did not prove all of its charges and the actions proven did not warrant termination. Therefore, ALJ, recommended that the penalty imposed on respondent be forfeiture of the 120 days' salary withheld following certification of the tenure charges, and two annual employment and adjustment increments. ALJ recommended that the Board's back payment following the 120-day suspension be calculated from April 15, 1996, the date that Morales notified the Department that his criminal indictment was dismissed until January 1, 1997, the date the Board returned him to pay status.

Commissioner adopted initial decision as his own with modification. The Commissioner concurred that charges proven did not warrant dismissal, but stressed that respondent's behavior cannot be countenanced in the school environment and increased the ALJ's recommended penalty to loss of six months salary plus increments. The Commissioner also found that back pay should be calculated from April 23, 1996, the Department's date of receipt of respondent's notice that his criminal indictment was dismissed, rather than from April 15, 1996, the date on the face of respondent's letter.

JULY 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6475-96
AGENCY DKT. NO. 460-11/94

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Petitioner,
v.
WILLIAM MORALES,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, Council, George and Dortch, attorneys)

Michael T. Barrett, Esq., for respondent (Bergman and Barrett, attorneys)

Record Closed: March 31, 1997 Decided: May 19, 1997

BEFORE **JEFF S. MASIN**, ALJ:

The Trenton Board of Education certified tenure charges against the respondent William Morales, a teacher in the district, pursuant to the Tenure Act, *N.J.S.A.* 18A:28-1 to -18. By letter of November 15, 1994, these charges were submitted to the Commissioner of Education. A request was made to stay the administrative proceedings due to the pendency of criminal charges arising from some of the allegations which form the basis of the certified charges. Counsel for the Board agreed to this request by letter of January 10, 1995. The criminal charges were ultimately dismissed and the certified charges were transferred to the Office of Administrative Law ("OAL") as a contested case on July 23, 1996, in accordance with the provisions of *N.J.S.A.* 52:14F-1 to -

15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was conducted on October 1, 1996, and hearings were held on January 23 and February 4, 1997. Post hearing briefs and reply briefs were submitted and the record was closed on March 31, 1997.

THE CHARGES

The Board certified six charges against Mr. Morales. These involve complaints that he engaged in inappropriate conduct toward several female students, displayed inappropriate materials in class, used inappropriate language, and that he committed a physical assault upon a male student. He denies that any of his conduct was inappropriate.

EVIDENCE

The Alleged Assault

Paul Gmitter, the principal of Harrison Elementary School since August 1996, was the principal of Grace A. Dunn Junior High (later Middle School) for five and one-half years. The school educated 6th, 7th and 8th graders. During the 1992-93 school year, Mr. Morales was a member of the school teaching staff as a bi-lingual teacher of social studies. On March 31, 1993, Mr. Gmitter received a report of an assault by Morales upon one J.O., a student. Gmitter spoke to both the student and his mother and to Morales, who denied any wrongdoing. Gmitter reported his findings to the district superintendent, and to his knowledge, Morales was permitted to continue teaching. He did not recommend that the teacher be terminated as a result of what he determined to have occurred.

The record establishes that all witnesses, including J.O. and Mr. Morales, agree that the incident in question occurred inside and just outside the school cafeteria. Gmitter was not a witness to this incident, learning of its details from others. Amongst these was a security officer, Angel Benitez, who came on the scene after the incident between the student and Morales had already begun. Benitez did not recall the incident in detail when testifying, but had filed a report some fifteen minutes after the incident. Approaching the cafeteria, Benitez saw Morales and the student right outside of the cafeteria entrance. Someone said that a teacher was having a

problem. Benitez did not know what may have happened, including anything that might have been said by either of the two prior to his own arrival on the scene. He did see a "small struggle" between the two and separated them. He noted a small cut, described as a "deep scratch," on O. He also recalled that the student referred to Morales as "G.I. Joe, this," and "G.I. Joe, that." Morales wanted the student taken to the office.

Robert G. Matlock, a teacher/disciplinarian/assistant principal at Dunn at that time and now an industrial arts teacher, was on his way to the cafeteria when he encountered "noise" and a "commotion." He observed a disturbance involving Morales and the student J.O. Security officers Barfield and Benitez were also present. Benitez "had O.," Morales was inside the cafeteria, "relatively close to O.," and was "annoyed, agitated, loud, and shouting" at O, in whose direction he was moving in a "somewhat aggressive demeanor." Matlock saw no physical contact between the two. He directed that O. be removed to classroom A-11, which was downstairs from the cafeteria. Matlock was trying to determine from O. what had happened, and as he was, Morales appeared at A-11. He had not been told to report to that location, but did so anyway. Matlock had called the student's mother, and as he was attempting to talk to her, Morales entered the room, speaking loudly and moving toward O. Morales was "loud, aggressive and accusatory about something." He was directed to stop yelling, which he did not do at first, and was then asked to leave. Matlock, who was concerned about the possibility of a physical altercation, had to repeat his direction to leave the room several times. Morales' conduct in A-11 was "inappropriate," he was "out of control," and his actions were not provoked by anything that O. was then doing.

Matlock saw no cuts on the student, but he was not looking for any.

Ms. Daisy Barfield, a security officer at the school, vaguely recalled the incident, about which she had filed a report. After reviewing it, she related that as she approached the cafeteria, she observed that Morales was bringing O. out of the cafeteria by his collar. From four to five feet away she saw Morales "slam" O. against the wall "with physical force." The student, who "just backed up with his hands against the wall," appeared to her to be cooperative and she saw no indication of any reason for the teacher to have to "slam" him against the wall. The student attempted to re-enter the cafeteria and Morales pulled him back into the hallway and asked that

the student be taken downstairs. She remembered that Morales told her that O. had been calling him names and that Morales was "very much upset" and "not under control." O. told her that he did not do "anything." She tried to get him to release O., but he did not want to let go of the boy. She tried to get Morales to calm down, while she radioed for assistance.

Ms. Barfield further recalled that when the two were in the hall prior to J.O.'s removal, Morales said "don't call me any more names" and then the two spoke to each other in Spanish. Later, O. said that Morales called his mother a "whore." She did not see any cuts or bruises on the student. She characterized Mr. Morales' conduct as "inappropriate."

On cross-examination the witness observed that Mr. Morales slammed O. against the wall prior to making the request to security to take Mr. O. downstairs. He made the request, then the comment about "whore" occurred and he again requested that O. be removed. Mr. Benitez was not present when the "slam" occurred.

J.O., who became 18 years old on February 5, 1997, was in the 7th grade at Dunn at the time of the incident. He recalled that he had been in the hall next to the lunch room and was talking to classmates while in line. They were talking about G.I. Joe toys which they had collected when younger. They walked past Mr. Morales, who said nothing to them at the time, and they proceeded to a table. At one point while they ate, A.S. told O. that "a teacher was looking at you." O. was not a student of Morales, and he did not know the teacher's name at the time. O. had no idea why the man was looking at him. He proceeded to clear the left over items from his lunch tray and then got in line. Mr. Morales came over to him, pulled him by the arm and "threw" him into the hallway. Conversing at first in English, O. asked what was wrong and Morales replied that "you know." O. stated that he did not know and asked how he could know since he did not even know Morales. Morales then said that O. "had to fucking respect him." (In his written statement about the incident, O. left out the curse word). He mentioned that O. had been calling him names and the boy asked in Spanish, "what did I say to you." The student again said that he did not know Morales and started to walk into the lunch room, but the teacher grabbed him. At this point, O. spoke in Spanish, saying "fuck you." Morales then called O. a "mother fucker," again in Spanish. Ms. Barfield then tried to calm Morales, whom O. characterized as blabbing at the mouth and throwing his hands up. Benitez then told O. to calm

down so things would not get worse. At one point when he was grabbed by the left arm, O. was scratched on the neck.

The witness claimed that prior to this incident he had had no dealings with Morales, who was at the time physically bigger than J. He was fearful of the teacher, and was shocked that a teacher would have something against him without any reason. He had not said anything about G.I. Joe to Morales. When he was taken to A-11 he was crying and scared. Morales arrived, screaming and shouting in the hallway, saying in Spanish that someone "should go to hell." Morales then entered the room as Mr. Matlock was talking to J.O.'s mother on the telephone. Morales spoke in Spanish and said that he would "get O." Matlock tried to move Morales out of the room.

The witness believed that he was suspended from school as a result of the incident.

Ms. A. G., Mr. O.'s mother, went to the school after receiving a telephone call about her son having been involved in an incident with a teacher. While she was on the phone speaking to Mr. Matlock, she could hear Mr. Morales yelling in the background and Matlock told her that Morales was in the room, acting out of hand and going for her son and that she had better come to the school right away. She could hear the voice say, "I'm going to get you."

Ms. G. went to Dunn where she saw Gmitter and Matlock. They indicated that they wanted to speak to both Morales and herself. Gmitter briefed her on the events, saying that Morales hit her son in the lunchroom, but that he did not really know exactly what had happened. Matlock told her Morales had thrown her son against the wall. When Morales was in her presence, she acknowledged to him that she knew that her son could get on one's nerves. He told her that the boy had been calling him names, mentioned the G.I. Joe reference, and said that J. did not respect Morales. Ms. G. did not understand this reference as a problem as such, and told him that he needed to calm down and get some psychological assistance. To this Morales responded that she was not going to be the one to tell him how to deal with kids. Gmitter advised her that she could press charges against Morales. About ten minutes later, as she went from the office to the school entrance to leave the building, Morales told her that she should not press charges if she knew what was good for her, to which she replied that she was not afraid of him and was not a

child who could be intimidated. Ultimately, charges were filed against the teacher on behalf of her son.

Thaddeus Robinson, a music teacher employed by the Trenton Board at Dunn since 1983, was in the cafeteria on the day of this incident. He was on his way out of it with food or had just finished eating when he saw Morales escort O. out of the cafeteria. The boy was familiar to him as one of his students, either at that time or during another quarter of the year. The respondent had his arm around the student and appeared to be trying to calm him, speaking to him in Spanish, a language Robinson said that he understood very well. However, Robinson could not hear exactly what was being said. O. was shouting and moving his arms around. Other students got up and followed the two out toward the hall. Robinson rushed out another set of doors to get these students "out of the way" and, as he stood with the kids behind him, he saw that Morales had O. against the wall, but not flat against it. Morales was talking to him, again trying to calm O. O. said that he didn't give a "so and so." (Robinson did not say exactly what O. actually said). He did not see Morales strike O. Morales asked for security. Meanwhile, O. kept pushing and fighting. Morales turned, said that he was going to write O. up and went downstairs. Robinson left the corridor before O. was removed. He never heard Morales curse. He could not tell if Morales was upset, although he had seen the respondent on previous occasions "go off" and get physically upset, which he was not during this incident.

Robinson claimed that he was never asked to give a statement about this incident and that he did not even know that it had been reported.

William Morales addressed the J.O. incident. While O. was not a student of his, Morales had seen him before, and described an incident which he alleged had occurred outside the school earlier that week when he had been near his home in the vicinity of the Mott School which his daughter attended. O. and a few others had been on a corner yelling at him, and he thought that they were just saying hello. As for the cafeteria incident, Morales was serving lunch duty at about 11:30. At one point, O. got up to throw out his tray refuse and nearly bumped Morales while saying G.I. Joe three times. O. then sat at a table adjacent to where Morales was. O. and his friends were laughing, smiling and pointing at Morales and saying, "Yea, you, you." Morales told the student that he wanted to talk to him and that he should come with him. He took O. by the

bicep and took him out into the hall. He then told O. that his name was Mr. Morales, not G.I. Joe. O. told him to get the fuck out of his face, saying that he did not know what Morales was talking about. During his direct testimony Morales said that he led O. up against the wall, but denied that he pushed, struck, dragged or hit the boy, saying that the student "went under his own volition." However, on cross-examination he said that he did not know if he slammed O. against the wall. O. was belligerent and cursed in Spanish, referring to Morales as a "son of a whore." Morales himself did yell at O., telling him to show him some respect, to stop cursing at him, and asking him why he was "doing this (apparently the name calling) when O. did not even know" Morales. While this was happening everyone in the cafeteria was coming to the door and security arrived. Morales told Barfield to take O. to the office, but the security personnel "just stood there." When O. tried to re-enter the lunch room, Morales told him "no, you're not going back in." Pushing, shoving, and cursing followed. Morales was scrapped in the chest during the scuffle. He did try to restrain O. at this time.

When O. was removed downstairs, Morales went to the disciplinary office. He wanted to fill out papers about the incident. He also sought to reason with O. before the student's mother arrived and to explain the matter to the parent. He was upset, but could not characterize himself as aggressive. He did argue loudly in the hallway with Detective Pedro Medina, a friend of his. He does not recall being "loud" when he meet with Mrs. Gonzalez and Mr. Gmitter.

Morales was never even issued a letter of reprimand for the cafeteria incident. He did feel that Mr. Gmitter had attempted to push Ms. Gonzalez into pressing charges when she herself had not been interested in doing so.

Charges One through Five

Mr. Gmitter also related that on June 3, 1993, he was advised that five students of Mr. Morales had complained about some unspecified problem. Ultimately, it developed that these students were complaining that Mr. Morales had a habit of putting his hand into his pants in the classroom, had shown playing cards with nude women on them to students, had "gawked" or stared at a student and touched her face, had a picture of a partially clad woman from the

Trentonian newspaper taped inside a locker, and had made a remark to a student about her menstrual cycle.[1]

Robert Mendez, a security officer with twenty-one years of experience with the Trenton Board of Education, first received a complaint from three students regarding the "porno" playing cards. He turned this information over to Principal Gmitter. Mr. Matlock wrote out a statement which he told Mendez to sign. Students did not tell him anything about Morales' purportedly fondling his private parts in class.

L. S., now a sixteen and a half year old student at Trenton Central High School, was in Mr. Morales' 8th grade social studies class at Dunn. At the time she had been on the mainland for two years, having previously lived in Puerto Rico. She characterized Morales as a "good teacher" whom she had in 7th grade, when she had no problems with him at all. Together with her classmates D. R., C., A., L.V., and J., she reported that Mr. Morales had engaged in several inappropriate activities in their class. They all reported this information together, although the situations they discussed were not all the same. They each said "just what they knew." She and D. had seen the same things. Specifically, she related that on nearly every day Mr. Morales would open his pants in front of the class, go back toward the chalk board with his back to the class, move his hands and then turn around and zip his pants back up while facing toward the class. She told him that he should do this in the bathroom.

The witness also reported that during this same school year she had seen Mr. Morales touch D. R.'s face. At the time of the hearing, she had not seen D. R. in years.

Ms. S. also recalled having seen a picture from the newspaper of a woman in a bathing suit taped inside a green book cabinet. He sometimes would show these to the class. The school security personnel did not find the pictures.

[1] Reference to the Statement of Tenure Charges does not indicate a charge which clearly relates to the cards with naked women. The first charge seems to relate to the newspaper photo(s), as no evidence was presented that Morales claimed any relationship to the women on the cards. However, the Statement of Evidence does refer to statements about the cards and this evidence has been presented in the hearing. Therefore, the Initial Decision will consider the "cards" evidence and rule upon it.

Ms. S. testified that earlier on the same day that the "pants" issue was finally reported, Mr. Morales made a comment to her in Spanish when she asked where a ruler was. His reply played upon the (perhaps colloquial) meaning in Puerto Rico of the Spanish word for "ruler," "regla," which supposedly referred to the menstrual period. Her recollection at the hearing was that he said, "didn't your ruler come last month." (However, in her written statement, P-12, she wrote in English that he said "that the period come next mouths (sic)"). She told him that he was not supposed to talk like that to her, that he had to give respect and he'd get respect back. This incident was the one which caused her to decide that she was going to the office to report Mr. Morales. There had been some previous discussion of doing so in regard to the "hands in pants," but she was scared to go. When she finally decided to go, others in the class decided to go as well.

Ms. S. wrote a report of her observations on June 3, 1993. Her original statement did not contain any reference to the "hands in pants." She did not have any assistance in writing the report, which she said was "truthful." She completed a "Discrimination Complaint" in Room A-11 at sometime, but could not recall when this was. She had been told that she had to write down what she was complaining about. She wrote "stuff she knew." Others were also asked to complete the form at the same time as she did. Mr. Mendez helped them fill out the complaint as she and the others did not then know a lot of English. They asked a lady who was present what the categories of discrimination on the form were. Additionally, a Ms. Figueroa, who was a counselor, may have been present and may have been consulted because she wanted to write clearly. However, she insisted that she was not told what to write. The similarities in the language of the complaints were coincidental.

Although in her written statement she wrote that Morales "was choing us somecars with womens with off clouses," at the hearing the witness explained that she did not personally see the playing cards, as she was absent the day that they were supposedly displayed to her classmates. This was the day before the "ruler" comment, and she was told about the cards by others.

The witness acknowledged that she knew B.M., who was not in her class. Ms. M.'s father was the pastor of the church which Ms. S. attended.

D.R., now 18 years old and attending Nottingham High, had Mr. Morales as a teacher in the 7th and 8th grades. She reported her concerns to Mr. Gmitter after first speaking to Mr. Mendez and a Mr. Rodriguez. She went to the office with L. S., C., and I. She personally observed the cards bearing the images of naked women in the classroom, which she believed he exhibited sometime in March. C., L.V. and J. were in class with her at the time this happened. She also saw the teacher pull his zipper down and fix his shirt, turning his back to the class. This happened about three or four times. He would use such words as "shit," "fuck," and "mother fucker" in class.

One day he touched her chin on the right side and she did not like this. She recalled that this happened after they had some sort of a disagreement in class about some "stupid things" and he yelled at her and she crumpled up a paper. He asked to talk to her alone, and then asked her why she was mad at him as he did not do anything to her. She also recalled that he was mad at her about a class trip that she did not go on. She also related that he used to look at her when she was walking, and one day when she had a short skirt on she happened to look back and he was "looking at (her) legs." She believed that he looked at all the girls in this manner.

Ms. R. wrote out her statement in Spanish, which at the time she spoke more easily than she did English, having been on the mainland for only two years. Her friends were present when she wrote the statement, and while no one helped her write the statement, they did "cooperate" and "did them together," "comparing notes" and apparently deciding amongst themselves what matters to write down. That explains why they all wrote down the same things, and a Ms. Figueroa, whom she described as a counselor, told them to write the "same things" on the Discrimination Forms. She did not know who wrote the statement in English but it was an accurate translation of her statement, which was itself a truthful statement of the events.

Ms. R. explained that she was tired of what Morales did and did not want him to do anything worse.

L. V., who also was Morales' student for two years, and recalled him as a "good teacher," never observed any inappropriate conduct on the respondent's part in the 7th grade. Although Morales did sometimes get mad and scream at the students to sit down and be quiet, Mr. V. did

not recall that Morales swore during the 8th grade year. He denied seeing any "fondling" in class. When he was asked for a statement in March of 1993, he wrote that he had seen the naked picture cards. However, in testimony he denied that Morales ever showed him cards with naked women on them. The girls in the class, specifically L.S. and D.R., said that they and he had seen them, but he had not. Similarly, the girls told him that they saw Morales "play with himself." When he was called to Principal Gmitter's office on the loudspeaker he became "kind of scared." Gmitter told him that he was to write down what the girls had said, that is, that he had seen the cards. He also denied ever seeing a pinup from the Trenton newspaper.

According to the witness, after he had written his statement, he heard L. tell C. that Morales had treated them "wrong" and they had made up the charges against Morales in order to get back at him. C. said nothing in response, as "she was always quiet."

The witness claimed that he did not know that Mr. Morales was indicted until a year later. Although the documentary evidence includes a statement that he gave to a police investigator at the Criminal Investigation Bureau, Mr. V. did not recall talking to a man at the police station. In the statement that he gave to this investigator, he mentioned that there were six cards, and now says that he gave this number because it "felt right," but nevertheless the statement of seeing any such cards was a lie, and he said this untruth because he had already said so before. Similarly, he was not sure why he said that Morales showed cards to J.C., when in fact this too was a lie. Despite his written statement, it was also not true that the teacher cursed almost every day. Morales did have baseball cards, but they were not kept in a box.

Mr. V. was fourteen years old at the time he made his statements and testified that at that time he could barely read. He did not really know the difference between right and wrong. He thought that it was "okay to say what wasn't true."

Mr. V. last saw the respondent a couple of months ago in downtown Trenton. He just "bumped into him" and asked him about his case. Morales told him that the criminal case had been dismissed and the "trial (apparently the tenure case) was going on." There was a discussion of the fact that V. could return to a volleyball and basketball program that Morales was associated

with at the Mott School or the YMCA. V., who had previously been told by a "judge" that he was not to be in this program, went to it twice about a month ago.

B.M., now a college student, knows Mr. Morales through friends and through Morales' daughter. She was on his volleyball team in the 8th grade. Ms. M. knows L.S. from Ms. M.'s father's church.

According to the witness, some time during 1993-1994 she was in Trenton High School, at her locker between classes, when she heard laughter across the hall, and L. S. then said that Morales was in trouble because he yelled at "them" and they made the charges up. M. told S. that this was not right, as Morales could get in a lot of trouble, but L.S. said that she did not care. At the time Ms. M. had a "case pending" against her father which had been in the newspaper and she did not want to get involved in another case. In August 1994 she told Morales about the conversation. He asked her whether she wanted to go to the volleyball program, but she had two jobs and could not. She has no contact with the respondent at this time.

Thaddeus Robinson testified that he had bumped into Mr. Morales about a month before this hearing and at that time he had recalled that he had seen kids from Morales' class with cards bearing pictures of naked women. He remembered that at the time he had told Morales about what he had observed and Morales said that he would take the cards away from the students. At the time Robinson had never asked Morales whether he had taken the cards. When he saw him a month before the hearing he mentioned this incident to Morales, but Morales did not recall it. Robinson claimed that he told other colleagues about the cards, but not Gmitter. When Morales was removed from teaching, Robinson heard that it had something to do with pornography, but not that cards were involved.

Asked why he did not act himself to confiscate the cards from the students, the witness said that he had not been "sure" of what he had seen, so he went to Morales. Robinson "couldn't stop them (the students) from going out of (his) classroom," so instead he went to their homeroom teacher.

William Morales testified that all of the charges made against him (other than the J.O. matter) arose from one class. He was shocked when told of the several charges, which he denied. He never fondled himself, although at the time he was having a weight problem and he did often tuck his shirt into his pants or adjust his belt after turning his back to the class. He denied that he cursed in front of his class. As for D.R.'s accusation of the comment about her menstrual period, he had "no idea" where the charge came from. There was an incident where the students had been working on a project and sometimes people would ask for equipment in Spanish, using the Spanish word for "ruler." He himself did not know why the term "ruler" was used in connection with the menstrual cycle and when he inquired he was told that it was because as a rule it came every month.

As for the photographs from the *Trentonian,* kids often joked about them and would kid him, saying "look at your new girlfriend." He would joke back, "oh, yea." Otherwise, he never displayed the photos, although he did use newspapers in class, handing them out for school work. Photos were not pinned up in the cabinet.

Mr. Morales did have baseball cards, which he would trade and sell with students, and he would sometimes bring them out before or after class or after the school day. He never had cards with naked women, never possessed or saw these. He did not recall that Mr. Robinson had told him that Robinson had seen students with cards of this type.

The respondent did touch Ms. R.'s face. He explained that two weeks prior to a class trip to New York she had no money to pay for the trip. He was aware that her financial situation at home was not good. She was upset and crying, and he told her not to worry, that he would get money from donations. She was at first appreciative, but then said that she would not go on the trip. He might have touched her face to cheer her up, but there was no sexual connotation to this action.

Morales denied any threats to L.S. or any other student. He was not in contact with the complaining students after they made the complaints and were then removed from his class. Two years ago he was at Mercer County College regarding his daughter's search for school funding. He saw Ms. S. there but kept away from her.

DISCUSSION

Mr. Morales is charged with several different allegedly inappropriate forms of conduct, to wit: (1) displaying playing cards with nude women thereon; (2) displaying newspaper "centerfold-type" photos and discussing alleged relationships between he and the women; (3) engaging in lewd and inappropriate behavior in class involving unzipping his pants, loosening his belt and manipulating his genitalia while his back was turned to his class; (4) making suggestive, lewd and offensive remarks to L.S., specifically regarding her menstrual cycle; (5) using lewd and profane language in class on a regular and continual basis; (6) making sexually suggestive remarks to and touching the face of D.R. in a manner which caused her apprehension and fear about the possible sexual connotations of that conduct.

In regard to some of the above matters, the facts are less clouded and disputed than with some of the others. For instance, Morales himself conceded that he did often adjust his shirt and belt in class, with his back turned to the class, but he denies that he was manipulating his genitalia. No student testified that they could actually see such manipulation or any actual handling of the respondent's private parts during these "back to the class" episodes. The most they could relate was that his hands were moving.

There is of course a considerable difference between a teacher adjusting clothing in class and one masturbating in class. One sort of conduct bespeaks a level of inappropriate sexual conduct, an inability to restrain one's sexually related actions to a private setting, an attempt to foist, even if only partially, one's sexual self upon a captive and impressionable audience; in short, serious deviant conduct. The other signifies only a lack of sense and judgment, a lack of decorum, a misapprehension of the accepted social graces, a failure to treat his position and that of his students' with appropriate dignity, but not a gravely serious deviation from appropriate social norms. While the truth respecting the inclusion of a sexual aspect in this conduct may lie with Mr. Morales' benign explanation, the scenes presented to a class of young teenagers may understandably have appeared far less benign. But even though the limited observations here cannot support a conclusion that the respondent was in fact handling his genitals and thus engaging in a serious level of maladjusted conduct, his actions were nevertheless inappropriate.

Such adjustments as he claims to have been making were not the sort that he should have accomplished in the plain sight of his students, even though he turned his back. If nothing else, the frequent repetition of this bespeaks a lack of judgment on Mr. Morales' part.

Mr. Morales acknowledges that he did touch Ms. R.'s face. Despite her concerns about the way he looked at her from behind, I find no evidence that the touch was in any way meant to convey any actual sexual message. The two had been involved in some discussions about an emotional matter regarding her limited financial resources and a class trip, there appears to have been some attempt by Morales to lift her spirits. While the touch was innocent enough in itself, I do not in any way suggest that Ms. R.'s feelings that Morales might have some actual or perhaps fantasized sexual interest in her should be overlooked. Nevertheless, while this incident of touching a student again may suggest a lack of judgment, by itself it would not call for any discipline other than perhaps a warning or reprimand to Mr. Morales that even innocent physical contact with young students, especially young females, cannot be permitted. As for the alleged "staring," the evidence as to any pattern of actual visual concentration upon the anatomy of female students is too limited and speculative to support any finding of any inappropriate conduct on Mr. Morales' part. It would be naive to suggest that some males do not look at females in this way, even sometimes those of a younger age, and looks can be misinterpreted. But to condemn this respondent on the skimpy record here for supposedly staring in the direction of Ms. R. and/or others would not be warranted.

The evidence regarding the nude picture cards, the cursing and the "ruler" comment to L.S., is less clear. Here, the students' versions and those of Morales and his supporting witnesses diverge. He completely denies that he had or showed the cards, while acknowledging that he did have and displayed baseball cards. He denies L.S.'s charge that he made reference to her period, and denies that he cursed. If Ms. M. and Mr. V. are to be believed, these charges were part of a plot, a constructed lie formulated by L.S. and others to get back at Morales because he yelled at them, or for some other unknown reason. V. originally was a supporter of charges against Morales, now he recants and claims he knows that the others lied. M. claims that she knew of the falsity of charges in 1994, but did not come forward then due to other personal issues in her life. Robinson never gave any information about this, or the O. matter.

The Board's case on these charges is somewhat slender. As for the cards, at present the only witness still asserting that she personally saw these cards displayed by Morales is D.R. L.S. says that she only wrote that she had seen them, but she now admits that she had not. L.V. also now denies that he ever saw them. The testimony of both of these students is suspect, as they first said one thing and now another. As for D.R., she did not seem to be getting along with Morales at the time that these accusations were made, and she was apprehensive about him. Did he actually show cards in her presence? Did someone else have and display cards, as Robinson says? Although several of the witnesses here were apparently sincere, I did find Robinson to be a strong witness, despite the rather late revelation of his knowledge of the case.

In view of Mr. Morales' long history of teaching in this district without incident, including nearly a year and three quarters of teaching these same students prior to March 1993, it would certainly appear that any inappropriate conduct towards his students would be conduct of an aberrational quality. I am not convinced by a preponderance of the credible evidence that he did exhibit these cards. The burden of proving this allegation by that level of evidence rests with the Board. It has failed to meet that burden, and all charges relating to the cards are hereby **DISMISSED**.

As for the newspaper photos, it is admitted by Morales that there was some occasion or perhaps occasions where there was some kidding about photos displayed in the newspaper. On the record here, I cannot find that he purposely and inappropriately showed these pictures of partially clad women, to his class. But there may well have been some instance of kidding about a woman or women in the newspaper photos and some joking reference to their being a girlfriend of Morales. Any such isolated incident calls for a warning or a reprimand, but not a more severe discipline. The record does not support any finding that Morales told the students that he had requested the photos be taken.

I find it unlikely that Ms. R. invented the "ruler" remark. Whatever else may be said about the truth of the other charges, this has the ring of truth. I believe that an off-hand request drew an off-hand, flip, completely uncalled for and inappropriate remark, stated by Morales as a "joke." There is no excuse for this sort of comment to a student. The third charge is therefore established.

The allegations that Morales cursed appear to be at least exaggerated, but this does not mean that he never used profane language in front of the students. How often is uncertain, but I am not convinced that it was a regular occurrence. The students' testimony on this score is opposed by a complete denial. There is enough here to suggest Morales had a sufficient temper and an insufficient control of his mouth to lead to a conclusion that he sometimes did use profane and lewd language in class. The fourth charge is therefore proven.

Finally, as for Charge Six, the specification of the details of the alleged physical assault within this charge alleges that Morales grabbed O. without provocation, threw him against the wall and caused him to suffer "cuts and abrasions." There is no doubt that he did grab or otherwise take hold of O. by the arm, as he admits that he did. Whether he threw or slammed him against the wall is in far more question. From the record, it appears that he forcefully guided the student against the wall, that some limited degree of force was applied to move O. there and up against the wall. A "throw" or "slam" appears to be too strong a characterization of the event, and the record, while suggesting that O. was somehow injured in this event, does not adequately identify exactly how that occurred. As for the lack of provocation, the use of the term "G.I. Joe" towards Morales was certainly did not provide him with a sufficient warrant for him to forcefully take physical control over a student who was otherwise not physically unruly or in any way a threat to anyone. If some form of discipline was appropriate, or if a mere conversation was sought in which to confront O. about inappropriate conduct toward and lack of respect for a teacher, another method other than this physical one should have been used to bring such about. In the circumstances present at the time, Mr. Morales' physical conduct toward the student was not justified.

I **CONCLUDE** that the Board has proven the sixth charge by a preponderance of the credible evidence.

SUMMARY AND CONCLUSIONS

I **CONCLUDE** that the Board has proven Charges 3, 4, and 6. Charge 1 has been established to the extent that I **FIND** that Morales did joke about some newspaper photo, but not about his requesting that they be taken, and not in regards to any cards. Further, I **CONCLUDE** that Charge 2 has been sustained only as to the lack of judgment in engaging in repeated instances of inappropriate "dressing" actions in the presence of his class, but not to the extent that he is found to have manipulated his genitalia. As to Charge 5, the Board has failed to establish that any comments by Morales or his touch of D.R. were in any fashion intended to be sexually suggestive and offensive to D.R., although I **FIND** that they did offend her and cause her some apprehension.

THE APPROPRIATE SANCTION

In determining the proper sanction to be imposed in this matter, I have taken into account this teacher's long history of satisfactory service and the fact that in regard to the several matters proven against him, the record does not suggest that he purposely, maliciously or intentionally acted in any offensive or depraved fashion toward his students and that in the O. incident, while he acted improperly, he was again not motivated by any inappropriate or improper motivations, but was responding, albeit overly aggressively, to a derisive student. The whole of the evidence and the conclusions drawn therefrom indicate that at least in the later part of the 1992-93 school year Mr. Morales was suffering from a serious lack of judgment and restraint, not something which was in accord with his demonstrated teaching history, at least as far as this record shows. Under the circumstances of this case, I am convinced that removal of tenure would be an inappropriate and overly harsh penalty for the conduct involved here. While any instance of inappropriate conduct on the part of a tenured teacher may be sufficient to warrant revocation of tenured status, and while a series of such events may also serve that purpose even if the separate events themselves are not individually so serious, I do not find that the instances here are of a sufficient character and quality to necessitate the extreme penalty of tenure loss. Mr. Morales needs to exercise some restraint on his mouth and person, but nothing proven here indicates that he is a threat to anyone or that his presence in the classroom represents an intolerable situation.

Instead, the loss of any increments for a period of two years would be an appropriate and severe enough penalty, especially when taking into account that this respondent has suffered a long suspension from employment due to the criminal matters which were ultimately dismissed and the loss of 120 days pay. Thus, the Board, in calculating the back pay which must be paid to Mr. Morales (see next section) shall pay him in accordance with the appropriate pay steps applicable to him for the years for which back pay is due, but shall adjust the back pay to levels which delete the affects of any increments to which he would normally have been entitled. Since he is due back pay for periods applicable to school years 1993-1994 until January 1, 1997, when he was restored to pay status, minus 120 days from the certification of tenure charges on November 14, 1994, the increments to be deemed as denied would be those for the school years 1995-96 and 96-97.

Back Pay

In the present matter, the parties are in agreement that Mr. Morales was indicted on May 1, 1994, and suspended without pay pending the outcome of the criminal proceedings on May 24, 1994. *N.J.S.A.* 18A:6-8.3 and *State v. Ramapo-Indian Hills*, 237 *N.J. Super.* 424 (App.Div. 1989). The Board certified tenure charges on November 14, 1994, and the matter was put on the inactive list at the Department of Education on January 15, 1995. The indictment was dismissed on April 7, 1996, and the Department of Education was notified of the dismissal on April 15, 1996. The case was then transferred to the OAL as an active case on July 23, 1996.

Case law supports the restoration of the back pay when a teacher is acquitted of the criminal charges or when they are otherwise dismissed. *Griffin v. Board of Education of the City of Paterson*, 1992 *SLD* 311; *Beatty v. Newton Board of Education*, 1991 *SLD* 6/25/91. But the suspension of back pay which results from the pendency of criminal charges is not the sole suspension of pay that may be implicated in a tenure proceeding. Ordinarily, when a teacher is suspended following the institution of tenure charges, pay may be suspended for no more than 120 days. *N.J.S.A.* 18:6-14. Thus, here, where the criminal matters were dismissed, Mr. Morales would receive back pay from the time of his suspension without pay on May 24, 1994, through the notification to the Department of Education on April 15, 1996. However, the Board argues that it should not be prejudiced by the inactive period which was requested by the respondent and consented to by the Board on the written understanding that the stay of proceedings would be

without prejudice to the Board. It therefore contends that the back pay should only be for the period from May 24, 1994, until January 15, 1995, and then for the period from the restoration of the case to the active list on July 23, 1996, until pay was restored by the Board on January 1, 1997.

Whether or not the tenure charges had been stayed Mr. Morales would not have been paid so long as the indictment remained in force. Had the tenure charges been tried during the pendency of the indictment and had the charges resulted in something other than removal, no doubt he would have remained suspended without pay until the outcome of the criminal case. Thus, he should be entitled to be paid for all of the time from the original suspension without pay on May 24, 1994, through January 1, 1997, except for 120 days from the date of the tenure certification. As for the period from the time of the dismissal of the indictment on April 7, 1996, and the notice to the Department on April 15 until the Department transferred the case to OAL, the record does not reveal the reasons for the delay in transfer, but this appears not to have been the fault of the parties. The equities favor Mr. Morales, as the 120 days had already run and the only reason he would not be paid at that point would have been his failure to advise the Department of the dismissal of the criminal charges. Since he did advise the Department, any further delay in the matter was the result of administrative reasons and should not adversely affect him. Of course, any back pay is to be offset by any monies received by him in mitigation of his losses. Counsel for the respondent shall submit an affidavit regarding any such monies to the Board counsel, who shall then prepare an affidavit detailing the Board's calculations of the back pay due under this decision. If the parties are unable to agree on the amount, they may seek a determination by reference of the dispute to the Commissioner.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 19, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

5/21/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 23 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 March 31, 1993, RI-90 Reporting Incidents of William Morales

P-2 April 6, 1993, hand-written note to Mr. Gmitter from Mr. Matlock

P-3 March 31, 1993, hand-written report of J.O.

P-4 Not in evidence

P-5 Not in evidence

P-6 March 31, 1993, hand-written report of William Morales

P-7 March 31, 1993, hand-written report of Security Officer Angel Benitez

P-8 March 30, 1993, hand-written report of Ms. Daisy Barfield, Security Officer

P-9 March 31, 1993, Vandalism, Violence and Substance Abuse Incident Report, Dunn Middle School, by Paul J. Gmitter

P-10 June 3, 1993, RI-90 Reporting Incidents of Security Officer Mendez

P-11 June 3, 1993, Security Officer's Report signed by Robert Mendez

P-12 June 3, 1993, hand-written report of L.S.

P-13 Undated hand-written report of D.R.

P-14 Not in evidence

P-15 Not in evidence

P-16 Undated hand-written report of L.V.

P-17 Discrimination Complaint Form of D.R. for incident in March 1993

P-18 Discrimination Complaint Form of L.S. for incident in March 1993

P-19 Discrimination Complaint Form of C.B. for incident in March 1993

FOR THE RESPONDENT:

R-1 Trenton, N.J. Police Division, Criminal Investigation Bureau, Transcript of Statement of L.V., dated June 24, 1993

OAL DKT NO EDU 6475-96
AGENCY DKT NO 460-11/94

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM MORALES,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions were timely filed by the Board in accordance with *N.J.A.C.* 1:1-18.4. No replies were filed by respondent.

The Board's exceptions initially contend that there is sufficient evidence to sustain Charge No. 1, that respondent showed photographs of partially nude women to his students. In so doing, the Board challenges the credibility determinations reached by the ALJ, particularly objecting to the weight accorded to the testimony of witnesses D.R, Thaddeus Robinson, and L.V. (Exceptions at pp. 4-5). The Board further avers that, even if the Commissioner concurs with dismissal of Charge No. 1, because the ALJ found in charges 3, 4 and 6 that respondent repeatedly engaged in conduct evincing a lack of judgment, respondent's tenure should nonetheless be removed. The Board asserts that, although separately these charges may not result in tenure removal, in combining all of them together, as they occurred within the same school year, such conduct is unbecoming and tenure removal is not too a harsh a penalty. (Exceptions at pp. 6-7)

The Board next argues that, if the Commissioner determines that respondent should not lose his tenure rights, he should, at the very least, penalize respondent for more than a 120-day loss of pay and two annual increments. In justification for such position, the Board refers to *Randolph Twp. Bd. of Ed. v. Mary Ellen DiPillo*, 95 *N.J.A.R. 2d*, 206, aff'd w/mod., 93 *N.J.A.R. 2d EDU* 13, where the State Board of Education found it appropriate for a teacher to

lose six months pay for causing a child to get on his knees and beg for a book where the teacher also had a history of yelling at students and telling them to "shut up." The Board notes that, "there should be similar cause for concern about the respondent's conduct as recognized by the ALJ in the within matter." (Exceptions at pp. 7-8)

Lastly, the Board objects to the ALJ's finding that it must pay respondent lost wages for the time period between April 15, 1996, when respondent notified the Department that his criminal indictment was dismissed, and July 23, 1996, the date the matter was filed with the OAL. While respondent did not cause a delay in restoring this matter to the Commissioner's active list, neither was the Board responsible for such delay. Thus, the Board claims it should not be required to pay respondent more than two months of lost wages when it did nothing to cause the delay in restoring this matter to the Commissioner's active case list. (Exceptions at pp. 8-9)

Upon review, the Commissioner determines to affirm the decision of the ALJ with modification as noted below. Initially, the Commissioner is unpersuaded by exception arguments regarding Charge No. 1. Although the ALJ's findings herein turn, to a great extent, on the credibility of witnesses and the weighing of evidence, the Commissioner is satisfied, based on the record before him, that the ALJ appropriately measured conflicts, inconsistencies, and the plausibility of content in deciding which testimony to credit, and the proper weight to assign thereto, in reaching the factual findings and conclusions herein. It is noted that credibility determinations of the finder of fact, who observed the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them. This is so especially where, as here, transcripts of the proceedings were not provided by either party.

As to the appropriateness of the recommended penalty, the Commissioner finds it necessary to balance the totality of the record herein with the need to stress most emphatically that behavior of the type evinced by respondent cannot be countenanced in the school environment. Accordingly, the Commissioner concurs with the ALJ that, in view of all the facts in this matter and respondent's prior history, the extreme penalty of loss of tenure does not appear to be warranted. However, he does not find loss of 120 days salary and two increments to be a penalty sufficient to impress upon respondent and others the seriousness of the charges proven in this matter, which include inappropriate remarks regarding a student's menstrual cycle

and an unwarranted physical response in dealing with a student who was himself not physically unruly and did not pose a threat to anyone. Rather, the Commissioner modifies the recommended penalty of the ALJ to include a loss of salary for six months plus the withholding of two increments.

Finally, with regard to the Board's contention that it should not be responsible for back pay between the period respondent notified the Department that his criminal indictment was dismissed and the date the matter was filed with OAL, the Commissioner modifies the date from which the Board must reimburse respondent to April 23, 1996, the date of the Department's *receipt* of respondent's letter to reactivate his case, rather than April 15, 1996, the date on the face of the notice sent to the Commissioner. Concededly there was a delay in transmitting this case to OAL, the reason for which is not ascertainable from the record herein; however, *N.J.S.A.* 18A:6-14 clearly holds that the Board is responsible for payment of salary during tenure proceedings except in the event of delay caused by the charged employee, stating:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the commissioner of education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) shall be paid beginning on the one hundred twenty-first day until such determination is made.

Accordingly, the initial decision of the OAL is affirmed for the reasons expressed therein, except as above modified with respect to penalty and the starting date for calculation of respondent's back pay following removal of this matter from abeyance status. The Commissioner hereby directs that respondent forfeit the 120 days' salary withheld following certification of the within tenure charges, plus salary for two additional months, and that he further be denied employment and adjustment increments for the 1995-96 and 1996-97 school years as recommended by the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 7, 1997
DATE OF MAILING JULY 8, 1997

356-97

356-97 SEC

IN THE MATTER OF	:	
DEBBIE A. PHILLIPS,	:	
BOARD OF EDUCATION OF	:	COMMISSIONER OF EDUCATION
THE TOWNSHIP OF ELSINBORO,	:	DECISION
SALEM COUNTY.	:	
	:	

JULY 8, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
DEBBIE A. PHILLIPS,	:	
Elsinboro Board of Education	:	
Salem County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Debbie Phillips was elected to serve a three-year term on the Elsinboro Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" before they are elected and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing Debbie Phillips to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Phillips replied that she could not attend the seven scheduled sessions because of her work schedule, but that she promised to schedule herself for a class in the near future; and

WHEREAS, she further replied that she was unable to attend the sessions that the NJSBA offers in June because they are weekend sessions and she is a single parent, so she has signed up for the October class; and

WHEREAS, the Commission notified Ms. Phillips that the Commission would discuss this matter at its May 27, 1997 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Ms. Phillips has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 1996 to April 1997 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, Ms. Phillips's response does not provide an adequate explanation of why she failed to attend one of the other one-day training session for the year allowed by law; and

WHEREAS, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Debbie Phillips violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of removal from the board.

Dated: May 27, 1997

Paul C. Garbarini, Chairperson

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 27, 1997.

Lisa James-Beavers, Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Ljb/tmg97.doc

IN THE MATTER OF	:	
DEBBIE A. PHILLIPS,	:	
BOARD OF EDUCATION OF	:	COMMISSIONER OF EDUCATION
THE TOWNSHIP OF ELSINBORO,	:	DECISION
SALEM COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(I), on March 25, 1997, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission by letter dated April 15, 1997 that she had been unable to attend the classes because of her work schedule and stated that she planned to schedule herself to attend a class in the near future; and

Whereas, she further replied that she was unable to attend the training sessions offered in June because they are weekend sessions and she is a single parent, so she has signed up for the October class; and

Whereas the Commission, having considered such response, voted on May 27, 1997, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

JULY 8, 1997
DATE OF MAILING JULY 8, 1997

357-97

357-97 SEC

IN THE MATTER OF WILLIAM E.	:	
YOUNG, ASBURY PARK BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
	:	

JULY 8, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
WILLIAM E. YOUNG,	:	
Asbury Park Board of Education	:	
Monmouth County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, William Young was elected to serve a three-year term on the Asbury Park Board of Education on April 15, 1996; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" before their election and mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on February 13, 1997; and

WHEREAS, at the request of the School Ethics Commission, the NJSBA published a notice with the heading "Last Chance to Meet Training Requirements" on the front page of the February 21, 1997 edition of *School Board Notes* advising that the March 15, 1997 session was the last that new board members could attend without penalty; and

WHEREAS, the NJSBA conducted seven training sessions between April 1996 and April 1997 at varying locations and continuously published the dates and times of the sessions; and

WHEREAS, the last training session to fulfill the requirement was held on March 15, 1997; and

WHEREAS, the Commission issued an Order on March 27, 1997, directing William Young to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Young failed to provide a timely response to the Order; and

WHEREAS, the Commission notified William Young that the Commission would discuss this matter at its May 27, 1997 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Mr. Young has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 1996 to April 1997 constitutes a violation of N.J.S.A. 18A:12-33; and

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that William Young violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of removal from the board.

Dated: May 27, 1997

Paul C. Garbarini, Chairperson

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on May 27, 1997.

Lisa James-Beavers, Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Ljb/tmg97.doc

IN THE MATTER OF WILLIAM E.	:	
YOUNG, ASBURY PARK BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MONMOUTH COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6:3-9.4; and

Whereas, the School Ethics Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6:3-9.3(i), on March 26, 1997 the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member failed to provide a timely response to the Order of the Commission; and

Whereas, the Commission voted on May 27, 1997, to recommend removal of the above-named Board member for failure to timely attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on May 28, 1997, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, a response was submitted on behalf of the above-named Board member indicating that he had been previously scheduled to attend an unspecified training session but was compelled to cancel due to a conflicting employment obligation, and that he had registered for, and planned to attend, the session to be held on June 20-22, 1997; and

Whereas, the Commissioner of Education has confirmed that the above-named Board member has, in fact, attended the June 20-22, 1997 training session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission, and, having done so, declines to order removal of the above-named Board member in light of his attendance at the June 20-22, 1997 training session, instead finding suspension to be the appropriate penalty in this instance; now therefore

IT IS ORDERED that a one-meeting suspension is imposed on the above-named Board member, to be effective for the next regularly scheduled meeting of the Board.

COMMISSIONER OF EDUCATION

JULY 8, 1997
DATE OF MAILING JULY 8, 1997

358-97

358-97

ROSLYN GNATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

JULY 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 8802-96

AGENCY DKT. NO. 407-9/96

ROSLYN GNATT,

Petitioner,

v.

BOARD OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

David L. Rosenberg, Esq., on behalf of petitioner (Klausner & Hunter, attorneys)

Sanford D. Brown, Esq., on behalf of respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: May 23, 1997 Decided: May 28, 1997

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

This matter concerns the petition filed by Roslyn Gnatt regarding the decision of the respondent to withhold her increments for the 1996-97 school year. The respondent denied the allegations in the petition, and the matter was sent, on October 18, 1996, to the Office of

Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I held a prehearing conference on February 13, 1997, and the parties discussed a settlement. Prior to setting a date for the hearing, I received a letter from David L. Rosenberg, Esq., on behalf of the petitioner, requesting that the matter be dismissed with prejudice and without costs.

Therefore, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that this matter be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 28, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

5/29/97
DATE

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DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 30 1997
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Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 8802-96
AGENCY DKT. NO. 407-9/96

ROSLYN GNATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Commissioner finds that although the Administrative Law Judge characterized the initial decision as a dismissal, in that the dismissal was pursuant to petitioner's application for same, this matter shall, instead, be considered a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1997
DATE OF MAILING JULY 10, 1997

359-97

359-97

G.L., on behalf of minors, Y-C.L. AND Y-Y.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

Synopsis

Petitioner, a domiciliary of the Board's district, challenges Board's residency determination. ALJ found that petitioner established that the parents of the minor children, from January 1996 until January 1997, were in the course of emigrating to the United States from Taiwan, a process that had been time-consuming, difficult and which constituted "family or economic hardship." During that period, the children were kept in the Holmdel home of petitioner who, along with his wife, supported the children gratis, assumed all personal obligations for them relative to school requirements, and kept and supported them gratuitously for a longer period than merely the school term. ALJ found that the children were not residing in the district for the sole purpose of receiving a free public education from the Board. Therefore, during the time period in issue, ALJ concluded that the children were entitled, pursuant to *N.J.S.A.* 18A:38-1b(1), to attend the Board's school's without payment of tuition.

The Commissioner adopted the initial decision as his own.

JULY 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 358-96

AGENCY DKT. NO. 16-1/96

G.L., ON BEHALF OF

Y-C.L. AND Y-Y.L., MINORS,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF HOLMDEL,

Respondent.

G.L., petitioner, pro se

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record Closed: May 7, 1997 Decided: May 29, 1997

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case involves whether minor children Y-C.L. and Y-Y.L. were entitled to a free, public education in the schools operated by the Board of Education of the Township of Holmdel (BOE) or whether tuition should be paid for their attendance in the BOE's schools. N.J.S.A. 18A:38-1 governs the case.

While the children's parents were attempting to emigrate from Taiwan to the United States and until the parents obtained a home here, petitioner G.L. and his wife, the children's uncle and aunt, kept, supported and supervised the children in their Holmdel home and the children attended the BOE's schools. The basic issue is whether these circumstances constitute a "family or economic hardship," as the phrase is intended in N.J.S.A. 18A:38-1, such that the children could attend the BOE's schools without payment of tuition.

PROCEDURAL HISTORY

In early January 1996, the petitioner's former attorney and the BOE's attorney exchanged letters and other documents relative to whether the children had a right to attend the BOE's schools. By letter dated January 12, 1996, the BOE's attorney's notified the petitioner's former attorney of his position that there was no hardship; the children would not be permitted to attend the BOE's schools; and a petition challenging this could be filed with the Commissioner of the New Jersey Department of Education. Consequently, the parties did not engage in the process provided by N.J.S.A. 18A:38-1, wherein, based upon a "sworn statement," etc., the BOE would make a "decision" on whether the children could attend the schools, before resort to an appeal to the Commissioner.

In a petition filed with the Commissioner on January 23, 1996, G.L. demanded an order staying the above-described exclusion of the children from the schools and requiring the BOE to allow the children to continue in the schools. The BOE's answer was also filed on January 23, 1996. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL), where, on January 30, 1996, it was filed as a contested case. N.J.S.A. 52:14B-2(b). On June 12, 1996, the BOE filed a motion for summary decision, dismissing the petition. The petitioner opposed the motion and, by letter dated July 10, 1996, Administrative Law Judge Solomon A. Metzger denied the motion. A hearing was scheduled; the case was assigned to me; the petitioner's former attorney withdrew from the case; and, on October 28, 1996, in the OAL, G.L. and the BOE's attorney conferred and entered into a settlement agreement, conditioned upon the BOE's approval. The BOE later rejected the agreement and the case was scheduled for

a hearing. On February 24, 1997, the hearing began, but G.L. realized that he needed a Mandarin Chinese translator/interpreter to adduce testimony from his witness and the hearing was adjourned. On April 9, 1997, petitioner filed a motion for summary decision. The BOE opposed the motion and I denied it. The hearing was rescheduled for May 7, 1997. On that day, petitioner questioned whether, given the absence of the above-described process provided by N.J.S.A. 18A:38-1, wherein the BOE would make a "decision," the case should be heard. I decided that, because the Commissioner had transmitted the matter here for filing as a contested case and to avoid further delay in the making of a decision on the matter, it should be heard. The case was then heard with Robert C. Hsu serving as translator/interpreter.

FINDINGS OF FACT

The findings of fact are substantially based upon the testimony of Y.C.L., the children's mother, who was a credible witness. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

G-Y.L. and Y.C.L., natives of Taiwan, are dentists and the parents of daughter Y-C.L., who was born in Taiwan on May 29, 1980, and daughter Y-Y.L., who was born in Taiwan on July 2, 1982. During relevant times, petitioner G.L., the brother of G-Y.L., has operated a business in New Jersey and he and his wife have resided in Holmdel Township.

In 1984, G-Y.L. and Y.C.L. visited the United States, decided to emigrate here, and applied for approval to do so. They did not receive approval until 1995. They then attempted to sell their properties and dental practice in Taiwan. The process of winding up their affairs was time-consuming and was complicated by G-Y.L.'s heart condition. However, Y.C.L. testified, it was required that the children emigrate to the United States within five months of the approval. G.L. and his wife volunteered to house, support and supervise the children while G-Y.L. and Y.C.L. were in Taiwan preparing for the whole family's move. Consequently, in late December 1995 the family traveled to the United States, and, when their parents returned to Taiwan, the children remained in the home of G.L.. Thereafter, G-Y.L. and Y.C.L. made numerous trips between Taiwan and the United States. (G-Y.L. was in Taiwan most of the time.) Consequently, they were unable to support and supervise the children. There was no agreement or expectation

that G-Y.L. and Y.C.L. would repay G.L. and his wife for their services, and there has been no such repayment. On G.L.'s tax returns, he showed the children as dependents. In early January 1996, the children were enrolled in and began attending the BOE's schools, which they continue to attend. From January 1996 until January 1997 the children were housed, supported and supervised, including supervision relative to school requirements, by G.L. and his wife. During this time, Y.C.L. occasionally provided the children with incidental spending money, e.g., for movies.

In December 1996 Y.C.L. signed a lease on a home in Holmdel, and in January 1997 she and the children began to reside in that home. G-Y.L. continues to spend most of his time in Taiwan, winding up their affairs.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1 states, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the

validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner;

(2) If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the

> decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.
>
> [Emphasis added.]

The petitioner has proven the following: For G-Y.L. and Y.C.L. and their children, the process of emigrating from Taiwan to the United States has been time-consuming and difficult, constituting a "family or economic hardship." Consequently, from January 1996 until January 1997, the children were kept in the Holmdel home of G.L. and his wife. G.L. and his wife "supported [the children] gratis." G.L. and his wife "assume[d] all personal obligations for the child[ren] relative to school requirements" and kept and supported the children "gratuitously for a longer time than merely through the school term." The children resided in the district as a necessary step in their emigration and did not reside in the district "solely for the purpose of receiving a free public education" from the BOE. During the time in issue, i.e., January 1996 to January 1997, the children were entitled to attend the BOE's schools without payment of tuition. N.J.S.A. 18A:38-1(b)(1).

ORDER

I **ORDER** the petition's claims **GRANTED**. For the children's attendance in the BOE's schools, no tuition is owed.

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

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

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

May 29, 1997
DATE

John B. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

5/30/97
DATE

DNA
DEPARTMENT OF EDUCATION

JUN 3 1997
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Petitioner's exhibits:

None in evidence

Respondent's exhibits:

None in evidence

WITNESSES

Petitioner's witnesses:

Y.C.L.

Respondent's witnesses:

None

Translator/Interpreter:

Robert C. Hsu

OAL DKT. NO. EDU 358-96
AGENCY DKT. NO. 16-1/96

G.L., on behalf of minors, Y-C.L. AND Y-Y.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter,* and relying upon the credibility determinations rendered by the ALJ, the Commissioner affirms the ALJ's findings and conclusions, and concurs that petitioner has demonstrated that the minor children were entitled to attend school in the Board's district, free of charge, during the time period in issue, January 1996 to January 1997, pursuant to *N.J.S.A.* 18A:38-1b(1).

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein. The Commissioner determines that petitioner owes no tuition to the Board for the period in question.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is herein noted that the record before the Commissioner did not include a transcript of the hearing before the OAL.

JULY 10, 1997
DATE OF MAILING JULY 10, 1997

360-97

OAL DKT. NO. EDU 6571-96
AGENCY DKT. NO. DHP #50-96

IN THE MATTER OF THE DISQUALI-	:	
FICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF J.H., JR.,	:	DECISION
	:	

SYNOPSIS

Teacher aide appealed his disqualification from school employment pursuant to criminal record check. During the course of this appeal, appellant also contested the application of *N.J.S.A.* 18A:6-7.1 to the employees of private schools for the educationally disabled which accept public school students.

Initially, the ALJ concluded that the requirements of *N.J.S.A.* 18A:6-7.1 apply to the employees of a facility, center, or school under the supervision of either the Department or a local Board of Education. ALJ found that legislative history shows a legislative intent that the bill's requirements so apply and that, further, where a statute is ambiguous, the interpretation of the statute by the administrative agency that administers it, while not binding, is entitled to weight in the determination of the ~~statute~~'s meaning and intent.

Having reviewed the testimony and documents admitted into evidence, the ALJ concluded that appellant affirmatively demonstrated rehabilitation. ALJ ordered that appellant was not disqualified from school employment as a teacher's assistant.

Commissioner adopted findings and determination in initial decision as his own, concurring that the requirements of *N.J.S.A.* 18A:6-7.1 apply to the employees of a facility, center or school under the Department of Education or a local Board of Education. In noting there was no cause to question the ALJ's assessment of petitioner's credibility, Commissioner deemed petitioner qualified for school employment as a teacher aide.

JULY 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6571-96

AGENCY DKT. NO. DHP-50-96

JOSEPH HENDERSON, JR.,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Jeff Thakker, Esq., for the petitioner

New Jersey State Department of Education, respondent, appearing on the papers pursuant to N.J.A.C. 1:1-5.6(a)*

Record Closed: March 3, 1997 Decided: June 2, 1997

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

This matter concerns the appeal of the petitioner, Joseph Henderson, Jr., as to his disqualification from school employment, pursuant to N.J.S.A. 18A:6-7.1.

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* Deputy Attorney General Arlene Goldfus Lutz submitted a response brief as to the issue of the application of N.J.S.A. 18A:6-7.1.

By letter dated May 13, 1996, the Department of Education (Department) notified the petitioner of its determination that he was disqualified from continued school employment (R-1d). The petitioner filed an appeal on July 25, 1996, and the Commissioner of the Department of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A 52:14F-1 to -13.

The hearing took place on December 9, 1996. Jeff Thakker, Esq., appeared on behalf of the petitioner, and the Department was not represented at the hearing but relied on papers sent to the petitioner and the OAL. After the hearing, Mr. Thakker requested that the record remain open and that he be given the opportunity to submit a brief as to whether N.J.S.A. 18A:6-7.1 applies to employees of private schools for the educationally disabled which accept public school students. I allowed Mr. Thakker to submit a brief on this issue, which I received on December 31, 1996. I sent a copy of the petitioner's brief to the Department for its comments. I received a response from Deputy Attorney General Arlene Goldfus Lutz on February 10, 1997. Mr. Thakker filed a reply on March 3, 1997, and the record closed on that date.

At my request, the date for the submission of this initial decision was extended to June 2, 1997.

FINDINGS OF FACT

I **FIND** that the facts in this matter are not in dispute.

In 1995, the petitioner got a job as a teacher assistant at the Howell Campus of the Coastal Learning Center (Coastal), a private school for the educationally disabled which accepts public school students. Coastal required that the petitioner sign a form allowing a criminal history record check (P-3). This check revealed that the petitioner was convicted for possession of cocaine in 1974 and was placed on probation for three years (R-1m), and was convicted for distribution of a controlled dangerous substance (cocaine) in 1986 and was sentenced to seven years in jail (R-1d; R-1gg). Both of these convictions are disqualifiers pursuant to N.J.S.A.

18A:6-7.1. In addition, the criminal record check revealed that the petitioner had fourteen other convictions, which are not disqualifiers, between 1970 and 1983 (R-1gg; R-1k).

By letter dated May 13, 1996, the Department notified the petitioner that its check had revealed the two convictions which are disqualifiers pursuant to N.J.S.A. 18A:6-7.1, and it gave the petitioner thirty days in which to challenge the accuracy of the criminal record or to establish rehabilitation (R-1d). Mr. Henderson submitted documents to the Department to show rehabilitation, and the matter was referred to the OAL for a hearing.

At the hearing, Mr. Henderson testified that he was born in 1951, and was raised in a poor neighborhood in Asbury Park by his mother. He graduated from high school in 1970. While in high school, Mr. Henderson was active in sports and did not use drugs. He joined the U.S. Air Force in 1970, and got an honorable discharge in 1973. While in the service, Mr. Henderson started to drink alcohol and use illegal drugs. Soon after his military release, Mr. Henderson was arrested and convicted for possession of cocaine (according to the petitioner it was heroin, and not cocaine). For several years thereafter, he did not use illegal drugs. During this period, he took a computer course and got married. The petitioner started to use illegal drugs again in 1979, and he continued to use illegal drugs until his arrest for the sale of cocaine in 1985. According to the petitioner, a friend of his asked him to purchase cocaine on several occasions. This friend was working undercover for the police, and the petitioner was arrested after he obtained the cocaine for the friend.

Mr. Henderson testified that he stopped using illegal drugs after his arrest in 1985, since he recognized that he had to change his life. He started going to the Good Hope Baptist Church and started to correspond with Pastor LeRoy Holmes.

After his conviction in 1986 (R-1g), Mr. Henderson was incarcerated for two years. While incarcerated, he took college courses, participated in a behavior modification program, and attended Bible readings and Narcotics Anonymous meetings. Also while he was incarcerated, he decided that he wanted to help troubled youths.

After his release and until 1994, Mr. Henderson did volunteer work at the St. Joe's Juvenile Shelter in Trenton, which is under the supervision of Jose Lopez. Mr. Lopez submitted a sworn statement confirming the petitioner's volunteer services and stating that the petitioner was a positive role model for the children (P-15). The petitioner also did volunteer work at the Gilmore J. Fisher Middle School in Ewing. Marossa Davis, a guidance counselor at the school, confirmed his volunteer service and stated that he was a good role model for students (P-6). During this period, Mr. Henderson was employed as an assistant at the Thomas Lewis Laboratory, which is part of Princeton University.

In 1993, Mr. Henderson started to work at the Exodus House in Asbury Park, which operates a drug recovery program for adults. Later, he worked for the Rugby School for troubled youths. Since 1995, he has been employed by Coastal. As a teacher assistant at Coastal, Mr. Henderson accompanies children between buildings, assists teachers and does crisis intervention counseling. John H. Quintaglie, the principal of the Howell Campus of Coastal, testified and submitted a sworn statement on behalf of the petitioner (P-20). Mr. Quintaglie stated that the petitioner is trustworthy, reliable, and has a good rapport with the students and their parents and guardians. Neal M. Hines, a drug and alcohol counselor employed by Coastal, testified that the students at Coastal relate well with the petitioner and that the petitioner is effective in his attempts to help them.

When he started to work at Coastal, Mr. Henderson was required to sign a form entitled Applicant Authorization and Certification (P-3). According to Mr. Henderson, he signed it based on the representation that it allowed the Department to do a criminal history check. Mr. Henderson stated that he did not read the form carefully and was not aware that he was also signing a certification that he had not been convicted of certain offenses, including controlled dangerous substance offenses.

In addition to his job at Coastal, the petitioner is employed by the Boys and Girls Club of Monmouth County (Club) in Asbury Park. He heads the Club's Smart Move Program, which counsels children with drug, gang and other problems, and supervises the Club's after-school recreation program. Kevin McMillan, the Club's board president (P-18), and Kenneth Saunders,

the Club's executive director (P-21), submitted sworn statements as to Mr. Henderson's excellent employment record and the fact that he is a role model for the students.

Mr. Henderson continued his religious studies and in 1994 he received certificates from the Monmouth Bible Institute and the Evangelical Training Association (P-2). He is now an ordained evangelist and a deacon at the Macedonia Baptist Church in Neptune. At this church, he teaches Bible studies and has organized a youth rap-music group. He is also active in various prison ministry programs. Pastor Kelvin McDonald of the Macedonia Baptist Church submitted a sworn statement as to Mr. Henderson's activities in the church and with the prison outreach ministry, which involves visiting inmates in prisons and helping newly released inmates (P-17). James D. Lang, Jr., vice president (P-13), and Frank M. Green, state director (P-7), of the Bill Glass Prison Ministry submitted sworn statements as to Mr. Henderson's volunteer prison ministry work. Mr. Henderson also does prison ministry work for the Community Network of Bishop LeRoy Holmes (P-25), and at the Middlesex County Prison under the direction of assistant pastor Willie Hill. Both Bishop Holmes and Assistant Pastor Hill submitted letters attesting to the petitioner's volunteer work (P-9; P-10). The petitioner also submitted letters from Louis Jordan, national founder and CEO of the National Concerned Officers Organization on Gang Activities, Inc. (P-12), William P. Lucia, chief of detectives, Monmouth County Prosecutor's Office (P-16), Rev. Herbert Presley (P-19), and Mayor Carl Williams of Asbury Park (P-23), attesting to his rehabilitation and his volunteer work in the community.

Mr. Henderson is president of the Old Timers' Association of Monmouth and Ocean counties, which runs dances and programs to raise money for college scholarships. He does volunteer work with the local food bank, which operates a Friday Night Feast to provide children with a good meal on Fridays. He is also on the executive board of the Center of Love, Inc., in Asbury Park, which provides crisis counseling for families. Tyrone K. Laws, the executive director of the Center of Love, testified and submitted a sworn statement (P-14) regarding Mr. Henderson's volunteer work at the Center of Love.

Also, Mr. Henderson is involved in the Mentor Program in Asbury Park, and a number of people involved with that program submitted sworn statements or letters regarding the petitioner's activities to help the community's youth to keep away from illegal drugs and criminal

activities. These letters and sworn statements are from Robert A. Honecker, Jr., an assistant prosecutor in Monmouth County (P-11), Jerry Hamlin, special projects coordinator for the Monmouth County Prosecutor's Office (P-8), Detective Dominic Fazio (P-1), Sebastian Trapani, director of the Community Mentor Program (P-22), Felicia Costantino, a Monmouth County probation officer (P-5), Colleen R. Christie, a Monmouth County supervising probation officer (P-4), and Superior Court Judge Paul F. Chaiet (P-24).

According to Mr. Henderson, he has not consumed any alcoholic beverages or illegal drugs or committed any criminal offenses since 1985.

CONCLUSION OF LAW

The threshold issue in this matter is whether the provisions of N.J.S.A. 18A:6-7.1 apply to employees of private schools for the educationally disabled which accept public school students. The pertinent provision of the statute provides:

> A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ or contract for the services of any teaching staff member or substitute teacher, teacher aide, . . . or any other person serving in a position which involves regular contact with pupils . . . unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such capacity or position.
>
> [Emphasis added.]

In his brief, the petitioner argues that consistent with the plain language of the statute its legislative history, N.J.S.A. 18A:6-7.1 only applies to schools that are under the supervisic both the Department and the local board of education. The petitioner argues that it has consistently held that a court is obligated to enforce the legislative language as written, an not, under the guise of construction, substitute a different meaning, even though s

alternative is more desirable. State Bd. of Medical Examiners v. Warren Hospital, 102 N.J. Super. 407 (Cty. Ct. 1968), aff'd, 104 N.J. Super. 409 (App. Div. 1969); In re Howell Tp., Monmouth County, 254 N.J. Super. 411 (App. Div. 1991), certif. denied, 127 N.J. 548 (1991).

The petitioner concedes that Coastal is under the supervision of the Department; however, he argues that Coastal is not under the supervision of any local board of education. The petitioner notes that local boards of education are permitted, pursuant to N.J.S.A. 18A:46-14, to enter into contracts to send educationally disabled students to privately operated schools and that N.J.A.C. 6:20-4.1 et seq. regulates the tuition that these private schools may charge, but that there is no statute or regulation authorizing the local school boards to supervise the privately operated schools.

In her response, Deputy Attorney General Lutz disagreed and argued that the provisions of N.J.S.A. 18A:6-7.1 are applicable to schools supervised either by the Department or a local school district. Ms. Lutz argued that private schools for the educationally disabled that accept public school students are under the supervision of the Department since such schools must be approved by the Department, N.J.S.A. 18A:46-15, and are subject to a monitoring process by the Department, N.J.A.C. 6:28-7.1 et seq.

It is the Department's position that the intent of N.J.S.A. 18A:6-7.1 is to insure that all public school students attend facilities and schools with employees that have passed the required criminal history check, and that public school students who are placed in private schools for the educationally disabled because the local school district cannot provide an appropriate education are entitled to the protections afforded to all other public school students pursuant to N.J.S.A. 18A:6-7.1.

I recognize that the petitioner's position that N.J.S.A. 18A:6-7.1 applies only where there s dual supervision is reasonable since the statute provides "the Department of Education and oard of education" (emphasis added). The courts have recognized that the "word 'and' carries th it natural conjunctive import." Pine Belt Chevrolet v. Jersey Central Power, 132 N.J. 564, 3 (1993) (citation omitted). However, the courts have also

> recognized that "[t]he words 'or' and 'and' are ofttimes used interchangeably, and the determination of whether the word 'and' as used in a statute should be read in the conjunctive or disjunctive depends primarily upon the legislative intent."
>
> [Ibid.]

I **CONCLUDE** that the legislative history of N.J.S.A. 18:6-7.1 shows a legislative intent that the word "and" be read in the disjunctive. All committee statements to the legislation reported that the bill's requirements apply to "all final candidates for employment by a board of education or a facility, center, or school under the supervision of the Department of Education." Assembly Appropriations Committee Statement to S. 223 (Mar. 6, 1986); Assembly Education Committee Statement to S. 223 (Feb. 27, 1986); Senate Education Committee Statement to S. 223 (Jan. 23, 1986). Former Governor Kean, in his review of the bill, also indicated that "Senate Bill No. 223 (OCR) would require criminal history checks on all final candidates for employment . . . in the public schools or in educational institutions under the supervision of the Department of Education." Governor Kean's Objections and Recommendations for Amendments to S. 223 (June 23, 1986).

Furthermore, where a statute is ambiguous, the interpretation of the statute by the administrative agency that administers it, while not binding, is entitled to weight in the determination of the statute's meaning and intent. American Nat'l Bank & Trust v. Presbyterian Homes, 148 N.J. Super. 465, 475 (App. Div. 1977); In re John Brennan, 126 N.J. Super. 368, 373 (App. Div. 1974); In re Petition of Public Service, 103 N.J. Super. 505, 513 (App. Div. 1968). The Department, the administrative agency that administers N.J.S.A. 18A:6-7.1, has taken the position that the statute applies to schools under the supervision of the Department or a local board of education.

Therefore, I **CONCLUDE** that the requirements of N.J.S.A. 18A:6-7.1 apply to the employees of a facility, center, or school under the supervision of either the Department or a local board of education.

Although the petitioner conceded that Coastal is under the supervision of the Department, the pertinent statutory provisions do not specifically give the Department "supervision" over private schools for the educationally disabled that accept public school students, and there is a question as to whether the Department's monitoring and approval of such private schools is tantamount to "under the supervision of the Department of Education" as required by N.J.S.A. 18A:6-7.1.

Ms. Lutz's brief clearly states that the Department has interpreted the statute, using a broad definition of "supervision," to require employees of private schools for educationally disabled students which accept public school students to meet the requirements of N.J.S.A. 18A:6-7.1. I **CONCLUDE** that such an interpretation of the statute is reasonable and consistent with the legislative intent. A private school for the educationally disabled that wants to accept public school students has to submit an application for approval, N.J.A.C. 6:28-7.2(a). If the school is approved, it must annually submit information regarding its program, staffing, services and building maintenance, N.J.A.C. 6:28-7.3(a), and is subject to a periodic monitoring procedure by the Department, N.J.A.C. 6:28-9.1, 6:28-7.9(a), in order to retain its approved status. These provisions give the Department rights akin to "supervision" in order to insure that public school students sent to these schools are provided, on a continuing basis, with appropriate education programs in suitable facilities.

The remaining issue in this matter is whether Mr. Henderson has shown rehabilitation.

Pursuant to N.J.S.A. 18A:6-7.1(e), a person with a criminal record will not be disqualified from school employment if said person shows clear and convincing evidence of his or her rehabilitation. This section sets forth a number of factors to be considered in determining whether the person has affirmatively demonstrated rehabilitation. These factors are:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

On behalf of the petitioner, Mr. Thakker argued that the petitioner grew up in the inner city of Asbury Park, associated with persons who used illegal drugs and were involved in criminal activities, and personally became heavily involved with illegal drugs during the 1970s and early 1980s. The petitioner's entire criminal record relates to his use of illegal drugs and to offenses committed to get money for drugs. Mr. Thakker noted that Mr. Henderson converted to Christianity after his 1985 drug arrest, that he was a model prison inmate, and that since his release from prison, he has been employed and has engaged in many volunteer activities to help others, especially children, avoid illegal drug usage and other criminal activity. Mr. Thakker argued that the petitioner has presented clear and convincing evidence of his dramatic and complete rehabilitation. Mr. Thakker argued that Mr. Henderson is a role model for the students at Coastal since they know he was able to overcome his drug addiction. See, Saunders v. N.J. Bd. of Educ., 91 N.J.A.R.2d (EDU) 12.

The petitioner acknowledges that the drug offenses are serious, but he argues that they are non-violent offenses and that he has been drug free and law abiding for more than ten years.

Although the petitioner was not a youthful violator, Mr. Thakker argued that his convictions were largely due to his association with friends who used illegal drugs and were involved in other criminal activities. The petitioner has substantially changed his lifestyle and there is no reason to believe he will ever resume using drugs or commit any other type of crime.

Having reviewed the testimony and the documents admitted into evidence, I agree with Mr. Thakker's arguments and I **CONCLUDE** that the petitioner has affirmatively demonstrated rehabilitation.

Also, Mr. Thakker argued that any disqualification of the petitioner based on his prior drug dependency constitutes discrimination pursuant to the New Jersey Law Against Discrimination and the Americans with Disabilities Act. Mr. Thakker presented no legal argument to support his position that a drug addiction is a handicap except to refer to Clowes v. Terminix International, Inc., 109 N.J. 575 (1988), which recognizes alcoholism as a handicap. Even if drug addiction should be considered a handicap, Mr. Thakker recognizes that there would still be a question as to whether such a handicap would reasonably preclude a person from performing the duties of Mr. Henderson's position. It is not necessary to address this argument here, since I have concluded that Mr. Henderson has shown rehabilitation.

Therefore, I **ORDER** that the petitioner not be disqualified from school employment.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 2, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

6/3/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 5 1997
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

P-1 Sworn statement of Detective Dominic Fazio, dated June 14, 1996

P-2 Certificate from the Monmouth Bible Institute issued to Joseph Henderson, Jr., dated June 11, 1994, and a certificate from the Evangelical Training Association, dated June 11, 1994

P-3 Applicant Authorization and Certification signed by Joseph Henderson, Jr., dated April 8, 1996

P-4 Sworn statement of Colleen R. Christie, dated June 4, 1996

P-5 Sworn statement of Felicia Costantino, dated June 4, 1996

P-6 Sworn statement of Marossa Davis, dated June 5, 1996

P-7 Sworn statement of Frank M. Green, dated June 3, 1996

P-8 Sworn statement of Jerry Hamlin, dated June 12, 1996

P-9 Sworn statement of Assistant Pastor Willie Hill, dated April 11, 1996

P-10 Sworn statement of Bishop LeRoy Holmes, dated June 4, 1996

P-11 Letter from Robert A. Honecker, Jr., dated May 31, 1996

P-12 Letter from Louis Jordan, dated June 10, 1996

P-13 Sworn statement of James D. Lang, Jr., dated June 12, 1996

P-14 Sworn statement of Tyrone K. Laws, dated June 5, 1996

P-15 Sworn statement of Jose Lopez, dated June 13, 1996

P-16 Sworn statement of William P. Lucia, dated June 9, 1996

P-17 Sworn statement of Pastor Kelvin McDonald, dated June 5, 1996

P-18 Sworn statement of Kevin McMillan, dated May 30, 1996

P-19 Sworn statement of Rev. Herbert Presley, dated June 4, 1996

P-20 Sworn statement of John H. Quintaglie, dated June 12, 1996

P-21 Sworn statement of Kenneth "Butch" Saunders, dated June 13, 1996

P-22 Sworn statement of Sebastian Trapani, dated June 3, 1996

P-23 Sworn statement of Mayor Carl Williams, dated June 13, 1996

P-24 Letter from Judge Paul F. Chaiet, dated August 14, 1992

P-25 Certificate of Appreciation issued to Joseph Henderson by The Community Network, dated December 17, 1994

P-26 Certificate of workshop attendance issued to Joseph Henderson by the Hampton University Ministers' Conference, 1992

For the Respondent:

R-1a Letter from Timothy B. Middleton, Esq., to Commissioner Leo Klagholz, dated June 24, 1996

R-1b Sworn statement of Bishop LeRoy Holmes, dated June 4, 1996 (same as P-10)

R-1c Sworn statement of William P. Lucia, dated June 9, 1996 (same as P-16)

R-1d Letter from Carl H. Carabelli to Joseph Henderson, dated May 13, 1996

R-1e Letter from Carl H. Carabelli to Jeff Thakker, Esq., dated June 10, 1996

R-1f Letter from Jeff Thakker, Esq., dated June 7, 1996

R-1g Letter from William C. Mack to Carl H. Carabelli, dated May 20, 1996, with attachments

R-1h Letter from Carl H. Carabelli to William Mack, dated May 13, 1996

R-1i Letter from Carl H. Carabelli to Union County Superior Court, dated May 13, 1996

R-1j Letter from Carl H. Carabelli to Frank Viscomi, dated May 13, 1996

R-1k Information regarding Joseph Henderson, Jr., from the FBI

R-1l Applicant Authorization and Certification for criminal history review, signed by Joseph Henderson, Jr., on April 8, 1996 (same as P-3)

R-1m Information regarding Joseph Henderson, Jr., from Union County

R-1n Sworn statement of Rev. Herbert Presley, dated June 4, 1996 (same as P-19)

R-1o Sworn statement of Jose Lopez, dated June 13, 1996 (same as P-15)

R-1p Sworn statement of Marossa Davis, dated June 5, 1996 (same as P-6)

R-1q Sworn statement of John H. Quintaglie, dated June 12, 1996 (same as P-20)

R-1r Sworn statement of Kenneth "Butch" Saunders, dated June 13, 1996 (same as P-21)

R-1s Sworn statement of Kevin McMillan, dated May 30, 1996 (same as P-18)

R-1t Sworn statement of Mayor Carl Williams, dated June 13, 1996 (same as P-23)

R-1u Sworn statement of Assistant Pastor Willie Hill, dated April 11, 1996 (same as P-9)

R-1v Certificate from the Monmouth Bible Institute issued to Joseph Henderson, Jr., dated June 11, 1994, and a certificate from the Evangelical Training Association, dated June 11, 1994 (same as P-2)

R-1w Sworn statement of James D. Lang, Jr., dated June 12, 1996 (same as P-13)

R-1x Sworn statement of Frank M. Green, dated June 3, 1996 (same as P-7)

R-1y Sworn statement of Pastor Kelvin McDonald, dated June 5, 1996 (same as P-17)

R-1z Sworn statement of Tyrone K. Laws, dated June 5, 1996 (same as P-14)

R-1aa Sworn statement of Robert A. Honecker, Jr., dated May 31, 1996 (same as P-11)

R-1bb Sworn statement of Jerry Hamlin, dated June 12, 1996 (same as P-8)

R-1cc Sworn statement of Detective Dominic Fazio, dated June 14, 1996 (same as P-1)

R-1dd Sworn statement of Sebastian Trapani, dated June 3, 1996 (same as P-22)

R-1ee Sworn statement of Felicia Costantino, dated June 4, 1996 (same as P-5)

R-1ff Sworn statement of Colleen R. Christie, dated June 4, 1996 (same as P-4)

R-1gg Letter from Carl H. Carabelli to Debbie Antanaitis, dated June 17, 1996

R-1hh Letter from Timothy B. Middleton, Esq., to Commissioner Leo Klagholz, dated June 13, 1996

R-1ii Affidavit of Joseph Henderson, Jr., dated June 16, 1996

WITNESSES:

For the Petitioner:

Dominic Fazio

Joseph Henderson, Jr.

Neal M. Hines

John H. Quintaglie

Tyrone K. Laws

For the Respondent:

None

OAL DKT. NO. EDU 6571-96
AGENCY DKT. NO. DHP #50-96

IN THE MATTER OF THE DISQUALI-	:	
FICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF J.H., JR.,	:	DECISION
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusions of the Administrative Law Judge (ALJ) that the requirements of *N.J.S.A.* 18A:6-7.1 apply to the employees of a facility, center or school under the supervision of either the Department of Education or a local board of education.

The Commissioner further concurs that petitioner has demonstrated rehabilitation in accordance with *N.J.S.A.* 18A:6-7.1, and is, therefore, qualified for school employment within the intent of the criminal history record check laws. It is observed in reaching this decision, that the Commissioner had no cause to question the ALJ's assessment of petitioner's credibility as such assessment is not belied by the record. Moreover, it was the ALJ who had the opportunity to hear petitioner's sworn testimony and to observe his demeanor, so that he was in the optimum position to make such determination.

ACCORDINGLY, for the reasons expressed therein, the Commissioner adopts the initial decision as the final decision in this matter and Petitioner is deemed qualified for school employment as a teacher aide.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1997
DATE OF MAILING JULY 10, 1997

361-97

361-97

BERNICE WOODS-BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION DECISION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning business education chairperson challenged Board's termination of her employment, claiming that, notwithstanding that her continued service on the date of February 1, 1996 was the result of administrative error, she had nonetheless acquired tenure by operation of law through having worked for the requisite period of time as specified in statute.

ALJ found that controlling statute as interpreted by recent court decisions required re-employment for a fourth year to be a necessary condition of tenure acquisition under *N.J.S.A.* 18A:28-5, and that petitioner had neither received such an offer nor been recommended by the superintendent as required by *N.J.S.A.* 18A:27-4.1. ALJ found it unnecessary to reach to petitioner's specific claim of entitlement under *N.J.S.A.* 18A:28-5(c), service for the equivalent of more than three academic years within a period of four consecutive academic years, based on calculation of length of the academic year. Petition was dismissed.

Commissioner affirmed findings and conclusions of initial decision.

JULY 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3749-96
AGENCY DKT. NO. 75-2/96

BERNICE WOODS-BROWN,
Petitioner,
v.
IRVINGTON BOARD OF EDUCATION,
Respondent.

Michael J. Buonaguro, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Nicholas Celso III, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: February 27, 1997 Decided: May 27, 1997

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

Statement of the Case

This is a dispute over whether or not petitioner acquired tenure by operation of law. While the board of education clearly intended to deny her tenure, the school superintendent made an error in determining the date on which tenure would accrue. Consequently, petitioner worked one day beyond what was supposed to be the effective date of her termination.

Petitioner contends that she satisfied the statutory requirements for tenure by working "for more than three academic years within a period of any four consecutive academic years." *N.J.S.A.* 18A:28-5(c). Respondent raises three reasons why tenure

was not achieved: first, that petitioner was not "reemployed" by the board upon expiration of her third contact; second, that her claim is barred because the superintendent did not recommend her for reappointment; and, third, that she failed to satisfy the requisite time period set forth in the statute.

With respect to the third issue, the parties utilize different methods for determining how much service is needed for tenure. Petitioner maintains that tenure automatically arises after service for thirty months or one-hundred twenty weeks, plus one additional day. Respondent, however, insists that accrual of tenure depends on the number of days in a particular district's school calendar and calculates that petitioner falls four or five days short of the necessary length of service.[1]

Procedural History

Ms. Bernice Woods-Brown ("Woods-Brown") filed a petition of appeal with the Commissioner of Education ("Commissioner") on February 19, 1996. Irvington Board of Education ("Board") filed its answer on March 20, 1996. Subsequently, on April 11, 1996, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Both parties agree that the outcome turns entirely on a legal question and that the matter should be decided on cross-motions for summary decision. Accordingly, on January 27, 1997, the parties filed a joint stipulation of facts and exhibits. Woods-Brown filed her motion for summary decision, together with supporting certifications and brief, on January 9, 1997. The Board filed its opposing brief on February 5, 1996. Thereafter, the parties filed reply briefs on or before February 24, 1996. The OAL heard oral argument on February 27, 1997, on which date the record closed.

[1] "Academic year" is defined as "the period between the time school opens in any school district or under any board of education after the general summer vacation until the next succeeding summer vacation." *N.J.S.A.* 18A:1-1. Slight differences in the Board's figures are attributable to whether the first day of school is taken as the date that teachers report to work or the date that students begin classes.

Findings of Fact

All of the relevant facts are stipulated. **I FIND**:

Irvington Board of Education is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey and entrusted with maintaining and conducting the schools of the Township of Irvington school district. Bernice Woods-Brown started working for the district midway during the 1992-93 academic year. By resolution dated February 24, 1993, the Board accepted the recommendation of its superintendent to appoint Woods-Brown to a ten-month position as chairperson of the high school business-education department, "effective February 1, 1993." Her duties were spelled out in a written job description and in the district's business-education curriculum. In addition, Woods-Brown was responsible for operating and implementing a work-study program for high school students. At all relevant times, she possessed various educational certificates with appropriate endorsements, including principal/supervisor, teacher of business education and data processing, and coordinator of cooperative vocational-technical education.

It appears that Woods-Brown continued her employment in the district for the entire 1993-94 and 1994-95 academic years and for the first half of 1994-95. However, on December 6, 1995, superintendent of schools Peter Carter wrote her a letter indicating that February 2, 1996 "represents the date on which you could obtain tenure with the [district]" and advising that he would not recommend her for tenure at the December 20th meeting of the Board. The letter went on to say that, "Upon denial of said tenure by the Board, your employment will cease on February 2, 1996 and your last day of work will be February 1, 1996."

One day later, on December 7, 1995, superintendent Carter met personally with Woods-Brown, in the presence of the acting high school principal, and verbally "advised her that she was being nonrenewed and denied tenure in conjunction with a

district-wide reduction in force." On December 14, 1995, Carter sent another letter to Woods-Brown, telling her that the Board "will consider the non-renewal of your employment and denial of tenure . . . during the closed session portion of its December 20, 1995 meeting" and informing her of the right to request a public discussion. Thereafter, on December 20, 1995, the Board held a regular meeting and voted unanimously to approve the recommendation of its superintendent not to renew her employment and, thereby, to deny her tenure, "effective February 1, 1996."

Despite the apparent inconsistency between the superintendent's letter referring to February 1, 1996 as her "last day of work" and the board resolution purportedly making her termination "effective" as of February 1, 1996, the parties agree that Woods-Brown did come to work and performed her usual and customary duties on February 1, 1996.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Woods-Brown did not satisfy the statutory requirements for tenure.

At the outset, the parties agree that there exists no genuine issue of material fact requiring a hearing and, therefore, that the matter may be decided by summary decision. *N.J.A.C.* 1:1-121.5. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520 (1995). Tenure is a statutory status that supersedes any contrary contractual terms. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 72 (1982). In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute. *Zimmerman v. Newark Bd. of Educ.*, 38 *N.J.* 65, 72 (1962), *cert. den.* 371 *U.S.* 956, 83 *S. Ct.* 508, 9 *L.Ed.*2d 502 (1963). Both sides agree that the present situation is governed by subsection (c) of *N.J.S.A.* 18A:28-5, which provides:

> The services of all teaching staff members . . . shall be under tenure during good behavior and efficiency . . *after*

> *employment* in such district or by such board for . . . the equivalent of more than three academic years within a period of any four consecutive academic years. (Emphasis Added).[2]

Initially, the Board urges that petitioner does not qualify for tenure because it refused to offer her employment *after* expiration of her third contract and, thus, she was not "employed" for more than three academic years. A recent Supreme Court opinion, *Picogna v. Cherry Hill Bd. of Educ.*, 143 *N.J.* 390 (1996), strongly supports the Board's reasoning. There a school board wrongfully terminated a teaching staff member's employment during the final year of the three-year contract. Although plaintiff was entitled to damages for breach of contract, the Court held that he did not acquire tenure. Interpreting identical introductory language to subsection (a) of the tenure statute, the Court ruled that in order to obtain tenure "plaintiff was required to serve three consecutive calendar years on probation with defendant and then be reemployed by the Board for at least one day in a fourth year." *Picogna*, at 402. Even though the plaintiff would have achieved tenure but for the board's misconduct, the Court determined that he had not satisfied "the statutory requirement of employment *after* expiration of three consecutive years." *Id. Accord, Canfield v. Pine Hills Bd. of Educ., rev'g on dissent below*, 97 *N.J. Super.* 483, 490-493 (App. Div. 1967).

In *Canfield*, a school board mistakenly failed to give the sixty-day notice of termination required under the cancellation clause of the contract, so that arguably the teacher's employment continued beyond statutory period for tenure. Reversing a judgment in the teacher's favor, the Supreme Court concurred with the view of the dissenting judge below that "the discharge of an employee before passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have give tenure."

---

[2] Subsection (a), which confers tenure after employment for "[t]hree consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose," is inapplicable because Woods-Brown was not employed on a calendar-year basis. Subsection (b), which confers tenure after employment for "[t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year" is inapplicable because Woods-Brown started in February and was not employed for three "consecutive" academic years.

97 *N.J. Super.* at 490. The Court adopted the dissenting judge's concern that a school district "should not be trapped into tenure by the construction of words which neither party expected to have that meaning." 97 *N.J. Super.* at 493

Our own factual pattern presents an even more compelling case against the accidental granting of tenure. Insofar as the record reflects, the Board made a good-faith decision to deny tenure to petitioner, without breaching her contractual rights or failing to give adequate notice. Indeed, Woods-Brown was fully aware long before her last day of work that she would not become tenured. Superintendent Carter sent her written notice of his negative recommendation on December 6, 1995, told her personally on December 7, 1995 and notified her on December 14, 1995 of the upcoming Board meeting at which her tenure would be considered. Moreover, on December 20, 1995, the Board passed a straightforward resolution declining to renew her contract and denying her tenure.

Case law emphasizes the importance of allowing a district to reach an informed judgment on whether a particular staff member should receive tenure. Illustratively, in *Zimmerman* , *supra*, the Supreme Court remarked that:

> . . . [A] board's duty to hire teachers requires more than merely appointing licensed instructors; it demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period. In essence, this constitutes a "proving out" period. 38 *N.J.* at 73.

Courts expressly recognize the utility of a probationary period "as a means of assessing a teacher's performance." *Kletzkin v. Spotswood Bd. of Educ.*, 136 *N.J.* 275, 280 (1994). Teachers who accept employment in a particular district do so with the clear understanding that they are "serving a probationary period and may or may not ultimately attain tenure." *Donaldson v. No. Wildwood Bd. of Educ.*, 65 *N.J.* 236, 245 (1974).

Recently, in *Martucci v. Linden Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 109 (Comm'r Oct. 25, 1995,) *rev'd* Dkt. No. 108-95 (St. Bd. Dec. 8, 1996) the State Board of Education acknowledged the requirement of reemployment after a probationary period in order to sustain a claim of tenure. *Martucci* involved a teacher who was promoted to principal and served for two years in that capacity. Prior to completion of the second year, the school board notified him that it was not going to offer him a contract for the following year. Nonetheless, the board allowed him to serve out the remainder of the second year. *N.J.S.A.* 18A:28-6(a) provides that any teaching staff member transferred or promoted with his consent to another position in the district shall not obtain tenure "until *after* . . . the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purposes." (Emphasis added). Since he had worked as a principal for two full years, the teacher claimed that he had achieved tenure. Applying the rationale of *Picogna* and *Zimmerman*, the State Board held that he did not acquire tenure "because he was not reemployed by the Board as a principal *after* being employed in that capacity for two years." (slip op. at 7). In further support of its decision, the State Board cited the disruption and additional expense that would occur if district boards were "forced to terminate the contracts of calendar year employees in order to prevent tenure acquisition." (slip op. at 8).

The State Board's analysis in *Martucci* is controlling here as well. Although Woods-Brown, like Martucci, may have technically served for the requisite amount of time, she too was not reemployed by the Board after completion of her probationary period. Instead, the Board gave her timely and effective notice that her employment would cease "effective February 1, 1995," which connotes that her last day of work would be January 31, 1995. Pursuant to statute, the Board had the option of having Woods-Brown continue to perform her duties "during the period between the giving of the notice and the date of termination of employment thereunder." *N.J.S.A.* 18A:27-9. Any work she performed on February 1, 1995 was done without the Board's approval and against its plain instructions. Even if the superintendent of schools inadvertently

allowed Woods-Brown to work beyond her termination date, he lacks legal authority to bind the Board to a new contract which that body has specifically declined to offer. [3]

Woods-Brown relies on an earlier case, decided twenty-five years ago, standing for the dubious proposition that a teaching staff member may obtain tenure by ignoring a school board's timely notice of nonrenewal. In *McGlynn v. Lumberton Bd. of Educ.*, 1972 *S.L.D.* 28 (Comm'r Feb. 3, 1972), a school board verbally served notice in March of its "intent" not to renew its superintendent's annual contract, which was about to expire at the end of June. (In contrast, the Board notified Woods-Brown not merely of its future intent, but of its fully-formed decision to terminate her contract). Next month, in April, the school board confirmed its intention in writing and inquired whether McGlynn wanted to revert to his former tenured position of principal for the coming year. Without responding to the board's inquiry, McGlynn continued performing his duties as superintendent for two weeks after the contract expiration date. Faulting the board for not taking unspecified measures to "discharge" its superintendent prior to June 30, the Commissioner determined that McGlynn had acquired tenure as superintendent "at the precise moment when the requisite period had expired." *McGlynn*, at 33. Whatever precedential value *McGlynn* may once have possessed, it has been overruled by *Martucci,* where the State Board held that tenure does not accrue until actual reemployment after the probationary period. Not only is *Martucci* a more current recitation of controlling law, but State Board pronouncements take precedence over contrary Commissioner's rulings. *Dore v. Bedminster Twp. Bd. of Educ.*, 185 *N.J. Super.* 447 (1982).

Additionally, the Board argues that Woods-Brown cannot obtain tenure without the affirmative recommendation of the superintendent for her final reappointment. Prior

[3] Part of the problem here arose from the fact that Woods-Brown began her initial employment subsequent to commencement of the regular academic year. Teaching staff who begin in September must receive a notice of nonrenewal by May 15 or the board's silence is deemed to constitute an offer of reemployment for the succeeding school year. *N.J.S.A.* 18A:27-10, -11. Nothing in this decision should be construed as expressing any opinion on whether or not a teacher whose contract is automatically renewed after the probationary period gains tenure.

to recent legislative amendments, the Appellate Division had declared that a school board was not bound by the staffing recommendations of its chief school administrator and that a superintendent of schools lacked "veto power" over teacher appointments. *Rotondo v. Carlstadt-East Rutherford Reg. High Sch. Dist.*, 276 *N.J. Super.* 36 (App. Div. 1994). Arriving at that result on the basis of statutory construction, the court suggested that, "If a new answer is to be reached, it is the Legislature that has to reach it." 276 *N.J. Super.* at 46.

In response to that invitation, the Legislature enacted *L.* 1995, *c.* 125, designed to "clarif[y] the role of the chief school administrator in school board employment decisions." *Sponsor's Statement to Assembly Bill 2410.* Unfortunately, the new law generated more confusion. On one hand, the new legislation, popularly known as the *"Rotondo* Bill," amended *N.J.S.A.* 18A:27-4.1(b) to read that "A board of education shall renew the employment contract of a certificated or non-certificated officer or employee *only* upon the recommendation of the chief school administrator[.]" (Emphasis added). More emphatically, the amendment added a sentence that "A nontenured officer or employee who is not recommended for renewal by the chief school administrator *shall be deemed nonrenewed.*" (Emphasis added). This language clearly implies that the superintendent's recommendation is a precondition to any grant of tenure. On the other hand, the amendment also provides that an officer or employee whose employment contract is not renewed is entitled to an informal appearance before the board, the purpose of which is "to permit the staff member to convince the members of the board to offer reemployment." Further, the amendment stated that the board "may not withhold its approval for arbitrary and capricious reasons." Commentators wondered whether the superintendent's approval was absolutely necessary after all, or whether the board could still override the superintendent's recommendation in certain circumstances. *School Law Reporter*, at 1 (Dec. 1995).

Such doubts were put to rest by the Commissioner in *Velasquez v. Brielle Bd. of Educ.*, OAL Dkt. EDU 8276-95 (Comm'r April 4, 1996), in which he found that the bill's legislative history and its origin as a response to the Appellate Division's decision in *Rotondo* demand that the statutory language be read to prohibit a school board from

reemploying a staff member whom the superintendent opposes. The Commissioner was able to harmonize the apparently contradictory provisions of the Act by pointing out that a school superintendent sits as a nonvoting member of the school board and, thus, that the employee's appearance before the board offers an opportunity to convince the superintendent to change a negative recommendation. Any other interpretation, the Commissioner observed, "ignores both the context of the specific language being relied upon and the overall scheme of the legislative enactment." *Velasquez*, slip op. at 26. Now that it has been authoritatively determined that a superintendent's approval is necessary for tenure, the consequences for Woods-Brown are clear. Mr. Carter told her more than once that he could not recommend her for tenure.

In light of the fact that Woods-Brown does not have tenure because she was not reemployed after her probationary period and also because the superintendent recommended against her reappointment, it is unnecessary to consider whether length of service should be measured by the passage of months or weeks or by the nearest day on a particular district's calendar.

Order

It is **ORDERED** that the Board's motion for summary decision in its favor is granted.

And further **ORDERED** that the relief requested by Woods-Brown is denied.

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

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

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

May 27, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/4/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 5 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 3749-96
AGENCY DKT. NO. 75-2/96

BERNICE WOODS-BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION DECISION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, as were replies by the respondent Board of Education (Board).

In her exceptions, petitioner renews her contention, which she claims was erroneously ignored by the ALJ, that she acquired tenure by operation of *N.J.S.A.* 18A:28-5(c). She did so, she claims, through being employed for the equivalent of more than three academic years within a period of four academic years as required by statute. Academic years, according to petitioner, are to be uniformly reckoned as thirty months, so that petitioner acquired tenure by virtue of having performed her duties on February 1, 1996 and, thus, having been employed for thirty months and one day.

In reply, the Board urges acceptance in full of the initial decision, but argues that, even accepting petitioner's stance that *N.J.S.A.* 18A:28-5(c) controls the present inquiry in its entirety, petitioner did not acquire tenure because she was not employed for the requisite number of days based on the academic calendar of the district during the years in question.

Upon review, the Commissioner concurs with the ALJ, for the reasons well expressed in the initial decision, that the State Board's analysis in *Martucci, supra,*

controls this matter in its entirety. Notwithstanding any differences in the manner of calculating the length of an academic year for purposes of tenure acquisition pursuant to *N.J.S.A.* 18A:28-5(c), the *Martucci* analysis clearly requires a valid offer of reemployment as a condition precedent to the granting of tenure under *any* provision of 18A:28-5. Thus, the ALJ did not err in finding it unnecessary to reach to petitioner's specific contentions regarding the precise length of an academic year when applying 18A:28-5(c).

Accordingly, for the reasons expressed therein, the initial decision of the Office of Administrative Law dismissing the petition of appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 10, 1997
DATE OF MAILING JULY 10, 1997

361-97

EDU #3749-96
C # 361-97
SB # 67-97

BERNICE WOODS-BROWN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 10, 1997

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nicolas Celso, III, Esq., of Counsel)

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

December 3, 1997

Date of mailing DEC 05 1997

362-97

IN THE MATTER OF THE TENURE	:	
HEARING OF CYNTHIA JOHNSON,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
_____	:	

JULY 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11315-96

AGENCY DKT. NO. 461-10/96

IN THE MATTER OF THE TENURE HEARING OF CYNTHIA JOHNSON, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Cherie L. Maxwell, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Claudine M. Liss, Esq., for respondent

Record Closed: May 22, 1997 Decided: May 27, 1997

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

This matter was transmitted to the Office of Administrative Law (OAL) on September 1, 1996, for hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 27, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/4/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 5 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

CLAUDINE M. LISS, ESQ.
11A PATERSON AVENUE
LITTLE FALLS, NEW JERSEY 07424
(201) 890-1819
Attorney for Repondent

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
MAY 22 1 31 PM '97

BEFORE THE OFFICE OF
ADMINISTRATIVE LAW
DOCKET NO.: EDU 1131596

IN THE MATTER OF THE TENURE HEARING OF CYNTHIA JOHNSON	STIPULATION OF SETTLEMENT

This matter having been brought before the Court upon joint application of Cherie L. Maxwell, Esquire, Sills, Cummins, Zuckerman, attorney for State Operated School District of the City of Newark (hereinafter ~~State~~ District) and Claudine M. Liss, Esquire, attorney for Cynthia Johnson, and

It appearing, subject to review and approval by the Commissioner of Education that this matter in dispute has been resolved by agreement between the parties, the following items are agreed upon:

1. Cynthia Johnson agrees to tender her resignation from employment with the State Operated School District of the City of Newark effective upon approval of this settlement by the Commissioner.

2. Cynthia Johnson has already returned to the State Board of Examiners any and all teaching certificates in her possession which have been issued to her and she has already informed the State Board of Examiners that she requests to have her name removed from the records of those certified to teach in the State of New Jersey.

3. Cynthia Johnson agrees to waive her rights, if any, to salary under N.J.S.A. 18A:6-14.

4. In light of the agreements by Ms. Johnson contained in paragraphs 1,2, and 3 above, the ~~State~~ District acknowledges that settlement of this case is in the public interest notwithstanding the nature of the charges in that it forecloses Ms. Johnson from being a teacher in New Jersey in the future, and avoids the costs attendant to litigation which the ~~State~~ District might have to bear.

5. This Agreement constitutes the Full Agreement between the parties and is subject to approval by the State District Superintendent and Commissioner of Education.

We hereby consent to the form and entry of the within stipulation of settlement:

FOR THE EMPLOYEE

Cynthia B. Johnson
Cynthia Johnson

Dated: April 8, 1997

Claudine M. Liss
Claudine M. Liss, Esq.
Attorney for Cynthia Johnson

Dated: April 8, 1997

FOR THE STATE OPERATED SCHOOL DISTRICT OF NEWARK

Beverly L. Hall
Dr. Beverly L. Hall
State District Superintendent

Dated: 4/30/97

Hope R. Blackburn
Hope R. Blackburn
Senior Associate Counsel

Dated: 4/30/97

OAL DKT. NO. EDU 11315-96
AGENCY DKT. NO. 461-10/96

IN THE MATTER OF THE TENURE	:	
HEARING OF CYNTHIA JOHNSON,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *(In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846.) The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

* The Commissioner has confirmed that on June 19, 1997, the State Board of Examiners took action to revoke respondent's certification.

JULY 10, 1997
DATE OF MAILING JULY 10, 1997

363-97

363-97 DHP-B

IN THE MATTER OF THE DISQUALI- :

FICATION FROM SCHOOL : COMMISSIONER OF EDUCATION

EMPLOYMENT OF B.D.W. : DECISION

:

SYNOPSIS

School bus driver appealed his disqualification from school employment pursuant to criminal record check.

Having reviewed the testimony and documents admitted into evidence, the ALJ concluded that appellant affirmatively demonstrated rehabilitation. ALJ ordered that appellant was not disqualified from employment as a school bus driver.

Commissioner adopted findings and determination in initial decision as his own, noting there was no cause to question the ALJ's assessment of petitioner's credibility. Thus, petitioner was deemed qualified for school employment as a school bus driver.

JULY 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 614-97

AGENCY DKT. NO. DHP #101-96

BOBBY D. WILLIAMS,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Bobby D. Williams, petitioner, pro se

New Jersey State Department of Education, respondent, appearing pursuant to N.J.S.A. 1:1-5.6(a)

Record Closed: March 19, 1997 Decided: May 2, 1997

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

This matter concerns the appeal of the petitioner, Bobby D. Williams, from his disqualification from employment as a school bus driver pursuant to N.J.S.A. 18A:6-7.1, and 18A:39-19.1.

By letter dated December 6, 1996, the Department of Education (Education) determined that the petitioner was disqualified from employment as a school bus driver (R-7). The petitioner

filed an appeal and on February 4, 1997, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing took place on March 19, 1997, and the record closed on that date.

FINDINGS OF FACT

I **FIND** the facts in this matter are not in dispute.

In 1996, the petitioner got a job as a school bus driver with Stout's Bus Service, Inc., and he was terminated when the company was informed by the Department of the petitioner's disqualification (R-8, R-10).

Pursuant to N.J.S.A. 18A:6-7.1 and 18A:39-19.1, school bus drivers are subject to a criminal history record check. Through this check, the Department was informed that the petitioner was arrested and convicted for the possession of a controlled dangerous substance on six occasions between May 1982 and December 1987. For the first five convictions, he was fined and sentenced to the Mercer County Correctional Center and/or put on probation (R-2). For the December 1987 conviction, he was sentenced to the New Jersey State Prison for four years and was fined $1,580.00 (R-2).

By letter dated December 6, 1996, the Department notified the petitioner that its check revealed a criminal record, and gave the petitioner the opportunity to challenge the accuracy of the criminal record or to establish rehabilitation (R-7).

In response to the Department's letter, the petitioner admitted the convictions but argued that he has been rehabilitated (R-3). The petitioner sent to the Department a number of letters to support his representation of rehabilitation (R-5, R-6, R-16, R-17, R-18).

At the hearing, Mr. Williams stated that he is thirty-five years old, married and supports their combined family of five children. Mr. Williams stated that prior to his December 1997

conviction, he was a drug addict and associated with people who used drugs. Mr. Williams never finished high school and for a while he was a professional boxer. During that period, he was active in sports but described himself as being self-centered and a drug user. According to Mr. Williams, being sent to prison changed his life and he decided to stop using drugs. When he was released from prison in 1990, he lived for a while in a half-way house and worked for the Trenton Times newspaper. Mr. Williams stated that he was on probation for only a short period and was unable to get a letter from his probation officer since his record was closed for too long of a period.

Later, Mr. Williams got a job with Stout's Bus Service, Inc. as a school bus driver. Mr. Williams liked the job and he would like to get another job as a school bus driver.

Stout's Bus Service, Inc. terminated the petitioner (R-8) after it was informed of his disqualification (R-10). On behalf of the petitioner, the company submitted a letter stating that during the few months he worked for the company, it found him to be a punctual, courteous and conscience employee, who was very good with the students (R-4).

Since December 1996, Mr. Williams has been employed as a counselor by the Bo Robinson Education and Training Center (R-19). This is a private facility for drug rehabilitation and his job primarily relates to safety and security. Mr. Williams describes his job duties as being similar to those of a correction officer.

Mr. Williams admitted that he used drugs for a short period after his release from prison and that he started attending a rehabilitation program. Mr. Williams did not complete the program and he has not used illegal drugs since 1991. He attributes his "cure" to God. Mr. Williams started to go to church to pray, and he no longer has any desire to use drugs. Mr. Williams stated that recovering drug addicts have to be careful since they can be tempted to resume taking drugs but since he has been "delivered" from drugs, he can and does work with addicts without experiencing any desire to use drugs.

Mr. Williams is an assistant to the pastor of the Trenton Church of Christ of the Apostolic Faith, Inc. and is a preacher at the church. He also sings in the church choir, is the church's

radio/electronic technician, oversees the church's weekly radio broadcast, and is the president of the young people's group.

According to Mr. Williams, he now tries to help others and to encourage addicts to stop using drugs.

Elder Corneluis Morrow, the pastor of the Trenton Church of Christ of the Apostolic Faith, testified and submitted a letter (R-6), on behalf of the petitioner. Elder Morrow has been the pastor of the church for 15 years and he meet the petitioner while he was using drugs. Elder Morrow got to know Mr. Williams better after he started attending church and he stated that the Lord saved Mr. Williams by helping him overcome his drug addiction. Elder Morrow stated that Mr. Williams is very active in church activities, that he is now a good person and that he no longer uses drugs.

In addition, a number of people active in the church submitted letters attesting to Mr. William's good character and honesty (R-5, R-16, R-17, R-18), including his wife (R-17), and his sister-in-law (R-16).

CONCLUSION OF LAW

Pursuant to N.J.S.A. 18A:6-7.1(e), a person with a criminal record will not be disqualified from being a school bus driver if said person shows clear and convincing evidence of his or her rehabilitation. This section sets forth a number of factors to be considered in determining whether the person has affirmatively demonstrated rehabilitation. These factors are:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

(6) Whether the offense was an isolated or repeated incident;

(7) Any social conditions which may have contributed to the offense;

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

Having reviewed the testimony and the documents admitted into evidence, I **CONCLUDE** that the petitioner has affirmatively demonstrated rehabilitation.

Although Mr. Williams has several dug convictions, his criminal activity occurred more than six years ago, and he has had no arrests or convictions since then. All of his convictions occurred while Mr. Williams was using drugs and associating with people who also used drugs. Mr. Williams has successfully changed his life style and he no longer uses drugs. Since his convictions, the petitioner has married, financially supports his family, and is now a responsible member of his church and community.

Therefore, I **ORDER** that the petitioner is not disqualified from employment as a school bus driver.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 2, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

May 6, 1997
DATE

D'Ventavacates
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 7 1997
DATE

Barbara A Harnett
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

R-1 Letter from Deborah N. Antanaitis to Bobby D. Williams, dated January 31, 1997

R-2 Letter from Carl H. Carabelli to Deborah Antanaitis, dated December 27, 1996

R-3 Letter from Bobby D. Williams to Carl H. Carabelli, dated December 12, 1996

R-4 Letter from Stout's Bus Service, Inc. to Carl Carabelli, dated December 12, 1996

R-5 Letter from James E. Smith, dated September 1, 1996

R-6 Letter from Elder Cornelius Morrow, dated august 19, 1996

R-7 Letter from Carl H. Carabelli to Bobby D. Williams, dated December 6, 1996

R-8 Letter from Stout's Bus Service, Inc. to Carl H. Carabelli, dated December 11, 1996

R-9 Documents regarding petitioner's criminal convictions

R-10 Letter from Carl H. Carabelli to Stout's Bus Service, Inc., dated December 6, 1996

R-11 Letter from Carl H. Carabelli to Mercer County Criminal Case Management, dated December 9, 1996

R-12 Letter from Carl H. Carabelli to the Trenton Municipal Court, dated December 9, 1996

R-13 Information regarding the petitioner from the FBI

R-14 Applicant Authorization and Certification signed by Bobby D. Williams

R-15 Letter from Deborah N. Antanaitis to Bobby D. Williams, dated January 9, 1997

R-16 Letter from Irene Harris, dated January 21, 1997

R-17 Letter from Patricia Patterson, dated January 22, 1997

R-18 Letter from Westley Rourk, dated January 23, 1997

R-19 Letter from the Bo Robinson Education and Training Center to Deborah N. Antanaitis, dated January 23, 1997

WITNESSES:

For the Petitioner:

Bobby D. Williams

Elder Cornelius Morrow

For the Respondent:

None

OAL DKT. NO. EDU 614-97
AGENCY DKT. NO. DHP 101-96

IN THE MATTER OF THE DISQUALI-	:	
FICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF B.D.W.	:	DECISION
	:	

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

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusion of the Administrative Law Judge (ALJ) that the within petitioner has demonstrated rehabilitation in accordance with *N.J.S.A.* 18A:6-7.1 and *N.J.S.A.* 18A:39-19.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws. * It is observed that in reaching this decision, the Commissioner had no cause to question the ALJ's assessment of petitioner's credibility, as such assessment is not belied by the record. Moreover, it was the ALJ who had the opportunity to hear petitioner's sworn testimony and to observe his demeanor, so that she was in the optimum position to make such determination.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision as the final decision in this matter. Petitioner is deemed qualified for school employment as a school bus driver.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* In affirming the ALJ's decision, the Commissioner is cognizant that petitioner's last disqualifying offense occurred ten years ago.

JULY 10, 1997
DATE OF MAILING JULY 10, 1997

365-97

365-97

RECORD SEALED

BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DR. EVA SZILLERY AND DR. SHARON CLOVER, MORRIS COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioning Board sought a determination as to whether Respondent Szillery and her child, S.W., were in a homeless state commencing with the school year 1994-95 until the present. Petitioner sought reimbursement for tuition for S.W.'s education.

ALJ concluded that Respondent Szillery was homeless during November and December 1994 following her loss of employment and forced eviction. However, in light of evidence and testimony of the Board's investigator, the ALJ concluded that respondent and her child were not homeless in 1995 until the present and that they were resident and domiciled in Scotch Plains while S.W. attended Madison public schools. ALJ ordered tuition for November and December 1994 be returned to respondent, subject, however, to an offset of sums owed by respondent to the Board. ALJ ordered respondent to pay tuition for her son at the nonresidential tuition rate commencing with January 1, 1995 until such time as S.W. may withdraw or is removed as a Madison public school student, subject to an offset of sums owed by the Board to respondent. ALJ ordered S.W. removed from Madison public schools as a public school student. It is noted that by previous order the ALJ ordered the record sealed.

Commissioner adopted findings and determination of the ALJ as his own.

JULY 11, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11051-95

Agency Dkt. No. 317-8/95

BOARD OF EDUCATION OF THE BOROUGH OF MADISON

Petitioner,

v.

DR. EVA SZILLERY AND DR. SHARON I.R. CLOVER, MORRIS COUNTY SUPERINTENDENT OF SCHOOLS,

Respondents.

Russell J. Schumacher,, Esq., for petitioner
(Rand, Algeier, Tosti, and Woodruff, attorneys)

Dr. Eva Szillery, *pro se*

Arlene Goldfus Lutz, Deputy Attorney General, for respondent,
Dr. Sharon I. R. Clover, Morris County Superintendent of Schools
(Peter G. Verniero, Attorney General of New Jersey, attorney)

Record Closed: February 19, 1997 Decided: May 21, 1997

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

STATEMENT OF CASE

Petitioner seeks a determination as to whether the respondent, Dr. Eva Szillery and her child, S.W., were in a homeless state commencing with the school year 1994-1995 until the present and reimbursement of tuition for S.W.'s education in the Madison School District.

PROCEDURAL HISTORY

By letter dated June 16, 1996, (P-6), respondent, Dr. Sharon I.R. Clover, Morris County Superintendent of Schools, (County Superintendent), advised Dr. Lawrence S. Feinsod, Superintendent of Schools of the Madison Borough School District, that she had received a request for mediation of a dispute between the petitioner, Board of Education of the Borough of Madison (Board), and respondent, Dr. Eva Szillery (Dr. Szillery), regarding whether Dr. Szillery was homeless during the 1994-95 school year and whether the Board should be required to reimburse her for two (2) months of non-resident tuition which was paid by her for the enrollment of her son, S.W., in the Madison School District.

The County Superintendent issued her determination in a letter dated July 6, 1995, (P-7). The decision stated, in part, as follows:

> Based on the eviction notice of April 15, 1994 and her sworn statement outlining all of the locations where the family stayed during the 1994-95 school year, I have concluded that Dr. Szillery was homeless during the time period for which she paid tuition (November and December, 1994). Therefore, Dr. Szillery's son, S.W., was entitled to be enrolled in the Madison School district without charge, so the tow months of tuition should be returned.
>
> I have further advised Dr. Szillery, through her attorney, that residency must be established prior to the beginning of the 1995-96 school year, so that a determination can be made as to the school district her son will attend. Madison has made a reasonable accommodation for the entire 1994-95 school year but cannot be expected to continue that arrangement. . .

On or about August 8, 1995, the Board filed a petition with the Commissioner of Education seeking a reversal of the portions of the County Superintendent's decision which determined that Dr. Szillery was homeless during the 1994-95 school year and that S. W. was entitled to attend the Madison Public Schools without the payment of tuition. The Board's petitioner also sought an order that Dr. Szillery's pay tuition in the amount of $3,696 for the balance of the 1994-95 school year (January through June, 1995).

Following a telephone conference on February 26, 196 with the parties, the Administrative Law Judge issued a Prehearing Order on March 11, 1996.

By Order of April 1996, leave was granted for the Board to submit its Amended Petition, which provided for a Third Count challenging Dr. Szillery's continuing claim that she was homeless and also sought tuition from Dr. Szillery for S.W.'s attendance in the Madison Public Schools during the 1995-96 school years and any subsequent school years.[1] On May 30, 1996, the Board withdrew paragraph 8 of the Third Count of the Amended Petition.

Upon the application by the Board, on July 15, 1996 a hearing was held to compel Dr. Szillery to answer certain interrogatories, provide more specific answers to certain interrogatories and provide copies of documents requested by the Board. The Order to Compel Discovery, issued July 26, 1996, which incorporated the ruling issued from the bench, set forth in detail the responses and documents required of Dr. Szillery. That Order stated that failure to comply would result in sanctions pursuant to *N.J.A.C.* 1:1-10.5, including: (1) suppression of defenses to petitioner's claim; (2) exclusion of

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[1] Counsel for the respondent, County Superintendent, in her March 29, 1996 letter advised that there was no objection to petitioner's motion to file an amended petition, but added a caveat:

> If the court finds that Dr. Clover's decision that Dr. Eva Szillery was homeless was incorrect, so that Dr. Szillery must pay tuition to Madison for her child, Dr. Clover has no objection to the court then finding that Dr. Szillery in addition owes tuition for the 1995-96 school year. If, however, the Court determines that Dr. Clover was correct that Dr. Szillery was homeless at the time she made her decision, then the Board is not entitled to tuition for the 1995-96 school year. The Board cannot seek in the first instance a determination from this court that at some time after Dr. Clover's decision Dr. Szillery was whether she is no longer homeless as defined by law must be addressed initially by Dr. Clover, and not by this Court.
>
> The issue on appeal in this matter is whether Dr. Clover's determination of July 1995 was correct. Should the Board wish a further determination regarding Dr. Szillery's status and whether it has changed since July 1995, Dr. Clover is willing to review any documents provided to her on the question.

In her August 29, 1996 letter, the County Superintendent advised counsel for the Madison Board of Education:

> I am in receipt of the Madison Board of Education's request for me to resolve a homeless dispute between Dr. Eva. Szillery and the Board. I have been advised by legal counsel that because of pending litigation on this same matter, which the Board initiated, I cannot make a determination on a new request at this time. (P-13)

Whatever reservation may have been intended by the County Superintendent's caveat to its acquiescence in the amended petition will not be directly affected by this Initial Decision, which is a recommended decision to the Commissioner of Education.

evidence by Dr. Szillery; (3) imposition of costs or reasonable expenses; and (4) other case-related action.

Dr. Szillery appealed that Order to the Commissioner of Education, who declined to grant the request for interlocutory review, finding that the request was untimely.

Dr. Szillery did not comply with that discovery order, but subsequently filed a motion "requesting confidentiality" of certain information. An Order was issued on October 23, 1996, which granted Dr. Szillery's request, in part, and directed her to comply with the discovery order by November 6, 1996.

Dr. Szillery did not comply with the discovery order and, upon application by the Board on November 20, 1996, the Administrative Law Judge issued an Order Imposing Sanctions. The sanctions imposed by Order were:

1. Any defenses or claims by respondent, Dr. Eva Szillery, shall be suppressed.

2. Any evidence on behalf of respondent, Dr. Eva Szillery, shall be excluded.

Dr. Szillery's request for interlocutory review was accepted by the Commissioner on December 12, 1996 and, on December 20, 1996, the Commission affirmed the order imposing sanctions.

Hearings on the merits concluded on December 6, 1996. The parties were granted leave to file written posthearing submissions.

Dr. Szillery's request, dated January 4, 1997, that additional hearings be scheduled for her to call additional witnesses to testify was denied on the basis that the order imposing sanctions precluded the presentation of evidence on her behalf.

Following requests by an individual, not directly associated with this matter, for transcripts of the proceedings and other related information, on February 14, 1997, the Administrative Law Judge, *sua sponte*, issued an Order Sealing the Record.

The time within which this Initial Decision was to be filed was extended by an Order of Extension.

FACTS

In September 1993, Dr. Szillery and her son, S.W., were domiciled in Madison where S.W. was enrolled in public school as a second grade pupil.

During April 1994, Dr. Szillery and S.W. were evicted from their residence by Order of the Morris County Superior Court. S.W. continued as a Madison School student. In September 1994, Dr. Lawrence Feinsod the Superintendent of Schools for the Madison Public School District (Madison Superintendent) was informed that S.W. no longer resided within Madison.

After discussing this with Dr. Szillery, the Madison Superintendent granted permission for S.W. to continue in the Madison public schools as a tuition student for the remainder of the 1994-95 school year, at a prorated tuition of $4,928 or eight monthly payments of $616. Dr. Szillery paid $664 in November 1994. In December, she paid $571 tuition which reflected the November 1994 overpayment of $45.

Additional tuition payments were not received and the Board advised Dr. Szillery by its February 10, 1995 letter that unless payment for January was received by February 27, 1995, S.W. would not be permitted to continue to attend school. (P-4)

Letters dated February 16, 1995 and February 17, 1995 were sent to Dr. Szillery by an attorney on behalf of the Board demanding payment of the January and February

tuition payments and advising that unless paid immediately educational services for S.W. would be discontinued effective February 27, 1997. (P-4, P-5).

The Madison Superintendent received a March 8, 1995 letter from an attorney representing Dr. Szillery in a wrongful discharge and discrimination matter. The attorney stated that Dr. Szillery's discharge left her unable to pay her rent in Madison, and she became homeless. The attorney stated that since the eviction, Dr. Szillery and her children were in temporary housing situations and were presently temporarily in Scotch Plains, but had never changed their domicile from Madison (J-3).

No further tuition was paid and the dispute continued with exchanges of correspondence including affidavits by Dr. Szillery and other supporting documents.

Dr. Szillery also contended that her family was homeless at the time that she paid tuition in November and December 1995 and was, therefore, entitled to reimbursement.

On June 14, 1995, Dr. Szillery left a telephone message with the office of the County Superintendent requesting that she mediate the tuition payment dispute (J-22).

The County Superintendent notified the Superintendent of Schools of the request to mediate Dr. Szillery's request that she be reimbursed for the tuition payments for November and December 1994. The County Superintendent requested that she be provided information documenting the reason it was determined that Dr. Szillery was not homeless in November and December 1994, when she paid tuition.

The Board responded through its attorney who enumerated reasons why the Board believed that Dr. Szillery was not homeless. (J-6) Upon review of the matters submitted on behalf of Dr. Szillery and the Board, on July 6, 1995, the County Superintendent advised the Madison Superintendent that she found for Dr. Szillery:

> Based on the eviction notice of April 15, 1994 and her sworn statement outlining all of the locations where the family stayed during the 1994-95 school year, I have concluded that Dr. Szillery was homeless during the time period for which she paid tuition (November and December, 1994). Therefore, Dr. Szillery's son, [S.W.], was entitled to be enrolled in the Madison School District without charge, so the two months of tuition should be returned.
>
> I have advised Dr. Szillery, through her attorney, that residency must be established prior to the beginning of the 1995-96 school year, so that a determination can be made as to the school district her son will attend. Madison has made a reasonable accommodation for the entire 1994-95 school year but cannot be expected to continue that arrangement. As always, I appreciate your cooperation and look forward to the resolution of this difficult situation. (P-7).

The Board filed the initial petition in this matter before the Commissioner and advised Dr. Szillery that S.W. could continue in the Madison public school system, but that, should it be determined that her family was not homeless, she would be expected to pay tuition for the 1995-1996 school year, as well as tuition that she may owe for the 1994-1995 school year . (P-8).

SANCTIONS

Remedies for failure to comply with discovery requirements should be proportionate to the nature and breadth of the failure. *Brown v. Mortimer*, 100 *N.J. Super.* 395 (App. Div. 1968).

When a party, who refused to comply, is specifically ordered to answer interrogatories more fully, but refuses to do so, severe sanctions, including dismissal with prejudice, may be appropriate. *See, Zimmerman v. United Service Auto.*, 260 *N.J. Super.* 368 (App. Div. 1992).

The sanctions imposed against Dr. Szillery, were that any defenses or claims would be suppressed and that she could not introduce evidence. Notwithstanding those sanctions, Dr. Szillery was permitted to participate in the hearing and to cross examine witnesses called by the other parties. Additionally, she was permitted to

submit argument by her written summation, which has been considered and is part of the record.

Inasmuch as the information sought in discovery, which Dr. Szillery refused to produce, would be expected to represent or result in evidence relevant to the issue of homelessness, it is appropriate for the Administrative Law Judge to draw adverse inferences against Dr. Szillery in those respects. *Interchemical Corp. v. Uncas Printing & Finishing Co.*, 39 *N.J. Super.* 318, 328 (App. Div. 1956).

EVIDENCE PRESENTED

Dr. Szillery is a college level instructor who received her doctoral degree from Eotvos Lorand University, Budapest, Hungary. She has taught at the County College of Morris, Rutgers University and other universities and colleges outside of New Jersey.

It was shown that for 1994 she received from the County College of Morris $3,800 and $4,231 in child support, a total of $8,575.88. For 1995 she received $27,320.24 from Rutgers University and $5,507.95 in child support, a total of $32,828.19. During 1996, Rutgers University paid her $23.659.05 through August 23, 1996 and child support through October 31, 1996 was $4,136.30, a total of $27,795.35.

Robert Calcagno, who described himself as an investigator,[2] testified that on November 21, 1996 he conducted a surveillance of Dr. Szillery and S.W. He was at the Central Avenue School attended by S.W. When school let out for the day he observed him enter a silver Datsun driven by Dr. Szillery who proceeded to a local supermarket which she and S.W. entered. They returned to the Datsun with a full bag of groceries and drove to a blue ranch style house in Scotch Plains where Dr. Szillery

[2] Following the hearing Dr. Szillery produced a January 7, 1997 letter from the New Jersey State Police stating that its Private Detective Unit did not show that private detective licenses had been issued to Robert Calcagno or to Michael Salzbach whose report of his surveillance of June 19, 1996 was marked as Exhibit P-21 for identification, but which was not accepted into evidence upon the objection of Dr. Szillery. Mr. Calcagno was cross-examined by Dr. Szillery.

pulled into the driveway and then suddenly backed out forcing him to back down an unfinished one lane road. After they left he knocked on the door of the house with the driveway she had pulled into. The door was locked and no one answered. There were cut out pictures and decorations with autumn themes. Dr. Szillery and S.W. arrived back about 6:30 p.m. and, after unlocking the rear door, brought the bag of groceries inside. Lights went on in the house. Between then and 8:00 p.m., when he ended the surveillance, no one else entered.

When Dr. Szillery backed up she noticed him and they did speak. He told her he was looking for another family. He could not recall the number on the house.

Other nearby buildings were boarded up, the one Dr. Szillery and S.W. entered appeared to be lived in.

The Board introduced other evidence tending to show that the Scotch Plains address was the residence of Dr. Szillery and S.W. The 1996-1997 Bell Atlantic White Pages contain a listing at that address in the name of Dr. Szillery's daughter, a student at Drew University (P-15). Records provided by Bell Atlantic reflect that there was continuous service since May 1994 (P-16). That same number is recorded as S.W.'s emergency number on cards on file at the Central Avenue School (P-10).

Public Service Electric & Gas Company records reflect service in the name of Eva Szilleiy (sic) at that address since May 17, 1994 (P-17). Elizabethtown Water Company records show regular consumption of water at that address. (P-18).

DISCUSSION

Action by Dr. I. R. Clover, Morris County Superintendent of Schools

When the County Superintendent was called upon to resolve the homelessness of S.W. she had to determine whether S.W. was homeless as defined by *N.J.A.C.* 6:3-

8.3. In particular, Dr. Szillery relied upon the condition of homelessness described by *N.J.A.C.* 6:3-8.3 that a pupil is homeless if he or she is the child of a homeless family which is out of necessity living with relatives or friends.

The County Superintendent provided opportunity for the Board and Dr. Szillery to provide information relevant to the claimed homelessness.

Included in the information submitted was the loss of employment by Dr. Szillery, the eviction for failure to pay rent and an affidavit by Dr. Szillery listing the several locations she and S.W. stayed for the year following their eviction.

The County Superintendent concluded that Dr. Szillery was homeless during November and December 1994 when she paid tuition for S.W. and that Dr. Szillery was entitled to return of the tuition paid by her.

Although there was other evidence introduced in these proceedings which was not available to the County Superintendent, she gave full opportunity to the Board to submit information contrary to Dr. Szillery's claim of homelessness (P-6). Inasmuch as the school district directly concerned with the issue of homelessness was solicited to provide information why it believed that Dr. Szillery was not homeless in November and December 1994, the Board's suggestion that the County Superintendent had the independent obligation to investigate the veracity of the matters presented is rejected.

Certainly the loss of employment and the following forced eviction gave strong credence to the claim of homelessness asserted by Dr. Szillery.

The decision of the County Superintendent was not arbitrary, capricious, nor unreasonable. That decision relating to the state of homelessness during November and December 1994 shall be affirmed.

1995 TO THE PRESENT

Although the Board was denied discovery of many documents in the possession or under the control of Dr. Szillery, it produced substantial evidence proving that Dr. Szillery and S.W. were living in a separate residence and that their homelessness had ended at least by May 1994.

Despite the attempted impeachment of the testimony of investigator Calcagno, his testimony that Dr. Szillery and S.W. appeared to be in residence at the house in Scotch Plains is bolstered by independent evidence which also shows that the house has been in continual use as a residence since late Spring 1994.

Dr. Szillery is a highly educated college instructor with several published articles and professional works.

While the total income for the years in question may have been relatively modest, it was certainly sufficient to maintain the nature of the premises described by Mr. Calcagno.

Electric service in the name of Dr. Szillery was provided by Public Service Electric and Gas to the Scotch Plains address. Several hundred dollars of services were provided and paid for on a regular basis. A telephone number in the name of Dr. Szillery's daughter who attends a New Jersey college, is for that same address.

The evidence presented shows that Dr. Eva Szillery and S.W. were not homeless in 1995 until the present and that they were resident and domiciled in Scotch Plains while S.W. attended Madison Public Schools.

CONCLUSION

From January 1, 1995 until the present, S.W., the son of Dr. Eva Szillery, was not entitled to a public education in the Madison School District and that Dr. Eva Szillery, mother of S.W., is responsible for tuition at the non-resident rate for the Madison School District.

ORDERS

It is **ORDERED** that the decision of Dr. Sharon I. R. Clover, Morris County Superintendent of Schools, that for the months of November and December 1994, Dr. Szillery was homeless and that tuition paid by her for her son should be returned is and shall be **AFFIRMED**.

It is **ORDERED** that the Board of Education of the Borough of Madison shall pay to Dr. Eva Szillery the amount of tuition paid by her on behalf of her son for November and December 1994, subject, however, to an offset of sums owed by Dr. Eva Szillery to the Board of Education of the Borough of Madison.

It is **ORDERED** that Dr. Eva Szillery pay to the Board of Education of the Borough of Madison, tuition for her son, S.W., at the non-resident tuition rate, commencing with January 1, 1995 until such time as S.W. may withdraw or is removed as a Madison Public School student, subject, however, to an offset for the sums owed by the Board of Education of the Borough of Madison to Dr. Eva Szillery.

It is **ORDERED** S.W. be removed from Madison Public School District as a public school student.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 21, 1997
DATE

Sebastian Gaeta
SEBASTIAN GAETA, JR., ALJ

Receipt Acknowledged:

May 28, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 2 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

SG/cb/dgi/mh

INDEX

PETITIONER'S EXHIBIT LIST:

P-1 Madison Public School's emergency card for S.W. dated September 7, 1994

P-2 November 29, 1995 [sic] letter of Dr. Lawrence S. Feinsod, Superintendent of Schools, Madison Public School District to Dr. Eva Szillery

P-3 February 10, 1995 letter of Michael M. Hayser, Business Administrator, Madison Public School District to Dr. Eva Szillery

P-4 February 16, 1995 letter of David B. Rand, Esq. to Dr. Eva Szillery

P-5 February 17, 1995 letter of David B. Rand, Esq. to Dr. Eva Szillery

P-6 June 16, 1995 letter of Dr. Sharon I. R. Clover, County Superintendent of Schools to Dr. Feinsod

P-7 July 6, 1995 Letter of Dr. Clover to Dr. Feinsod

P-8 Letter of David B. Rand, Esq. to Dr. Eva Szillery

P-9 Madison Public Schools emergency card for S.W. dated September 6, 1995

P-10 Madison Public Schools emergency card for S.W. dated September 3, 1996

P-11 August 28, 1996 letter of Russell J. Schumacher, Esq. to Dr. Eva Szillery

P-12 August 29, 1996 letter of Dr. Clover to Mr. Schumacher

P-13 Memorandum of Michael Hayser to Dr. Feinsod dated November 25, 1996

P-14 Portion of interrogatories propounded to Dr. Szillery and partial answers

P-15 Plainfield-Somerville Bell-Altantic telephone book listing for April 1996

P-16 May 9, 1996 letter of Russell J. Schumacher, Esq. to Bell-Atlantic New Jersey with subpoena attached

P-17 Certification of Denise S. Hofbauer, Esq. with records of the PSE&G Company attached

P-18 Certification of Edward F. Cash with records of the Elizabethtown Water Company attached

P-19 December 5, 1996 letter of Ralph England, scheduling coordinator County College of Morris to Russell J. Schumacher, Esq. with documents relating to the employment of Dr. Szillery

P-20 Child support records of Lancaster County Pennsylvania Domestic Relations Section for 1994-91996 plaintiff Eva Szillery, defendant Paul Wheaton

P-21 Investigative report of Michael Salzbach dated June 19, 1996 [not admitted into evidence]

P-22 Curriculum vitae for Dr. Eva J. Szillery [remainder of the exhibits not admitted into evidence]

JOINT EXHIBITS

J-1 July 6, 1995 letter of Dr. Sharon I. R. Clover, Morris County Superintendent to Vincent Jesuele, Esq.

J-2 June 27, 1995 letter of Vincent Jesuele, Esq. to Dr. Sharon Clover

J-3 March 8, 1995 letter of Vincent Jesuele, Esq. to Dr. Lawrence Feinsod

J-4 March 27, 1995 letter of Vincent Jesuele, Esq. to David B. Rand, Esq. with copy of affidavit signed by Dr. Eva Szillery attached

J-5 Handwritten note Dr. Szillery to Dr. Clover enclosing eviction notice and affidavit

J-6 June 20, 1995 letter of David B. Rand, Esq. to Dr. Clover

J-7 June 20, 1995 letter of Vincent Jesuele, Esq. to David B. Rand, Esq.

J-8 June 20, 1995 letter of David B. Rand, Esq. to Vincent Jesuele, Esq.

J-9 June 2, 1995 letter of David B. Rand, Esq. to Vincent Jesuele, Esq.

J-10 May 23, 1995 letter of Vincent Jesuele, Esq. to David B. Rand, Esq.

J-11 March 7, 1995 letter of David B. Rand, Esq. to Dr. Eva Szillery

J-12 February 25, 1995 memorandum of David B. Rand, Esq. to Dr. Szillery

J-13 March 19, 1994 memorandum of Dr. Eva Szillery to David B. Rand, Esq.

J-14 February 24, 1995 letter of Dr. Eva Szillery to David B. Rand, Esq., documents of the Lancaster County Domestic Relations office attached thereto

J-15 Facsimile from Bill Hedrick to David B. Rand, Esq. enclosing emergency cards and registration forms

J-16 February 17, 1995 letter of David B. Rand, Esq. to Dr. Eva Szillery

J-17 February 10, 1995 letter of Michael M. Hayser to Dr. Eva Szillery

J-18 Telephone message from Dr. Saul Magzamen of Rutgers regarding employment of Dr. Eva Szillery and receipt for certified mail form sent to Dr. Eva Szillery

J-19 November 29, 1995 letter of Dr. Lawrence Feinsod to Dr. Eva Szillery

J-20 Madison Board of Education bill for 1994-1995 tuition for S.W. addressed to Dr. Eva Szillery

J-21 Non-resident tuition agreement signatures of the Board Secretary and Superintendent of Schools

J-22 June 16, 1995 letter of Dr. Sharon Clover to Dr. Eva Szillery

J-23 June 16, 1995 letter of Dr. Sharon Clover to Dr. Lawrence Feinsod

J-24 June 14, 1995 letter of Dr. Szillery to Dr. Doris Smith, County of Morris Department of Education with several enclosures attached

J-25 June 6, 1995 Appeal of the decision of the Madison Public Schools by Dr. Eva Szillery addressed to Dr. Doris Smith with several documents attached

COURT EXHIBIT

C-1 January 4, 1997 letter of Dr. Eva Szillery to the Administrative Law Judge requesting leave to reopen the matter and conduct a hearing with the letter of Russell J. Schumacher to Dr. Szillery dated January 31, 1997 attached

POST-HEARING SUBMISSIONS

Post-hearing brief, petitioner Board of Education of the Borough of Madison

Post-hearing submission and argument by Dr. Eva Szillery

Post-hearing brief of the County Superintendent of Schools, Dr. Sharon I. R. Clover

February 13, 1997 letter of Dr. Eva Szillery to the Administrative Law Judge

OAL DKT.NO. EDU 11051-95

AGENCY DKT.NO. 317-8/95

RECORD SEALED

BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DR. EVA SZILLERY AND DR. SHARON CLOVER, MORRIS COUNTY SUPERINTENDENT OF SCHOOLS,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions for the Board and Respondent Szillery, and replies thereto, were timely filed in accordance with *N.J.A.C.* 1:1-18.4.[1]

Respondent Szillery's general contention is that she and her son, S.W., were in 1995, and continue to be, homeless and, therefore, entitled to a free public education in the Board's schools. In that these exceptions generally recast and reiterate arguments raised throughout this litigation and considered by the Administrative Law Judge (ALJ), they are not summarized in detail herein.

In reply, the Board refutes each of the arguments raised by Respondent Szillery and contends the points raised by her were thoroughly addressed by the ALJ and, thus, the Commissioner should adopt the determination of the ALJ finding that she is not homeless. The

[1] Although the Board's reply exceptions were filed on June 30, 1997, more than five days from the date the Commissioner received Respondent Szillery's exceptions, such replies were timely filed in that Respondent Szillery sent them via first class mail to the Board while she hand-delivered them to the Commissioner. Further, Respondent Szillery provided no proof that they were faxed or otherwise delivered to the Board.

Board also excepts to the ALJ's finding that Respondent Szillery was homeless for the period encompassing November and December 1994, asserting that the ALJ's ruling is inconsistent with his finding at page 11 of the initial decision that the Board proved that Respondent Szillery and S.W. were not homeless as of May 1994. Thus, the Board seeks an order that her nonresidential tuition obligation extend from November 1994 through the 1996-97 school year.

Respondent Clover notes that the only issue before the ALJ concerning the County Superintendent was whether her decision regarding the determination of Respondent Szillery's homelessness during November 1994 and December 1994 and reimbursement of tuition for that time was arbitrary and capricious, and urges affirmance of the initial decision on that point. She further reiterates that this affirmation should not, in any way, lead the Commissioner to find that Dr. Szillery was homeless for the period from November 1994 through July 1995, in that the "reasonable accommodation" made by the school district is not tantamount to a determination of homelessness for the entire year.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons expressed therein. The Commissioner is satisfied that the ALJ fully considered and correctly rejected the claims presented in Respondent Szillery's exceptions, including her assertions that she was homeless in 1995 until the present and that S.W. is entitled to a free public education in the Board's schools. The Commissioner further concurs with the ALJ's determination that Respondent Szillery was properly deemed homeless by the County Superintendent in November and December 1994, and that no tuition should be charged for this period.

Accordingly, the Commissioner concurs with the decision of the ALJ and orders Respondent Szillery to pay the Board tuition for S.W. at the nonresidential tuition rate, commencing January 1, 1995, until such time as S.W. may withdraw or is removed from the Board's schools, subject to offset by the amounts paid by Respondent Szillery for S.W.'s attendance during November and December 1994, as directed by the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 11, 1997
DATE OF MAILING JULY 11, 1997

365-97

EDU #11051-95
C # 365-97
SB # 68-97

BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	
DR. EVA SZILLERY,	:	STATE BOARD OF EDUCATION
RESPONDENT-APPELLANT,	:	DECISION
AND	:	
DR. SHARON CLOVER, MORRIS COUNTY SUPERINTENDENT OF SCHOOLS,	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, July 11, 1997

For the Petitioner-Cross/Appellant, Rand, Algeier, Tosti & Woodruff (Russell J. Schumacher, Esq., of Counsel)

For the Respondent-Appellant, Dr. Eva Szillery, pro se

For the Respondent, Mary Rubinstein, Deputy Atorney General (Peter Verniero, Attorney General of New Jersey)

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

January 7, 1998

Date of mailing JAN 09 1998

366-97

366-97

PHYLLIS HAMMER, MARIE HOWE , HAZEL JOHNSON, LINDA KLEINMAN, ROSEANNE PSOMAS, CAROLE SHANLEY, RICHARD SIMAKOWICZ, XIOMARA SOTOLONGO, ADA TOLEDO, ALIDA TROCHE, AND EILEEN WURST,	:	
PETITIONERS,		COMMISSIONER OF EDUCATION
V.	:	
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, tenured teachers and attendance officers, challenged Board's decision to freeze their salaries in order to recoup monies allegedly overpaid to them. Petitioners contended such action constituted a withholding of their increments.

Citing *Cerato*, the ALJ concluded that petitioners were not deprived of any rights under the Tenure Employees Hearing Law (*N.J.S.A.* 18A:28-5 and 18A:6-10) by freezing their salaries until the overpayments were recouped. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own. Summary decision was entered in favor of the Board.

JULY 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 1186-97
AGENCY DKT. NO. 565-11/96

PHYLLIS HAMMER, MARIE HOWE,
HAZEL JOHNSON, LINDA KLEINMAN,
ROSEANNE PSOMAS, CAROLE SHANLEY,
RICHARD SIMAKOWICZ, XIOMARA SOTOLONGO,
ADA TOLEDO, ALIDA TROCHE, and EILEEN WURST,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF PASSAIC, PASSAIC COUNTY,
Respondent.

Kathleen A. Naprstek, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Matthew J. Michaelis, Esq., for respondent

Record Closed: May 9, 1997 Decided: June 3, 1997

BEFORE **EDITH KLINGER**, ALJ:

On November 26, 1996, petitioners filed a Petition of Appeal with the Commissioner of Education alleging that respondent, the Board of Education of the City

of Passaic (Board), wrongfully withheld their annual increments and that this constituted a reduction in compensation in violation of *N.J.S.A.* 18A:6-10. On December 19, 1996, the Board filed its answer. On January 10, 1997, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone prehearing conference was held with the parties on April 17, 1997. At this time, consideration was given to the possibility that this matter could be disposed of on the papers. At a second telephone conference, held on April 23, 1997, the parties agreed that respondent would move for summary decision because the material facts in this matter are not in dispute. Respondent's motion was received on April 25, 1997, and the record closed on May 9, 1997, when petitioners' response was received.

UNDISPUTED FACTS

The following material facts are not in dispute:

1. Petitioners Hammer, Howe, Johnson, Kleinman, Psomas, Shanley, Simakowicz, Sotolongo and Wurst are all tenured teachers in the district. Toledo and Troche are tenured school attendance officers in the district.

2. Respondent inadvertently paid the petitioners' salaries for the 1995-1996 contract year in excess of those salaries specified in the salary schedules which are part of the employment agreement.

3. In or about the month of August 1996 and prior to the commencement of the 1996-1997 contract year, the Board adopted a resolution freezing the inadvertently inflated salaries paid to petitioners during the 1995-1996 contract year which were in excess of those salaries specified in the salary schedules of the employment agreement commencing in the 1996-1997 contract year.

4. The relevant employment contract covering this matter became effective on September 1, 1994, and expires on August 31, 1997.

5. Salaries at the incorrect higher level have been and will continue to be frozen at this level until the Board recoups the overpayments in salaries it erroneously made to petitioners.

6. The intent of the respondent's action is to recoup the overpayments by freezing petitioners' salaries at the present level, not to withhold increments or reduce salaries for cause.

7. When the overpayments have been recouped, each petitioner will be restored to his or her appropriate place on the salary schedule so that no actual loss of salary or benefits will result.

THE RELEVANT STATUTES

Pursuant to *N.J.S.A.* 18A:28-5, no tenured teacher or other tenured employee of a school district shall be "dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause," and then only in the manner prescribed by statute. *See also N.J.S.A.* 18A:29-14. *N.J.S.A.* 18A:6-10 provides, in relevant part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who

> may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

RESPONDENT'S MOTION FOR SUMMARY DECISION

The Board argues that, as a matter of law, the method which it employed to recoup the inadvertent salary overpayments made to the petitioners was the correct one to be applied and did not violate any of their statutory tenure rights. Any question of violation of contractual rights is not within the jurisdiction of the Commissioner of Education and may not be pursued in this forum.

Respondent relies upon *Cerato v. Board of Education of the City of Newark*, 94 *N.J.A.R.*2d (EDU) 248. I **FIND** that the facts in *Cerato* are substantially similar to the facts in the present case.

The Board of Education of the City of Newark withheld Cerato's salary and increment adjustments for the 1992-1993 school year because it had inadvertently neglected to withhold his increment for the 1991-1992 year for reasons of discipline. Cerato argued that the Board's action violated his tenure rights under *N.J.S.A.* 18A:28-5 and his rights under *N.J.S.A.* 18A:29-14 because it imposed an impermissible reduction in his compensation. The administrative law judge reached the following conclusions: (1) the freezing of Cerato's salary until the recoupment was complete did not constitute an impermissible reduction in compensation under *N.J.S.A.* 18A:28-5, nor did it contravene *N.J.S.A.* 18A:29-14; (2) Cerato had demonstrated no right, vested or equitable, to salary mistakenly overpaid to him; and (3) the Board measures to recoup the overpayment are part of its obligation to guard public funds. Summary decision was granted in favor of the Board.

The commissioner affirmed the decision of the administrative law judge, stating that the Board did not violate the Tenure Employees Hearing Law, *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:6-10 by freezing Cerato's salary until the recoupment was complete:

> a board's determination to freeze a teacher's salary until it recoups an inadvertent ministerial overpayment does not constitute an unlawful reduction in compensation as envisioned by *N.J.S.A.* 18A:28-5. The latter case makes plain that "*** the appropriate step for a board to take when the issue of erroneous salary level arises is to hold the salary level in place, not to reduce it through deductions."
>
> . . . [N]o deductions of the overpayment to petitioner were ever undertaken. Rather, the Board herein *froze* petitioners' salary . . . .
>
> [94 *N.J.A.R.*2d (EDU) at 250 (citations omitted).]

The State Board affirmed the decision without opinion at 94 *N.J.A.R.*2d (EDU) 422.

Petitioners attempt to distinguish *Cerato* from the present matter by arguing that they, unlike Cerato, immediately sought to correct what they perceived to be a mistake in their salaries. They also argue that the Board did not recoup their overpayments by following the procedures that would apply in the case of disciplinary withholding of increments. I **FIND** that there is no merit to these arguments: the Board is not questioning the timeliness of petitioners' appeal for relief, nor are the recoupments to be equated to disciplinary proceedings. Respondent is simply recovering public money that was inadvertently paid to petitioners which they were not entitled to receive.

I **CONCLUDE** that the holding in *Cerato* is determinative of the outcome of this proceeding. I **CONCLUDE** that petitioners in the present case were not deprived of any rights under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:6-10, by freezing their salaries until the overpayments are recouped. I therefore **CONCLUDE** that petitioners are entitled to no relief and that respondent is entitled to summary decision dismissing petitioners' appeal as a matter of law.

ORDER

It is **ORDERED** that summary decision is **GRANTED** to respondent and the petition herein is **DISMISSED WITH PREJUDICE**.

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

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

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

June 3, 1997
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

6/9/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 1186-97

AGENCY DKT. NO. 565-11/96

PHYLLIS HAMMER, MARIE HOWE , HAZEL JOHNSON, LINDA KLEINMAN, ROSEANNE PSOMAS, CAROLE SHANLEY, RICHARD SIMAKOWICZ, XIOMARA SOTOLONGO, ADA TOLEDO, ALIDA TROCHE, AND EILEEN WURST,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by petitioners in conformance with *N.J.A.C.* 1:1-18.4. No replies were filed by the Respondent Board of Education.

Petitioners' exceptions rely on arguments expressed before the Administrative Law Judge (ALJ) at hearing, arguing that the Board should not be allowed to freeze the salaries of petitioners until such time as it recoups the overpayments it made to petitioners. Petitioners except to the ALJ's reliance on the decision entered in *Cerato*, *supra*, averring it is completely distinguishable from the present situation in that therein petitioner had salary increments withheld for unbecoming conduct, pursuant to *N.J.S.A.* 18A:29-14. The present petitioners contend that they did not silently accept the Board's overpayments but attempted to correct the mistake and should not now be penalized. Further, petitioners note there is no evidence to substantiate that they did anything which would warrant having their increments withheld for inefficiency or other good cause pursuant to *N.J.S.A.* 18A:29-14. Thus, petitioners urge the Commissioner to find that *Cerato* does not dictate that a similar decision be reached in this matter.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that respondent is entitled to summary judgment. There is ample support in case law to sustain the finding that where a board has erroneously overpaid a tenured staff member, it may recoup such overpayments by freezing the staff member's salary without charging such staff member with inefficiency or other just cause, or acting to withhold an increment pursuant to *N.J.S.A.* 18A:29-14. Therefore, the Commissioner finds that the ALJ correctly characterized the intent of *Cerato, supra*, and related case law, in determining that the Board acted appropriately herein. See also *Markot v. East Brunswick Board of Education,* 1989 *S.L.D.* 3043, aff'd New Jersey Superior Court, Appellate Division, December 24, 1990, A-345-89-T5.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL, hereby entering summary judgment in favor of the Board and dismissing the Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 15, 1997
DATE OF MAILING JULY 15, 1997

368-97

368-97

LEAH KARPEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 15, 1997

OAL DKT. NO. EDU 7640-96
AGENCY DKT. NO. 184-5/96

LEAH KARPEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OLD TAPPAN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JULY 15, 1997
DATE OF MAILING JULY 15, 1997

367-97

GALE KENNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

J ULY 15, 1997

OAL DKT. NO. EDU 5411-96
AGENCY DKT. NO. 97-3/96

GALE KENNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JULY 15, 1997
DATE OF MAILING JULY 15, 1997

369-97

369-97

DEBORAH DRISCOLL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 15, 1997

OAL DKT. NO. EDU 8798-96
AGENCY DKT. NO. 398-9/96

DEBORAH DRISCOLL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREEHOLD, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JULY 15, 1997
DATE OF MAILING JULY

371-97

371-97

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board Little Ferry sought Commissioner's declaration that the April 30, 1997 organizational meeting of Respondent Board Ridgefield Park was null and void in that Little Ferry's representative member to this Board, pursuant to N.J.S.A. 18A:38-8.1, was improperly precluded from voting on organizational issues at this meeting, including election of Board officers. Petitioner requested Commissioner to direct a new reorganization; to direct Ridgefield Park to include the vote of the sending district member with regard to organizational issues; and to enjoin Ridgefield Park from excluding the sending district member from voting on any other disputed matter without the consent of the Commissioner.

Having reviewed the parties' arguments and in light of the interpretative clarification of *N.J.S.A.* 18A:38-8.1 provided by the May 30, 1997 decision of the Commissioner entitled *Board of Education of the Borough of Lincoln Park, Morris County v. Board of Education of the Town of Boonton, Morris County, Joy Northrop DeVincenzi, and Walter Angilly,* the Commissioner concluded that Little Ferry's representative to the Ridgefield Park Board, by virtue of her statutorily granted membership on such Board, was entitled to vote in the election of Board officers and other procedural matters attendant to the orderly conduct of Board operations. Thus, Ridgefield Park's impermissible exclusion of its sending district representative Board member from the vote for Board officers at its April 30, 1997 reorganization necessitated a voiding of such reorganization. Commissioner declared the reorganization void and directed the Board to reorganize consistent with his dictates and to confirm the completion of such with the County Superintendent. Citing *Pijeaux* and other relevant cases, the Commissioner concluded that all subsequent actions of the Board and its *de facto* officers were accomplished within the scope of their authority and, as such, there was no basis upon which to invalidate such actions.

JULY 24, 1997

Agency Dkt. No. 149-5/97

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For Petitioner, Ferrara, Turitz, Harraka & Goldberg (Stanley Turitz, Esq.)

For Respondent, Fogarty & Hara (Rodney T. Hara Esq.)

This matter comes before the Commissioner of Education by way of a Petition of Appeal and a Motion for Emergent Relief filed by petitioner, Little Ferry Board of Education (hereinafter "Little Ferry"), on May 13, 1997. Little Ferry requests the Commissioner to declare the April 30, 1997 organizational meeting of respondent, Ridgefield Park Board of Education (hereinafter "Ridgefield Park"), null and void in that Little Ferry's representative member to this Board, pursuant to *N.J.S.A.* 18A:38-8.1, was improperly precluded from voting on organizational issues at this meeting, including the election of Board officers. It asks that the Commissioner, therefore, direct a new reorganization; that Ridgefield Park be directed to include the vote of the sending district member with regard to organizational issues; and that Ridgefield Park, further, be enjoined from excluding the sending district member from voting on any other disputed matter without the consent of the Commissioner. Ridgefield Park filed its Answer to the Petition and

Emergent Relief Motion on May 27, 1997. By letter dated May 28, 1997, the Director of the Bureau of Controversies and Disputes advised the parties that, upon review of the submitted papers in this matter, it appeared that a decision of the type envisioned in this case was not amenable to emergent relief and a subsequent determination on the merits but, rather, was a matter of first impression on an issue of law which would be more appropriately addressed by an expedited determination on the merits. As such, the parties were accorded 10 days from their receipt of the director's letter to submit any additional arguments supporting their respective positions on the merits of this case, and 5 days from their receipt of any submission of their adversary to file replies to such submission. By letter filed June 11, 1997, Respondent Ridgefield Park advised that it would rely on the arguments advanced in its previously submitted brief in opposition to petitioner's application for emergent relief, to support its position on the merits of the within matter. Upon expiration of the allotted time period for the filing of additional arguments, the record in this matter closed on June 12, 1997.[1]

BACKGROUND

The within parties are engaged in a sending/receiving relationship, pursuant to *N.J.S.A.* 18A:38-8, whereby Little Ferry sends its high school students, grades 9 through 12 to Ridgefield Park's High School. Subsequent to the January 1995 enactment of *N.J.S.A.* 18A:38-8.1, which provides that a sending district whose students comprise at least 10 percent of the total enrollment of students in the receiving district shall have a representative on the receiving district's board of education, a representative of Little Ferry was sworn in as a member of the

[1] It is noted that by letter dated June 17, 1997, Petitioner Little Ferry filed a supplementation to its previously submitted brief in support of its arguments on the merits of this matter. Such submission was, subsequently, opposed by Ridgefield Park as untimely. Given the clear timelines established by the director's May 28, 1997 letter and in view of the fact that at no time during this allotted period did Little Ferry request an extension of time within which to file supplementary materials, its submission dated June 17, 1997 will not be considered herein.

Ridgefield Park Board at that body's 1995 reorganization meeting. The matter at issue herein occurred at the April 30, 1997 organizational meeting of Ridgefield Park where, subsequent to the swearing in of the Little Ferry representative, but prior to commencement of voting, the Board discussed the circumstances giving rise to the Little Ferry representative's right to vote, specifically, whether this individual would be permitted to participate in the election of the president and vice-president of the Board, and it moved to conduct a Board vote on this issue. After seeking advice of Board counsel, the motion was defeated by a vote of 5 to 5, and the Little Ferry representative was, consequently, precluded from voting for Board officers.

POSITION OF THE PARTIES

Little Ferry argues that the exclusion of its representative from the vote for Board officers, who possess "powers and authorities which directly impact and affect the education of Petitioner's students including presiding at meetings, appointment of committees and committee chairmen and other administrative functions which naturally devolve upon said officers," (Petitioner's Letter Memorandum at p. 2) is clearly in contravention of petitioner's statutory Board membership rights and "in violation of previous practice and agreements between the parties." (Petitioner's Petition of Appeal, #6, at p. 2) It posits that although *N.J.S.A.* 18A:38-8.1 limits specific voting rights of its representative with respect to "issues confronting the board," the clear language of the statute and subsequent positions of the Commissioner dictate that this representative is, in all other respects, a full member of the Board. As such, it maintains that votes regarding procedural and organizational matters of the Board must include the sending district appointee. (Petitioner's Letter Memorandum at p. 2) Moreover, Little Ferry maintains that this position was, heretofore, recognized as a settled and accepted practice between the

parties in that its representative member has previously been included and permitted to vote for Ridgefield Park Board officers.

Little Ferry further argues that not only was its representative precluded from voting, but such member was not included in the calculation of voting requirements or quorum in direct violation of a Department of Education directive, dated February 22, 1995, stating that "the requirements for a quorum, as well as other voting requirements, must be amended to reflect the new total membership of the board." (*Id.* at p. 3, quoting from Petitioner's Exhibit A, Letter of Peter B. Contini, Assistant Commissioner) As such, Little Ferry asserts that even if it were possible to read *N.J.S.A.* 18A:38-8.1 so narrowly as to support Ridgefield Park's exclusion of the sending district representative from the election of Board officers, "the voting requirements still need to reflect her membership [on] the board." (*Id.*) Consequently, Little Ferry contends that voiding of the April 30, 1997 organizational meeting elections would still be required.

In reply, Ridgefield Park advances that, notwithstanding Little Ferry's contention that its member representative's right to vote for Board officers is "projected" by *N.J.S.A.* 18A:38-8.1, it fails to advance any statutory language in support of this position. (Ridgefield Park's Reply Brief at p. 3) Rather, Ridgefield Park contends that this statutory provision clearly and concisely sets forth the scope of voting rights conferred upon a sending district representative to a receiving district's board. Specifically, it asserts that this provision, on its face, "provides four specific areas in which a designated sending member may vote:

> a. Tuition to be charged the sending district by the receiving district and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;
>
> b. New capital construction to be utilized by sending district pupils;

c. Appointment, transfer or removal of teaching staff members providing services to pupils of a sending district, including any teaching staff member who is a member of the receiving district's central administrative staff; and

d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district. [*N.J.S.A.* 18A:38-8.1]" (*Id.*)

It argues that, pursuant to the canons of statutory construction which require a statute to be interpreted in accordance with its clear, unambiguous language, given that voting for the election of board officers is not a delineated subject matter in the clear, narrow, and specifically detailed list of instances where a sending district representative is entitled to vote, petitioner in this matter was properly excluded from voting. (*Id.* at p. 4)

Ridgefield Park further maintains that this position is also entirely consistent with the legislative history of the statute in that such "elucidates that the purpose for amending *N.J.S.A.* 18A:38-8.1 was to clarify the voting rights conferred to representatives of a sending district on receiving district boards of education." (*Id.*) It posits that because the legislative intent was to avoid confusion with respect to voting rights, "the statute reflects restrictive language that was intended to be narrowly construed." (*Id.*)

With respect to Little Ferry's assertion that the exclusion of its representative violates past accepted practice, Ridgefield Park, while conceding that the representative was permitted to vote for officers at the Board's 1996 organizational meeting, contends that such action was mistakenly undertaken in violation of law. It advances that when the illegality of this practice was brought to its attention by Board counsel at the 1997 organizational meeting, the Board properly complied with the dictates of *N.J.S.A.* 18A:38-8.1 by defeating the motion which would have permitted the Little Ferry representative to vote. It proposes that a prior incident that

is not consistent with the law is not binding upon the Board, citing *Naseef v. Cord, Inc.*, 90 *N.J. Super* 135, 142 (App. Div.), *aff'd*, 48 *N.J.* 317 (1966) as authority for this proposition. (*Id.* at p. 5)

Ridgefield Park next denies Little Ferry's allegation that it failed to comply with quorum and voting requirements at the reorganization meeting. In this regard it proffers

> ***[t]he minutes from the 1997 reorganization meeting indicate that the respondent acknowledged petitioner's representative's membership, in that she was sworn in and her name appears on the roll list of members present and her absence was noted on all motions***. Accordingly, respondent did calculate petitioner's representative into its total membership thereby rendering it a ten member board at the 1997 reorganization meeting.
>
> (Ridgefield Park's Reply at p. 5)

Finally, Ridgefield Park urges that if Little Ferry's requested relief is granted and the Board's 1997 election of officers and other organizational issues are voided, the Board's ability to carry out its functions will be seriously impeded. (*Id.* at p. 7)

COMMISSIONER'S DETERMINATION

Upon review of the parties' arguments advanced in this matter and in light of the interpretative clarification of *N.J.S.A.* 18A:38-8.1 provided by the recently decided matter entitled *Board of Education of the Borough of Lincoln Park, Morris County v. Board of Education of the Town of Boonton, Morris County, Joy Northrop DeVincenzi, and Walter Angilly*, decided by the Commissioner May 30, 1997, I conclude, for the reasons outlined below, that Little Ferry's representative to the Ridgefield Park Board, by virtue of her statutorily granted membership on such Board, was entitled to vote in the election of Board officers and other procedural matters attendant to the orderly conduct of Board operations.

It is observed that Ridgefield Park effectively argues, as did the respondent board in *Lincoln Park, supra,* that the rights of board membership of the sending district representative are controlled by that individual's statutory limitations on voting. I, again, reject this interpretation of *N.J.S.A.* 18A:38-8.1 as unduly restrictive and find that such a circumscription of the representative's board membership rights cannot be reasonably inferred from the plain language of the statute nor is it supported by the legislative history and expressed intent of this provision. (For a comprehensive discussion of the legislative history and intent of *N.J.S.A.* 18A:38-8.1 see *Lincoln Park,* at pp. 9-17.) As was elucidated in *Lincoln Park, N.J.S.A.* 18A:38-8.1 addresses two distinct subjects, it 1) grants the sending district entitlement to membership on the receiving district's board of education as a representative of the sending district, and it 2) designates those matters *before the board* (emphasis added) upon which the representative is eligible to vote. I find that this recognition of the duality of the statute's purpose is key to the understanding and correct application of its directives. Consistent with this finding, it is undeniable that, notwithstanding that the representative of a sending district has limited voting rights on substantive matters which arise before the board, in all other respects such representative, by virtue of the statutory entitlement to a seat on the receiving district board, is empowered to function as a full member of the board. As determined in *Lincoln Park,* these membership rights include entitlement to copies of all information, documents and communications when distributed to other board members, even though these items are in areas falling outside this individual's voting eligibility, along with full deliberative and participatory rights on the merits of extra-statutory matters before the board.

Consonant with the interpretative framework established in *Lincoln Park,* I find and conclude that eligibility for full participation, including voting rights, in those procedural and

organizational matters necessary to ensure the effective operation of the board itself also inures to the sending district representative by virtue of that individual's board membership. Again, subsequent statutory restrictions governing the voting rights of the representative *on substantive issues arising before the board* cannot be superimposed on the separately granted membership rights, thereby depriving this individual of full and effective participation as a board member. As such, Ridgefield Park's impermissible exclusion of its sending district representative Board member from the vote for Board officers at its April 30, 1997 organizational meeting necessitates a voiding of such reorganization. Therefore, Ridgefield Park will be required to reorganize in accordance with *N.J.S.A.* 18A:10-3 and *N.J.S.A.* 18A:15-1, recognizing the full participatory rights of all of its members.[2] [3]

The Commissioner notes, however, that all other Board business conducted at the April 30, 1997 organizational meeting, pursuant to *N.J.S.A.* 18A:10-5, as well as that conducted at subsequent meetings, will be unaffected by the within determination, as disturbing these actions would be contrary to long-established law in this area. In the conducting of such business, the individuals identified as Board President and Vice-President performed as "de facto" Board officers in that "they held office under color of a known election or appointment and their ineligibility was unknown to the public at the time [they acted]." (*Maxine J. Pijeaux v. Board of Education of the City of Orange, Essex County*, 94 *N.J.A.R. 2d* (EDU) 345, 346) As such,

> [It]s members had certainly a color of title, and their actual incumbency was complete....Under these circumstances the acts of

[2] Despite the conclusion mandated in this matter, the Commissioner is persuaded that the actions of Ridgefield Park herein are not attributable to bad faith or ill will but, rather, were taken in a good faith effort to satisfy what appeared to be the dictates of a heretofore uninterpreted statutory provision.

[3] Given the within determination of the Commissioner, it was unnecessary to reach the parties' arguments with respect to voting or quorum requirements at the April 30, 1997 organizational meeting.

> the board, in which third persons are interested, cannot be impugned on the ground that the title of the members is defective. (*Pijeaux,* at 346, quoting *Kimball v. Hendee*, 57 *N.J.L.* 307, 309 (S. Ct. 1894))

(Also see *Lesley Monsees et al. v. Board of Education of the Borough of Bloomingdale, and Theodore Lovell*, 1982 *S.L.D.* 1409; *Claire M. Egan and Basil H. Blair v. Joseph G. Brody et al.*, 1970 *S.L.D.* 153.) The Commissioner, thus, concludes that all subsequent actions of the Board and its *de facto* officers were accomplished within the scope of their authority and, as such, there is no basis upon which to invalidate such actions.

Accordingly, the April 30, 1997 organizational meeting of Ridgefield Park is hereby declared void. The Board is directed to reorganize, consistent with the dictates expressed herein, within 20 days of the date of this decision, and to confirm the completion of this action with the County Superintendent.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 24, 1997
DATE OF MAILING JULY 24, 1997

372-97

372-97

E.R., on behalf of minor child, A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JULY 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12293-95
AGENCY DKT. NO. 430-11/95

E.R., on behalf of minor child, A.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT,
Respondent.

Laurence H. Olive, Esq., for petitioner

Joanne L. Butler, Esq., for respondent
(Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: May 30, 1997 Decided: June 4, 1997

BEFORE **RICHARD McGILL,** ALJ:

E.R. filed a petition with the Commissioner of Education seeking reinstatement of minor child, A.K., into a school of the Board of Education of the South Orange and Maplewood School District pursuant to *N.J.S.A.* 18A:38-1(b). Respondent counterclaims for tuition during any period of ineligibility against E.R., who is A.K.'s cousin, and against L.K., who is A.K.'s father. The matter was transmitted to the Office of Administrative Law on December 8, 1995 for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time

limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 4, 1997
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

6/12/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMIN. LAW
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SCHENCK, PRICE, SMITH & KING
Attorneys at Law
10 Washington Street
P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for Respondent South Orange/
Maplewood Board of Education

EVERETTE RANDOLPH, Petitioner, v. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDUOS-430-11/95 Agency Ref. No. 11985-95 **STIPULATION OF SETTLEMENT**
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, Counterclaimant, v. EVERETTE RANDOLPH and LEROY KINER, Counterclaim Respondents.	

Petitioner Everette Randolph and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, and Counterclaim Respondents Everette Randolph and LeRoy Kiner, herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any

other party's claim.

2. The parties waive any and all claims which were or could have been asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, and specifically release the other parties from any claims arising out of or related to these claims.

3. The pupil A.K. will be permitted to continue to attend District schools so long as she satisfies the statutory criteria set forth in N.J.S.A. 18A:38-1, et seq.

4. As a result of the foregoing, Petitioner hereby withdraws the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

Everette Randolph
EVERETTE RANDOLPH

LeRoy Kiner
LEROY KINER

Leo M. Gordon, President
BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

F:\APPS\SSOLDATA\WP\JLB\211589.1

OAL DKT. NOS. EDU 12293-95 and EDU 11985-95
AGENCY DKT. NO. 430-11/95

E.R., on behalf of minor child, A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 24, 1997
DATE OF MAILING JULY 24, 1997

373-97

373-97

IN THE MATTER OF THE TENURE HEARING OF THOMAS HOPEWELL, SCHOOL DISTRICT OF THE TOWNSHIP OF FRANKLIN, WARREN COUNTY.	:	
THOMAS HOPEWELL, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, WARREN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

JULY 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

IN THE MATTER OF TENURE CHARGES FILED AGAINST THOMAS HOPEWELL (BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, WARREN COUNTY)

OAL DKT. NO. EDU 3635-97
AGENCY DKT. NO. 29-1/97

THOMAS HOPEWELL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN,
Respondent.

OAL DKT EDU 11028-96
AGENCY DKT. NO. 387-9/96

Raenee K. Mantoni, Esq., for petitioner
(Broscious, Glynn & Fisher, attorneys)

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

Record Closed: June 9, 1997

Decided: June 9, 1997

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

This matter involves tenure charges of unbecoming conduct certified by the Board of Education of the Township of Franklin ("Board") against Thomas Hopewell under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1. Hopewell filed

a separate suit against the Board challenging the suspension of his salary prior to certification of any tenure charges.

Thomas Hopewell is a tenured teaching staff member employed by the district. On or about September 9, 1996, the Board placed him on involuntary leave of absence without pay. Four months later, on January 8, 1997, the Board made a finding of the existence of probable cause to certify tenure charges which, if true, would be sufficient to warrant dismissal or reduction in salary. Basically, the charges allege that Hopewell exhibited inappropriate behavior during the 1995-96 school year which interfered with his ability to perform his teaching duties. As a result of its determination, the Board suspended Hopewell, without pay, effective January 23, 1997. Therefore, Hopewell has not received any salary for the entire 1996-97 school year.

On January 24, 1997, the Board filed its written tenure charges with the Commissioner of Education ("Commissioner"). Hopewell filed an answer on March 13, 1997. Subsequently, on March 27, 1997, the Commissioner transmitted the matter to the Office of Administrative Law ("'OAL") for determination as a contested case.

Both parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. of Educ.*, 1983 *S.L.D.* ___ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

On May 14, 1997, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Hopewell testified that he fully understood and voluntarily agreed to the terms of settlement. In addition,

the parties have prepared the stipulation of settlement, which is attached and fully incorporated in this decision. The Board passed a resolution approving the settlement terms on May 22, 1997.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. It is anticipated that a hearing in this matter would be lengthy and expensive. Initially, the case was set down for four days of hearing. There are four medical experts plus numerous fact witnesses who would be called to testify. If the hearing takes longer than four days, it would continue into the 1997-98 school year.

2. Medical reports indicate that Hopewell suffers from a debilitating medical condition and is under treatment for that condition.

3. Aside from behavior attributable to his medical condition, Hopewell has a distinguished record of service for eleven years. As recently as 1993-94, he was chosen by a committee, composed of board members, school administrators, colleagues and community representatives, as Teacher of the Year.

4. Under the proposed terms of settlement, Hopewell will resign from his position effective June 1, 1997. In exchange, he will receive a lump-sum payment of $20,000.

5. If the tenure charges are not proven, Hopewell will be entitled to his full annual salary of $43,000. Even if the Board prevails on the tenure charges, it may be still liable to pay back salary from September 1996 though January 1997. Moreover, Hopewell would soon be entitled to resumption of his salary pending the outcome of the tenure hearing.

6. As part of the agreement, Hopewell has acknowledged his understanding that the Commissioner may refer the matter to the State Board of Examiners for whatever action it deems appropriate.

7. Before entering into this agreement, Hopewell fully understood his rights and had an adequate opportunity to consult with legal counsel.

8. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of settlement are in the public interest.

It is **ORDERED** that the parties comply with the settlement terms and the proceedings are hereby concluded.

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

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

June 9, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/13/97
DATE

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DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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SETTLEMENT AGREEMENT

This Agreement, made this 14th day of May, 1997, by and between the Board of Education of the Township of Franklin, County of Warren ("Board") and Thomas Hopewell ("Mr. Hopewell").

RECITALS:

A. The Board employs Mr. Hopewell as a tenured elementary school teacher.

B. Mr. Hopewell has been employed as a teacher since the 1985-86 school year.

C. Mr. Hopewell's year end evaluations and observations have been consistently excellent. As recently as the 1993-94 school year Mr. Hopewell was accorded recognition as the Teacher of the Year within the Franklin Township School District.

D. During the past several years Mr. Hopewell has been treated for depression and was hospitalized for a period of two weeks in January of 1995. Since his hospitalization in January of 1995 Mr. Hopewell has been prescribed a series of mood altering medications as well as additional medication to assist him in sleeping.

E. The psychological disorder suffered by Mr. Hopewell and the prescribed medications may have caused Mr. Hopewell to suffer bouts of disorientation, in addition to, sleep related problems.

F. In his teaching staff position during the 1995-96 school year, Mr. Hopewell suffered from periodic losses of control over his demeanor, which resulted in allegations that Mr. Hopewell had engaged in certain conduct unbecoming a teacher.

G. Because of Mr. Hopewell's behavior, the Board, on May 13, 1996, placed Mr. Hopewell on an administrative leave of absence pending further reports from psychiatrists or psychologists regarding his ability to return to work.

H. Based on Mr. Hopewell's behavior during the 1995-96 school year the Chief School Administrator filed Tenure Charges and a Statement of Evidence with the Board Secretary, and the Board, after having considered the Statement of Evidence and Mr. Hopewell's medical condition, certified the Tenure Charges, which alleged unbecoming conduct against Mr. Hopewell, on January 23, 1997.

I. Mr. Hopewell, Board supervisory and administrative personnel and Board of Education members believe the incidents set forth in the Statement of Evidence are a direct result of Mr. Hopewell's documented psychiatric disability.

J. In addition to certifying the charges, the Board further determined that Mr. Hopewell should be suspended without pay pursuant to **N.J.S.A.** 18A:6-14. Mr. Hopewell has also initiated litigation against the Board challenging the Board's decision not to continue him on full salary prior to the date of the Board's certification of tenure charges against him.

K. Because of (1) Mr. Hopewell's long and unblemished service to the district, (2) Mr. Hopewell's diagnosed medical condition, (3) his need to continue psychotherapy and his need to remain on mood altering medications, and (4) the probability that Mr. Hopewell will not be cleared to return to work to perform his instructional duties in the future because of his diagnosed medical condition, Mr. Hopewell and the Board have negotiated a tentative resolution of the Tenure Charges, which will, in effect, avoid extensive, time consuming and extremely costly litigation that would involve four separate expert medical witnesses.

L. The Board has considered Mr. Hopewell's offer to settle in Executive Session and has approved the settlement.

M. Mr. Hopewell has been advised that the Commissioner of Education, pursuant to **N.J.A.C.** 6:11-3.6, is authorized to refer cases contested before him relating to proffered tenure charges to the State Board of Examiners for possible revocation of one's teaching certificate.

THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS HEREIN CONTAINED, the Board and Mr. Hopewell agree as follows:

1. Mr. Hopewell shall immediately complete an application for an ordinary disability retirement pursuant to the relevant TPAF statutes and regulations, which retirement will be effective June 1, 1997.

2. The Board of Education will fully cooperate with Mr. Hopewell regarding the completion of the application for an ordinary retirement and will attest to the fact that he is permanently and totally disabled from continuing to perform his duties and functions as an elementary school teacher within the District.

3. The Board of Education shall pay Mr. Hopewell the sum of $20,000. (Mr. Hopewell's teaching salary for the 1996-97 school year is approximately $43,000).

4. The Board of Education shall continue to maintain Mr. Hopewell as part of the District's health insurance program during the pendency of his application for the aforementioned ordinary disability retirement.

5. The Board of Education shall prepare a favorable letter of recommendation that may be utilized by Mr. Hopewell if in the future he seeks employment in a non-education related position. This letter will accurately reflect Mr. Hopewell's many achievements as an educator within the Franklin Township School District.

6. The Board and Mr. Hopewell shall exchange General Releases to be prepared by the Board of Education with the only exception to those General Releases being the terms and conditions of the Settlement Agreement.

7. As part of this settlement, Mr. Hopewell shall provide proof from his treating physician that he is legally capable of fully understanding and agreeing to this settlement.

8. The Board and Mr. Hopewell agree not to disclose the terms and conditions of the within settlement to any third parties and also agree to not discuss with any third parties any issue involved in the entire matter.

9. This settlement is contingent upon the approval of the Commissioner.

Attest:

Ken R. Springer
An Atty of New Jersey

Thomas Hopewell
Thomas Hopewell

Attest:

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, IN THE COUNTY OF WARREN

Secretary

By: John A Kinsella
Board President

OAL DKT. NOS. EDU 3635-97 and EDU 11028-96
AGENCY DKT. NOS. 29-1/97 AND 387-9/96 (CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMAS HOPEWELL,	:	
SCHOOL DISTRICT OF THE TOWN-	:	
SHIP OF FRANKLIN, WARREN COUNTY.	:	
	:	
THOMAS HOPEWELL,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWN-SHIP OF FRANKLIN, WARREN COUNTY,	:	
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners for such action, if any, as it deems appropriate.

COMMISSIONER OF EDUCATION

JULY 24, 1997
DATE OF MAILING JULY 24, 1997

374-97

374-97

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

JULY 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11162-96
AGENCY DKT. NO. 410-9/96

IN THE MATTER OF THE TENURE HEARING OF ROBERT PIZZELLA, STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY

Ken Iwama, Esq., for petitioner, State Operated School District of Jersey City
Philip Feintuch, Esq., for respondent
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: June 12, 1997 Decided: June 17, 1997

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State-Operated School District of the City of Jersey City certified charges of unbecoming conduct against respondent, Robert Pizzella. Pizzella is a tenured teacher employed by the District. On September 9, 1996, the District found probable cause to certify the tenure charge of unbecoming conduct which, if true, could warrant

cause to certify the tenure charge of unbecoming conduct which, if true, could warrant Pizzella's termination. On September 10, 1996, the District filed the written charges with the Commissioner of Education.

The Department of Education transmitted the matter to the Office of Administrative Law on October 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to 15 and 52:14F-1 to -13. Hearings were scheduled for June 12 and June 13, 1997.

A hearing was held on June 12, 1997 wherein the parties agreed to settle this matter. At the hearing, Pizzella was carefully examined by his attorney wherein he was advised as to the nature of the charges and that any settlement agreement herein is subject to the approval of the Commissioner of Education. Further, that the Commissioner could refer this matter to the State Board of Examiners for further action. Thereafter, Pizzella acknowledged that he fully understood the charges and the consequences of this settlement. See *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842.

After a review of the entire record, I **FIND** that the proposed settlement is consistent with the public interest because it will save significant legal expenses and costs as well as time expended by administrators and witnesses. I further **FIND** that Pizzella had full opportunity to consult with legal counsel prior to entering into the agreement. Pizzella is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, Pizzella was informed by counsel that notwithstanding the parties agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any execution of the settlement prior to the approval by the Commissioner is done at the peril of the parties.

It is therefore **ORDERED** that upon approval by the Commissioner that the parties comply with the settlement terms and that the proceedings are hereby **CONCLUDE**.

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

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

6/17/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

June 20, 1997
DATE

D. M. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 24 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DOCKET NO. EDU 11162-96
AGENCY DET. NO. 410-9/96

RIZZELLA, ROBERT
STATE OPER SCH. DIST JERSEY CITY

This matter having been amicably resolved by and between the parties as follows:

(1) Rizzella resigns effective June 30, 1997

(2) Rizzella agrees not to apply for any teaching position in the Jersey City Public School System.

(3) Rizzella withdraws any and all pending actions including those in increment withholding

(4) District agrees to withdraw tenure charges in the instant matter.

Robert Rizzella
ROBERT RIZZELLA

Dated: June 12, 1997

ORIN FEINTUCH, ESQ.

Ken Iwama, Esq.

OAL DKT. NO. EDU 11162-96
AGENCY DKT. NO. 410-9/96

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

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. This matter shall, however, be forwarded to the State Board of Examiners for such action, if any, it deems appropriate pursuant to *N.J.A.C.* 6:11-3.6.

COMMISSIONER OF EDUCATION

JULY 24, 1997
DATE OF MAILING JULY 24, 1997

375-97

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM TIERNEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF WAYNE, PASSAIC COUNTY.	:	
	:	

JULY 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11006-96

AGENCY DKT. NO. 364-8/96

IN THE MATTER OF THE TENURE HEARING OF WILLIAM TIERNEY, BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY.

Stephen R. Fogarty, Esq., for petitioner
(Fogarty & Hara, attorneys)

Sanford R. Oxfeld, Esq., for respondent
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: June 11, 1997 Decided: June 13, 1997

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 10, 1996 for hearing as a contested case pursuant *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was scheduled for June 10, 12, 13 and 16, 1997 at 9:00 a.m., at the OAL in Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement, indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 13, 1997
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

6/18/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

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FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY

JANE GALLINA MECCA
ELLEN MARIE WALSH
DENNIS J. MADIGAN
JANET L. PARMELEE
ALISA M.L. JACOBSON

23 HIGHLAND CROSS
RUTHERFORD, N.J. 07070-2110

(201) 935-0440
TELECOPIER (201) 935-3470

June 10, 1997

VIA FEDERAL EXPRESS

The Honorable Margaret M. Hayden, A.L.J.
Administrative Law Judge
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing
of William Tierney, Board of Education
of the Township of Wayne, Passaic County
O.A.L. Dkt. No. EDU-11006-96
Agency Dkt. No. 364-8/96

Dear Judge Hayden:

Pursuant to our letter dated June 6, 1997, enclosed please find a fully executed copy of the settlement agreement in the above-captioned matter which we submit for your review and approval.

Both parties have agreed to the proposed settlement, subject to approval by Your Honor and the Commissioner of Education. Moreover, both parties agree that the proposed settlement is in the best interest of the Wayne Township Public Schools as well as the public. Finally, the proposed settlement agreement is consistent with Cardonick v. Brooklawn Bd. of Ed., 1983 S.L.D. _____ (St. Bd. of Ed. April 6, 1983), wherein the record of a proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest. [slip op. at 5-6]

The Board respectfully seeks Your Honor's approval of this proposed settlement agreement. In support thereof, the Board submits the following reasons.

It is predicted that the hearing in this matter would be long and arduous. The Board has filed a voluminous statement of evidence in support of its charges. The Office of Administrative Law has scheduled four (4) hearing dates: June 10, 12, 13 and 16, 1997. However, the hearing could become protracted and necessitate additional hearing dates, particularly since the respondent has asserted a defense to the charges under the Americans with Disabilities Act and New Jersey's Law Against Discrimination. Additionally, much time would be taken from the Wayne Township Public Schools administration if they testified to the numerous incidents which led to the filing of the tenure charges.

Under the proposed terms of settlement, William Tierney (hereinafter referred to as "Tierney") would resign his position immediately. In exchange, he would receive his salary from the date of his resignation, June 4, 1997, until June 30, 1997, or 19 workdays, in the amount of $6,380.96. (A day's pay is defined as 1/240 of Tierney's annual salary of $80,600, which is $335.84; consequently, 19 x $335.84 = $6,380.96.) In addition, the Wayne Board of Education (hereinafter referred to as the "Board") would pay Tierney's health and medical insurance (including dental and prescription) in accordance with the parties' negotiated contract through August 31, 1997, at a total cost of $1,559.70. Thus, the total financial cost of this settlement to the Board is $7,940.66.

If the tenure charges were adjudicated, a thirty (30) day post-hearing brief submission period would follow the hearing dates. Reply briefs would than be exchanged within a ten (10) day period. Your Honor would have forty-five (45) days to prepare an initial decision and the Commissioner of Education would have an additional forty-five (45) days for review and issuance of a final decision. Regardless of whether or not the Board prevailed, it would incur the additional expense of paying Tierney's annual salary of $80,600 from July 1, 1997 through at least the end of October 1997, at the estimated prorated amount of $26,867.20 (Tierney's per diem salary rate of $335.84 x 80 workdays = $26,867.20.)

Furthermore, if the tenure matter proceeded to hearing, it is estimated conservatively that the Board's legal fees would be approximately $65,000. Moreover, Tierney has asserted affirmative defenses to the tenure charges under the Americans with Disabilities Act and the New Jersey Law Against Discrimination related to his alcoholism which would increase significantly the legal fees necessary to litigate this matter. Thus, a realistic estimate of the Board's total legal fees to bring this matter to closure would be approximately $75,000.

An essential provision of the proposed settlement agreement obligates Tierney to surrender all licenses and/or teaching certificates authorizing him to teach in the State of New Jersey. Additionally, Tierney agrees that he will not oppose any action by the State Board of Examiners to revoke his teaching licenses or certificates. Accordingly, the primary purpose of the tenure hearing is readily accomplished within the proposed settlement.

Both parties concur that Tierney fully understood his rights relative to this proposed settlement and had an adequate opportunity to consult with legal counsel. Moreover, Tierney has attested to his knowledge of, understanding, and voluntary agreement with this settlement (see Tierney Affidavit, Exhibit C). In addition, the parties affirm that the proposed settlement completely disposes of all issues in controversy.

Consequently, for all of the above-mentioned reasons, the Board submits that the proposed settlement is in the public interest and respectfully seeks Your Honor's approval.

Respectfully submitted,

FOGARTY & HARA

By: _____
Stephen R. Fogarty

SRF:lp
Enclosures
cc: Dr. Ray V. Kwak
Superintendent of Schools
Sanford R. Oxfeld, Esq.

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JUN 11 1 21 PM '97

FOGARTY & HARA, ESQS.
23 Highland Cross
Rutherford, New Jersey 07070
(201) 935-0440
Attorneys for Petitioner,
Board of Education of the
Township of Wayne

IN THE MATTER OF THE TENURE HEARING OF WILLIAM TIERNEY, BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO.: EDU 11006-96 AGENCY REF. NO.: 364-8/96

SETTLEMENT AGREEMENT

WHEREAS, petitioner, Board of Education of the Township of Wayne (hereinafter referred to as the "Board") certified tenure charges against respondent, William Tierney (hereinafter referred to as "Tierney") for unbecoming conduct, insubordination, incapacity, and abandonment of position and suspended Tierney without pay on August 22, 1996; and

WHEREAS, said charges for unbecoming conduct, insubordination, incapacity, and abandonment of position were filed by petition with the Commissioner of Education on August 23, 1996; and

WHEREAS, Tierney filed an Answer to the petition on September 12, 1996, denying the charges filed against him; and

WHEREAS, the Board has withheld the salary increments of Tierney for the 1996-1997 school year based on Tierney's unbecoming conduct, insubordination, incapacity, and abandonment of position; and

WHEREAS, the parties agree that a settlement would benefit all witnesses and be in the best interests of the Wayne Township Public Schools; and

WHEREAS, further litigation of these charges would necessitate the disruption of the Board's educational program due to the necessary absence of administrators and teachers for testimony at the hearing; and

WHEREAS, the Board would incur substantial financial costs by continuing this litigation that would significantly exceed the cost of this settlement; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and the mutual promises and covenants of the parties set forth below, the parties hereby agree as follows:

1. Tierney hereby resigns his position of employment with the Board, together with all tenure and seniority rights, effective immediately subject only to approval of this Agreement by the Board, the Office of Administrative Law and the

Commissioner of Education. Tierney submits his resignation knowingly, voluntarily and irrevocably, free of coercion or duress, after consulting with counsel and receiving advice as to its ramifications. Tierney will sign an irrevocable letter of resignation from all employment with the Board in a form attached hereto as Exhibit A.

2. The Board, by resolution, will publicly accept the resignation of Tierney at its next regularly scheduled meeting. The form of the Board's resolution is attached hereto as Exhibit B.

3. The Board agrees to withdraw, with prejudice, its tenure charges in the above-captioned matter bearing O.A.L. Docket No. EDU 11006-96 and Agency Ref. No. 364-8/96, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

4. Tierney agrees to withdraw, with prejudice, his counterclaim under the New Jersey Law Against Discrimination, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

5. In consideration for his immediate resignation, the Board agrees to pay Tierney his salary through June 30, 1997, excluding his salary increments which were withheld for the 1996-1997 school year. All monies due Tierney from the effective date of his resignation until final approval of this Agreement will be paid, after normal payroll deductions, upon final approval of this Agreement. Any remaining payments shall

be paid in the normal course of business, net of normal payroll deductions. The Board will continue to provide health and medical insurance in accordance with the parties' negotiated contract through August 31, 1997.

6. Tierney shall surrender any licenses and/or certificates that he may possess to teach in the public schools of the State of New Jersey, with the explicit understanding that the within matter will be transferred to the State Board of Examiners for purposes of revoking his certificates(s), and that he does not oppose such revocation. For the purpose of expressly demonstrating acceptance of the terms of this paragraph, an Affidavit of Tierney is attached hereto as Exhibit C.

~~7. Tierney agrees that he will at no time in the future apply for the restoration of his licenses and/or certificates and further agrees that he will at no time in the future teach or seek employment in any school, public or private, in the State of New Jersey or any other state in the United States of America.~~

8. Tierney hereby agrees to waive any and all claims he has, or could have, against the Board, its agents, employees, and representatives, including, but not limited to, claims for discrimination; contract, tort or constitutional violations; or attorney's fees. Tierney shall execute a General Release in favor of the Board releasing the Board from all claims, liabilities or expenses to which it may be subject, arising from

any claims or rights of Tierney. The form of this General Release is attached hereto as Exhibit D. Nothing in this Agreement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

9. The parties acknowledge that this Agreement shall be submitted to the Office of Administrative Law and the Commissioner of Education for review and approval, and that the terms of this Agreement are expressly made subject to and contingent upon such review and approval. In the event that either agency disapproves and/or rejects any of the terms contained herein, this Agreement shall be null and void and the parties shall return to the same positions which they held prior to this Agreement.

10. The parties recognize that each has been represented by legal counsel or a representative of his or its own choosing and that they sign they fully understand the duties and obligations enumerated herein. This Agreement shall be subject to the laws of the State of New Jersey.

11. The undersigned representative of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

12. Tierney hereby declares that he is of sufficient physical, mental and emotional capacities to understand and agree to all of the terms and conditions of this Agreement and

agrees that he is and will continue to be bound by these terms and conditions in the future.

13. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

By: _____
Mrs. Jeanette Makus
Board Secretary/Business Administrator

Dated:

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE

By: _____
Christopher P. Vergano
Board President

Dated: 6/10/97

WITNESS:

_____
Sanford R. Oxfeld

Dated: 6-4-97

_____
William Tierney

Dated: 6-4-97

WILLIAM TIERNEY
37 Rock Burn Path
West Milford, New Jersey 07480

Mr. Christopher P. Vergano
Board President
Wayne Township Board of Education
50 Nellis Drive
Wayne, New Jersey 07470

Re: Letter of Resignation

Dear Mr. Vergano:

Pursuant to the terms of the Settlement Agreement between the Township of Wayne Board of Education and myself, I hereby submit my irrevocable resignation from the position of teacher/Athletic Director, effective immediately. This resignation is expressly conditioned upon the Board's compliance with the aforesaid Settlement Agreement and is of no force or effect, even if accepted, unless said Agreement is fully performed by the Board.

Sincerely,

William Tierney

Dated: 6-4-97

WAYNE BOARD OF EDUCATION
PASSAIC COUNTY, NEW JERSEY

RESOLUTION

BE IT RESOLVED by the Township of Wayne Board of Education as follows:

1. William Tierney shall be paid his salary through June 30, 1997, excluding his salary increments which were withheld for the 1996-1997 school year. The Board will continue to provide health and medical insurance in accordance with the parties' negotiated contract through August 31, 1997.

2. The request of William Tierney to tender his resignation with the Board of Education effective immediately, is hereby approved and accepted.

3. The terms, stipulations and conditions as established in a Settlement Agreement between the Board of Education and WILLIAM TIERNEY, which is annexed to this Resolution, are hereby adopted and approved by the Board of Education. The President and Secretary of the Board of Education are hereby authorized and directed to execute the attached Settlement Agreement, and any other documents necessary to effect said Settlement Agreement.

MOTION: **C. Vergano**
SECOND: **C. Herman**
VOTE: **6-0**

AYES: **D. Pudup, D. Vreeland, H. Weinberg, L. Wilbur, C. Herman, C. Vergano**
NAYES: **-0-**
ABSTAIN: **-0-**
ABSENT: **J. Durr, L. Katz, J. Schweighardt**

I hereby certify that this is a true copy of the Resolution approved by the Wayne Board of Education at their June 5, 1997 Board Meeting.

Jeanette Makus
Board Secretary

Dated: June 5, 1997

restier

FOGARTY & HARA, ESQS.
23 Highland Cross
Rutherford, New Jersey 07070
(201) 935-0440
Attorneys for Petitioner,
Township of Wayne Board of Education

IN THE MATTER OF THE TENURE HEARING OF WILLIAM TIERNEY, BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW O.A.L. DOCKET NO.: EDU 11006-96 AGENCY REF. NO.: 364-8/96
	:	**AFFIDAVIT OF WILLIAM TIERNEY**

William Tierney, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the respondent in the above-captioned matter, and hereby submit this Affidavit in accordance with the terms of the Settlement Agreement between myself and petitioner, Township of Wayne Board of Education.

2. Specifically, in accordance with the aforesaid Settlement Agreement, I hereby agree to surrender any licenses and/or certificates that I may have or possess to teach in the public schools of the State of New Jersey. I expressly and specifically understand that the within matter will be

transferred to the State Board of Examiners for purposes of revoking my certificate, and I do not oppose such revocation.

William Tierney

Sworn and subscribed to
before me this 4th day
of June, 1997.

Notary Public
Samuel R Oxtell
An atty at law of NJ

RELEASE

This Release, dated June 4 , 19 97 , is given

BY the Releasor(s) WILLIAM TIERNEY

referred to as "I".

TO TOWNSHIP OF WAYNE BOARD OF EDUCATION,
its officers, agents, servants, attorneys,
or employees or any one of them.

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

Any and all claims arising out of the employment relationship between William Tierney and the Board of Education of the Township of Wayne, including, but not limited to, any claims or causes of action pursuable before any state or federal court, agency, pension fund, or any other adjudicative tribunal or authority.

This Release does not apply to any rights which William Tierney may have under the terms of the Settlement Agreement between William Tierney and the Board of Education of the Township of Wayne.

2. Payment. I have been paid a total of $1.00 or will be , in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Joseph Lore

William Tierney
WILLIAM TIERNEY (Seal)

(Seal)

STATE OF NEW JERSEY, COUNTY OF MORRIS SS.:
I CERTIFY that on June 4 , 19 97,

WILLIAM TIERNEY
personally came before me and stated to my satisfaction that this person (or if more than one, each person):

(a) was the maker of the attached instrument; and
(b) executed this instrument as his or her own act.

(Print name and title below signature)
Samuel R Oxfeld
Attorney at Law of NJ

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OAL DKT. NO. EDU 11006-96
AGENCY DKT. NO. 364-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM TIERNEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF WAYNE, PASSAIC COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement. This matter shall be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for action against respondent's certificate as it deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that respondent provided notification that he would not oppose revocation of his certificate and/or licenses.

JULY 24, 1997
DATE OF MAILING JULY 24, 1997

376-97

M.S., on behalf of minor children, E.W. and J.W.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

JULY 24, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2850-97

AGENCY DKT. NO. 35-1/97

M.S. ON BEHALF OF MINOR CHILDREN,

E.W. AND J.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF PENNSAUKEN,

CAMDEN COUNTY,

Respondent.

Marcie Sanders, petitioner *pro se*

David A. Luthman, Esq., for respondent (Toll, Sullivan & Luthman, attorneys)

Record Closed: June 18, 1997 Decided: June 18, 1997

BEFORE **BARBARA A. HARNED**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 21, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

6/18/97
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

6/19/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 23 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

1. That the Pennsauken Board of Education does hereby rescind the Notice of Transfer with respect to E.W. and J.W.

2. That M.S., on behalf of E.W. and J.W., acknowledges that the Pennsauken Board of Education had probable cause to issue the Notice of Transfer.

3. That the rescission of the Notice of Transfer is without prejudice to the rights of the Pennsauken Board of Education to take future action to compel the transfer from the Pennsauken School District of E.W. and J.W., provided however that such action shall not take place prior to the conclusion of the 1996-1997 school year.

Based upon the above stipulations, it is agreed that the pending appeal before the Office of Administrative Law may be withdrawn.

MARCIE SANDERS

DAVID A. LUTHMAN
Solicitor, Pennsauken Board
of Education

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

DAVID A. LUTHMAN, ESQUIRE
TOLL, SULLIVAN & LUTHMAN
1415 East Route 70, Suite 509
Cherry Hill, New Jersey 08034
(609) 795-3030
Attorneys for Respondent

M.S. ON BEHALF OF MINOR CHILDREN, E.W. & J.W.

vs.

BOARD OF EDUCATION, TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY

STATE OF NEW JERSEY
DEPARTMENT OF PERSONNEL
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. CSVOT 10024-96S

BEFORE THE HONORABLE
BARBARA HARNED, A.L.J.

STIPULATION OF SETTLEMENT

On or about January 9, 1997, the Respondent, Pennsauken Board of Education, forwarded to M.S., as Guardian for J.W. and E.W., notice that J.W. and E.W. would be transferred from the Pennsauken School District based upon non-residence. M.S. thereafter filed a petition with the Commissioner of Education disputing the District's determination and the Department of Education transmitted the controversy to the Office of Administrative Law. In accordance with N.J.S.A. 18A:38-1, J.W. and E.W. remained in the Pennsauken School District during the pendancy of the proceedings.

A pre-hearing telephone conference was held before the Honorable Barbara A. Harned, A.L.J., on May 28, 1997, and at that time, the parties reached an agreement to be memorialized by this Stipulation of Settlement. It is therefore agreed as follows:

3h

LAW OFFICES
TOLL, SULLIVAN & LUTHMAN
1415 E. ROUTE 70, SUITE 509
CHERRY HILL, NEW JERSEY 08034

DANIEL B. TOLL (1919-1984)

EDWARD SULLIVAN
DAVID A. LUTHMAN
MARIA S. BILOTTI**
JODI G. NASH**
MEREDITH A. HARA
KELLY C. HAYNOR*

**MEMBER NJ & NY BAR
*MEMBER NJ & PA BAR

TELEPHONE
609-795-3030
FAX
609-795-9191
OR
609-795-1314

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

June 13, 1997

The Honorable Barbara A. Harned
Chief Administrative Law Judge
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625

Re: M.S. on behalf of Minor Children, E.W. & J.W.
Docket No. CSVOT 10024-96S

Dear Judge Harned:

Enclosed please find the original, fully executed Stipulation of Settlement with regard to the above referenced matter, received in my office today. This matter may be considered settled.

If there are any questions, please do not hesitate to contact me.

Very truly yours,

TOLL, SULLIVAN & LUTHMAN

DAVID A. LUTHMAN

DAL/djh

Enclosure

cc: Dr. Harold R. Kurtz, Superintendent

OAL DKT. NO. EDU 2850-97
AGENCY DKT. NO. 35-1/97

M.S., on behalf of minor children, E.W. and J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

JULY 24, 1997
DATE OF MAILING 24, 1997

379-97

379-97

JAMES EDWARD WALKER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH, COUNTY,

RESPONDENT.

JOHN WILLIAMS

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH, COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, two nontenured corridor aides who were under contract with respondent, contended they had been wrongfully suspended without pay following arrest on charges of impairing the morals of two students and for sexual assault. Matters were consolidated.

ALJ noted that the language of the statute clearly permits suspensions without pay in only two circumstances: when an employee is indicted or when tenure charges are brought against an employee (*Slater*) and the statute is not limited to tenured employees. Thus, the ALJ concluded that petitioners were entitled to pay from December 2, 1996, the first day of their suspension, until March 12, 1997, the day of their indictments. ALJ further concluded that petitioners' back pay award was subject to mitigation reflecting any money they may have earned elsewhere during the applicable time period.

Commissioner adopted initial decision as his own, entering summary judgment in favor of petitioners and ordering the Board to pay petitioners for the time they were suspended without pay, offset by earnings received elsewhere during the applicable time period.

JULY 25, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NOS. EDU 674-97S and

EDU 675-97S (CONSOLIDATED)

AGENCY DKT. NOS. 6-1/97 and 12-1/97

JAMES EDWARD WALKER,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF LONG BRANCH,

MONMOUTH COUNTY,

Respondent,

and

JOHN WILLIAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF LONG BRANCH,

MONMOUTH COUNTY,

Respondent.

Arnold Mellk, Esq., for Petitioner, John Williams (Wills, O'Neill & Melk, attorneys)

Thomas W. Cavanagh, Jr., Esq., for Petitioner, James Edward Walker (Chamlin, Rosen, Cavanagh & Uliano, attorneys)

Arsen Zartarian, Esq., for Respondent Board of Education of the City of Long Branch (McOmber & McOmber, attorneys)

Record Closed: April 17, 1997 Decided: June 12, 1997

BEFORE **BARBARA A. HARNED** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners and respondent in these consolidated matters have cross moved for summary decision. In both cases, petitioners are challenging their suspensions without pay imposed by respondent Board of Education of the City of Long Branch (Board). Petitioners contend that their suspensions should have been with pay, at least for part of the time period of the suspension. The petitions were filed with the Department of Education on January 6 and 10, 1997 and transmitted to the Office of Administrative Law (OAL) on February 7, 1997 for hearing as contested cases pursuant to *N.J.S.A.* 52:14B-1 to -15 and 52:14F-1 to -13. A telephone conference call was held on March 13, 1997 at which time the two matters were consolidated. In addition, all parties indicated that they would file for summary decision pursuant to *N.J.A.C.* 1:1-12.5. Petitioner Walker filed his motion for summary decision on March 18, 1997. On March 19, 1997, petitioner Williams filed his motion for summary decision. Respondent Board's cross motion for summary decision was filed on March 27, 1997. Petitioner Walker filed a response to the Board's cross motion on April 2, 1997. Oral argument by telephone conference call on the cross motions was held on April 11, 1997. On April 17, 1997, counsel for petitioner Walker submitted the date of the criminal indictment against petitioner Walker into the record and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

Unless otherwise noted, the following facts are undisputed and I adopt them as **FINDINGS OF FACT.** Petitioners, James Edward Walker and John Williams, Jr., are employed as corridor aides under contract with respondent, the Long Branch Board of Education. Neither Walker nor Williams

have tenure in their positions. By letter dated December 3, 1996, Joseph M. Ferraina, Superintendent of Schools for the District of Long Branch, suspended both petitioners without pay, effective December 2, 1996.

In his certification filed in support of the Board's cross motion for summary decision, Superintendent Ferraina states that he took this action in response to a telephone call he received from petitioner Williams shortly after the 1996 Thanksgiving holiday weekend. According to the superintendent, during this call petitioner Williams advised him that petitioner Walker had taken two special education fifteen-year old students to Williams' apartment and made them something to eat. Further, petitioner Williams advised Superintendent Ferraina that the girls were very nervous and became sick in the apartment and that one of the girls started to panic, began having an asthma attack and had to dial 911 for emergency medical assistance. Shortly thereafter, Superintendent Ferraina became aware that petitioners had been arrested on charges of impairing the morals of the two students and for sexual assault. In their letter briefs, petitioners seem to challenge the accuracy of the facts set forth in the superintendent's certification by characterizing same as "allegations." However, neither petitioner submitted a certification denying any of those factual statements. Accordingly, for purposes of this motion, the facts set forth in Superintendent Ferraina's certification are adopted as **FINDINGS OF FACT.** *See, e.g., Heljohn Management Corp. v. DiLeo,* 55 *N.J. Super.* 306, 312 (App. Div. 1959).

By letters dated December 9, 1996, counsel for petitioners filed objections with the Board to the suspensions without pay, arguing that the suspensions should have been with pay. On December 17, 1996, the Board met and affirmed the suspensions without pay. Petitioners were originally scheduled for grand jury proceedings in December, 1996. Apparently due to scheduling and administrative conflicts within the Monmouth County Prosecutor's Office, the grand jury proceedings were postponed until February and an indictment handed down on March 12, 1997. In that indictment petitioners were charged as follows: aggravated criminal sexual contact - third degree (First Count); criminal sexual contact - fourth degree (Second Count); attempted aggravated sexual assault - second degree (Third Count); attempted sexual assault - second degree (Fourth Count); aggravated criminal sexual contact - third degree (Fifth Count); criminal sexual contact - fourth degree (Sixth Count); attempted aggravated sexual assault - second degree (Seventh Count);

attempted sexual assault - second degree (Eighth Count); and endangering the welfare of a child - third degree (Ninth Count). In addition, the following charges were made against petitioner Walker: possession of a controlled dangerous substance with intent to distribute - fourth degree (Tenth Count); distribution of a controlled dangerous substance - fourth degree (Eleventh Count); distribution of a controlled dangerous substance - fourth degree (Twelfth Count); terroristic threat - third degree (Thirteenth Count) and tampering with a witness or informant - second degree (Fourteenth Count).

LEGAL DISCUSSION

The Uniform Administrative Procedure Rules contain provisions governing motions for summary decision and provide in pertinent part that summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.A.C.* 1:1-12.5(b). This is essentially the same standard established by *R.* 4:46-2 for the granting of summary judgment in the Superior Court of New Jersey. Hence it is appropriate to look to court decisions under *R.* 4:46-2 for guidance as to the granting of summary decisions in the administrative arena. In its most recent case involving summary judgment, the Supreme Court of New Jersey held that

> deciding a Motion for Summary Judgment under *Rule* 4:46-2 . . . requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 523 (1995).

In the instant matter, as discussed below, I have decided to grant petitioners' motion for summary decision. Accordingly, although both parties have cross-moved, I consider the Board to be the non-moving party and will view the "competent evidential materials" in "the light most favorable to the" Board and determine whether those evidential materials, viewed in that favorable light, would permit "a rational fact finder to resolve" the matter in favor of the Board. *Brill, supra.*

Petitioners argue that their suspensions must be with pay pursuant to *N.J.S.A.* 18A:6-8.3 which provides that

> [a]ny employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

The language of the statute clearly permits suspensions without pay in only two circumstances: when an employee is indicted or when tenure charges are brought against an employee. *Slater v. Board of Educ.*, 237 *N.J. Super.* 424, 426 (App. Div. 1989). Thus, it would seem that petitioners are entitled to back pay from the time of their suspensions (December 2, 1996) to the time of their indictment (March 12, 1997). The Board, however, argues that the above-quoted statute is a "tenure" statute that applies only to tenured employees and that nontenured employees may be suspended without pay in circumstances other than the two permitted by the statute. Specifically, the Board argues that nontenured employees may be suspended without pay when "sufficient facts [are] brought to the attention of a board of education so as to convince the board of education that inappropriate, unacceptable, and reprehensible conduct has been engaged in by an employee" (Letter brief on behalf of respondent, page 8). The Board further argues that since it may dismiss a nontenured employee for such conduct, it is illogical to conclude that it cannot suspend a nontenured employee without pay for the same conduct.

I do not find the Board's arguments persuasive in light of the plain language of the statute . While the Board labels 18A:6-8.3 as a "tenure law" there is no language in the statute itself or in the section headings of which it is a part that supports that characterization. *N.J.S.A.* 18A:6-8.3 is contained within Article 2, Section A of the school laws. Article 2 is described as applying to "Public Educational Institutions and Systems" and Section A specifically as applicable to "Employees; Qualifications; Discrimination; Prohibitions; Leave to Serve in Legislature." More importantly, when the Legislature intends to limit applicability of a statute to only certain employees, it does so in an explicit manner. Thus, *N.J.S.A.* 18A:6-11 refers to "[a]ny charge made against any employee of a

board of education *under tenure during good behavior and efficiency*" (emphasis added). Similarly, *N.J.S.A.* 18A:6-8.4 refers to "[n]o person employed by a public educational system or institution in a position which requires a certificate issued by the State Board of Examiners." *See also, N.J.S.A.* 18A:6-8.2. In sharp contrast, *N.J.S.A.* 18A:6-8.3 refers to "[a]ny employee" without any limiting language. That the statute is not limited to tenured employees also finds support in *Worrell v. Bd. of Educ. of the Twp. of Cherry Hill,* 1979 *S.L.D.* 401, affirmed by the Commissioner, 1979 *S.L.D.* 418. In *Worrell,* the hearing examiner held that an employee was improperly suspended without pay under the statute. While not specifically stated, it appears that the employee was nontenured. The statutory language is clear and unambiguous; is not limited to tenured employees nor does it contain any exception for "reprehensible conduct". Even viewing the evidential materials in the light most favorable to the Board, its argument that it may suspend a nontenured employee without pay for "reprehensible conduct" cannot be sustained given the plain language of *N.J.S.A.* 18A:6-8.3.

The Board seeks to bolster its interpretation of the statute by arguing that since it can dismiss a nontenured employee for "reprehensible conduct," *a fortiari* it may therefore suspend a nontenured employee without pay for such conduct. The Board, however, does not dispute that petitioners are members of a union and that their dismissal would be subject to binding arbitration. Perhaps for that reason, the Board did not seek to dismiss petitioners pending the outcome of the criminal proceedings. For whatever reason, the Board did not seek dismissal but rather suspension without pay. When it decided to do so, the plain language of *N.J.S.A.* 18A:6-8.3 became operative.

The Board argues alternatively that even if the statute applies to nontenured employees, it does not apply to petitioners in this case because they were not suspended "pending any investigation, hearing or trial or any appeal therefrom" as set forth in the statute, but rather as a result of admissions made by petitioner Williams. Apart from the fact that the Board cannot justify its suspension of petitioner Walker on this basis, its argument really makes little sense. The Board was clearly suspending petitioners pending something happening. Otherwise, it would have terminated their employment immediately. The only logical conclusion is that petitioners were suspended pending the outcome of the grand jury investigation and/ or the criminal trial.

For the above reasons **I CONCLUDE** that petitioners are entitled to pay from December 2, 1996, the first day of their suspension, until March 12, 1997, the day of their indictments. Petitioners contend that the pay award should be continued beyond the March 12, 1997 indictment date since a new vote by the Board following indictment to suspend without pay is required. That identical issue was raised and soundly rejected by the Appellate Division in *Slater v. Board of Educ.*, 237 *N.J. Super.* 424,427 (App. Div. 1989). As held in *Slater,* "it exalts form over substance to require payment of Slater's salary after indictment because the local board failed to shuffle some papers" and therefore when a school board validly suspends an employee upon arrest, "subsequent indictment on the charges for which the employee was arrested will serve to legitimize the suspension of salary prospectively without further board action." *Id.* at 427-28. I further **CONCLUDE** that petitioners' back pay award is subject to mitigation reflecting any money they may have earned elsewhere during the applicable time period. *Worell, supra; see White v. Twp. of North Bergen,* 77 *N.J.* 538, 558-59 (1978).

ORDER

For the above stated reasons, **IT IS ORDERED** that petitioners be paid what they would have earned in salary from the Board for the period December 2, 1996 to March 12, 1997, less any outside earnings they may have made during that period. Each petitioner shall provide the Board an affidavit of all earnings, if any, received during the applicable period of time, to be supplied within 10 days of the receipt of this decision. If the parties are unable to agree upon the amount of money to be paid to any petitioner, such matter shall be addressed to the Commissioner for such proceedings as he shall order.

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

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

this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/12/97
DATE

Barbara A. Harned
BARBARA A. HARNED, ALJ

Receipt Acknowledged:

6/13/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

JAMES EDWARD WALKER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH, COUNTY,

RESPONDENT.

JOHN WILLIAMS

V.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH, COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the Board in accordance with *N.J.A.C.* 1:1-18.4.

The Board generally recasts and reiterates arguments raised before the Administrative Law Judge (ALJ) contending that *N.J.S.A.* 18A:6-8.3 should not be strictly interpreted where, as here, circumstances militate in favor of a petitioner's suspension without pay. It notes that the spirit of the law should sustain the Board's action to suspend nontenured petitioners without pay where an employee himself has admitted criminal wrongdoing to the superintendent.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ, for the reasons expressed therein, that petitioners are entitled to summary judgment pursuant to the clear language of *N.J.S.A.* 18A:6-8.3. In so ruling, the Commissioner is satisfied that the ALJ fully and fairly considered and rejected the Board's arguments concerning the equities in applying such statute to the present facts.

Accordingly, the Commissioner affirms the initial decision of the OAL, entering summary judgment in favor of petitioners, and orders that the Board pay petitioners for the time they were suspended without pay, offset by earnings received elsewhere during the applicable time period.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 25, 1997
DATE OF MAILING JULY 25, 1997

380-97

S.N. AND J.N., on behalf of minor child, R.N.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JULY 28, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING PETITIONERS' MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 4829-97

AGENCY DKT. NO. 208-6/97

DATE: July 7, 1997

S.N. AND J.N., ON BEHALF OF MINOR CHILD, R.N.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET,

Respondent.

Francis J. Campbell, Esq., for petitioner (Kalac, Newman, Lavender and Campbell, attorneys)

Michael J. Gross, Esq., for respondent (Kenny and Gross, attorneys)

BEFORE **JOSEPH LAVERY,** ALJ:

THE MOTION

Petitioners, S.N. and J.N., ask that **respondent, the Board of Education, Township of Hazlet (the Board)** (a) be compelled to modify its disciplinary penalty and allow their son, R.N., to participate in extracurricular activities, and interscholastic athletics, or, in the alternative, (b) to overturn the Board's discipline in its entirety because of biased decision-making.

ANALYSIS

Background:

On March 17, 1997, after hearing, and by formal resolution, the Board suspended R.N. from attendance at class for nine days, and barred him from participation in extracurricular activities and interscholastic sports for the remainder of junior year, and all of senior year. The Board conditioned R.N.'s graduation on an exemplary disciplinary record henceforth, and warned that he would be expelled for any future act of violence.

It took this step after R.N., age 17, on February 24, had confronted another student, J.E., age 14, who was leaving a school bus, and challenged him to a fight. R.N. had driven to the bus stop in his car for that purpose. A fight followed, and the other student sustained blows to the head in an altercation which lasted a minute or two, before a passerby intervened to end the conflict, and R.N.'s friends persuaded him to leave. R.N. was suspended by his school principal for nine days for the fight, and for injuries sustained by the other student. The other student, J.E., was hospitalized for three days.

Arguments of the Parties:

Petitioners' argument:

In support of the motion, petitioners argue that the Board's action was arbitrary, capricious and unreasonable. Petitioners insist that the proceedings before the Board were "tainted," because that body considered unsworn statements of student witnesses, and other unverified information, despite the agreement of its counsel that the matter would be decided on stipulated facts. Some of the Board members were biased and prejudiced (which limited discovery would show) as well, which contributed to a penalty arrived at without consideration of all mitigating factors. Finally, because of the Board's decision to go outside the agreed-upon record, R.N.'s right to due process was violated.

Additionally, emergent relief is necessary to prevent unreasonable harm. R.N., by the terms of an essentially punitive Board decision, will miss football summer camp. He also cannot obtain a remedy if he does not participate in the fall schedule. This, despite an absence of disciplinary history, R.N.'s remorse and apology, an exemplary academic record, pending charges in superior court, and little risk that the event will be repeated.

Further, petitioners contend, this Board seeks to bind any future Board which may be elected next spring, an *ultra vires* act.

For all the foregoing reasons, which satisfy the test of *N.J.A.C.* 6:24-1.4(b), R.N. should be reinstated to the full status which thorough and efficient education requires.

The Board's reply:

The Board replies that petitioners have failed to satisfy the regulatory and case law standard for emergent, interim relief. The petitioners must carry a burden of proving that such an extraordinary remedy as is sought here is warranted.

In addition, the Board maintains, petitioners have not satisfied the discovery rule requiring "good cause" for depositions, a precondition normally addressed only after the exhaustion of interrogatory exchanges. Thus, the Board argues, in the present circumstance, this request is tantamount to a "fishing expedition."

Further, the Board states, it is vested with broad discretion in disciplinary matters, and the right of minors to a free public education is not without limits. In this undisputed instance, physical assault is by law subject to suspension or expulsion.

As to prejudicial statements reviewed by the Board which were beyond the stipulation prepared by counsel , petitioners were on notice beforehand, as their own exhibits reveal. Beyond this, the Board notes, petitioners received the full measure of due process in a hearing before the Board, especially since they have no entitlement to hearing on loss of nonacademic privileges.

For all these reasons, the Board asserts, petitioners have failed to satisfy the four-part standard of *Crowe v. DiGoia*, 90 *N.J.* 126 (1982), incorporated by reference within *N.J.A.C.* 6:24-1.5(b), the rule governing emergent relief before the Commissioner of Education.

CONCLUSIONS OF LAW

The Legal Standard for Emergent Relief:

The rule governing emergent relief is *N.J.A.C.* 6:24-1.5, and this rule, in turn, relies on the four-part test of *Crowe v. DiGoia*, 90 *N.J.* 126 (1982) as its standard. Interim relief should not be granted thereunder, except (1) when necessary to prevent irreparable harm, (2) when the legal right underlying the claim in settled, (3) when the material facts are uncontroverted, and (4) when the relative hardship caused by grant or denial of relief is considered.

Here, there is no irreparable harm, and the law relating to petitioners' claim, though apparently settled, is not in their favor. R.N. is entitled to a thorough and efficient education, as argued, but not extracurricular activities, such as football camp and participation in the subsequent season. The material facts are also uncontroverted, but this certitude does not redound to petitioners' benefit, since it is plain that R.N. sought out a fellow student, and purposefully inflicted harm, interrupted only by a passing motorist and R.N.'s friends.

This event, uncontroverted in its material, stipulated facts, suggests a violation of *N.J.S.A.* 18A:37-1, which directs compliance with lawful authority, and leaves open the application of *N.J.S.A.* 18A:37-2(d), authorizing suspension, or even expulsion. Since R.N. endured only nine days suspension, and continues to benefit from classes providing a full curriculum, petitioners' claim lacks a likelihood of success.

Lastly, given the involvement of violent behavior, the relative hardship of R.N.'s loss of extracurricular activity pending a full hearing pales in comparison with the need for good order and safety among the student population. On the facts stipulated, nullifying through an interim

stay the most significant disciplinary bar (to football participation) would be a signal ominous in its implication for school efforts toward control of assaultive behavior.

Petitioners contend in their brief and at oral argument that certain circumstances suggest a fatal bias permeated the Board's decision. These circumstances include, among other things: consideration by the Board of statements outside a stipulation relied on its argument, and the influence by either blood relationships or personal friendships among Board members with the injured student's family. Petitioners believe they should be free to explore these perceived possibilities through limited deposition of Board members.

Assuming, only for the purpose of petitioners' argument, that one might ignore the settled prohibition against looking behind the thought processes of a deciding entity,[1] petitioners' arguments are unpersuasive. In the record thus far, nothing beyond allegations and a post-decision newspaper quote gives life to the charges of bias. It is significant that, in reply, the Board proffers an affidavit by its Superintendent in which he would affirm that, before it heard R.N.'s case, he cautioned the Board to disclose any conflicts its members felt might color their participation. None did. As the Board reasonably argues, in a small school district, personal familiarity with the residents, including petitioners, is inevitable. In a small school district, there is a greater chance of personal familiarity with the residents, including petitioners, than might prevail in larger districts.

The presumed correctness of the Board's action cannot be overcome by mere charges, made in the hope of obtaining a discovery order. These asserted grounds would not prompt a grant of depositions, even during a proceeding for emergent relief, without first exhausting normal preliminary steps. *N.J.A.C.* 1:1-10.2. Petitioners' efforts seem directed toward an investigation of whether suspicions might be justified. Neither the emergent motion rule nor the discovery rule, discussed above, anticipate such an approach. Petitioners' motion would more appropriately be considered during plenary hearing on the merits.

[1] *N.J. Turnpike Authority v. Sisselman, et al.*, 106 *N.J. Super.* 358, 367 (App. Div. 1969)

As to an alleged violation of the School Ethics Act, and assorted remaining charges by petitioners, the likelihood of success on those arguments is below *de minimis*, and cannot support an order.

ORDER

I ORDER therefore that the emergent relief sought by petitioners be, and hereby is, **DENIED.**

This order is subject to review, as well as acceptance, rejection, or modification by the **COMMISSIONER OF EDUCATION**, pursuant to *N.J.A.C.* 1:1-14.9 and -14.10, or at the end of the case under *N.J.A.C.* 1:1-18.6

July 7, 1997

DATE

Joseph Lavery ALJ

JOSEPH LAVERY, ALJ

OAL DKT. NO. EDU 4829-97
AGENCY DKT. NO. 208-6/97

S.N. AND J.N., on behalf of minor child, R.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, including the audiotape of proceedings before the Administrative Law Judge (ALJ), and the Order on Motion for Emergent Relief of the Office of Administrative Law have been reviewed. By letter dated July 11, 1997, from the Director of the Office of Controversies and Disputes, the parties were provided 13 days from the transmission of the ALJ's order to file exceptions to such order, and 5 days from receipt of any exceptions of their adversary to file a reply. No submissions were filed by the parties.

Upon careful and independent review, the Commissioner concurs with the ALJ that petitioners have failed to meet the standards for the granting of emergent relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Accordingly, the recommended order of the ALJ denying petitioners' Motion for Emergent Relief is adopted for the reasons well expressed therein, and this matter shall proceed, consistent with the recommendation of the ALJ, to a plenary hearing on its merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 28, 1997
DATE OF MAILING JULY 28, 1997

381-97

381-97 B

CITY COUNCIL OF THE CITY OF PATERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

City Council appealed General Fund tax levy of $41,877,208 certified by State-operated School District, first seeking reductions in the amount of $2,979,560 and later reducing this amount to $2,256,265.

Upon review of the appeal herein to determine the necessity of the disputed amounts for purposes of providing a thorough and efficient system of education, Commissioner determined that full amount of $41,877,208 was necessary and directed that general fund tax levy stand as certified by the District.

JULY 28, 1997

CITY COUNCIL OF THE CITY OF PATERSON,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION

Susan E. Champion, Esq., for Petitioner
Louis M. Flora, Esq., for Respondent

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on April 19, 1996, through the filing of a Petition of Appeal by the City Council of the City of Paterson (City), seeking reduction of the General Fund tax levy certified by the State-operated School District of the City of Paterson (District) for 1996-97 school purposes pursuant to *N.J.S.A.* 18A:7A-52(a). The proposed reduction of $2,979,560 from the $41,877,208 tax levy certified by the District was effectuated through cuts in ten (10) line items, for the reasons given in the City's petition. As per the City's Position Statement at p. 6 (see below), the City subsequently withdrew its recommended reductions in account number 11-110-100-101, Salaries for Preschool and Kindergarten, and account number 11-213-100-101, Salaries of Resource Room staff. Consequently, the amount of reduction in dispute is $2,256,265, in a total of eight (8) line items.

An answer to the City's petition was filed by the District on June 12, 1996. In accordance with established briefing schedules, on September 4, 1996, the respective parties filed position statements pursuant to *N.J.A.C.* 6:24-7.8, followed by responsive

statements on September 11, 1996 and September 13, 1996. On September 23, 1996, the City filed a final summation.

Upon review of the parties' submissions, the Commissioner determined that further information would be necessary to enable him to render a decision on the appeal. Accordingly, on January 14, 1997, the Bureau of Controversies and Disputes directed the parties to submit the more detailed calculations and documentation underlying their general contentions as to the District's salary accounts. On February 6 and February 7, 1997, respectively, the parties submitted their replies to this directive, and on February 13, 1997, the District submitted a response to the City's reply. Thereupon, the record of this matter was deemed closed.

The amounts in dispute in this appeal are as follows:

Tax Levy Certified by District		Tax Levy Sought by City	
General Fund	$41,877,208	General Fund	$39,620,943
Amount of Proposed Reduction		**Amount in Dispute**	
General Fund	$2,256,265	General Fund	$2,256,265

PROCEDURAL BACKGROUND AND STANDARD OF REVIEW

The statutory framework under which the budget of a State-operated school district is established differs from that applicable to other school districts. In contrast to other districts, the budget of a State-operated school district is set under *N.J.S.A.* 18A:7A-50, -51, and -52, which provide for current-year funding and require that, after comment and recommendation by the district board and public hearing, the State district superintendent shall fix the amount necessary to be appropriated and raised. Moreover, challenges to the education budget established by the district differ from budget appeals under other provisions of Title 18A in that *N.J.S.A.* 18A:7A-52(a) provides that the municipal governing body rather than the district board must initiate any appeal to the Commissioner, and the governing body must prevail in that appeal before any budget reductions may be effectuated. *Mayor and Council of the City of Jersey City v. State-Operated School District of the City of Jersey City, Hudson County*, 92 *N.J.A.R.* 2d(EDU) 461, 474.

In rendering judgment relative to budget appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education (T&E). The Legislature by way of statutory scheme has delegated the responsibility for providing such T&E to local boards of education except in those instances where a State-operated school district is established as a result of continued failure to meet certification criteria. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies, or, as in the instant matter, appeals by municipalities seeking a reduction in the tax levy certified by the State district superintendent of a State-operated school district. In reviewing appeals from local boards, the Commissioner must determine whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T&E. *Board of Education of East Brunswick Township v. Township_Council of East Brunswick*, 48 *N.J.* 94 (1966) and *Board of Education of Deptford_Township v. Mayor and Council of Deptford Township*, 116 *N.J.* 305 (1989). In reviewing appeals from municipalities in State-operated districts, the Commissioner must "determine the amount necessary for the district to provide a thorough and efficient educational program including the implementation of the plan to correct deficiencies." *N.J.S.A.* 18A:7A-52(a). For this purpose, the standard of review is "whether the City has demonstrated that the certification of the State Superintendent is in excess of that required to provide for a thorough and efficient education." *Jersey City, supra*, 475.

Mindful, then, of the standard to be applied in this matter, the Commissioner makes determinations as set forth below.

GENERAL ARGUMENTS OF THE PARTIES

The City contends that the District will have a $4.6 million surplus in its salary accounts, which have historically been overbudgeted. The City warrants that its reductions in these accounts were calculated using the actual 1995-96 budget year

expenditure figures provided by the District in its April 2, 1996 audit report, which also included projections for salary line-item expenditures to the end of the fiscal year. To these amounts, the City added the 4% salary increase negotiated by the District and factored in increases in appropriate line-items for substitute teachers, attendance bonuses/incentives, performance bonuses/incentives, retirement payoffs and bumping rights. The City also took into account expected changes such as reductions in staffing: one less teacher in Grades 1-5, 9 fewer teachers for grades 6-8, 14 teachers for grades 9-12, 30 teachers for Basic Skills and 11 teacher aides for other instruction, at annual salary levels of $33,000 for teachers and $20,000 for aides. The City affirms that the reductions proposed below will not adversely impact on the ability of the District to provide T&E or prevent implementation of any corrective action plan.

The City further makes two general arguments with respect to the District's method of calculating the amounts necessary for salary appropriations. First, it contends that the District's submissions evidence that in calculating the amount of each line item appropriation, it included the 4% salary increase on the salaries generated by the total number of positions in each line item, reaching a subtotal which is then reduced by the salaries of the excessed positions. By such method, the City claims that the District is providing raises for people no longer employed. In that the 4% raises represent an expense for the upcoming 1996-97 fiscal year, the City queries how the District can justify appropriating such salary raises for positions which will not exist in the coming fiscal year. The City reasons that, in view of the fact that 326 positions are being eliminated for a salary savings in excess of $9,000,000, the District has effectively budgeted and appropriated for an excess of $360,000, representing 4% of the approximate $9,000,000 in salary savings based on the reduced number of positions. (City's Position statement at p. 7)

The City next finds troubling the District's method of calculating those salary line items which involve the category of "Subs, Incentives, MAG, Contractual Items." (*Id.*) Here, the City argues that the costs for such items are normally related to the number of teachers in each specific category/line item. The City asserts that there should be a reasonable basis for the amount placed in such accounts. However, after

examination, the City finds that the dollar amounts in such categories, when divided by the number of employee positions in each such line item, results in "significantly varying dollar amounts per teacher/employee." (*Id.*) For example, the City observes that, with respect to the line item for Salaries of Preschool/Kindergarten staff, the dollar amount is $322,500 for 65 positions, resulting in a per position figure of $4,961; whereas, the per teacher/employee dollar amount for the Salaries for Grades 9-12 line item is $2,093. (*Id.*) Thus, the City concludes that the District's calculations are arbitrary.

As to the District's contention, *infra*, that the budget should be calculated based upon actual, rather than projected figures, the City agrees. However, the City argues that "obtaining accurate figures, properly segregated between the various accounts, is not always made easily accessible by the District." (City's Summation at p. 2) The City further adds that, even with the use of actual expenditures, "***past experience has shown subsequent budget expenditure requests by the District to often be inflated and unrealistic ***." (*Id.*)

The District denies these contentions and avers that all monies budgeted are necessary in order to provide for T&E, as well as noting that the budget for FY 97 is less than that for FY 96. Additionally, the District asserts that the City did not adequately calculate for the inclusion of costs of substitute teachers, performance bonuses/incentives, attendance bonuses/incentives, retirement payoffs, bumping rights, and movement on the salary guide. (District's Answer at p. 2) Nor, the District asserts, are the City's estimates soundly based on the District's historical experience. (*Id.*) The District contends that the City's system of analysis "***is the most unsophisticated, unprofessional and inaccurate method of public finance budget preparation." (District's Reply at p. 1) It argues that the City's calculations do not provide for the "real life" situations which arise in the course of a budget year, and affect district expenditures. The District maintains that actual, rather than projected, data should be used to set the 1996-97 budget. (*Id.* at p. 2) In support of its contentions, the District provides calculations for each line item reduced, demonstrating how the amount budgeted was derived.

The District further notes that the surplus referenced was dedicated to revenue in the 1996-97 budget so as to reduce the local tax levy, which has remained

fairly constant. Finally, the District points to its efforts to find alternative methods of obtaining revenue, devise operational efficiencies and reduce staff (privatization of custodial positions and abolition of a substantial number of positions) as an indication of the leanness of the District's budget.

SPECIFIC ARGUMENTS OF THE PARTIES

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02520	11-120-100-101	Salaries-Gr. 1-5	$25,772,008	$104,957

The reduction which the City proposes was calculated by using anticipated projected expenditure figures provided by the District at the time of the filing of the Petition based on figures contained in the March 19, 1996 Secretary's report and/or the April 2, 1996 audit report. The projected expenditure was $23,700,726. Although the District's *actual* expenditures in this line item were $24,279,212, the City maintains that the recommended reduction is appropriate. (City's Position Statement at p. 2) That is, the City reasons that, given the actual amounts expended in the account in the year ending June 30, 1996, and reducing said amount as per a single position, then adding the 4% contracted salary increase for the 1996-97 fiscal year, the City's recommended appropriation of $25,667,051 *exceeds* that which is needed based on the aforesaid calculation. Moreover, the City contends that this figure includes appropriate costs for substitutes, attendance bonuses/incentives, performance bonuses/incentives, retirement payoffs and bumping rights, resulting in an approximate increase of 6% over the amount actually spent in this line item for the recently ended fiscal year. (*Id.*)

The District denies that the reduction of $104,957 in this line item was proper. In so doing, it relies upon its calculation which begins with the number of positions at February 26, 1996 (including nine vacancies), adds costs for six vacancies to be filled and three staff to return from leaves of absence, applies the 4% negotiated settlement, reduces the amount as per the one full-time position to be eliminated, factors

in bumping rights, reductions in force, substitutes, incentives, MAG and contractual items for a total of $25,772,008.

Disputed Line-Item Number 2

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02530	11-130-100-101	Salaries-Gr. 6-8	$19,346,604	$ 89,864

The City notes that, as with the previous line item, the amount of actual year end expenditure as of June 30, 1996 ($18,456,805) exceeded that which was projected in April of 1996 at the time of the filing of the petition ($17,998,408). Again, the City, for illustration purposes, shows that by reducing the figure for the actual amount by the reductions in salary as per the elimination of nine full-time positions, and applying the 4% salary increase, the City's proposed appropriation is in excess of the needed amount, based on the above computation. (City's Position Statement at p. 2) Once again, the City affirms that this figure accounts for substitutes, incentives, etc. The City concludes that its recommended appropriation is an approximate 6% increase over the District's net costs for this line item and is more than adequate in view of last year's actual expenditures. (*Id.* at p. 3)

The District relies upon its calculations to conclude that the City's reduction in this line item is improper. The District starts with the number of positions at February 26, 1996 (including 10 vacancies), adds costs for 10 vacancies to be filled, applies the 4% salary increase, reduces the amount as per the nine full-time positions to be eliminated, factors in bumping rights, reductions in force, substitutes, incentives, MAG and contractual items for a total of $19,346,604.

Disputed Line-Item Number 3

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02540	11-140-100-101	Salaries-Gr. 9-12	$17,866,368	$198,056

The reduction proposed by the City was calculated based upon the anticipated projected expenditures provided to it by the District last spring. While the actual amount of expenditures in this account was $16,877,485, the City maintains that

the reduction was proper. Again, the City calculates that even using the actual amounts expended in the subject account as the starting figure, its recommended appropriation exceeds that which is needed to meet anticipated costs in this line item. Thus, the City submits that its figure is more than adequate in light of the actual expenditures for the 1995-96 fiscal year and further maintains that the proposed reduction can be made without adversely affecting the quality of education to the students in the District. (City's Position Statement at p. 3)

The District again relies upon its calculations to conclude that the City's reduction in this line item is improper. The District starts with the number of positions at February 26, 1996 (including 19 vacancies), includes costs for the 19 vacancies to be filled, applies the 4% salary increase, reduces the amount as per the 14 full-time positions to be eliminated, factors in bumping rights, reductions in force, substitutes, incentives, MAG and contractual items for a total of $17,866,368.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
04810	11-230-100-101	Salaries-Basic Sk.	$10,452,601	$296,605

The City reasons that, given the actual amount expended in this account in the 1995-96 fiscal year, and reducing said amount by the salaries for the 30 full-time positions to be eliminated, then adding the 4% salary increase, the result is indeed less than that which the City has appropriated. Thus, the City reasons that the District will not be adversely affected by the reduction in this account.

The District relies upon its calculations to conclude that the City's reduction in this line item is improper. The District begins with the number of positions at February 26, 1996 (including 8 vacancies), includes costs for the 8 vacancies to be filled, applies the 4% salary increase, reduces the amount as per the 30 full-time positions to be eliminated, factors in bumping rights, reductions in force, substitutes, incentives, MAG and contractual items for a total of $10,452,601.

Disputed Line-Item Number 5

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
04900	11-240-100-101	Salaries-Bilingual	$ 2,867,142	$255,497

The City proposes a reduction in this account of $255,497. Again, the City reasons that, given the actual amount expended in this account in the year ending June 30, 1996 of $2,472,003, then adding the 4% contracted salary increase for the upcoming fiscal year, the City's recommended appropriation of $2,611,645 well exceeds the amount which results from the aforesaid calculation which should be the amount needed for this line item. Further, the City notes that available remaining balance in the 1995-96 budget of $256,362 in this line item. (City's Position Statement at p. 4)

Again, the District relies upon its calculations to conclude that the City's reduction in this line item is improper. The District starts with the number of positions at February 26, 1996 (including 5 vacancies), includes costs for the 5 vacancies to be filled, applies the 4% salary increase, factors in bumping rights, reductions in force, substitutes, incentives, MAG and contractual items for a total of $2,867,142.

Disputed Line-Item Number 6

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
02640	11-190-100-106	Salaries-Other	$ 2,131,884	$392,015

The City again points out that the actual amount of fiscal year expenditures for this line item significantly exceeded that which was projected by the District. The City argues that it arrived at the designated reduction by using the projected expenditure amount, adjusted by the 11 excessed positions, and applied the 4% salary increase. However, using the District's actual year-end expenditures as the starting point, the City's resulting figure would be $1,899,041. Thus, the City reasons that its appropriation will not adversely affect the District.

Again, the District relies upon its calculations to conclude that the City's reduction in this line item is improper. The District starts with the number of positions at February 26, 1996 (including 7 vacancies), includes costs for the 7 vacancies to be filled,

applies the 4% salary increase, reduces the amount as per the 11 full-time positions to be eliminated, factors in bumping rights, reductions in force, substitutes, incentives, MAG and contractual items for a total of $2,131,884. Here, the District further notes that this account provides for the base calculated salaries of both classroom instructional aides and the hourly calculated wages for lunchroom aides. The District argues that while the component relating to the base salaries can be calculated, the amount budgeted for lunchroom aides on an hourly rate of pay is estimated on a review of years of service for all hired staff and based upon average amounts of salaries paid over the past three or four fiscal years. The amount the District has budgeted reflects the ability to hire the same number of aides for the same number of hours at the rates of pay called from the contracts, less an already existing deduction of over $200,000 to anticipated temporary vacancies. (District's Reply at p. 3)

Disputed Line-Item Number 7

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07370	11-000-290-220	Social Security Contr.	$ 2,715,717	$134,041

The City reduced social security contributions on the same basis and according to the same method as was employed to reduce salary line items above, using a F.I.C.A. withholding rate of 7.65 percent. The City asserts that the District apparently has not taken into account the reduction of the excessed staff in its calculations. (City's Position Statement at pp. 4, 5)

In reply to the District's arguments, *infra*, the City finds that the District's contentions as to the proposed increase in the social security wage base are misplaced in that such increases will affect very few, if any, nonteaching personnel covered by social security and for whom contributions are made by the District, rather than the State. The wages of such affected employees, the City continues, would not come up to the levels cited by the District. (City's Summation at p. 3)

The District contends that the City has used a simplistic method of calculation which fails to account for actual staffing patterns and "real world" conditions.

(District's Reply at p. 2) The District adds that the City's calculations further fail to take into account the increase in covered wages of 2 1/2%, from $61,200 to $62,700, which occurred on January 1, 1996. (*Id.*) Moreover, the District expects the social security wage base to further rise, resulting in an adjusted 4% increase during the second half of fiscal year 1997. The higher rate, the District avers, will be applicable for the full year. The District further asserts that the City did not review increases or decreases in non-calculated salary accounts such as part-time employees, hourly employees, overtime pay and other types of salaries which are not based on calculated salaries, but are covered by social security. (*Id.* at p. 3) Thus, the District maintains that its figures are actual and accurate, and are based upon real staffing levels. (*Id.*)

Disputed Line-Item Number 8

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
07420	11-000-290-290	Other Empl. Benefits	$18,625,727	$785,230

The City proposes a reduction of $785,230. Its appropriation represents a 9.3% increase for health insurance and related costs above the District's cost basis for this line item at the start of the current fiscal year. The City argues that the District's calculations include the 326 excessed employees, and its budgeted figure thus includes an artificially increased base amount. Again, the City notes a year-end surplus in this line item of $356,193. As to the District's assertions, *infra*, the City counters that the District's reliance on a 12.2% rate of increase is misplaced in that this figure is accurate as to only one component of the various health benefit programs offered by the District to its employees. (City's Summation at p. 3)

The District contends that the City's calculations are based on erroneous assumptions, and provides in support a detailed analysis of these accounts and the manner in which budgeted amounts were derived. The District further refutes that it failed to properly account for the 326 excessed employees in its calculations. Moreover, the District alleges that a 9.3% increase in costs for health insurance is not a reasonable amount. The District affirms that the State of New Jersey, Division of Pensions and

Benefits acknowledges that a 12.2% increase in rates is more reasonable, as this is the amount by which the premium will be increased. (District's Reply at p. 3)

COMMISSIONER'S DETERMINATION

Upon careful review of the record of this matter, including the extensive salary information submitted in response to the Commissioner's request for further explanation and documentation, the Commissioner finds that the monies in dispute are, in fact, necessary for provision of a thorough and efficient system of education.

In so finding, the Commissioner expressly notes that the crux of this dispute was which party's method of salary cost projection provided a higher probability of accurately estimating the District's salary needs for the 1996-97 school year. The budgeting of salaries is not an exact science, as it must take into account such potentially uncertain factors as attrition, reductions in force and filling vacancies, which are exacerbated in a large urban district such as Paterson. The Commissioner also notes that the general method of salary cost projection employed by the City would be an acceptable one if applied to a more stable environment; however, review of the District's workpapers, facts, assumptions and methodology clearly indicates that circumstances were present which could not be equitably accounted for under the City's methodology herein. The Commissioner further notes the District's practice of inappropriately coding in regular K-12 instructional salary accounts all of its budgeted amounts, including special and noninstructional, in the areas of substitute services, performance incentives, sick incentives, class coverage, vacation buy-back, salary guide movement and retired sick pay. (Upon actual payment of these amounts, the District then reclassifies them under the applicable function.) As a result of this practice, actual expenditures and the original budget are not comparable. The City's methodology excludes the inappropriately recorded costs, which in turn creates a perception of overbudgeting. Thus, the Commissioner finds that the District's more elaborate methodology, having no material weaknesses, is the more appropriate methodology under the circumstances and is satisfied that the amounts included by the District in its salary accounts are necessary for provision

of T&E, as are the concomitant amounts in the social security and health benefit accounts.

In view of the findings herein regarding coding, however, the District is directed to make forthwith the adjustments necessary to properly code amounts budgeted for substitutes, class coverage and salary guide movement under the function to which they pertain, to budget amounts for performance incentives, sick incentives vacation buy-back and retired sick pay in Business and Other Support Services - Other Employee Benefits, and to budget cafeteria aides' salaries under the applicable teacher salary account, when this duty is performed by a teacher, and under the Maintenance of Plant Services - Salaries account when performed by noninstructional employees.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the District projected an unreserved surplus of $6,159,881 and allocated $4,144,000 as revenue, leaving $2,015,881 as undesignated unreserved surplus.

The District's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 report) and the District's annual year-end audit report reveal that no additional surplus is available to fund District appropriations, and the Commissioner so finds.

SUMMARY

In summary, the Commissioner directs action on the City's proposed line-item reductions as set forth below. The Commissioner further notes that all line-item appropriations where reductions have not been approved are restricted in accordance with N.J.A.C. 6:20-2A.11(b)3.

Description	Account Number	Reduction Approved	Reduction Rejected
Salaries-Gr. 1-5	11-120-100-101	-0-	$104,957
Salaries-Gr. 6-8	11-130-100-101	-0-	89,864
Salaries-Gr. 9-12	11-140-100-101	-0-	198,056
Salaries-Basic Sk.	11-230-100-101	-0-	296,605
Salaries-Bilingual	11-240-100-101	-0-	255,497
Salaries-Other	11-190-100-106	-0-	392,015
Social Security Contr.	11-000-290-220	-0-	134,041
Other Empl. Benefits	11-000-290-290	-0-	785,230

Total Line-Item Determinations:	$2,256,265
Tax Levy Certified by District:	41,877,208
Proposed Reductions Approved:	-0-
Additional Application of Surplus:	-0-
Total Tax Levy for 1996-97:	$41,877,208

Accordingly, the Passaic County Board of Taxation is directed to let stand the tax levy certified by the State-operated School District of the City of Paterson for General Fund purposes of the 1996-97 school year. The District is directed to make such changes in its budgeting practices as are necessary to reflect proper coding practices as set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 28, 1997
DATE OF MAILING JULY 28, 1997

383-97

IN THE MATTER OF THE TENURE HEARING	:	
OF ANTONIA M. BENECCHI, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
MANTUA, GLOUCESTER COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming charges against elementary music teacher for allegedly throwing a tambourine (which hit a child) and pushing a music stand (which grazed another child).

Having considered the evidence and all of the circumstances of the incident, the ALJ concluded that respondent did engage in unprofessional conduct, failed to properly control her class and displayed less than proficient ability to adjust her lesson plan to existing circumstances. ALJ, however, found that removal of respondent's tenure was too great and too harsh a penalty as she acted without malicious and cruel intent, she was seriously challenged and patently ignored by the students and she has recognized the faults of her actions. ALJ concluded that a one-step reduction in pay together with the loss of any increments which respondent would have been due since her suspension and any which she may be due for the coming school year 1997-98 was a sufficiently steep penalty.

Commissioner concurred with the ALJ's credibility determinations, as well as his resultant findings and conclusions. However, in light of respondent's apparently unblemished record in the District, the Commissioner modified the recommended sanction -- respondent was to forfeit her 120 days' pay already withheld, and was to be subject to the loss of her increments, if any, which were due since her suspension and any which were due for the 1997-98 school year.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8794-96

AGENCY DKT. NO. 372-8/96

BOARD OF EDUCATION OF
THE TOWNSHIP OF MANTUA,

Petitioner,

v.

ANTONIA M. BENECCHI,

Respondent.

Raymond T. Page, Esq., for petitioner

Ned P. Rogovoy, Esq., for respondent (Waltman, Reilly & Rogovoy, attorneys)

Record Closed: April 24, 1997 Decided: June 9, 1997

BEFORE **JEFF S. MASIN**, ALJ:

The Board of Education of Mantua Township certified tenure charges against the respondent teacher. The Commissioner of Education transferred the contested case to the Office of Administrative Law ("OAL") and the case was preheard on January 14, 1997. Hearings were held on April 7 and 8, 1997, and thereafter, briefs were submitted to the judge and the record closed on April 24, 1997.

The Board alleges that Ms. Benecchi engaged in inappropriate conduct for a teacher on April 18, 1996, when she (1) allegedly threw a tambourine during a music class and threw a music stand over, each item purportedly striking a student and (2) used inappropriate language in the

presence of students. In addition, it contends that she (3) failed to maintain proper discipline and control over her class and, (4) failed to recognize the need to adjust her lesson plan for that day in view of the disruptive behavior of the students, (5) failed to send the student who had been struck by the tambourine to the nurse and (6) failed to control her emotions so as to act within the appropriate manner for a professional. The Board seeks to have her tenure removed.

The evidence presented at the hearing establishes that certain facts concerning the events of the 16th of April are not in dispute. Ms. Benecchi was a music teacher at the J. Mason Tomlin Elementary School. She had been employed in the district since 1991. On April 16th, Iowa tests were being given in the school, and as a result the regular schedule was disrupted. Ms. Benecchi was to teach a music class which would run from 1:10 P.M. to 1:45 P.M. The class consisted of approximately 25 fourth grade students. Normally, this class involved singing, but on the day in question, Ms. Benecchi decided that the instrumentalists who were to play at the upcoming concert scheduled for the following Wednesday would have an opportunity to play before an audience consisting of the rest of the students in that music class. According to her testimony, her intent was both to give these musicians the opportunity to experience playing before others and to teach the listening students the proper etiquette.

The evidence is undisputed that the class did not go well. As the solo musicians played, students began to laugh, talk and otherwise be disruptive. While the actual sequence of events is not undisputed and the testimony regarding that will be reviewed below, the basic occurrences during the class are not in conflict. At some point, Ms. Benecchi ordered J.H., a female student, to leave the room and go to the office. This happened when Ms. Benecchi admittedly told students that they were acting like a "bunch of animals" and Ms. H. then made a monkey sound. Ms. H. did proceed to the office.

In addition to her problems with J.H. and others, Ms. Benecchi had difficulty with student J.S., who was talking and who was otherwise disruptive. At one point in the class, he was ordered to go to the time out seat, which was located separate from the other student's chairs, against a wall. He concedes that he used the "f" word in class, but exactly when and in response to what is in dispute.

At some point in the class, Ms. Benecchi, trying to get the attention of the students and to finally get them to be quiet, took a tambourine from the piano where she was standing while playing and leading the class, and eventually she threw it down onto the floor, which was carpeted. She again picked it up and threw it a second time. At another point after this, she pushed over a music stand. The exact results of these actions, and whether the objects struck students, are in dispute.

Ms. H., who is now 11, testified that she could not recall if the class was in the morning or the afternoon. She believed that the students sat wherever they wanted to. She remembered that some of the students were playing their instruments and some just sitting. There were music stands in front of some of the students. J.S. started to talk to T.S., and he was making fun of and laughing at the instrument players. They were sitting somewhere near the door. Ms. Benecchi told them to stop talking, they did, but started to again talk. Ms. Benecchi then stopped everyone from playing and told the boys to be quiet and told J. to go to the side of the room, which he did. Students continued to play, but J. kept talking to T. The teacher then stood up behind the piano and picked up a tambourine and threw it towards the ground in front of her. It bounced and struck the side of J.'s face and eye. Ms. H. saw it hit the boy, who she recalled to have been sitting about 4 1/2 feet from Benecchi. She saw J. hold his eye or face. He said a curse word. Benecchi then asked him if he had to go to the nurse and he said "no." The class quieted down, but 6-7 minutes later J.H. was sent out of the class when, as noted above, she responded to Benecchi's "animals" comment with the monkey sound. J.H. only saw the tambourine thrown one time.

On cross-examination, Ms. H. appeared to be confused about whether J.S. had actually gone to the time out chair. The tambourine was thrown over the piano in the direction of that chair.

J.S., now 12 years old, recalled that he was sitting in the first row of seats on the day in question. He was about six feet from the piano and twelve feet from the door. When the students were playing their instruments, most of those not playing were talking. Ms. Benecchi yelled at them two or three times, but the talking continued. She then stood up from the piano and "grabbed" the tambourine from the top of it and threw it in front of her. It hit the floor or "the

chair" and bounced right in front of his feet. He was struck in the right cheek bone. A piece of the instrument, P-3, broke off and he recovered it from the floor and put it in his pocket. When he was struck, he held his cheek, "pushed down the chair" and said a curse, "What the f---," actually using the full word. Ms. Benecchi said nothing to him, but she did then say that he was to stand by the wall and he went to the time out chair. He never asked for medical attention, and does not remember anyone asking him if he needed any such assistance. He was "bruised" and crying, ,but not loudly. He stopping crying when he was sitting in the time out chair. Within five to six minutes he was allowed to return to his normal seat. On re-direct, he recalled that Ms. Benecchi asked him "Does the baby need an icepack." He said that he did not.

J.S. advised Mr. Cataffi, his regular classroom teacher, of what had happened and showed him a red mark made by the tambourine. Cataffi did not ask him whether he wanted to go to the nurse. He showed the same red mark to the school principal, Mr. Cattell. When he got home after school, he advised his mother of the incident. She returned to school with him, and at a meeting Ms. Benecchi apologized.

The student recalled that Ms. Benecchi threw the tambourine twice. The second such incident occurred when he was seated in the time out chair. She took it from about three feet from where he was seated in the time out chair. He did not see where on the wall it hit.

Contrary to Ms. H.'s recollection of the events, Mr. S. believed that J.H., who testified she saw him struck, had actually been sent out of the room before he was hit by the tambourine.

A.T., now eleven years old, testified that she had brought her instrument to class that day. This use of the instruments in this class was not the usual activity, as the class usually sang songs. Ms. T. had a music stand in front of her. J. S. was talking and Ms. Benecchi yelled at him. The teacher threw the tambourine down and it bounced and hit him under the eye. At some point, he was sent to sit in front of the closet, but Ms. T. could not remember where he was sitting when he was hit. She recalls that Benecchi commented to J.S., "Do you need an ice pack, little baby?" She also asked if he wanted to go to the nurse and he said "no."

At a point in the class, Ms. Benecchi was standing in front of D., who was seated next to A.T. A.T. was not talking, and does not think that D. was. The teacher "knocked over" or "pushed down" the music stand which had music on it, and it "kind of skinned me a little" on the left knee. She did not remember if she was upset from this. She did not remember if Benecchi bumped into the stand, but she did use her hand to knock it over. She did not recall if Benecchi said anything at that time. The teacher picked up the stand. A.T. did not see any mark on her knee at that time and did not show any to Mr. Cattell that day. She first noticed a mark the following Wednesday and she went to the school nurse at that time.

Ms. T. explained that when these events happened she was afraid because one student had already gotten hurt and she did not know if anything else would happen to anybody.

D.R., now twelve years old, recalled students talking and Benecchi getting mad. Benecchi warned J.S. and then told him to sit in the time out chair, which he did, but only after saying the "f' word. He does not remember her response at that time. Later on, J.S. was back in his regular seat, but he talked again, and was again told to go to the time out chair.

D.R. recalled that Benecchi threw the tambourine "like a frisbee," which he remembered bouncing off the wall and striking J.S. on the cheek bone, but he was not sure which one. D.R. was "scared" when she threw it. He also recalled that the music stand fell on A., but does not recall how it came to fall.

School Principal John Collins Cattell first learned of the incidents in Ms. Benecchi's class when he received a phone call from J.S.'s mother at 3:45 that afternoon. She reported that he had come home with a piece of plastic that had been thrown in the music class and that he had a mark on his right cheek where he had been hit by the instrument or this piece of it. She and her son came to school and conferred with Cattell, who noted redness on the boy's right cheek bone area. He then spoke to Ms. Benecchi in the presence of Ms. S. and her son. The respondent had returned to the school at his request from the Center City School where she had gone after the dismissal at 3 P.M. as part of her normal Thursday afternoon responsibilities. She explained that she was trying to give students rehearsals for the spring concert scheduled for the following week. They were unruly, she was attempting to get control, she banged the tambourine on the piano and

then threw it on the floor. She was just trying to get the students' attention, did not intend to hurt anyone, and as he recalled, she was "not sure if it (apparently the injury) happened." She "looked at J.S. and apologized and said that she was "sorry it happened," but told him he was one of those causing the trouble. After the boy and his mother left, Benecchi told the principal about J.S.'s "f--- you" remark, which she had not wanted to embarrass his mother with. He knew that she had sent one student from the class, J.H., to the office for disciplinary reasons. He asked her why she had not let him know before she left the building about what had happened in the classroom, but he did not ask why J.S. was not sent to the office earlier. She responded that she was "afraid I would wring her neck."

The tambourine was retrieved from the classroom the next day. When he looked on Thursday, it was not in its usual place and could not be located.

John Samuel Cattafi, a teacher at J. Mason Tomlin, was the homeroom teacher for the class of youngsters involved in this case. On that particular Thursday, he had them till 1:05 P.M. and they returned to him at 1:45. When they returned his attention was directed to J.S., who seemed very sad and solemn and appeared ready to cry. He asked the boy, who was always quiet in class, what was wrong and a couple of other students said that something had happened in the music room. He asked if J.S. wanted to go to the nurse, but got no response to the inquiry. J.S. also did not respond when asked if he wanted to go to the principal. At this point, Cattafi did not pursue the matter any further, and left the school when summoned for a family medical emergency. He did not notice any mark on the boy's face, although he did not observe him from any closer than ten feet.

David S. Porreca, who has been the superintendent in Mantua for eighteen years and taught and served as an assistant principal and middle school principal prior to that, was offered and accepted as an expert in elementary education. He testified that he was alerted to the incident by Mr. Cattell. Although he sat in on an interview with eight students about the situation, he never spoke to the respondent about it.

Dr. Porreca explained that, based upon his understanding of the events in question, Ms. Benecchi should have recognized that the children were not cooperating in listening to the

instrumentalists and that there was an undercurrent of impoliteness. She should have stopped the activity until the class was restored to a more conducive attitude or, if this was unsuccessful, she should have taken other steps, either to properly bring the class under control and/or to change the activities. A forthright discussion concerning courtesy would have been appropriate. Those causing problems could have been seated closer to the teacher. If the difficulties were not eliminated and instead continued, then she could have used the intercom to contact the principal regarding the unruly and uncontrollable class and the principal could then have consulted with either the class as a whole or particular students. Additionally, students other than the one student who was properly sent to the principal could have been similarly dispatched to the office.

Referring to her affidavit, Dr. Porreca explained that while she said that she had changed her lesson plan, he saw no attempt to gain control over the class. She apparently realized that something had to be done, however she did not attempt more stringent measures to gain control other than to change the subject matter of the lesson. As an example, the time out for an individual student could have been extended to an in-seat time-out for the whole class.

Ms. Benecchi's reference to the students as a "bunch of animals" was inappropriate and not the type of language proper as part of a reprimand, it was not likely to help bring them to order. It simply added more fuel to the fire as the behavior declined. He also believed that if she addressed J.S. as to the need to go to the nurse, she was therefore aware that he had been struck and she should have insisted that he go.

Dr. Porreca emphasized that this teacher was not dealing with just an every day occurrence, but instead with a class that was completely out of control for a short time. Student after student disregarded instructions. In summary, if after sending J.H. out J.S. was a continued problem then he should have been sent out or if the whole class was misbehaving, the building principal should have been contacted to sort things out.

Dr. Porreca had reviewed Ms. Benecchi's written affidavit, but it did not change his mind as to the impropriety of her conduct.

As previously noted Antonia M. Benecchi testified concerning her basic plan for the day, which was not a usual one due to the Iowa test. She explained that she had told the students not playing to listen, not to boo, whistle, make fun of mistakes, but instead to applaud and show appreciation. About six pupils had instruments in class. After the group played a full band piece, "Twinkle, Twinkle Little Star," which went very well, several of the instrumentalists wanted to play solo, and she "went with the excitement." The class enjoyed the first player, who played very well. When K. M. played her clarinet, she squeaked, which brought comments such as "you suck," "you don't know how to play," and "put it away." She told the students to appreciate the players, listen and keep their opinions to themselves. The next player wanted to start over a few times and the class laughed hysterically. J. H. and R.P. were especially loud. Benecchi told E. to move two seats away from J. and that she would not be playing her instrument. J.H. started to mimic her, and when told to be quiet, she acted like a monkey. Told to stop, she would not, and she was sent to the office with a note. This happened during the second third of the class. When Benecchi decided that the soloists were not gaining confidence because of the fun others were making of them, she decided that the players should perform as a group again. They were asked to take out the music for "Yankee Doodle Dandy." She started the musical introduction on the piano, at which she always stands when she plays in class. The students were talking continuously and loudly. She told them to listen as an audience and not to talk. She stopped the introduction, then started again, but the talking continued. Again she asked that they be quiet, and started to play again. At this point she was feeling frustrated, angry, and made fun of, and the students were being continuously disruptive. Most complied with her next request for quiet, and she started the introduction once more. Noise persisted. She focused on one of a group making noise, and told J.S. to go to the time out chair. He gave her a "raspberry" and she again told him to go, but he did not. She was "so frustrated" and she took the hand drum and said "I said, move" and threw the drum to the ground, at the right side of the keyboard. It "hopped" toward the front of the piano at the side. At that point, J. got up and said "f--- you," using the full word. She took the tambourine, which was at her feet, and threw it like a frisbee at the door. At this point in time, J. had not yet gone to the time out chair, and J.H. had already been sent out of the room to the office.

Ms. Benecchi said that her intent was to make a loud noise to get the attention of the students. She never noticed the chip in the tambourine and had no indication that the drum made

contact with his body. Therefore she was not aware of any need for him to go to the nurse. He seemed to be pouting while sitting in the time out chair. She asked him if he had a reason to be crying.

When she realized that the instrument performance was not working, the respondent moved to "Plan B" and asked the students to put their instruments away and she handed out a musical play "Light fingers" with dialogue and songs. This was in the last third of the class toward the end of the period. However, there still was noise, laughter and disruption. She took a music stand and pounded it on the floor. This did not work, so she pushed the stand into the side of the piano to get attention.

Ms. Benecchi readily acknowledged that neither her throwing of the tambourine nor her pushing of the music stand was appropriate conduct. She did not report the incidents to the office as the class was unruly, but she did not feel that anything about the incident was reportable. She apologized when she met with Mr. Cattell later that day.

The respondent was suspended in April 1996 (that record does not reveal the exact date). Since that time she has taken courses in classroom management and strategies in the Berks County unit of St. Joseph's College. These courses met over two weekends and she wrote a paper on this incident as part of the course.

Ms. Benecchi characterized this as a rough class, discipline wise, and had told this to Mr. Cattafi during the course of the school year. Some of the children were often rude. She had written nothing to Mr. Cattell about the class and she had not attended any conference about the class. As for the use of the principal's office as a management tool, she saw the calling in of that office as a "last resort." She believed that she should try to handle discipline problems in the classroom. She was "caught off guard" by J.S., who she characterized as generally a quiet boy. She does not believe that either J. or A.T. were struck by the tambourine or by the stand, respectively.

The witness denied that she ever told anyone that she "could throw things too." She never mentioned an ice pack. She did not reference his mother or that he would go home crying to her. She observed no bruise on the cheek that afternoon.

DISCUSSION

The respondent does not attempt to deny that she acted in an improper and unprofessional manner both when she threw the tambourine and when she pushed over the music stand. The acts are just as unprofessional regardless of whether one or both of the students were struck by either the drum or the stand. As Dr. Porreca said, there were perfectly acceptable means available to Ms. Benecchi for dealing more effectively, safely and professionally with the unruly members of her class than by means of these rash, violent, dangerous physical actions, which undoubtedly were manifestations of frustration and anger at the students who had been and continued to be so disruptive, noisy, rude, disrespectful and undisciplined. She had no excuse for these actions, whatever her level of mental and emotional stress. Dr. Porreca's testimony is convincing that she could and should have tried other less dramatic and less dangerous means of asserting and retaining control and cooperation. Additionally, her "animals" comment was unprofessional.

While there are some discrepancies in the testimony of the four students as to time sequence, and while it is unclear how J.H. could have seen J.S. struck or even the tambourine thrown as it appears that she was already out of the class at that time, nevertheless, as for the results of Ms. Benecchi's actions, I **FIND** that J.S. was struck by either the piece of the tambourine or the instrument itself, perhaps more likely by the piece. I also **FIND** that A.T. was grazed by the music stand. I see no reason to conclude that the students were mistaken or that they lied about the contacts, and despite the lack of observation of the marks left by these contacts by some who saw the students afterward, and the delayed notice of marks evidencing the contact, the greater weight of the credible evidence supports the finding that they were struck.

Based upon the evidence, I **CONCLUDE** that the respondent engaged in unprofessional conduct, failed to properly control her class and displayed less than proficient ability to adjust her lesson plan to the existing circumstances.

THE APPROPRIATE SANCTION

The Commissioner of Education has made it quite clear, and the Appellate Division has agreed, that under appropriate circumstances, a tenured teacher can lose tenure as the result of one incident of unprofessional conduct. *In Re: Fulcomer*, 93 *N.J. Super.* 404 (1967). The parties have reviewed a number of cases in which serious misconduct has either led to removal of tenure or to a lesser sanction. The Board has particularly relied upon *South Orange-Maplewood Board of Education v. Nancy Simonic*, OAL DKT. NO. EDU 730-85 (July 3, 1985), *adopted* by Commissioner (August 23, 1985), *aff'd* by State Board (January 8, 1986), where a teacher was found to have thrown a pair of pliers in the direction of a group of students who had failed to respond to her repeated requests to take their seats. The pliers struck a student in the eye. The respondent had testified that she was waving the pliers above her head when her right ankle gave way and as she fell toward the right the pliers flew forward. The ALJ found, apparently contrary to her version, that she intentionally threw the pliers a distance of some forty feet. No doubt of some significance to the outcome, Ms. Simonic had previously been warned about throwing objects. The Commissioner deemed the single incident sufficiently flagrant and of such a magnitude as to warrant dismissal from the tenured position.

In *Fulcomer, supra,* which is discussed by the respondent a teacher, after first dropping his textbook on the student's desk, laid hands upon a student who was inattentive, and when the boy was released and then went to the front of the room and when told to resume his seat went toward the rear door, Fulcomer pursued and took hold of the student. Both fell to the floor. The appellate court concluded that while they disapproved of the teacher's conduct, they nevertheless saw no indication of premeditation, cruelty or viciousness, or of an intent to punish or inflict corporal punishment. "Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline." *Fulcomer, supra,* at 421.

As cases such as *Simonic* and *Fulcomer* indicate, in cases where a teacher attempts to gain control of and bring discipline to an unruly classroom, the line between that conduct which is unacceptable and that which is so outrageous as to necessitate the removal of the teacher can be a fine one indeed. In the present case, I have no problem with the fact that Ms. Benecchi had no

vicious intent, no premeditated concept or plan, no cruel purpose in her conduct. Her unfortunate reference to the group as "animals" and her throwing and pushing of objects were responses to a distinctly frustrating situation. She acted precipitously and incorrectly, but her conduct did not stem from wicked or hateful thought. She simply and quite unfortunately was overwhelmed by the situation. She was clear as to the impropriety of her deeds as soon as they were reviewed with her. I have not the slightest doubt that she is both truly sorry for them and that she now understands that this conduct is entirely unacceptable, this regardless of whether the students were hit by the objects or not.

The Board argues that the respondent's conduct created fear in the classroom, and the evidence from the children supports this. That was an unfortunate result of the misguided actions of the respondent. But the same climate must have been created in young and impressionable children in *Fulcomer*, yet removal was not the outcome. In *Tenure Hearing of Frederick L. Ostigren*, 1966 *S.L.D.* 185, cited by the Board in regard to its concerns regarding the use of physical force and the fear factor, the incident involved was a fight at a baseball game which had been provoked by an obscene comment by the student. The Commissioner forcefully condemned the use of violence and force, as the quote cited by the Board reflects, but the Commissioner also noted that the factors which determine the appropriate level of sanction are the nature and circumstances of the incidents, the teacher's prior record and present attitude, the expressed concerns of the parents and the likelihood of such behavior recurring. *Ostigren, at 187.* Evidence of contrition, remorse, apology, and of provocation as well, led the Commissioner to order that the teacher suffer a reduction in salary.

In this present matter, the facts and circumstances of the incident reveal that Ms. Benecchi's conduct cannot be excused. The needs and desires of the parents and of the Board to protect young students from both physical and emotional harm are well recognized. At the same time, while other appropriate means of maintaining discipline were available to her and should have been used, Ms. Benecchi was in fact sorely tested by her students, and was also subjected to a highly provocative curse before she threw anything. She was apologetic and recognized her errors when she met with the student and parent, she has suffered a lengthy suspension, some of it without pay, she has no prior record, and she has undertaken at her own expense course work to enhance her understanding of measures and tactics for discipline and classroom control. While

post-incident study cannot be an excuse for light treatment, it is nevertheless important for gauging the likelihood of any repeat of the unacceptable conduct.

Based upon the evidence, and given all of the circumstances, I **FIND** that removal of Ms. Benecchi's tenure in this instance, where she acted without malicious and cruel intent, where she was seriously challenged and patently ignored by the students and where she has recognized the faults of her actions, would be too great and too harsh a penalty. I judge the circumstances here to reflect conduct that was abberational for this teacher, and I deem the likelihood of any repetition of her mistakes to be extremely remote. While a serious sanction is wholly warranted, the ultimate sanction is not. Instead, I **CONCLUDE** that a one-step reduction in pay and the loss of any increments which Ms. Benecchi would have been due since her suspension and any which she may be due for the coming school year, 1997-98, is a sufficiently steep penalty.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 9, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6/11/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 16 1997
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1 Summary Evaluation Report for Antonia Benecchi dated April 12, 1994

J-2 Summary Evaluation Report for Antonia Benecchi dated May 15, 1995

J-3 Classroom Diagram

J-4 Mantua Twsp. Public Schools Teacher Observation Form for Antonia Benecchi dated November 29, 1995 Mantua Twsp. Public Schools Teacher Observation Form for Antonia Benecchi dated

J-5 Mantua Twsp. Public Schools Teacher Observation Form for Antonia Benecchi dated March 11, 1996

FOR THE PETITIONER:

P-1 Handwritten note of Miss Benecchi

P-2 Mantua Twsp. Public Schools Conduct Referral slip for J.H. dated April 18, 1996

P-3 Piece of plastic

P-4 Tambourine

P-5 Chair

P-6 Music Stand

P-7 Photograph of classroom

FOR THE RESPONDENT:

R-1 Benecchi's Notes (typed)

R-2 Benecchi's Notes (handwritten)

R-3 Handwritten draft of April 29, 1996 memo from John Cattell

R-4 Not offered

R-5 Accident Report, Mantua Township Schools, dated April 25, 1996

R-6 Affidavit of Antonia M. Benecchi

OAL DKT. NO. EDU 8794-96
AGENCY DKT. NO. 372-8/96

IN THE MATTER OF THE TENURE HEARING	:	
OF ANTONIA M. BENECCHI, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
MANTUA, GLOUCESTER COUNTY.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's credibility determinations, as well as his resultant findings and conclusions. The Commissioner does, however, modify the recommended sanction in this matter so as to determine that respondent shall forfeit her 120 days' pay already withheld, and shall be subject to the loss of her increments, if any, which may have been due since her suspension and any which may be due for the 1997-98 school year. The Commissioner finds that such a penalty sufficiently demonstrates that respondent's conduct, even under provocative circumstances, was indeed unprofessional and imprudent, yet also considers her apparently unblemished record in the District and is consistent with penalties effectuated in prior tenure determinations which did not result in the dismissal of respondent.

Accordingly, the initial decision is adopted, as modified, for the reasons well-expressed by the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 28, 1997
DATE OF MAILING JULY 28, 1997

384-97

384-97

TELFORD BERKEBILE, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
NICHOLAS BYCZKOWSKI, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
JOHN GOLDSBOROUGH, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
PETER KRZYZKOWSKI, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
ARLENE NOVAK, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
ROBERT PETCHEL, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	

JULY 28, 1997

JOSEPH PRATO,
PETITIONER,
V.
BOARD OF EDUCATION OF THE BOROUGH
OF SOUTH RIVER, MIDDLESEX COUNTY,
RESPONDENT.

MELVIN ROSSI,
PETITIONER,
V.
BOARD OF EDUCATION OF THE BOROUGH
OF SOUTH RIVER, MIDDLESEX COUNTY,
RESPONDENT.

FREDERICK SCHAUM,
PETITIONER,
V.
BOARD OF EDUCATION OF THE BOROUGH
OF SOUTH RIVER, MIDDLESEX COUNTY,
RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, nine nontenured custodians, contended the Board improperly suspended them without pay. Petitioners argued that the Board had no legal authority to refuse to pay them during the pendency of investigations and complaints into possible criminal activity (falsifying vouchers for overtime and weekend duty). Board refused to reinstate them or pay back compensation even though charges were ultimately dismissed.

ALJ found that summary judgment was warranted pursuant to *N.J.S.A.* 18A:6-14. ALJ found that petitioners were not illegally suspended, but the Board acted illegally when it refused to pay petitioners during the period of suspension as no indictment was pending against them. ALJ directed the Board to restore petitioners to the positions they would have had had it not acted improperly by making their otherwise lawful suspensions payless. Petitioners had a duty to mitigate their damages during the suspensions by making reasonable efforts to secure employment during the suspension, but the burden to establish that petitioners did not put forth reasonable efforts to mitigate while suspended under suspicion of illegal conduct lies with the respondent. ALJ determined petitioners need not account for the monies received from unemployment compensation as they can deal with the Department of Labor on their own concerning repayment of such benefits.

Commissioner concurred with the ALJ that the issuance of summary judgment was warranted. Commissioner found that interest was not warranted in that petitioners provided no basis for concluding that the Board acted in bad faith. Commissioner concurred that the Board failed to meet the burden necessary to fully litigate the issue of mitigation. Commissioner modified the ALJ's recommendation regarding unemployment benefits, concluding that the amount of back pay owed by the Board should be offset by unemployment benefits already paid to petitioners, as well as the amount of any actual earnings received.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

TELFORD BERKEBILE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10768-96
AGENCY DKT. NO. 527-11/96

NICHOLAS BYCZKOWSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10769-96
AGENCY DKT. NO. 528-11/96

JOHN GOLDSBOROUGH,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10770-96
AGENCY DKT. NO. 529-11/96

PETER KRZYZKOWSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10771-96
AGENCY DKT. NO. 530-11/96

ARLENE NOVAK,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10772-96
AGENCY DKT. NO. 531-11/96

ROBERT PETCHEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10773-96
AGENCY DKT. NO. 532-11/96

JOSEPH PRATO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10774-96
AGENCY DKT. NO. 533-11/96

MELVIN ROSSI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10775-96
AGENCY DKT. NO. 534-11/96

FREDERICK SCHAUM,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,
Respondent,

OAL DKT. NO. EDU 10776-96
AGENCY DKT. NO. 535-11/96

Michael C. Damm, Esq., for petitioner Telford Berkebile (Selikoff and Cohen, attorneys)
Charles Uliano, Esq., for petitioner Nicholas Byczkowski (Chamlin, Rosen, Cavanagh and Uliano, attorneys)
James M. Weinberg, Esq., for petitioner John Goldsborough (Weinberg and Weinberg, attorneys)
Mary J. Hammer, Esq., for petitioner Peter Krzyzkowski (Bucceri and Pincus, attorneys)
Michael J. Buonaguro, Esq., for petitioner Arlene Novak (Zazzali, Zazzali, Fagella and Nowak, attorneys)
G. Robert Wills, Esq., for petitioner Robert Petchell (Wills, O'Neill and Mellk, attorneys)
Michael T. Barrett, Esq., for petitioner Joseph Prato (Bergman and Barrett, attorneys)
David L. Rosenberg, Esq., for petitioner Melvin Rossi (Klausner and Hunter, attorneys)
Robert J. MacNiven, Esq., for petitioner Frederick Schaum (Iaria and MacNiven, attorneys)
Robert A. Blanda, Esq., for respondent

Record Closed: May 13, 1997 Decided: June 10, 1997

BEFORE **JEFF S. MASIN**, ALJ:

These contested cases concern the question as to whether the respondent Board of Education of the Borough of South River acted improperly and without legal authority when it

suspended nine non-tenured custodians without pay. The nine have all filed complaints with the Commissioner of Education, arguing that the Board had no legal authority to refuse to pay them during the pendency of investigations and complaints into possible criminal activity. The Commissioner transferred the cases to the Office of Administrative Law ("OAL") and a prehearing conference was held on March 19, 1997. The petitioners then moved for summary decision, pursuant to *N.J.A.C.* 1:1-12.5.[1]

The background of the dispute is that an investigation began in May 1996 concerning allegations that custodians in the district were filing false vouchers for overtime and weekend duty. The parties agree that the Board notified each of the petitioners by letter dated August 7, 1996, that the Board would be considering matters which might have relevance to their employment at its meeting of August 12. None appeared at the Board session and the Board proceeded to suspend each of the petitioners without pay.

The Middlesex County Prosecutor's Office and the South River Municipal Prosecutor each declined to prosecute any charges against the petitioners. Ultimately, a private attorney was hired by the Board to prosecute the matters in the South River Municipal Court, but the criminal charges pending therein, which had been brought on a citizen's complaint by the Superintendent of Schools and were for alleged violations of *N.J.S.A.* 2C:5-2A (Conspiracy) and *N.J.S.A.* 2C:20-4A (Theft by Deception), were all dismissed on a motion made by the Board's retained counsel.

The several petitioners were each notified by mail dated December 5, 1996, that a meeting of the Board would be held on January 6, 1997, at which the Board would consider charges against them. Each letter stated a specific charge against the particular recipient. This meeting was postponed until January 30. Thereafter, in a letter dated February 3, 1997, each petitioner was advised that at the Board's meeting, they had been "found guilty" and each was terminated.

The terminations are currently the subject of arbitration proceedings and their validity is not under consideration before either the Commissioner or this administrative tribunal.

[1] All of the petitioners have joined in the brief in support of summary decision filed by David Rosenberg, Esq., counsel for petitioner Melvin Rossi.

Arguments of the Parties

The petitioners seek summary decision based upon their contention that, while the Board may have had the authority to suspend them pending the investigations, it was without authority to make those suspensions without pay. Their position is premised upon a reading of the applicable statutory provision, *N.J.S.A.* 18A:6-8.3, which permits the suspension of an employee of a school board.

Suspended employee or officer of board of education; compensation; exceptions

> An employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.[1]

The petitioners' attorneys argue that each of their clients is a Board employee who have been suspended from employment and is therefore eligible to state a claim under this law. They contend that the sole exception provided by this act to the general principle that those employees suspended for reasons other than the pendency of an indictment must be paid during the period of suspension, is that which allows for the suspension of tenured employees for a period of up to 120 days following the certification of tenure charges to the Commissioner. *N.J.S.A.* 18A:6-14. Since these employees are not tenured, and they were never indicted, the exception does not apply to them. Therefore, the Board could not lawfully suspend them without pay, but had to continue to pay them during the period of suspension.

In support of their position, the petitioners cite two cases which have each concluded that absent indictment or certified charges a board may not suspend a tenured employee without pay. *Slater v. Board of Education of Ramapo-Indian Hills Regional High School District,* 237 *N.J.*

[1] Sections 18A:6-1 to 18A:6-7.4.

Super. 424 (App. Div. 1989), and *Roberts v. Clinton Township Board of Education*, 92 *N.J.A.R. 2d* (EDU) 123 (1991).

The respondent believes that the same statute relied upon by the petitioners as the source for limiting the power of the Board in fact grants the Board the discretion to suspend without pay, even where no indictment is pending and the employees are not tenured employees. In its brief, the Board cites the following language from *N.J.S.A.* 18A6-8.3 for this proposition

> . . . except that in the event of charges against such employee or officer brought before the board of education . . .

Counsel for the Board argues that the issues regarding back pay must be addressed by looking at three distinct periods of time. The first runs from the suspension without pay on August 12, 1996, until the dismissal of the charges in the South River Municipal Court on November 6, 1996; the second from November 6 until December 5, 1996, on which date the petitioners were served with the charges filed before the Board; and the third from December 5 until the petitioners were terminated by the Board's action of February 15, 1997. He submits that the petitioners are not eligible for any pay after December 5, for as of that date they would come within the exception to the suspension-with-pay mandate which covers cases in which "charges (are) . . . brought before the board . . ."

THE STANDARD FOR SUMMARY DECISION

The traditional standard for determining whether a motion for summary decision can be granted was long ago formulated in *Judson v. Peoples' Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74-75 (1954). In *Robin Brill v. The Guardian Life Insurance Company of America, et al.*, 142 *N.J.* 520 (1995), the New Jersey Supreme Court elaborated upon this standard, incorporating the United States Supreme Court's analysis as presented in *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 106 *S.Ct.* 2505, 91 *L. Ed. 2d* 202 (1986) and *Celotex Corp. v. Catrett*, 477 *U.S.* 317, 106 *S. Ct.* 2548, 91 *L.Ed. 2d* 265 (1986). Under the refined formulation, as before, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating

search" of the record, consisting as it may of affidavits, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion.

In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, ..." *Judson, supra.*, at 75 (citations omitted). The *Brill* decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." *Brill, supra* at 530. Under the new standard, the same analytical process used to decide motions for a directed verdict is used to resolve summary judgment motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Brill, supra.*, at 536, quoting *Liberty Lobby, supra*, 477 *U.S.* at 251-52, 106 *S.Ct.* at 2512, 91 *L. Ed.* 2d at 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that be the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

DISCUSSION

The parties agree that the source for deciding the question of whether the Board could lawfully suspend these employees without pay during any period prior to their purported termination is *N.J.S.A.* 18A:6-8.3. However, they differ on its meaning. Clearly, the statute

allows for suspension without pay where an indictment has been returned against a board employee, but in the present matter no indictments were returned.

Interestingly, the Board does not attempt to defend the legality of a suspension without pay for any of these employees during the period from August 12 until December 4, when no charges were pending before the Board. Apparently, it concedes that the statute does not give it the authority to suspend without pay merely because of the pendency of an investigation or of charges which are pending in a prosecutor's office or in a municipal court, but which have not yet resulted in an indictment. For the period beginning December 5, the Board relies on the language cited above from its brief, the exception for charges "brought before the board." If one reads only the quoted portion it does appear that this language would apply, that is, as of the point at which the charges were filed with the board, the board could suspend without pay. But the flaw in the Board's analysis for the period from December 5, is that the portion of the statute which it chooses to quote in its brief is not the whole phrase which defines the exception for charges before the board. The whole phrase is "except in the event of charges brought before the board of education . . . pursuant to law, such suspension may be with or without pay or salary *as provided in chapter 6 of which this section is a supplement.*" (italics supplied). Thus, in order to support a suspension without pay, a board must show that some portion of chapter 6 of Title 18A relevant to the particular employees subjected to the suspension provides for a suspension without pay. That portion cannot be 18A:6-8.4 itself, for no reference to the rest of chapter 6 would be necessary if 6-8.4 itself permitted suspension without pay in every instance where a charge was brought before the board. An examination of the whole of chapter 6, from 6-1 to 6-74, the very sections footnoted in 6-8.4 itself, reveals only one situation where the statutory provisions allow a suspension without pay, other than where an indictment exists, and that sole exception is where a tenured employee is suspended upon certification of tenure charges, and then the suspension without pay can only last for up to 120 days, at which point it must become a suspension with pay, unless in the interim an indictment is returned, or where the matter is delayed by action of the suspended employee. *N.J.S.A.* 18A:6-14. There is no provision within 6-1 to 6-74 which allows for a non-tenured employee's pay to be suspended based solely upon the existence of charges before the board.

The action of a board suspending an employee without pay must be grounded in some portion of chapter 6 which allows for a without pay suspension. The exception in 6-8.4 is regulated by the presence or absence of authority for suspensions within the rest of chapter 6. There is no authority in this chapter permitting a non-tenured employee to be suspended without pay unless an indictment is pending against the employee. None was in the present case, and therefore the Board acted without authority when it determined to withhold pay from these suspended employees. They are therefore entitled to have their withheld pay restored to them, together with all benefits which they would have otherwise been entitled to had their pay not been suspended. *See, Worrell v. Bd. of Ed. of theTwsp. of Cherry Hill*, 1979 *S.L.D.* 401, 415-416.

No disputes regarding any material facts exist which prevent a determination of this legal issue. The exact amount of money each petitioner is entitled to may be a matter of legal or factual dispute, but the fundamental decision that the Board acted illegally can be made without any need for further delineation or resolution of the facts.

Back Pay Award

> Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension . . . . *N.J.S.A.* 18A:6-30

In this case, the petitioners were not illegally suspended, but the board acted illegally when it refused to pay the petitioners during the period of suspension. Under the provisions of this statute, the respondent is required to restore the petitioners to the position that they would have had had it not acted improperly by making their otherwise lawful suspensions payless. As this provision has been interpreted, the petitioners had a duty to mitigate their damages during the suspensions by making reasonable efforts to secure employment during the suspension. *School District of the Twp. of Teaneck v. Hogue,* OAL. DKT. EDU 1696-83 (Sept. 27, 1983), *adopt. with mod.* Comm. of Educ. (Nov. 16, 1983); *White v. Twp. of North Bergen*, 77 *N.J.* 538 (1978) (no distinction between "compensation" and "salary" as far as duty to mitigate). Public policy requires such reasonable efforts, but the burden to establish that the petitioners did not put forth

reasonable efforts to mitigate while suspended under suspicion of illegal conduct lies with the respondent, *Hogue, supra.* As for the need to account for unemployment compensation payments, the payment of full reimbursement for the total compensation lost will impose upon the petitioners the obligation to repay the unemployment payments to the Department of Labor. *N.J.S.A.* 43:21-5(b). However, it is more appropriate that the petitioners receive the full amount from the Board and deal with the Department of Labor on their own. Thus, they need not account for the monies received from unemployment compensation in this proceeding.

Each petitioner shall provide the Board an affidavit of all earnings received during the period of suspension without pay, to be supplied within 10 days of the receipt of this decision. If the parties are unable to agree upon the amount of money to be paid to any petitioner, such matter shall be addressed to the Commissioner for such proceedings as he shall order.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 10, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

6/12/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 16 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

OAL DKT. NOS. EDU 10768-96 through 10776-96 (CONSOLIDATED CASES)
AGENCY DKT. NOS. 527-11/96 through 535-11/96

TELFORD BERKEBILE, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
NICHOLAS BYCZKOWSKI, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
JOHN GOLDSBOROUGH, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
PETER KRZYZKOWSKI, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
ARLENE NOVAK, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
ROBERT PETCHEL, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	

JOSEPH PRATO, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	
MELVIN ROSSI, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION
FREDERICK SCHAUM, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY, RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and the petitioners' joint reply thereto, filed through one attorney, were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

The Board excepts to the Administrative Law Judge's (ALJ) contention that the Middlesex County Prosecutor's Office and the South River Municipal Prosecutor declined to prosecute any charges against petitioners and explains the procedural history of the instant matter at length. (Board's Exceptions at pp. 1-3)

The Board then avers that summary judgment was inappropriate herein due to the unresolved issue regarding mitigation of damages, noting that discovery would have provided the Board with the opportunity to learn exactly what petitioners did to mitigate their damages. Additionally, the Board excepts to the lack of a determination in the initial decision requiring each petitioner to provide an affidavit as to what, if anything, each of them did to mitigate the damages. In citing *West Orange Supplemental Instructors Assoc. et al. v. Board of Education of West Orange Twp.*, 92 *N.J.A.R. 2d* 287 (EDU) 1991, on remand, 94 *N.J.A.R. 2d* 337 (EDU) 1993, the Board avers that petitioners were required to use reasonable diligence and to exercise

ordinary care to mitigate any damages which they may have sustained. (Board's Exceptions at pp. 4-6)

Additionally, the Board excepts to the ALJ's directive regarding the unemployment benefits which have been paid to the petitioners. Citing *Willis v. Dyer,* 63 *N.J. Super.* 152, 163-164 (App. Div. 1978), the Board contends that legal authority supports a finding that back salary be reduced by unemployment benefits received by an employee. (Board's Exceptions at p. 7)

In reply, petitioners first contend that they were improperly served with the Board's exceptions in that only one of the nine petitioners was served. (Petitioners' Exceptions at p. 1) Next, while concurring with the ALJ's determination that their suspension without pay was not allowable under *N.J.S.A.* 18A:6-14, petitioners except to the ALJ's calculation of damages, urging the Commissioner to award them interest on their back pay in that the Board acted in bad faith when it suspended them without pay in direct contravention of statute. (Petitioners' Exceptions at pp. 2-5) They further contend that the question of mitigation of damages should not have been considered by the ALJ in that the Board failed in its pleadings to raise it as an affirmative defense. In support of this proposition, the Board cites *Winans-Carter Corporation v. Jay & Benisch*, 107 *N.J. Super.* 268 (App. Div. 1969). (Petitioners' Exceptions at p. 5) Lastly, petitioners argue that the Board failed to sustain its burden of proof on the mitigation issue in the instant matter. (*Id.* at pp. 5-6)

Initially, the Commissioner notes that exceptions were served upon the attorney that collectively represented the petitioners in the filing of exceptions, so that no harm was incurred. Thus, the Commissioner will not reject the Board's exceptions on this basis alone.

Upon review of the substantive issues raised, the Commissioner affirms the initial decision, finding that the issuance of summary judgment was warranted in the present matter pursuant to *N.J.S.A.* 18A:6-14. In so ruling, the Commissioner is satisfied that the ALJ fully and fairly considered the procedural history of this matter and the Board's arguments concerning the appropriateness of issuing summary decision herein. With regard to the arguments raised in petitioners' exceptions seeking interest, the Commissioner finds that interest is not warranted in that petitioners have provided no basis for concluding that the Board acted in bad faith or in deliberate violation of law as required by *N.J.A.C.* 6:24-1.16.

In addressing the exception arguments regarding mitigation, the Commissioner concurs that the Board failed to meet the burden necessary to fully litigate this issue herein.

While the Board correctly asserts that *West Orange, supra*, requires that petitioners use reasonable diligence and exercise ordinary care to mitigate any damages which they may have sustained, it is well-settled in law that failure to mitigate is an affirmative defense and the burden to demonstrate such failure rests with the employer. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 *S.L.D.* 759; *Goodman v. London Metals Exchange, Inc.* 86 *N.J.* 19 (1981). It is not enough for an employer to merely raise lack of mitigation as an issue. As stated in *Cartin v. Continental Homes of New Hampshire*, "Such burden [of failure to mitigate] is not met by merely arguing the possibility and, absent concrete evidence, the issue is merely speculative." 360 *A. 2d.* 96, 134 *Vt.* 362 (1976). (*Zielenski* at 764) Rather, as stated by the Supreme Court in *Goodman, supra*,

> Mitigation*** is an affirmative defense and the burden of proving the appropriateness of its application rests on the wrongdoer, in this case the employer ***[who] may establish a prima facie case by first showing that comparable employment opportunities were available and, ***that there were other suitable [available] jobs***. (at 40-41)

In the instant matter, the Board raised the question of failure to mitigate in its answering papers in opposition to petitioners' Motion for Summary Decision but did not provide supporting affidavits, as required under *N.J.A.C.* 1:1-12.4(a), in order to defeat a motion for summary judgment, to meet its burden under the *Goodman* case, bringing forth facts serving to demonstrate that comparable job opportunities were available to petitioners in similar types of employment, with reasonable and diligent efforts.* Thus, the Board cannot now complain that it was denied its opportunity to pursue this issue.

Finally, the Commissioner modifies the recommendation of the ALJ regarding unemployment benefits, concluding that the amount of back pay owed by the Board should be offset by unemployment benefits which have already been paid to petitioners, as well as by the amount of any actual earnings received. The Commissioner favors such approach as efficient and consistent with the approach set forth in *Willis v. Dyer, supra,* wherein the Appellate Division held that unemployment benefits received by plaintiff should be deducted by the township from the back pay due him. See also *Labor and Industry Dept. v. Smalls,* 153 *N.J. Super.* 411 (App. Div. 1977).

* Given this finding, the Commissioner finds it unnecessary to reach to the question as to whether affirmative defense of failure to mitigate must be raised in the initial pleadings.

Accordingly, for the reasons expressed therein and as further explicated above, the initial decision is affirmed with modification, and summary judgment is entered in favor of petitioners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 28, 1997
DATE OF MAILING JULY 28, 1997

385-97

C.M., on behalf of minor child, S.F., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioning grandparent, C.M., challenged Board's residency determination concerning her grandson, S.F. Petitioner claimed S.F.'s mother and husband were not capable of supporting or providing care for S.F. due to economic hardship.

ALJ found that C.M. was domiciled within the District; that S.F. was living with C.M.; that C.M. was supporting S.F. *gratis* and intended to keep and support S.F. gratuitously for a longer time than merely through the school term. However, ALJ further found that there was insufficient testimony in the record to establish that W.B., C.M.'s mother, was not capable of supporting S.F. as a result of economic hardship; that petitioner failed to establish that the effects of prior abuse of S.F. by his stepfather and of W.B. by her former husband prevented S.F. from living with W.B. and prevented her from providing care for S.F. Therefore, ALJ concluded that petitioner failed to establish any legally sufficient reason for providing a free public education to S.F. in the District. Petition was dismissed. ALJ determined petitioner was responsible for the payment of the annual tuition of $21,475.80 prorated for that portion of the 1996-97 school year during which S.F. was enrolled in respondent's School District.

Commissioner adopted in part and reversed in part the initial decision. Commissioner concurred with the ALJ that petitioner had demonstrated that S.F. was living with her and was supported by her *gratis*. Commissioner, however, declined to find that S.F. was not entitled to a free public education in the District. Commissioner found that petitioner met her burden of proving that the parents of S.F. were incapable of supporting or providing care for him due to family or economic hardship, thereby establishing S.F.'s entitlement to a free public education provided by the Lenape Regional High School District. *N.J.S.A.* 18A:38-1b(1).

JULY 28, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8983-96
AGENCY DKT. NO. 466-10/96

C.M. ON BEHALF OF A MINOR CHILD, S.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

Respondent.

Stan R. Gregory, Esq., for petitioner (Gibbs & Gregory, attorneys)

Louis L. Chodoff, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: March 14, 1997 Decided: April 28, 1997

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner contests respondent's determination that she does not satisfy the requirements of *N.J.S.A.* 18A:38-1 thereby entitling S.F., a minor child who is her grandson, to a free public

education in the district's schools. The matter was transmitted to the Office of Administrative Law (OAL) on October 30, 1996 for hearing as a contested case. The matter was assigned to the undersigned administrative law judge on December 2, 1996. Since petitioner is entitled to an expedited hearing pursuant to *N.J.S.A.* 18A:38-1, a hearing was scheduled for December 27, 1996. Prior to the scheduled hearing, the attorneys conferred with the ALJ and requested that the matter be adjourned and rescheduled. Accordingly, the hearing was rescheduled for January 24, 1997. On that date a hearing was held and concluded. The record remained open to permit the attorneys to submit legal arguments. Upon the submission of legal arguments the record closed on March 14, 1997.

FACTUAL DISCUSSION

The following is not intended to be a verbatim summary of the testimony, but is intended to summarize that testimony and evidence found to be relevant to the issues in this matter.

C.M., petitioner herein, testified that she lives in Vincentown, which is in the Lenape Regional High School District. She has lived at this location for nine years with her husband and S.F. S.F. has lived there his entire life. Since March 1996, W.B., who is her daughter and is S.F.'s mother, has made no contributions toward the support of S.F. She admitted that W.B. buys birthday and Christmas presents for S.F. but provides no other support. W.B. lives in Hainesport with her husband, J.B. and her five other children. In fact, C.M. testified that she helps W.B. with school clothing for her five children and if she gets behind in her bills. C.M. and her husband own the property which W.B. and her husband and family live on.

C.M. testified that S.F. attends Y.A.L.E. School and C.M. is involved in all decisions involving the school. She has attended meetings at Y.A.L.E. School, although she indicates that W.B. has also attended these meetings. For example, when S.F. was suspended from the bus, she and W.B. shared the responsibility for transporting S.F., but she is ultimately responsible. If S.F. misbehaves in school or is disciplined, the school contacts her rather than W.B. The school notifies her and she then calls W.B. She indicated that she has the superior role with regard to S.F. The Lenape Regional High School Child Study Team gave her a copy of Parental Rights in Special Education and she signed a receipt for this document (P-1).

C.M. testified that she purchases everything S.F. needs. S.F. has resided with her most of the time except for six or seven months. S.F. has health insurance coverage through his stepfather, J.B., because it is provided at no additional cost. However, it is C.M. who takes S.F. to the doctor, and any co-payments for medical attention for S.F. are paid by C.M. All medications provided to S.F. are paid by C.M.

C.M. testified that W.B. works for the company owned by C.M.'s husband, who is W.B.'s father, and is there every day.

C.M. testified that she was familiar with S.F.'s family life when he was living with his mother, W.B. She is aware of S.F.'s life in connection with his stepfather, W.F. She has been to the doctor regarding problems with W.F. She was present when S.F.'s stepfather, W.F. hit and kicked S.F. She indicated that on one occasion, when S.F. was five or six years old, W.F. had a gun to the heads of his children. The Mount Laurel Police were called and W.F. threatened to kill all of the children. W.F. also mistreated her daughter and the children and was very abusive toward all of them including S.F. W.F.'s abusive mistreatment caused strain on the daughter's family. It made W.B. feel incapable and it made S.F. feel as if he were not a worthy person. However, W.F. did not mistreat his own children, S.F. and his brother D.F. having a different father. S.F. has not been with the family very much and has lived with C.M. However, S.F. has gone back to W.B. on occasions.

C.M. testified that when S.F. has lived with W.B. she has a hard time with him. S.F.'s behavior is such that he has a very quick temper and would lash out at his brothers. W.B. would then call and ask C.M. to come to get S.F. While S.F. was living with W.B. there were disruptions, arguments, fights and there was a negative effect on the other children. W.B. cannot mentally support S.F.

C.M. testified that she talked to the doctor about S.F.'s behavior. The doctor told her that S.F. is so full of anger toward his father that anger is the only way to fight back for the mistreatment he suffered. She testified that W.B. resides in Hainesport which is in the Rancocas Valley School District.

On cross-examination, C.M. testified that she is not the court-appointed guardian for S.F. He has been in the Y.A.L.E. School since February 1992, and it does not matter what school he attends because he will still be placed at Y.A.L.E. School. All actions with Y.A.L.E. are through her and she attends all meetings. She identified a special education Annual Review for S.F., which occurred on September 30, 1996 (R-1). C.M. testified that she was present but did not sign the Annual Review. W.B. was there and participated. She also indicated that when S.F. was suspended from the school bus the problem with transportation was worked out with both W.B. and C.M. providing his transportation. She identified a fax sent to the School District concerning this transportation problem and identified the handwriting on the fax as being that of her daughter, W.B., S.F.'s mother. She admits that W.B. was involved in the planning of S.F.'s transportation. She also admitted that W.B. has been actively involved in S.F.'s schooling. However, W.B. was not involved in treatment at Y.A.L.E.

C.M. testified that she does not charge W.B. rent for the house in which W.B. and her family live. However, they pay the property taxes on the house. S.F. is on J.B.'s health insurance, although C.M. pays for medications. S.F.'s stepfather, W.F., has been out of the picture five or six years. W.B. has been married to J.B. for the past three years. J.B. has a good relationship with S.F. as long as he does not attempt to correct S.F. The six or seven months that S.F. was living with W.B. was in 1993 and part of 1994. The reason that S.F. left to live with W.B. was that he did not want to live by the rules of C.M.'s house. He was given the option of either living by these rules or leaving, and he chose to leave.

C.M. testified that since September 1996, W.B. sees S.F. every day except on weekends when she rarely sees him. She also indicated there are occasions when S.F. sleeps at W.B.'s house, but this has only occurred four or five times since September 1996. S.F. has his own telephone in the house and he calls his mother often. S.F. moved back with W.B. for approximately three months from March through June 1996. However, S.F.'s brothers do not want him to live with them.

C.M. testified that W.B. completed the application and she then signed it (R-3). She admitted that S.F.'s friends attend Lenape High School. She also admits that there is a desire on the part of S.F. to play football at Lenape.

C.M. testified that S.F. returned to W.B.'s house in March 1996. He got in trouble in school and she put him on restrictions. He refused to abide by these restrictions and he left. In June 1996 he agreed to abide by the restrictions and moved back in with C.M.

C.M. testified that there is no financial support for S.F. by W.B. except for gifts for his birthday and for Christmas.

On redirect examination, C.M. testified that she did not sign the Y.A.L.E. School Annual Review because she was taking care of another grandchild and W.B. signed it. She also indicated that she discussed the contents of the fax of September 4, 1996, regarding transportation with W.B. prior to it being sent. Dr. Camman had called and spoke to her, and she directed W.B. to send the fax. She assumed the transportation obligation for S.F. She explained the problem at W.B.'s home is that if W.B.'s husband, J.B. corrects S.F. he gets angry. However, S.F. listens to what his grandfather says. She also indicated that it does not matter where S.F. plays a sport, as long as he plays. She last talked to the doctor about one year ago. She indicates that S.F. still acts out.

W.B. testified that her husband is J.B. and they have five children ages 14, 11, 10, 9 and 8 living at home. She has trouble making ends meet and there is not enough money to support them all. Her husband works and she also works for her parents. However, she was recently laid off. She also gets child support for four of the children. However, she cannot make it without her parents' continued support.

S.F. went back to live with her parents at the end of June 1996, and he was there on July 4, 1996. She would not have been able to support S.F. in September 1996 because she simply does not have enough money. S.F. is residing with C.M. because it is the best place for him, not in order for him attend a certain school. She indicates that it is hard for her to handle S.F. He is

going to Y.A.L.E. and will still be going there no matter what school he attends. S.F. does not attend Lenape.

When S.F. is not present, her family life is "okay". When S.F. is present, if he has a good day, their family life is normal. However, when S.F. gets upset, he gets violent and hits the other children. This disrupts family life and makes it difficult for her. She indicated that S.F. needs one-on-one support, and she cannot give him full support.

W.B. testified that she has gone to see Dr. Edward Silver with S.F. Dr. Silver indicates that S.F. acts out because of abuse by his stepfather W.F. W.F. kicked, abused and threatened S.F. from the time he was two until he was eight or nine years old. S.F. does much better when he is with his grandparents because he respects his grandfather. Emotionally and financially it is the best place for him.

When S.F. moved back with her from March until June 1996, things were normal until the end of March 1996. S.F. then got into trouble with the law and things went downhill. He had trouble following her rules. He is very emotional and very physical. He pushed her and she realized she could not handle him. However, he can always come to her home and visit.

W.B. testified that she wrote and sent the fax to Dr. Camman on September 4, 1996, at C.M.'s direction. She indicates that if S.F. is in trouble at Y.A.L.E. School or on the bus they call her mother, C.M. She indicated that both she and her mother took S.F. to school while he was suspended from the bus. If there is a meeting, the school calls C.M., who then calls her. J.B. has S.F. on his health insurance plan because it is at no cost.

W.B. testified that when she signed the Parent Affidavit on September 3, 1996 (R-4, page 17 and 18) she truthfully answered question 5, concerning whether she is providing any support, in the affirmative. However, she denies that she is the primary financial supporter for S.F. She also indicated that her response to question 7, to the effect that she and his grandparents are providing financial support to S.F., related to transportation and health insurance. She explained that she answered this question this way because she participates in providing transportation and S.F. receives health insurance coverage through her husband. She also indicated that her response

to question 4 of the Parent Affidavit, ("Don't get along with father and feels better living with grandparents.") are not the only reasons S.F. is not living with her. The father she was referring to is referring to is S.F.'s stepfather, W.F. She also admitted that the Parent Affidavit is blank with respect to question six asking if she is not providing support, explain why not.

W.F. also admitted that it is her Affidavit and her signature on the Affidavit attached to the Amended Petition (R-4, pages 12-14). She confirmed that her net income is $286.91 per week and her husband's is $310 per week.

W.B. testified that S.F. moved back with C.M. in June 1996 and not in mid-August 1996. She knows that S.F. was back with her mother before July 4, 1996. She indicated that prior to August 1996 she could not support S.F. by herself. It was difficult but not impossible to support him. S.F. has a good relationship with her husband, J.B. S.F.'s stepfather, W.F., left the scene in 1990, and the abuse of S.F. occurred prior to 1990. She also indicated that S.F. is doing better with his behavior at the present time. When the transportation problem occurred at Y.A.L.E. School, both she and her mother may have talked to Dr. Camman. From September 1996 to the present she has attended school meetings for S.F. She identified a letter of January 30, 1996 sent to her at her parents' address (R-6). She indicated that she did not go to this meeting. She admitted that she was still actively involved in S.F.'s schooling and his treatment plan. She also admitted that she went to more meetings than C.M. for the 1993 and 1994 school year because S.F. was living with her in Hainesport.

W.B. feels that her father, S.F.'s grandfather, is a positive influence on S.F. She sees S.F. at work every day and sees him once or twice a month on weekends when he occasionally stays in her home. S.F. calls, but speaks to his brothers more than he speaks to her. She and her family are an active part of S.F.'s life. She indicated that her parents usually go to Florida for one week and S.F. goes with them. The one exception was on one occasion S.F. stayed at his grandparents home with a family friend.

On redirect examination, W.B. testified that during the 1993-94 school year she supported S.F. In connection with the transportation problem (R-2), she took S.F. to school, but not everyday. She took him at the direction of her mother and when she did not take him, her mother

did. From September 1996 to the present, both she and her mother have attended every meeting in connection with S.F. However, she only found out about the meetings from her mother. She admitted that if S.F. is living with her the school calls her.

William J. Krzan testified for respondent. He is the Personnel Director at Lenape Regional High School District and has held the position for five years. He is involved with all personnel administration and student attendance issues. He identified a contract to send S.F. to Y.A.L.E. School at an annual cost of $21,475.80 (R-16).

C.M. testified in rebuttal and indicated she was present at the Annual Review meetings on May 14, 1993 (R-12), September 28, 1993 (R-13) and May 8, 1995 (R-10). However, she is not sure if she was present at the meeting of May 10, 1994 (R-11). She indicated that she was involved in other problems at that time and she may not have been there.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:38-1 provides that public schools shall be free to: (a) Any person who is domiciled within the school district; (b)1. Any person who is kept in a home of another person domiciled within the school district and is supported by such other person gratis as if he was such other person's own child. Such other person must file with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term. The child's parent or guardian is also required to file with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. It requires that these statements be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child.

If admission is still denied, on a hearing before the commissioner, the petitioner has the burden to prove by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student's attendance.

In order to focus on the issues in this matter, it is helpful to review the submissions of the parties and the positions that they have taken as to these issues.

Petitioner's Argument

Petitioner asserts that it is undisputed that C.M. is domiciled within respondent's school district, that S.F. is between the age of 5 and 20 and that C.M. is supporting S.F. gratis as if he were her own child. C.M. pays all of the medical bills for S.F. including co-payments. However, it is admitted that for two brief periods of time totaling six months S.F. resided with his mother, W.B., and that the husband of W.B. provides health insurance for S.F. because this health insurance is provided at no cost to W.B. or her husband through his employment. Petitioner makes the argument that S.F.'s stepfather providing insurance coverage to him and S.F.'s overnight visits with W.B. approximately twice per month is no basis for determining that C.M. does not support S.F. gratis. Petitioner also asserts that because W.B. buys S.F. clothes occasionally, that this does not impede a finding of support by C.M.

Petitioner asserts that the affirmative responses provided by W.B. to questions 5 and 7 in her Parent Affidavit of September 4, 1996 (attached to R-4), are the result of unfair and inappropriate questions, and that W.B.'s testimony explained why she answered these questions in the affirmative. She believed that since her husband provided health insurance for S.F. and since she purchased clothing as gifts for S.F., she should answer these questions in the affirmative.

Petitioner also asserts that C.M. has assumed all personal obligations of S.F. relative to school requirements and intends to keep and support S.F. gratuitously for a time longer than merely through the school term. It is pointed out that when S.F. was not allowed to ride the bus

to school, C.M. would drive him to school most of the time. However, because of her duties in connection with her husband's businesses C.M. could not take S.F. to school every day. Thus, at C.M.'s direction, W.B., who was in the employ of C.M., would also bring S.F. to school. Petitioner argues that the documents signed by W.B. with respect to C.M.'s special education program applied to previous school years and that *N.J.S.A.* 18A:28-1(b)(1) is clearly prospective and applies only to the current school year. Petitioner assert that both of the witnesses for petitioner testified that the school notifies C.M. of S.F.'s school activities and that C.M. testified she has been at every meeting this school year.

Petitioner argues that it was clearly established that W.B. is not capable of providing support for S.F. due to economic hardship. C.M. must often assist W.B. with her monthly bills and W.B. testified that she can barely make ends meet. On numerous occasions in the past, C.M. has had to pay W.B.'s bills because W.B. and her husband cannot afford to pay them. It is pointed out that W.B. stated that if S.F. were to live with her she would not be able to support him and the other children in the household.

Petitioner also argues that W.B. is not capable of providing support and care for S.F. due to a family hardship. When S.F. was younger, prior to 1990, he was abused by his stepfather by being beaten and kicked by him. As a result, ever since that time S.F. has been emotionally disturbed and has been medically diagnosed as such. S.F. is difficult to control and W.B. does not have the time to give S.F. the attention that he needs because she has five other children to care for. When S.F. has attempted to reside with W.B. he completely disrupts family life, beats up his other brothers and has physically pushed W.B., and she testified that it is hard for her to control him because he is physical. However, when S.F. is residing with C.M. he does not behave in this manner because he is given proper attention, he lives by the rules of the household and he respects C.M.'s husband who is his grandfather. Because of this disruption of the family life of W.B., petitioner argues that a hardship has been established justifying S.F. residing with C.M.

Respondent's Argument

Respondent points out that unlike the typical case where it must actually be determined which school the pupil will be attending, the decision in this matter will not effect where S.F.

attends school. As a classified student he currently attends the Y.A.L.E. School in Cherry Hill and has been attending that school since September 1992. The only practical consequence of the decision in this matter is whether Lenape Regional High School District will be responsible for the payment of approximately $84,000 for tuition costs for S.F. during his high school years.

Respondent argues that petitioner has failed to establish that S.F.'s parents are incapable of providing support to him due to either a family or economic hardship. Respondent points out that the Application For Non-Resident Pupil submitted by petitioner to respondent on September 3, 1996(R-4, page 16), did not indicate that S.F. was residing with C.M. because W.B. is incapable of supporting S.F. financially or that because of parental abuse W.B. was incapable of providing adequate care for C.F., as is now claimed. In addition, respondent points out that W.B.'s Parent Affidavit (R-4, page 17) indicates that S.F. does not reside with her because he does not get along with his father and feels better living with grandparents. When questioned during the hearing W.B. indicated that her answer to this question on the Parent Affidavit included all of the reasons that S.F. no longer resides with her. Respondent points out that in responding to questions 5 and 7 of the affidavit, W.B. stated that she was providing support and financial costs for S.F. With respect to question 6 of the Parent Affidavit requiring her to explain why she was not providing financial support, W.B. left the answer blank and provided no response.

Respondent also asserts that at the September 17, 1996 meeting of the School District Board of Education, petitioner informed the Board that S.F. had friends who attended Lenape High School and she believed it would be beneficial for S.F. to play football there. Petitioner admitted on cross-examination that she failed to advise the Board about any claimed economic hardship or any allegation that W.B. was incapable of providing care to S.F. due to parental abuse.

Respondent also makes the assertion that the Amended Petition filed with the Commissioner contradicts the statements contained in the Application since the Amended Petition now asserts in paragraph five that S.F. has been in the care of C.M. for approximately 11 years and during that time W.B. has provided no support for him. In addition, W.B. further asserts that

due to family hardship she is incapable of supporting or providing care for S.F. and also is incapable due to economic hardship.

Respondent argues that the testimony of C.M. and W.B. demonstrate that W.B. continues to assume a significant part of S.F.'s personal obligations relative to school responsibilities. It is asserted that C.M. admitted that she makes no decision regarding S.F.'s schooling on her own but always consults W.B. W.B. also testified that she plans to stay actively involved in deciding S.F.'s educational plans. Respondent also relies upon Annual Reviews and other school documents dated between 1993 and 1996 which are signed either by both W.B. and C.M. or by W.B. alone. In addition, respondent relies upon the September 4, 1996, fax sent by W.B. to the Lenape Regional High School District regarding S.F.'s transportation to school while he was suspended from using the school bus. Respondent also points out that the Annual Review meeting of September 30, 1996, at Y.A.L.E. School was attended by both W.B. and C.M. but that C.M. did not sign the Participant section of the document.

Respondent argues that petitioner offered no expert medical testimony to substantiate the claims regarding the alleged effects on S.F. of the abuse which occurred approximately 7 years previously. Respondent also argues that the testimony concerning W.B.'s difficulty in meeting current expenditures even without S.F. residing with W.B. should not be accepted. Respondent points out that W.B.'s net household income is over $31,000 per year, that W.B. pays no mortgage or rent to live in the house, that W.B. receives child support for four of her six children, that W.B. receives financial support from petitioner and that W.B. supported all six of her children, including S.F,. when S.F. moved back in with her for six or seven months during the 1993-94 school years and for four months from March to June 1996. Thus, respondent argues that it would not be impossible for W.B. to support S.F. if S.F. were to live with W.B.

Respondent points out that C.M. is not S.F.'s legal guardian and that S.F. was allowed to return to their house only if he agreed to abide by their rules. It was pointed out the S.F. has left C.M.'s house twice to go back to live with W.B. because of his refusal to live by their rules.

Analysis

After considering the arguments of the parties, it is clear that the central issue in this matter is whether the child's parent is not capable of supporting or providing care for the child due to a family or economic hardship. With respect to the other requirements of the statute, I **FIND** that C.M. is domiciled within the school district. I **FIND** that S.F. is living with C.M. and that C.M. is supporting S.F. gratis and intends to keep and support S.F. gratuitously for a longer time than merely through the school term. I **FIND** as a fact that W.B.'s participation in meetings relative to S.F.'s school programs or involvement in discussions and decisions regarding S.F.'s schooling have no impact on this finding. C.M. has testified that she has assumed all personal obligations for S.F. relative to school requirements, and I **FIND** that no testimony or evidence has been provided by respondent to dispute this contention.

The most difficult aspect of this case, as with many other similar cases, is the requirement that it be established that the child's parent is not capable of supporting or providing care for the child due to a family or economic hardship. In *J.B. v. Bd. of Educ. of the Twp. of Ocean, Monmouth County*, 96 *N.J.A.R.* 2d (EDU 628) the State Board of Education indicated that:

> The express language of *N.J.S.A.* 18A:38-1(b) requires more than simply a finding of family hardship in order for a child kept in the home of another person domiciled within the district to be entitled to a free public education in that district. Rather, the hardship must be of such nature that the parents or guardians are not capable of supporting the child or providing care as a result of that hardship.

The testimony upon which petitioner claims economic hardship is that W.B. and her husband J.B. do not earn sufficient income to support themselves and their family of five children, and that adding S.F. to the family will make it even more difficult to make ends meet. However, W.B. admitted that she receives child support for four of the children. It was also established during the hearing that the house that the family lives in belongs to C.M. and her husband and that W.B. and J.B. pay no rent but only pay taxes. In addition, it is undisputed that their net income exceeds $31,000.

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The burden of proof is upon the petitioner to demonstrate each and every element of the statute, *Gunderson v. City of Brigantine Bd. of Educ.*, 95 *N.J.A.R.* 2d. (EDU) 39, 41. Mere conclusory statements that a parent is unable to provide financial support for a child is not sufficient by itself to establish economic hardship. *C.f., S.L. v. Clifton City Bd. Of Educ.*, 95 *N.J.A.R.2d* (EDU) 476, 477. There has been no showing that S.F. residing with W.B. and her family would cause a financial or economic hardship. There has been no showing where W.B.'s family income is spent and no showing, for example, that the actual expenses of W.B.'s family without S.F. exceeds its income, and that the additional expenditures required if S.F. were present would make the situation worse. There has been insufficient testimony in the record to established that W.B. is not capable of supporting S.F. as a result of economic hardship, and I so **FIND**.

C.M. testified that W.B.'s former husband, S.F.'s stepfather, was abusive towards both S.F. and W.B. Both C.M. and W.B. testified that, as a result, S.F. suffered psychological harm and is emotionally disturbed, and that it is better emotionally for S.F. to live with C.M. In addition, while S.F. lived with W.B., if he became upset when things did not go his way or when he was corrected by W.B. or her husband J.B., he became violent, beat up his brothers and disrupted the house. Because W.B. was also abused by her former husband, she feels incapable of handling S.F. The difficulty with these assertions on the part of petitioner is that the testimony regarding the alleged psychological harms resulting from these incidents of abuse suffered by both S.F. and W.B. is unsupported by any type of expert testimony regarding the impact of the abuse or its present effects. I agree with respondent that, other than the lay opinion testimony of petitioner and W.B., I have no way of knowing whether this situation is the direct result of the past instances of abuse.

The question may be raised why the cause of S.F.'s behavior is important in assessing whether a family hardship exists. All that is required is that the hardship be of such nature that the parents or guardians are not capable of supporting the child or providing care as a result of that hardship. However, the reason it is important is that the family hardship claimed by petitioner is based on assertions that S.F. is emotionally disturbed and it is better emotionally for him to live with C.M., and that because W.B. was abused by her former husband she feels incapable of handling S.F. Both of these assertions involve issues which are best addressed by an expert in the

field of psychology. I have no way of deciding on the facts before me whether S.F. is emotionally disturbed. The fact that S.F. was classified as emotionally disturbed for special education purposes indicates that he suffers from one or more conditions which interfere with his educational progress. However, there is nothing in the record upon which I am able to base a conclusion that S.F.'s emotional state is such that it is better for him to live with C.M. rather than with his mother, W.B. There is also nothing in the record upon which I am able to base a finding that because W.B. was abused, she is incapable of caring for S.F.

Therefore, I **FIND** that petitioner has failed to establish that the effects of prior abuse of S.F. by his stepfather and of W.B. by her former husband prevents S.F. from living with W.B. and prevents W.B. from providing care for S.F. Quite simply, I **FIND** that petitioner has failed to establish any legally sufficient reason for providing a free public education to S.F. at the Lenape Regional High School District based on the statutory requirement to establish that the parent is not capable of providing care as a result of the hardship.

In view of the fact that the burden of proof is upon the petitioner to demonstrate each and every element of the statute, *Gunderson v. City of Brigantine Bd. of Educ.*, *supra*, 95 *N.J.A.R.* 2d. (EDU) at 41, I **FIND** that petitioner's claim in this matter must fail.

Since petitioner has not prevailed she will be responsible for the payment of annual tuition of $21,475.80 (R-16) prorated for that portion of the 1996-97 school year during which S.F. was enrolled in respondent's school district.

DECISION AND ORDER

Based upon the foregoing it is hereby **ORDERED** that respondent's determination denying S.F. admission to the Lenape Regional High School District is hereby **AFFIRMED** and petitioner's appeal is hereby **DISMISSED**. It is further **ORDERED** that petitioner shall be assessed tuition for the student's attendance at the Lenape Regional High School District.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 25, 1997
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

4/30/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 2 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

APPENDIX

LIST OF WITNESSES

For Petitioner:

C.M.
W.B.

For Respondent;

William J. Krzan

LIST OF EXHIBITS

For Petitioner:

P-1 Lenape Regional High School District Child Study Team Parental Receipt Release, dated September 3, 1996

For Respondent:

R-1 Y.A.L.E. School Design/Review Plan, dated September 30, 1996
R-2 Fax from W.B., dated September 4, 1996
R-3 Affidavit of C.M., dated September 3, 1996
R-4 Amended Petition of C.M., dated October 9, 1996, with attachments
R-5 William J. Krzan's letter to C.M., dated September 19, 1996
R-6 Letter of Michael L. Harris, Director of Special Services, Southampton Township Public Schools, dated January 30, 1996
R-7 Correspondence Log, dated September 6, 1995
R-8 Correspondence Log, dated April 4, 1995
R-9 Authorization for Transfer of School Records, signed by W.B. on February 28, 1995
R-10 Annual Review Conference Report, dated May 8, 1995
R-11 Annual Review Conference Report, dated May 10, 1994
R-12 Annual Review Conference Report, dated May 14, 1993
R-13 Y.A.L.E. School Instructional Guide, dated September 28, 1993
R-14 Annual Review Conference Report, dated May 6, 1996
R-15 Individualized Education Program Conference Participation Verification, dated May 8, 1995
R-16 Tuition Agreement between Lenape Regional and Y.A.L.E. School, Incorporated, dated September 23, 1996

OAL DKT. NO. EDU 8983-96
AGENCY DKT. NO. 466-10/96

C.M., on behalf of minor child, S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Both petitioner's exceptions and the reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioner refutes the ALJ's conclusion that she failed to show that family hardship exists in the instant matter sufficient to render W.B. incapable of providing support to S.F. Rather, petitioner asserts,

> ***It is irrelevant whether [S.F.'s] mental condition came from his early childhood, or whether he had been diagnosed as being mentally disturbed. The issue with regard to family hardship in the present case is whether S.F.'s behavior caused a family hardship, which made W.B. incapable of providing support for him. There is no need for an expert witness for that. The best witness for such determination is W.B. The basis of S.F.'s behavior is not relevant, as Judge Martone provides. (Petitioner's Exceptions at p. 1)

Petitioner argues that W.B.'s testimony established that S.F.'s behavior was beyond her control when he resided with her, and "[t]here was constant tension, fighting and brawling throughout the house." *(Id.* at p. 2) Petitioner continues,

> Regardless of the basis or origin of S.F.'s mental condition, when he resided with W.B. it caused a family hardship which made W.B. incapable of supporting him. It is submitted, that when a child physically accosts his parent, that is a hardship which makes the parent incapable of providing support for that child. (*Id.*)

Thus, petitioner maintains that she has proven that when S.F. lives with W.B., "it caused a family hardship which made W.B. incapable of supporting him." (*Id.*)

Further, petitioner contends that W.B.'s testimony has established that she cannot financially support S.F.

> ***There was the testimony of W.B. that she could not financially support S.F. *** [Petitioner] also testified that she gives W.B. substantial funds for the maintenance and support of her family without S.F. residing with W.B. Logically, if S.F. were to reside with W.B., she would even have a harder time financially. *** Furthermore, [W.B.] testified that she had just been laid-off from her employment. Judge Martone did not provide that the testimony of the witnesses was incredible. As a matter of fact, he found in favor of [petitioner] on the other portions of his decision without [petitioner] submitting any paper evidence, and solely based [on petitioner's] and W.B.'s testimony as evidence. (*Id.* at p. 3)

Moreover, petitioner asserts that the Board has "***submitted no evidence to dispute the contention that W.B.'s expenses were in excess of her and her husband's income, and that if S.F. were to live with her it would not create a[n] economic or financial hardship." (*Id.*)

In reply to petitioner's exceptions, the Board asserts that the ALJ properly found that petitioner failed to establish by a preponderance of the record evidence that W.B. was incapable of providing care for S.F. due to family hardship. (Board's Reply at p. 1) Here, the

Board contends that "***[p]etitioner's claim that S.F. allegedly physically abused W.B. amounts to nothing more than hyperbole." (*Id.* at p. 2) The Board argues that, contrary to petitioner's assertion, the fact that S.F. may have pushed her on one occasion, as W.B. so testified, does not create family hardship, nor does it render W.B. incapable of providing care for S.F., as required by *N.J.S.A.* 18A:38-1b(1). (*Id.*) Not only did W.B. fail to testify that S.F. was residing with petitioner because she was incapable of providing care for him, but the documentary evidence, according to the Board, also fails to support petitioner's claim of incapability.[1] The Board further notes that W.B. "testified that S.F. was 'doing better with his behavior at the present time,'" and that S.F. could return to W.B.'s home whenever he wanted. (*Id.*)

As to petitioner's argument that the ALJ impermissibly focused on the cause of S.F.'s behavior rather than the effects of the behavior, the Board contends that petitioner's argument ignores the fact that W.B.'s claims of family hardship are grounded "*solely* on the alleged lingering effects of alleged parental abuse over seven years ago ***." (emphasis in text) (*Id.* at p. 3) However, without expert testimony and documentation to support petitioner's claim, the Board asserts that the ALJ properly determined that he could not make a finding that "family hardship" renders W.B. incapable of providing care to S.F.

The Board next addresses petitioner's contention that she has shown that W.B. is incapable of providing care to S.F. due to economic hardship. Here, the Board argues that petitioner has improperly cited the record evidence with regard to W.B.'s testimony, and has further impermissibly attempted to shift the burden of proof. (*Id.* at p. 4) The Board affirms that

[1] The Board points out that "W.B. testified that when S.F. resides with her, it 'makes it difficult for her'***." (Board's Reply at p. 2, citing to Initial Decision at p. 6) Moreover, W.B.'s affidavit submitted to the District affirms that "S.F. is not living with her because he '[didn't] get along with [his] father and fe[lt] better living with [his] grandparents.'" (*Id.*, citing Petitioner's Affidavit at p. 17, Respondent's Exhibit No. 4)

W.B. did not testify, as petitioner's exception arguments so state, that "if S.F. were to come [to] live with her that 'she was certain that she could not make ends meet.'" (*Id.*, citing to Petitioner's Exceptions at p. 2) Rather, the Board refutes, W.B. testified that "**it would be difficult, but not impossible, to financially support S.F." (*Id.*) The Board herein underscores that the pertinent statute requires that a petitioner support her claims of incapability due to economic hardship with documentation. Moreover, the Board stresses that the burden of proof remains with petitioner to prove each and every element of the statute. (*Id.*)

The Board next presents its cross-exceptions to the ALJ's initial decision, first offering a list of 23 specific findings which it proposes in lieu of, or in addition to, those findings of the ALJ. The Board then asserts that petitioner failed to establish by a preponderance of the record evidence that she assumed all personal obligations for S.F. relative to school, contrary to the ALJ's finding. The Board contends that the ALJ's own factual findings contradict his conclusion in this regard.

> ***For example, Judge Martone found that W.B. regularly attended important meetings over the years, both prior to and after S.F.'s application to the Lenape District, with respect to S.F.'s educational and treatment planning and review, and was involved in other aspects of S.F.'s schooling***. The documentary evidence admitted at the hearing corroborates W.B.'s assumption of these responsibilities. (*Id.* at p. 8)

The Board further excepts to the ALJ's failure to make a finding on the issue of whether S.F. was living with petitioner for the sole purpose of receiving a free public education within the Lenape District. (*Id.* at p. 9) The Board notes that S.F. has not lived with petitioners continuously and that it is merely S.F.'s "word" that he will abide by his grandparents' rules which keeps him in their home. (*Id.*) Yet, the Board contends that, "***both petitioner and

W.B. *** testified that S.F. can return home whenever he wants, [and] admitted that S.F. still regularly returns to W.B.'s house to spend nights and, on occasion, entire weekends." (*Id.*) The Board further argues that, on cross-examination, W.B. admitted that petitioner advised her that she needed to sign the affidavit submitted with the Petition of Appeal in order to establish S.F.'s residence within the Lenape District. This admission, asserts the Board, renders petitioner unable to reestablish that S.F. is not living with her for the sole purpose of obtaining a free public education from the Lenape District. (*Id.* at p. 10)

Finally, the Board excepts to the ALJ's finding that petitioner has established that she is supporting S.F. *gratis* within the meaning of *N.J.S.A.* 18A:38-1b(1). (*Id.*) Here, the Board points to the uncontroverted evidence which belies W.B.'s assertion that she did not provide support to S.F. The Board concludes,

> W.B. is still physically and emotionally able to care for S.F., and testified that she did for two extended periods of time previously, and for countless additional nights and weekends now, and during the past two years. No claim of economic or family hardship was made by W.B. until after the Lenape Board denied S.F.'s application for non-resident pupil status, and then only after W.B. was advised by petitioner as to the applicable statutory standards. W.B. lives only a short distance from petitioner's house *** and both petitioner and W.B. testified that W.B. sees S.F. on a daily basis, that W.B. regularly speaks to S.F. on the phone, and that W.B. is still actively involved in his life. W.B. testified unequivocally that she has, and continues to, assume significant obligations relative to S.F.'s school requirements. W.B. and her husband, with whom W.B. testified that S.F. has a good relationship, provide support to S.F. in the form of clothes, gifts, money, and health insurance. W.B. also testified that S.F. can return home at any time he wishes. Clearly, the relationship between petitioner and S.F. is not the type of relationship that the affidavit law was designed to recognize. (*Id.* at p. 12)

Accordingly, the Board urges that the Commissioner modify the initial decision consistent with its cross-exceptions and affirm the ALJ's ultimate conclusion denying petitioner's instant appeal and ordering petitioner to reimburse the Board, as stated in the initial decision. (*Id.*)

Upon careful and independent review of the record in this matter, which did not include transcripts of the hearing held at the OAL, the Commissioner adopts in part, and reverses in part, the recommended decision of the ALJ. Initially, the Commissioner concurs with the ALJ that petitioner has demonstrated that S.F. is living with her and is supported by her *gratis* (initial decision at p. 13). Contrary to the Board's assertions, the fact that S.F. occasionally spends an evening or weekend at his mother's home, and that he has, from time to time, returned there for more extended periods and is free to do so provided that he behaves appropriately, does not alter the fundamentally long-term and stable nature of his residence in the home of his grandmother. Nor does the fact that his mother, who has given up neither legal custody nor her parental rights, retains a level of interest and involvement in her son's personal and educational welfare rise to the level of precluding a finding that S.F.'s grandmother is primarily responsible for these matters. Thus, the Commissioner is satisfied that the ALJ's findings and conclusions in this regard are both appropriate and correct.

However, the Commissioner declines to further concur that S.F. is not entitled to a free public education in the District by virtue of petitioner's failure to establish that the parents of S.F. are incapable of supporting or providing care for him due to family or economic hardship. *N.J.S.A* 18A:38-1b(1). The Commissioner recognizes that "[t]he amendments to N.J.S.A. 18A:38-1 *** were intended to ease the burden on local boards of education attempting to remove illegally enrolled students ***." *Gunderson v. Board of Education of the City of*

Brigantine, Atlantic County, 95 *N.J.A.R. 2d* (EDU) 39, 42. Prior to the enactment of the amendment, if a local board doubted the validity of sworn statements submitted to it by a resident in order to show the residency of a child within the district, it was required to initiate proceedings before the Commissioner to contest the validity of the statements. (Senate Bill No. 1447, Statement of 1993, enacted as *c.* 380) However, under those circumstances where a local board determines the evidence does not support the validity of the resident's claim, the amended statute allows the board to deny the child admission, and provides that *the resident* may appeal the board's decision to the Commissioner. The amendment further requires additional proofs to be filed by a parent or guardian attesting to the fact that the parent or guardian "***is not capable of supporting or providing care for the child due to family or economic hardship and the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district." *N.J.S.A.* 18A:38-1b(1).[2]

Notwithstanding the increased burden placed on the resident by this amendment, the fundamental purpose of the statute was not altered. That is, the statute continues to aim to prevent enrollment in a local district by those students who, through deceptive living arrangements, are attempting to fraudulently obtain a free public education in the district. Thus, where there is nothing in the record to indicate that a petitioner has acted with fraudulent intent to mislead the Board into permitting a nonentitled student to attend school in the District, see *H.M. and L.M., on behalf of their minor children, J.M. and J.M. v. Board of Education of the Township of Freehold, Monmouth County*, decided by the State Board April 2, 1997, and where, as herein, the finder of fact has, in all respects, accepted the testimony of petitioners and their

[2] In all such cases where a local residency determination is challenged, the resident is entitled to an expedited hearing and the child may not be denied admission during the pendency of the proceedings. N.J.S.A. 18A:38-1b(1).

witnesses as credible, claims of family or economic hardship should not be invalidated as "conclusory" because petitioners do not buttress their statements with extensive documentary evidence or assessments from expert witnesses (as here, in the field of psychology, *id.* at pp. 14, 15). To the contrary, certain types of hardship, such as those arising from a child's behavior in the parent's home or from a precarious but not destitute financial status, are often not amenable to evidence beyond the credible testimony, for instance, as to the child's actions and their effect on the remainder of the family and on the need for supplemental support from relatives.

In the present instance, petitioner and W.B. have testified regarding S.F.'s quick, and sometimes violent, temper, and described aggressive and disruptive behaviors of a type that are corroborated by the assessments contained in S.F.'s annual review conference reports (Exhibits R-10 through R-14) and by the fact of his having been suspended from school bus privileges due to his actions (*id.*, at p. 6). Additionally, they have testified as to S.F.'s negative effect on W.B.'s other children when S.F. lives with W.B. and the family (*id.* at p. 3), as well as W.B.'s inability to give S.F. the individualized emotional attention he requires and control him when he evinces aggressive or disruptive behavior (*id.* at p. 6). Both petitioner and W.B. have attested to the history of abuse in their family and its effect on petitioner and S.F. (*id.* at p. 3, 6), particularly with regard to S.F.'s behavior and W.B.'s inability to handle it. Finally, W.B. has attested to the financial burden of raising five additional children, of being recently laid off, of being continually short of money and the fact of her dependence on the continued support of her parents, both in terms of money and provision of living quarters (*id.* at p. 1, 5).

Under these circumstances, the Commissioner finds that petitioner has sufficiently demonstrated that W.B. is not presently capable of supporting or providing care for S.F. due to

family and economic hardship, and that S.F. is not living with petitioner solely for the purpose of receiving a free public education in the District.

Accordingly, the initial decision of the ALJ is affirmed in part, and modified to the extent that the Commissioner finds that petitioner has met the burden of proof, as set forth above, necessary to establishing S.F.'s entitlement to a free public education in the Lenape Regional High School District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 28, 1997
DATE OF MAILING JULY 29, 1997

385-97

EDU #8983-96
C # 385-97
SB # 72-97

C.M., on behalf of minor child, S.F.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 28, 1997

For the Petitioner-Respondent, Gibbs & Gregory (Stan R. Gregory, Esq., of Counsel)

For the Respondent-Appellant, Archer & Greiner (Louis L. Chodoff, Esq., of Counsel)

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

December 3, 1997

Date of mailing DEC 05 1997

386-97

386-97

M.R., by his guardian ad litem, J.N., AND K.K., by his guardian ad litem, F.K.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning students, residents of respondent Passaic County school district who had applied and been accepted for admission into academies operated by the Bergen County Vocational District, appealed respondent Board's refusal to pay tuition and transportation costs. Board contended petitioners were only entitled to attend Passaic County vocational schools, that the academies petitioners sought to attend were quasi-private magnet schools rather than vocational schools, and that appropriate offerings were available within the district and county.

Commissioner found that, as a matter of law, students who are accepted into county vocational schools outside their county of residence are entitled to attend such schools at no cost to themselves or their parents when a comparable type of program is not offered by their district or county of residence; Commissioner further found that such entitlement extends to provision of transportation. Commissioner rejected Board's contention that academies of the type at issue herein are outside the scope of vocational training, finding instead that they offer advanced preparation for technical careers and related postsecondary schooling, as clearly contemplated by laws governing provision of vocational education. Commissioner found that, notwithstanding availability of a precollege curriculum within respondent district and availability within Passaic County of vocational instruction in same general area sought be petitioners, there was no discrete, coherent program comparable to the type offered by the Bergen County academies available to petitioners within Passaic County. Accordingly, respondent Board was directed to remit tuition costs and nonresident fees, if any, to the Bergen County Vocational District on behalf of petitioners and to arrange for their transportation to and from their schools of attendance.

JULY 29, 1997

M.R., by his guardian ad litem, J.N., AND K.K., by his guardian ad litem, F.K.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,	:	
RESPONDENT.	:	

For Petitioners, Jeffer, Hopkinson, Vogel & Peiffer (Reginald F. Hopkinson, Esq.)

For Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Derlys Maria Gutierrez, Esq.)

This matter was opened before the Commissioner of Education on June 11, 1997, by way of a Petition of Appeal with Motion for Emergent Relief filed on behalf of two Passaic County students whose district of residence, the respondent Board of Education herein, has denied their request for payment of tuition and transportation to attend academies operated by the Bergen County Vocational School District, where they have applied and been accepted.

On June 20, 1997, the Board of Education (Board) filed its Answer to the Petition and Reply to the Motion, to which petitioners filed a responsive submission on June 27, 1997.

Upon review of these filings, the Commissioner has determined that the issues raised are appropriately decided through an expedited ruling on the merits, and, further, that they can be decided on the basis of the existing record. Accordingly, the Commissioner proceeds to determination as set forth below.

POSITIONS OF THE PARTIES

Petitioners are students residing in the Passaic County municipality of Pompton Lakes, who graduated from the eighth grade in respondent's school district in June 1997. They have applied and been accepted to, respectively, the Academy for Engineering and Design Technologies and the Academy for Business and Computer Technologies, both magnet schools operated by the Bergen County Vocational School District and both employing a rigorous and highly competitive admissions process. When advising petitioners of their acceptance, the academies informed them that, as nonresidents of Bergen County, they were responsible for making arrangements to satisfy the academies' tuition requirement of approximately $17,950 per pupil and to provide for transportation to and from the academies, prior to commencement of their course of study on August 11, 1997. Petitioners' parents requested that the respondent Board arrange for such payment of tuition and provision of transportation, claiming entitlement under *N.J.S.A.* 18A:54-20.1; this request was denied. Petitioners contend that the laws of this State require a local board of education to provide tuition on behalf of resident students who apply, and are accepted, for admission into out-of-county vocational education schools. Thus, the Board's denial herein was not within its discretionary authority, and, moreover, effectively bars petitioners from an education which they have properly and lawfully met the criteria to obtain and now have the statutory right to receive.

The Board denies that it has any such obligation. According to the Board, petitioners seek tuition and transportation for what they describe as vocational education, when in reality the schools they seek to attend do not fall anywhere within the purview of vocational education as described by *N.J.S.A.* 18A:54-1. Instead, they are, in fact and by their own description, academically rigorous magnet high schools. As such, they effectively function as private schools within a public school setting, and petitioners' request is nothing more than an attempt to obtain a private education at public expense. Moreover, even if the academies at issue are considered vocational in nature, petitioners would still not be entitled to the relief they seek. Attendance at out-of-county vocational

schools is mandated by *N.J.S.A.* 18A:54-20.1 only where there is no county vocational school within the county, whereas Passaic County has its own County Technical Institute to which the Board regularly sends students wishing to pursue courses of study in state-of-the-art computer systems and other advanced technologies to equip them for the demands of a technology driven workforce. (The 1996-97 per pupil cost for this Institute was $14,504, of which the respondent Board paid $9,564.) Additionally, the district itself offers a rigorous academic program, suitable for exceptionally talented students who seek to prepare for college in the manner offered by the Bergen County academies. Finally, the Board contends that if petitioners succeed in their claim, the County of Passaic, which petitioners should have joined as a necessary party, is required pursuant to *N.J.S.A.* 18A:54-23.4 to pay for a substantial portion of the attendant costs, as they do for Passaic County students attending the County Technical Institute. The Board does not have funds budgeted to meet the expenses petitioners' request would generate.

Petitioners respond to these arguments by rejecting as altogether misguided the notion that high academic standards and preparation for college education are incompatible with vocational education and cannot occur in a vocational school setting. To the contrary, the special magnet schools at issue herein, and others like them in select counties throughout the state, are clearly vocational schools; however, they are schools of a particular kind offering a uniquely intensive, high-level experience not available to students attending the Passaic County vocational school. This being so, the general scheme for provision of vocational education, which mandates attendance outside a pupil's district or county of residence when no comparable program is available therein, dictates that petitioners are entitled to the relief they seek. With regard to the Board's contentions regarding assessment of certain costs to Passaic County, petitioners allege that the statute cited by the Board has been repealed as of July 1, 1990, and that it is not petitioners' obligation, but the Board's, to seek any applicable relief from the county.

ANALYSIS AND DETERMINATION

The entitlement of New Jersey students to attend county vocational schools is initially established by *N.J.S.A.* 18A:54-20.1, which provides as follows:

18A:54-20.1. Enrollment of pupils in county vocational schools; funding; tuition

a. The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes.

b. The board of education of a county vocational school district shall receive pupils from districts without the county so far as their facilities may permit.

c. The board of education of a county vocational school district shall receive such funds as may be appropriated by the county pursuant to *N.J.S.* 18A:54-29.2 and shall be entitled to collect and receive from the sending districts in which each pupil attending the vocational school resides, for the tuition of that pupil, except for a post-secondary vocational education pupil, a sum not to exceed the actual cost per pupil as determined for each vocational program classification, according to rules prescribed by the commissioner and approved by the State board. Whenever funds have been appropriated by the county, the county vocational school district may charge a fee in addition to tuition for any pupils who are not residents of the county. The fee shall not exceed the amount of the county's per pupil appropriation to the county vocational school district.

d. The tuition and nonresident fee, if any, shall be established not later than January 15 in advance of the school year by the board of education. The tuition for each program category shall be at the same rate per pupil for each sending district whether within or without the county, and 10% of the tuition amount and nonresident fee, if any, shall be paid on the first of each month from September to June by or on behalf of the board of education of each sending district.

Such entitlement is further elaborated through State Board of Education regulation at *N.J.A.C.* 6:43-3.11, which provides as follows:

6:43-3.11 Access to vocational instruction offered

(a) Pupils shall be permitted to enroll in programs of vocational instruction offered by district boards of education other than their resident district so long as the resident district board of education does not offer a

comparable type of program and space is available for additional enrollees in the programs offered by the receiving district board of education.

(b) To the extent that space is available, each type of program of vocational instruction offered by the State Board [pursuant to *N.J.A.C.* 6:43-2.1(a), the State Plan for Vocational Education] shall be made available to all pupils residing in the State, and each program of instruction offered by a district board of education shall be made available to all pupils residing in the district or community served by the district board of education offering such instruction.

(c) Pupils shall be admitted for enrollment in classes and provided instruction on the basis of their potential for achieving the occupational or other objective of such instruction.

Taken together, these enactments clearly establish a statewide delivery system for vocational education that ensures pupil access to such education through a tiered structure that first directs pupils to the local or regional district, then to the county district if the local district does not offer a comparable type of program, and then to schools statewide, to the extent that facilities permit and students qualify, if a comparable type of program is unavailable within the county district. The terms of both the statute and rule are plain in their directive that county districts *shall* admit nonresident students to the extent space is available and students qualify, and that they *shall* be entitled to collect tuition from the sending districts in which their pupils reside, together with a nonresident fee to the extent permitted by law. Indeed, the mechanism established for setting and collection of county district tuition is, by its own terms, applicable to sending districts both within and without the county. There can, therefore, be no question, that students are entitled to attend, without cost to the student or parent, vocational schools outside their district and county of residence when comparable types of programs are not available within the county.

Such right of access of necessity entails a concomitant right to transportation. Thus, *N.J.S.A.* 18A:39-1, which generally requires districts to provide transportation for resident students living remote from the public school they attend, cannot be construed as inapplicable to students whose public school of attendance is a vocational school located outside the county. Nothing in the language of the statute, which excludes no categories of public school pupils and sets no limitations on the

distance of the public schools of attendance, supports such a reading, nor would this be consistent with the laws establishing entitlement to access.

Next to be addressed is the Board's contention that academies of the type at issue herein are not vocational schools, but rather elite, quasi-private academic institutions not falling within the scope of vocational education as defined by *N.J.S.A.* 18A:1, which reads:

> **18A:54-1. Definitions.** As used in this chapter, "vocational education" means any education the controlling purpose of which is: (a) to fit for profitable employment; (b) to provide training which is supplemental to the daily employment; or (c) to fit for homemaking, according to the state plan for vocational education adopted by the state board.

By its own terms, this statute is informed by rules and policies of the State Board of Education, set forth at *N.J.A.C.* 6:43-1.1 *et seq.* Of particular relevance herein are regulations which expressly contemplate preparation for enrollment in advanced or highly skilled postsecondary vocational or technical education programs, including college preparatory work:

> **6:43-3.3 Advanced, skilled vocational and technical education**
>
> (a) Vocational instruction shall be primarily designed to prepare individuals for employment in a specific occupation. It may also prepare individuals for enrollment in advanced or highly skilled postsecondary vocational and/or technical education programs.
>
> (b) An approved secondary technical education program includes three years of college preparatory mathematics, two one-year laboratory science courses and a technical laboratory course which is conducted a minimum of 400 minutes per week for a period of not less than two years.

It is clear from this regulation, and the larger context in which it appears, that the State Board's view of vocational education encompasses a range of levels from rudimentary to highly advanced. Thus, there can be no support for the Board's contention that schools espousing rigorous academic standards and offering high-level preparation for advanced postsecondary education are, inherently, incompatible with the concept of vocational education, and, thus, outside the scope of entitlement otherwise provided by Chapter 54 of Title 18A. Such a view ignores the changing and ever more sophisticated

needs of today's workplace, as well as the wisdom of the Legislature in recognizing that the State plan for vocational education must remain fluid in response to this continual evolution.

The undisputed facts in the present matter establish that the schools at issue herein are, in actuality, advanced-level vocational schools falling well within the purview of the State's vocational education delivery system. Within that system, they effectively function as career academies, magnet schools offering rigorous, highly structured programs linking college-level academics to advanced preparation in specified vocational/technical fields (in this instance, Engineering and Design Technology, and Business and Computer Technology). There is no basis, either in law or sound educational policy, for excluding schools of this type from the scope of a student's access to vocational education as contemplated by Chapter 54 and its implementing rules.

Given that the law requires access to out-of-county vocational programs under specified circumstances, and that career academies of the type at issue herein are not to be excluded from the scope of such access, the question with regard to petitioners' claim must now become whether a comparable type of program exists within Passaic County so as to preclude petitioners' entitlement to attend their schools of choice in Bergen County. Initially, the Commissioner rejects the notion that the existence of a vocational/technical school within the county of residence automatically acts to preclude access to schools outside the county. The language of the laws governing access clearly speaks to a *comparable type of program*, not to the mere existence of a vocational/technical school within the resident district or county. Moreover, even the availability of some level of instruction in the same general area sought by the student will not necessarily constitute a comparable type of program. Although the Board herein claims, without dispute from petitioners, that it offers within its own district a rigorous precollege academic program and that there exists within Passaic County a vocational/technical school offering instruction in computers and advanced technologies, to which the district normally sends vocational students, no claim is ever made that the Board can provide petitioners with a discrete, coherent *program* comparable to the type available in the Bergen County district. To the contrary, it is plain from the undisputed

facts that this type of program is *not* available to petitioners within respondent's school district or the Passaic County Vocational District. Therefore, having duly applied and been admitted to the Bergen County academies, petitioners are entitled to attend these schools at no cost to themselves, or their parents, for tuition or transportation.

ORDER

Accordingly, pursuant to *N.J.S.A.* 18A:54-20.1 (c) and (d), the Pompton Lakes Board of Education is directed to remit the established tuition and nonresident fee, if any, to the Bergen County Vocational School District on behalf of petitioners, and to provide for their transportation to and from their schools of attendance pursuant to *N.J.S.A.* 18A:39-1.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The Commissioner notes that *N.J.S.A.* 18A: 54-23.4 has not, as claimed by petitioners, been repealed by *P.L.* 1990, *c.* 52, that law having repealed 18A:54-23, but not the subsequent sections (18A:54-23.1 through 18A:54-23.5). However, neither does 18A:54-23.4, which is part of an enactment (*P.L.* 1973, *c.* 333) dealing solely with postsecondary students, apply to the matter herein, as claimed by respondent, so as to establish a county obligation to pay all or part of the cost of petitioners' education.

JULY 29, 1997
DATE OF MAILING JULY 29, 1997

386-97

C #386-97
SB # 71-97

M.R., by his guardian ad litem, J.N. AND K.K., by his guardian ad litem, F.K.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, July 29, 1997

For the Petitioners-Respondents, Jeffer, Hopkinson, Vogel & Peiffer (Reginald F. Hopkinson, Esq., of Counsel)

For the Respondent-Appellant, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Commissioner of Education, Geraldine Callahan, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

This matter was initiated by a petition of appeal accompanied by an application for emergent relief filed on behalf of two students who had applied to and been accepted by the Academy for Computer Technologies and the Academy for Engineering and Design, respectively, both of which are operated by the Bergen County Technical Schools. The students, who had graduated from eighth grade in the Pompton Lakes school district in Passaic County in June 1997, had requested that the Board of Education of the Borough of Pompton Lakes (hereinafter "Board") pay for their tuition and transportation to attend the academies in question, and the Board had

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refused to assume these costs. The students' guardians then petitioned the Commissioner of Education, seeking payment by the Board pursuant to N.J.S.A. 18A:54-20.1 and N.J.S.A. 18A:54-23.4.

With their petition, petitioners filed a notice of motion for emergent relief and a brief in support of that motion. The Board filed an answer to the petition and a brief in opposition to the motion for emergent relief, accompanied by the certification of its superintendent and supporting exhibits. Petitioners then filed a letter memorandum in response to the Board's submissions.

Following the submission of petitioners' reply to the Board's responsive papers, the Commissioner determined that the issues raised could appropriately be decided by an expedited ruling on the merits of the matter on the basis of the record before him. Accordingly, he proceeded to do so, thereby disposing of this matter in its entirety.

The Commissioner found that the academies at issue were vocational schools within the meaning of Chapter 54 and its implementing regulations. He further found that no program comparable to the type available in Bergen County could be provided by the Pompton Lakes Board. He therefore directed the Board to remit tuition on behalf of petitioners to the Bergen County Vocational School District pursuant to N.J.S.A. 18A:54-20.1 and to provide for their transportation pursuant to N.J.S.A. 18A:39-1.

The Pompton Lakes Board appealed the Commissioner's determination, contending that the academies at issue do not provide vocational education within the meaning of N.J.S.A. 18A:54-1 and the implementing regulations, and that, as a result, it is not obligated to pay for petitioners' education at these academies. It further contended that even if the State Board determined that the academies were vocational

schools, the dispute should be returned to the Commissioner for a factual hearing in the Office of Administrative Law on the question of whether it could offer a comparable program to petitioners in Passaic County.

Petitioners countered that the Commissioner had properly interpreted and applied the applicable statutes, and argued that a hearing was not necessary because there were no material facts in dispute.

In its reply brief, the Pompton Lakes Board reiterated its earlier arguments that the academies were not vocational schools within the meaning of New Jersey's statutes and that their programs did not constitute vocational education and training. The Board also contended for the first time that the Commissioner's determination violated the Carl D. Perkins Vocational and Applied Technology Act ("Perkins Act"), 20 U.S.C.A. §2301 et seq.

On November 5, 1997, the Deputy Attorney General representing the Commissioner filed a letter brief on his behalf. By this filing, the Commissioner moved to participate in the matter to request that it be remanded to him so that he could have the opportunity to consider the Board's claim relating to the Perkins Act.

The Pompton Lakes Board is in accord with the Commissioner's request. Petitioners, however, oppose the request, arguing that the question involved is one of law which the State Board should now decide.

We grant the Commissioner's motion to participate so as to allow the State Board to entertain his request for a remand. After careful consideration, we grant the request and remand this matter to the Commissioner with the further direction that it be transmitted to the Office of Administrative Law for hearing and determination of all the

issues raised by this appeal, including the factual question of whether the Board can offer a comparable program to petitioners in Passaic County. Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995).

December 3, 1997

Date of mailing DEC 05 1997

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M.R., by his guardian *ad litem*, J.N., and K.K., by his guardian *ad litem*, F.K.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

October 19, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1084-98

AGENCY DKT. NO. 203-6/97

M.R. BY HIS GUARDIAN AD LITEM, J.N. AND

K.K. BY HIS GUARDIAN AD LITEM, F.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BORO

OF POMPTON LAKES,

Respondent.

Reginald F. Hopkinson, Esq., for petitioner
(Jeffer, Hopkinson, Vogel & Peifer, attorneys)

Lester Arons, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Christopher W. McGarry, Esq., Intervenor
(Bergen County Vocational Technical Institute)

Record Closed: July 24, 1998 Decided: August 4, 1998

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 13, 1998, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Prior to the scheduled hearing, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

August 4, 1998
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

8/7/98
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 1998
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

SILLS CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondent
Pompton Lakes Board of Education

"M.R." by his guardian ad litem, "J.N."; and "K.K." by his guardian ad litem, "F.K."	COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Dkt. No. EDUOS 01084-98N Agency Dkt. No. 203-6/97
Petitioners,	
-vs-	Civil Action **CONSENT AWARD**
POMPTON LAKES BOARD OF EDUCATION	
Respondent	
and	
BERGEN COUNTY VOCATIONAL TECHNICAL INSTITUTE,	
Intervenor.	

THE CONSENT AWARD expressed herein is the result of agreements reached between the Petitioners, Respondent, and Intervenor and is the result of discussions between counsel with the assistance of the Court. This Consent Award has been formally approved at public meetings of the Pompton Lakes and Bergen County Vocational Technical School Districts and agreed to by the parents/guardians of M.R. and K.K.

The Consent Award contains the following provisions:

1. Pompton Lakes will make no further payments towards tuition, out of county fees, or transportation for the remainder of the 1997-1998 school year.

2. For the remainder of the academic careers of M.R. and K.K. at Bergen Vo-Tech, school years 1998-1999, 1999-2000, and 2000-2001, the Pompton Lakes Board of Education will be responsible to pay a total of $10,000 per student per year. These monies are in lieu of payments for tuition and out of county fee.

3. Pompton Lakes will make no further payments towards the cost of transporting M.R. and K.K. to the Bergen County Vocational Technical School District.

4. Presuming both M.R. and K.K. complete the next three years of schooling at Bergen County Vocational Technical School, Pompton Lakes' full and total responsibility under this settlement is $10,000 per child, or $20,000 per year, for three years, creating a total obligation of $60,000.

5. Bergen Vo-Tech has a bus transportation route which goes through the Borough of Oakland. The parents of M.R. and K.K. will be responsible to transport their children to the appropriate "pick-up" point for the bus provided by Bergen Vo-Tech which stops in Oakland. Bergen Vo-Tech shall provide a pick-up point in Oakland for the school years 1998-1999, 1999-2000, and 2000-2001.

6. Provided the students do not drive themselves to school, the parents of M.R. and K.K. shall each pay the sum of $1,500 to Bergen Vo-Tech for the cost of transporting each child from the pick-up point to the Bergen Vo-Tech and back, and this shall be the

maximum amount paid by the parents each year to the Bergen County Vocational Technical School for any purpose under the terms of this Agreement.

7. By letter of February 11, 1998, attached hereto and made a part hereof, Dr. John Greico, the Superintendent of Schools of Bergen County Vocational Technical School has represented to the Director of the Office of School to Career and College Initiatives of the New Jersey State Department of Education that his district will no longer accept out of county students in either the Academies, Institutes, or regular programs. In response, Commissioner Leo Klagholz has informed Bergen Vo-Tech that any future plans to accept out of county students will require the prior permission of his office. Based upon the above cited letter, it is the expectation of the Pompton Lakes Board of Education that none of its students will be solicited or admitted to any program at Bergen Vo-Tech in the foreseeable future.

8. While there is no present expectation that any further Pompton Lakes students will be admitted to Bergen County Vocational Technical School District, the parties nonetheless hereby agree that should such an admission and subsequent attendance occur, the following terms shall apply:

   a. In the first year of the student's attendance, the cost in lieu of tuition and out of county fees at Bergen Vo-Tech will be paid by the amount of the in-county tuition charged by Passaic Vocational Technical School District multiplied by the number 1.042.

   b. The dollar amount derived by that calculation shall be the full payment in lieu of tuition and out of county fee for Bergen Vocational Technical School District, not

only in the first year of the students' attendance, but in each and every year of the students' attendance, without additional increase.

c. Transportation arrangements necessary for said students shall be made between Bergen County Vocational Technical School District and the parents of the accepted student/s. The Pompton Lakes Board of Education shall have no responsibility for any transportation costs.

9. Should any provision of this Agreement be held unenforceable, the remainder of the Agreement shall nevertheless be valid and in full force and effect.

This Consent Agreement, signed and dated by counsel for each of the three parties to this dispute hereby agree that as a result of their clients' agreement to its terms, this document shall be submitted to the Office of Administrative Law to be conformed as a Consent Award.

The undersigned hereby consent to the form and entry of the above Consent Award.

SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS, P.A.
Attorneys for Respondent-Appellant
Pompton Lakes Board of Education

By: _____
LESTER ARON, ESQ.

Dated: June 25, 1998

The undersigned hereby consent to the form and entry of the above Consent Award.

JEFFER, HOPKINSON, VOGEL & PEIFFER
Attorneys for Petitioners-Appellees
"M.R.," by his guardian ad litem, "J.N.";
and "K.K.", by his guardian ad litem, "F.K."

By: _____
REGINALD F. HOPKINSON, ESQ.

Dated: 6/22, 1998

The undersigned hereby consent to the form and entry of the above Consent Award.

Nowell Amoroso, P.A.
Attorneys for the Intervenor
Bergen County Vocational Technical School

By: _____
CHRISTOPHER W. McGARRY

Dated: June 23, 1998

OAL DKT. NO. EDU 1084-98
AGENCY DKT. NO. 203-6/97

M.R., by his guardian *ad litem*, J.N., and K.K., by his guardian *ad litem*, F.K.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

Upon review, the Commissioner accepts the proposed stipulation as settlement of the within matter, as it has been fully agreed to by all parties as a means of ending the present litigation. In so doing, however, he clarifies that such acceptance in no way establishes a precedent that would preclude students in the respondent district or elsewhere outside Bergen County from attending the Bergen County Vocational Technical School District, with tuition and transportation provided by the district of residence, where they are so entitled by law.

Accordingly, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement and the clarification stated herein.*

COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

October 19, 1998
Date of Mailing, October 19, 1998

388-97

388-97 E

S.C.B. AND L.A.B., on behalf of minor child, D.B.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

JULY 31, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 6082-97

AGENCY DKT. NO. 230-6/97

S.C.B. AND L.A.B., ON BEHALF OF MINOR CHILD, D.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL SCHOOL DISTRICT,

Respondent.

Christine Giordano Hanlon, Esq., for petitioner (Evans, Osborne, Kreizman & Bonney, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

BEFORE **KATHRYN A. CLARK**, ALJ:

STATEMENT OF THE CASE

The petitioners, parents of a 16 year old buy, D.B., claimed that the action of the Board of Education of the Monmouth Regional School District in expelling D.B., deprived their son of

due process and further, that the action of the BOE was arbitrary, capricious and unreasonable. In this action, they have requested emergent relief and reinstatement of their son so that he may enter the 11th grade in September, 1997.

PROCEDURAL HISTORY

The petitioner appealed to the Department of Education and on July 10, 1997 the Department of Education transmitted this matter to the Office of Administrative Law for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The matter was scheduled for oral argument on the motion for emergent relief on July 16, 1997 at 3:00 p.m. The oral argument on the motion was heard on July 16, 1997 at 3:00 p.m., at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey.

DISCUSSION OF THE TESTIMONY AND EVIDENCE

On March 4, 1997, D.B. and two of his friends, A.C. and C.G., were detained by two school officials. The boys smelled of marijuana, and later testing showed that there was marijuana present in their bodies. All three eventually admitted smoking marijuana on school grounds.

A search of D.B.'s shoes and socks revealed three small zip-lock bags of marijuana and a search of his backpack revealed a piece of foil that smelled of burnt marijuana. There was no indication that the other two boys had any drugs or drug paraphernalia in their possession.

C.G. was suspended for 1 day. A.C. was suspended for 10 days. D.B. was expelled at the March 18, 1997 meeting of the BOE. A letter sent to D.B.'s parents on March 6 stated the charges, i.e., possession of a C.D.S., intent to distribute a C.D.S. and being under the influence of a C.D.S. As the charges were uncontested, the BOE's counsel said that the BOE did not hold an actual "hearing" on the expulsion, and no report containing a discussion of testimony, findings or

conclusions was produced, in large part because D.B. admitted to smoking and being in possession of marijuana. The result of the BOE's meeting of March 18, 1997 was a short letter to the parents saying that their son was expelled (Petitioner's brief, exhibit 1.)

Petitioner's counsel claimed that this letter was inadequate to apprise petitioner fully of the reasons why the BOE made its decision. The petitioner also argued that the BOE was treating D.B. disproportionately, as opposed to his two friends, C.G. and A.C., and also as opposed to other students who were found with illegal drugs.

The petitioner claimed that D.B. was suffering irreparable harm by the expulsion, that he was undergoing counseling, that all his recent drug tests have come back negative, that he realized the error of his ways, that he was being denied the opportunity to participate in extracurricular activities, such as baseball, and that the cost of home studies was unjustified as D.B. was entitled to a free public education.

The BOE countered by pointing out that this present appeal was not brought until almost the last minute, that D.B. had lost three months of school already as a result of his own actions and that home or alternate schooling had not been requested by D.B. The BOE counsel went on to point out that it is very unlikely that D.B. would be allowed to participate in extracurricular activities because he would probably be on probation if he returned to school. Further, the BOE was entitled to treat D.B. differently from A.C. and C.G. because of D.B.'s extensive disciplinary record and because he was the only one in possession of drugs and drug paraphernalia. Also, there are alternatives available to D.B. for a free public education or he can be transferred to another school district, as well as a private or parochial school.

The BOE counsel said that the likelihood of D.B. being able to enter 11th grade was remote before this incident, because of his poor academic record.

The undersigned raised the question as to why this matter was not brought as a special education case, as D.B. has a P.I. classification. However, D.B.'s parents chose to proceed.

D.B. is to appear in Family Intake on July 17, 1997, on the charge of possession of less than 50 grams.

DISCUSSION

D.B.'s parents are seeking a stay of the BOE's actions, so that D.B. may begin the 11th grade in September, 1997.

Leaving aside the boy's discipline problems, it is not at all evident that D.B. would have passed the 10th grade, or would be entitled, in September, 1997, to enter the 11th grade. He missed at least 3 months of school at the end of his 10th grade. He did not take his final exams, and his grades up until his expulsion in March do not inspire confidence that he would have passed the 10th grade. If, indeed, D.B. is in summer school, is he likely to pass and will he earn enough credits to enable him to pass the 10th grade before the start of the 1997-1998 school year?

CONCLUSION

The action of the Board in expelling D.B. was not arbitrary, capricious or unreasonable. The law is well-settled that a board of education may expel a student for sufficient cause. The treatment of D.B. is indeed different from that afforded his two friends, and may be different from that afforded to other students in other cases at other times. But there is not a factual similarity between and among all the students mentioned, sufficient so that the penalty handed out to D.B. appears to be disproportionate or unreasonable. Further, no violation of due process to the extent that emergent relief would be mandated is shown. The likelihood of success on the merits is yet to be determined. The favorable reports from his counsellors are commendable, but they are after the fact. Also, the advisability of ordering the District, now, to admit D.B. into the 11th grade for the fall term is questionable. The emergent relief petition is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

July 18, 1997
DATE

Kathryn A. Clark/RWS
KATHRYN A. CLARK, ALJ

jz

OAL DKT. NO. EDU 6082-97
AGENCY DKT. NO. 230-6/97

S.C.B. AND L.A.B., on behalf of minor child, D.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter, including the audiotape of emergent proceedings by the Administrative Law Judge (ALJ) and the initial decision on Motion for Emergent Relief of the Office of Administrative Law, have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief as petitioners failed to meet the standards for such relief as set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) and *N.J.A.C.* 6:24-1.5.

Accordingly, the ALJ's determination to deny emergent relief is adopted for the reasons expressed therein and this matter shall duly proceed on its merits in accordance with the ALJ's recommendation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 31, 1997
DATE OF MAILING JULY 31, 1997

390-97

390-97

ANGEL LUIS JUARBE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 1, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 10929-96
AGENCY DKT. NO. 488-11/96

ANGEL LUIS JUARBE,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Anthony P. Sciarrillo, Esq., represented petitioner

Derlys Maria Gutierrez, Esq., represented respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A.)

Record Closed June 9, 1997 Decided: June 12, 1997

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

This matter was transmitted to the Office of Administrative Law (OAL) on December 10, 1996, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences, as provided in the attached papers.

Having reviewed the contents of the attached papers, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached papers meet the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

6/12/97
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

6/18/97
DATE

D N Centanastis /fc
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ANTHONY P. SCIARRILLO
COUNSELLOR AT LAW
Valley National Bank Building
381 Franklin Avenue
Belleville, New Jersey 07109-1703
Telephone Number: (201) 450-9777
Telefax Number: (201) 450-9825

ANTHONY P. SCIARRILLO
MARVIN L. COMICK

16 Sutton Place
Cranford, New Jersey 07016
(908) 272-0963
PLEASE REPLY TO:
BELLEVILLE OFFICE

June 6, 1997

Honorable Thomas E. Clancy, ALJ
Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Angel Luis Juarbe v. State Operated
School District of the City of Newark
Agency Dkt. No. 488-11/96

Dear Judge Clancy:

Enclosed please find a fully executed Memorandum of Agreement with respect to the above captioned matter. It is the position of the parties that this Memorandum of Agreement resolves all items in dispute with respect to the above captioned matter.

For that reason, I am respectfully requesting that this Memorandum of Agreement be filed and incorporated into an Order closing out the matter.

By copy of this letter, I have provided a copy of the Memorandum of Agreement to Derlys Maria Gutierrez, Esq. on behalf of the State Operated School District of the City of Newark.

Thank you.

Very truly yours,

ANTHONY P. SCIARRILLO
APS/tp
Enclosure
c. Derlys Maria Gutierrez, Esq.

MEMORANDUM OF AGREEMENT

This Agreement between ANGEL LUIS JUARBE, Petitioner, (hereafter referred to as "Petitioner") and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent, (hereafter referred to as "DISTRICT" and collectively referred to as the "Parties") in the matter before the State of New Jersey, Department of Education, Agency Docket No. 488-11/96, wherein the Parties desire to settle all items in dispute with respect to the above matter, hereby agree, as follows:

1. Effective July 1, 1997, and upon a satisfactory performance evaluation for the 1996-1997 school year, the DISTRICT agrees Petitioner's salary and placement on the appropriate salary guide shall be restored prospectively for the 1997-1998 school year. The increment shall not be restored in the event an unsatisfactory performance evaluation is received.

2. The Petitioner agrees to withdraw the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 488-11/96. This provision is applicable in the event of a satisfactory or unsatisfactory evaluation.

3. The DISTRICT agrees to withdraw its Answer to the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 488-11/96.

4. The Parties hereby release, waive, and forever discharge any and all past, present and future claims they may have against each other which arises out of this Petition.

5. This Agreement contains the entire agreement and understanding between the parties and constitutes full and final agreement on any and all issues relating to the Petition filed by Petitioner against the DISTRICT.

6. This Agreement shall be governed by the laws of the State of New Jersey.

7. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

8. The Parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under all circumstances surrounding this matter.

9. The terms and conditions of this Agreement are subject to the ratification and approval by the DISTRICT.

10. The parties have entered into this Agreement freely and voluntarily with a fuli understanding of their rights and the contents of this Agreement.

11. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seals to this Agreement effective on the 9th day of April, 1997.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

By _____
BEVERLY HALL, Ed.D.
State District Superintendent

_____
Witness

By _____
ANGEL LUIS JUARBE
Petitioner

_____
Witness

OAL DKT. NO. EDU 10929-96
AGENCY DKT. NO. 488-10/96

ANGEL LUIS JUARBE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 1, 1997
DATE OF MAILING AUGUST 1, 1997

391-97

391-97

CHARLOTTE B. BANKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 1, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 10928-96
AGENCY DKT. NO. 488-10/96

CHARLOTTE B. BANKS,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Anthony Sciarrillo, Esq., represented petitioner

Derlys Maria Gutierrez, Esq., appeared for respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A.)

Record Closed June 9, 1997 Decided: June 12, 1997

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

This matter was transmitted to the Office of Administrative Law (OAL) on December 10 1996, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences, as provided in the attached papers.

Accordingly, I **CONCLUDE** that the attached papers meet the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

6/12/97
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

6/18/97
DATE

DM Centanaro Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ANTHONY P. SCIARRILLO
COUNSELLOR AT LAW
Valley National Bank Building
381 Franklin Avenue
Belleville, New Jersey 07109-1703
Telephone Number: (201) 450-9777
Telefax Number: (201) 450-9825

ANTHONY P. SCIARRILLO
MARVIN L. COMICK

16 Sutton Place
Cranford, New Jersey 07016
(908) 272-0963
PLEASE REPLY TO:
BELLEVILLE OFFICE

June 6, 1997

Honorable Thomas E. Clancy, ALJ
Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Charlotte B. Banks v. State Operated
School District of the City of Newark
Agency Dkt. No. 489-10/96

Dear Judge Clancy:

Enclosed please find a fully executed Memorandum of Agreement with respect to the above captioned matter. It is the position of the parties that this Memorandum of Agreement resolves all items in dispute with respect to the above captioned matter.

For that reason, I am respectfully requesting that this Memorandum of Agreement be filed and incorporated into an Order closing out the matter.

By copy of this letter, I have provided a copy of the Memorandum of Agreement to Derlys Maria Gutierrez, Esq. on behalf of the State Operated School District of the City of Newark

Thank you.

Very truly yours,

Anthony P. Sciarrillo

ANTHONY P. SCIARRILLO
APS/tp
Enclosure
c. Derlys Maria Gutierrez, Esq.

MEMORANDUM OF AGREEMENT

This Agreement between CHARLOTTE B. BANKS, Petitioner, (hereafter referred to as "Petitioner") and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent, (hereafter referred to as "DISTRICT" and collectively referred to as the "Parties") in the matter before the State of New Jersey, Department of Education, Agency Docket No. 489-10/96, wherein the Parties desire to settle all items in dispute with respect to the above matter, hereby agree, as follows:

1. The DISTRICT will modify its directive to withhold the Petitioner's employment and adjustment increments for the 1996-1997 school year to reflect paragraph 2, below.

2. The DISTRICT will restore $2,000.00 plus any applicable longevity to Petitioner's 1996-1997 annual salary.

3. The Petitioner agrees to withdraw the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 489-10/96.

4. The DISTRICT agrees to withdraw its Answer to the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 489-10/96.

5. The Parties hereby release, waive, and forever discharge any and all past, present and future claims they may have against each other which arises out of this Petition.

6. This Agreement contains the entire agreement and understanding between the parties and constitutes full and final agreement on any and all issues relating to the Petition filed by Petitioner against the DISTRICT.

7. This Agreement shall be governed by the laws of the State of New Jersey.

8. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

9. The Parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under all circumstances surrounding this matter.

10. The terms and conditions of this Agreement are subject to the ratification and approval by the DISTRICT.

11. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

12. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seals to this Agreement effective on the 5th day of April, 1997.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

By Beverly L. Hall
BEVERLY HALL, Ed.D
State District Superintendent

Witness

Witness

By Charlotte B. Banks
CHARLOTTE B. BANKS
Petitioner

OAL DKT. NO. EDU 10928-96
AGENCY DKT. NO. 489-10/96

CHARLOTTE B. BANKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 1, 1997
DATE OF MAILING AUGUST 1, 1997

392-97

392-97

BENNIE LEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 1, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 10930-96
AGENCY DKT. NO. 490-10/96

BENNIE LEE,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Anthony Sciarrillo, Esq., represented petitioner

Derlys Maria Gutierrez, Esq., appeared for respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A.)

Record Closed June 9, 1997 Decided: June 12, 1997

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

This matter was transmitted to the Office of Administrative Law (OAL) on December 10 1996, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences, as provided in the attached papers.

Accordingly, I **CONCLUDE** that the attached papers meet the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

6/12/97
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

6/18/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ANTHONY P. SCIARRILLO
COUNSELLOR AT LAW
Valley National Bank Building
381 Franklin Avenue
Belleville, New Jersey 07109-1703
Telephone Number: (201) 450-9777
Telefax Number: (201) 450-9825

ANTHONY P. SCIARRILLO
MARVIN L. COMICK

16 Sutton Place
Cranford, New Jersey 07016
(908) 272-0963
PLEASE REPLY TO:
BELLEVILLE OFFICE

June 6, 1997

Honorable Thomas E. Clancy, ALJ
Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Bennie Lee v. State Operated
School District of the City of Newark
Agency Dkt. No. 490-11/96

Dear Judge Clancy:

Enclosed please find a fully executed Memorandum of Agreement with respect to the above captioned matter. It is the position of the parties that this Memorandum of Agreement resolves all items in dispute with respect to the above captioned matter.

For that reason, I am respectfully requesting that this Memorandum of Agreement be filed and incorporated into an Order closing out the matter.

By copy of this letter, I have provided a copy of the Memorandum of Agreement to Derlys Maria Gutierrez, Esq. on behalf of the State Operated School District of the City of Newark.

Thank you.

Very truly yours,

ANTHONY P. SCIARRILLO
APS/tp
Enclosure
c. Derlys Maria Gutierrez, Esq.

MEMORANDUM OF AGREEMENT

This Agreement between BENNIE LEE, Petitioner, (hereafter referred to as "Petitioner") and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent, (hereafter referred to as "DISTRICT" and collectively referred to as the "Parties") in the matter before the State of New Jersey, Department of Education, Agency Docket No. 490-11/96, wherein the Parties desire to settle all items in dispute with respect to the above matter, hereby agree, as follows:

1. The DISTRICT will modify its directive to withhold the Petitioner's employment and adjustment increments for the 1996-1997 school year to reflect paragraph 2, below.

2. The DISTRICT will restore $2,000.00 plus any applicable longevity to Petitioner's 1996-1997 annual salary.

3. The Petitioner agrees to withdraw the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 490-11/96.

4. The DISTRICT agrees to withdraw its Answer to the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 490-11/96.

5. The Parties hereby release, waive, and forever discharge any and all past, present and future claims they may have against each other which arises out of this Petition.

6. This Agreement contains the entire agreement and understanding between the parties and constitutes full and final agreement on any and all issues relating to the Petition filed by Petitioner against the DISTRICT.

7. This Agreement shall be governed by the laws of the State of New Jersey.

8. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

9. The Parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under all circumstances surrounding this matter.

10. The terms and conditions of this Agreement are subject to the ratification and approval by the DISTRICT.

11. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

12. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seals to this Agreement effective on the 5th day of April, 1997.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

By Beverly L. Hall
BEVERLY HALL, Ed.D
State District Superintendent

Witness

Gerald A. Samuels
Witness

By Bennie Lee
BENNIE LEE
Petitioner

OAL DKT. NO. EDU 10930-96
AGENCY DKT. NO. 490-10/96

BENNIE LEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 1, 1997
DATE OF MAILING AUGUST 1, 1997

393-97

393-97

MILDRED PELOSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 1, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 10931-96
AGENCY DKT. NO. 491-11/96

MILDRED PELOSO,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Anthony Sciarrillo, Esq., represented petitioner

Derlys Maria Gutierrez, Esq., appeared for respondent
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A.)

Record Closed June 9, 1997 Decided: June 12, 1997

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

This matter was transmitted to the Office of Administrative Law (OAL) on December 10 1996, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences, as provided in the attached papers.

Accordingly, I **CONCLUDE** that the attached papers meet the requirements of *N.J.A.C. 1:1-19.1.1*, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

6/12/97
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

6/18/97
DATE

D N Centanaitis /jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

ANTHONY P. SCIARRILLO
COUNSELLOR AT LAW
Valley National Bank Building
381 Franklin Avenue
Belleville, New Jersey 07109-1703
Telephone Number: (201) 450-9777
Telefax Number: (201) 450-9825

ANTHONY P. SCIARRILLO
MARVIN L. COMICK

16 Sutton Place
Cranford, New Jersey 07016
(908) 272-0963
PLEASE REPLY TO:
BELLEVILLE OFFICE

June 6, 1997

Honorable Thomas E. Clancy, ALJ
Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: Mildred Peloso v. State Operated
School District of the City of Newark
Agency Dkt. No. 491-11/96

Dear Judge Clancy:

Enclosed please find a fully executed Memorandum of Agreement with respect to the above captioned matter. It is the position of the parties that this Memorandum of Agreement resolves all items in dispute with respect to the above captioned matter.

For that reason, I am respectfully requesting that this Memorandum of Agreement be filed and incorporated into an Order closing out the matter.

By copy of this letter, I have provided a copy of the Memorandum of Agreement to Derlys Maria Gutierrez, Esq. on behalf of the State Operated School District of the City of Newark.

Thank you.

Very truly yours,

ANTHONY P. SCIARRILLO
APS/tp
Enclosure
c. Derlys Maria Gutierrez, Esq.

MEMORANDUM OF AGREEMENT

This Agreement between MILDRED PELOSO, Petitioner, (hereafter referred to as "Petitioner") and the STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent, (hereafter referred to as "DISTRICT" and collectively referred to as the "Parties") in the matter before the State of New Jersey, Department of Education, Agency Docket No. 491-11/96, wherein the Parties desire to settle all items in dispute with respect to the above matter, hereby agree, as follows:

1. Effective July 1, 1997, and upon a satisfactory performance evaluation for the 1996-1997 school year, the DISTRICT agrees Petitioner's salary and placement on the appropriate salary guide shall be restored prospectively for the 1997-1998 school year. The increment shall not be restored in the event an unsatisfactory performance evaluation is received.

2. The Petitioner agrees to withdraw the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 491-11/96. This provision is applicable in the event of a satisfactory or unsatisfactory evaluation.

3. The DISTRICT agrees to withdraw its Answer to the Petition filed with the State of New Jersey, Department of Education, Agency Docket No. 491-11/96.

4. The Parties hereby release, waive, and forever discharge any and all past, present and future claims they may have against each other which arises out of this Petition.

5. This Agreement contains the entire agreement and understanding between the parties and constitutes full and final agreement on any and all issues relating to the Petition filed by Petitioner against the DISTRICT.

6. This Agreement shall be governed by the laws of the State of New Jersey.

7. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

8. The Parties shall be bound by the terms and conditions of this Agreement, finding it to be fair and equitable under all circumstances surrounding this matter.

9. The terms and conditions of this Agreement are subject to the ratification and approval by the DISTRICT.

10. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

11. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

IN WITNESS WHEREOF, the parties hereunder set their hands and seals to this Agreement effective on the 7th day of April, 1997.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

By Beverly L. Hall
BEVERLY HALL, Ed.D.
State District Superintendent

Witness

Gerald A. Samuels
Witness

By Mildred R. Peloso
MILDRED PELOSO
Petitioner

OAL DKT. NO. EDU 10931-96
AGENCY DKT. NO. 491-10/96

MILDRED PELOSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 1, 1997
DATE OF MAILING AUGUST 1, 1997

394-97

394-97

P.C., on behalf of minor child, C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent challenged as arbitrary and capricious the Board's decision to impose a four-month suspension on her son, C.C., for allegedly assaulting a teacher.

Based on the record and witness testimony, the ALJ concluded that due process requirements were met with respect to the initial suspension, the continuation of the suspension, and the notification of the parent and student of the date of the expulsion hearing. Moreover, the ALJ concluded that the Board's decision to advance to expulsion proceedings was based on the determination that C.C. was not a classified student and, therefore, was ineligible for special education. ALJ concluded that the Board's action suspending C.C. for four months rather then expelling him was appropriate and affirmed such action.

Commissioner adopted findings and determination in initial decision as his own.

AUGUST 4, 1997

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5546-96
AGENCY DKT. NO. 133-4/96

P. C. ON BEHALF OF MINOR CHILD C.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,

Respondent.

Pamela Cooley, o/b/o C.C., *Pro Se*

John Peter Duggan, Esq., for Respondent
(Wolf, Helies & Duggan, P. C.)

Record Closed: May 27, 1997 Decided: June 17, 1997

BEFORE **MARIA MANCINI La FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, P.C., is challenging the decision of Respondent Board of Education of Rahway to impose a four month suspension on her son, C. C., for assaulting a teacher as arbitrary and capricious. This matter was transmitted to the Office of Administrative Law on May 24, 1996 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.*. 52:14F-1 to -13.

FINDINGS OF FACT

Based on the evidence presented at the hearing, as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter:

1. During the 1995-1996 school year, C. C. was a student in the eighth grade at Rahway Intermediate School.

2. Lara Moskowitz (nee Selesner), hereinafter Moskowitz, was a teacher at the same school during that time. She was a member of a three person teaching team also consisting of Mr. Curnow and Mr. Spaulding, all of whom were present at the time the incident giving rise to this claim occurred.

3. A detention was held on September 29, 1995. There were between 10 and 20 attendees.

4. C.C. was a part of the detention group.

5. C.C. did not report to the initial detention to which Ms. Moskowitz had assigned him nor did he report to the central detention to which he had been assigned.

6. C. C. left detention on September 29 at about 3:20 p.m. before the group was dismissed at 3:30 p.m.

7. C. C. had not completed homework assignments on several occasions. This was the reason for his detention.

DISCUSSION AND CONCLUSIONS

The ultimate issue in this case is, whether in light of the circumstances giving rise to the action of Respondent in suspending C.C., the four month suspension was appropriate. Determination of this issue requires resolution of the question of whether C. C. intentionally struck his teacher with his shoulder upon leaving the room.

Ms. Moskowitz and Mr. Spaulding both testified that, in leaving the classroom C. C. did strike Moskowitz, who was standing in the hallway outside of the classroom, with his shoulder. As a result, Moskowitz stumbled, but did not fall, backward. C. C., on the other hand, testified that he did not strike her shoulder at all; moreover, she was inside the classroom, blocking the doorway. He further stated that he "faked left" and then went to the right, a behavior which I find to be provocative under the circumstances,

because, if Moskowitz was in C. C.'s path, his faking left would have demonstrated that she did not have to move since she was obviously positioned to his right.

In addition, the testimony from both sides indicates that C.C. was upset and resentful at having been forced to attend this detention. Indeed, C. C. himself testified that he felt he did not deserve to be there, he was upset, he voiced his feelings, and he decided that he did not want to be there (at detention), so he left.

Taking the following factors into consideration:

(a) this incident took place after only approximately 3 1/2 weeks of school;

(b) C. C. admitted that he had not completed his homework assignment in a timely fashion;

(c) C.C. admitted that he had not attended the previous detentions to which Ms. Moskowitz had assigned him;

(d) C. C.'s admission that he "faked" left; and

(e) C. C.'s resentment at being kept in detention,

I **CONCLUDE** that C. C. exhibited an attitude of total defiance of authority during the course of the detention. I **FURTHER CONCLUDE** that C. C. intentionally struck Ms. Moskowitz as he left the detention room with enough force to cause her to stumble backwards. Accordingly, I **FURTHER CONCLUDE** that C.C. attempted to cause the teacher bodily injury.

Since Respondent has demonstrated, by a preponderance of the evidence that an assault on Ms. Moskowitz did take place[1], the provisions of *N.J.S.A.* 18A:37-2.1, requiring immediate suspension, consistent with due process, pending suspension or expulsion proceedings before the local Board of Education when an assault, as committed on certain Board employees including, among others, teachers, acting in performance of her duties where her authority to act is apparent, applies. According to

[1] *N.J.S.A.* 2C:12-1 provides that a person is guilty of assault if he attempts to cause . . . bodily injury to another

the same statutory provision such proceedings are to take place no later than 21 calendar days following the day of suspension.

Turning to the issue of the immediate suspension, consistent with due process, the record reveals that Mr. Yergalonis, at that time the Principal of Rahway Intermediate School, met with P.C. and C. C. on October 2 at 3:00 p.m., after a ten-day suspension of C. C. had been approved by the Superintendent (R-1). By letter dated October 5, 1995, P.C. was advised that the suspension hearing was set for October 17, 1995, at 3:00 p.m.; moreover, the notice of the suspension hearing states that P. C. could bring "any persons and materials to provide a response to the allegations . . . (R-2). The notice was hand delivered and receipt was acknowledged by P. C. (R-3). I **CONCLUDE** that the suspension hearing was scheduled and held within the statutory parameters.

As a result of the "due process suspension hearing, Mr. Yergalonis recommended expulsion proceedings be initiated and C. C.'s suspension was continued through November 21, 1995. During the period between October 17 and November 21, 1995, an evaluation of C. C. was conducted to determine whether he should participate in the special education program. It was determined that he was not eligible for special education (R-5b). P. C. neither agreed nor disagreed with this determination (R-5c).

The record indicates that P. C. was advised of each step the district took, from the notice of immediate suspension up to and including the decision of the Board on November 21, 1995 to continue the suspension of C. C. until the regular meeting of the Board on December 18, 1995, at which time an expulsion hearing was to be held. The Superintendent's letter dated December 4, 1995 advised Petitioner of her right to have counsel present at that time and P.C. requested an adjournment of the December 18, 1995 date in order to give her time to seek legal representation.

Based on the documents in evidence, as well as on the testimony of Mr. Yergalonis, I **CONCLUDE** that due process requirements were met with respect to the initial suspension, the continuation of the suspension, and the notification of the parent and student of the date of the expulsion hearing.

It is clear from the record that the initial suspension was continued in order to afford the parties the opportunity to have the Child Study Team (CST) evaluate C. C.;

upon finding him ineligible for the special education class, the Board on November 21 apparently decided to consider expulsion, an option granted under *N.J.S.A.* 18A:37-2.1. The first indication that the Board was considering expulsion is contained in the letter of December 4, 1997 from the Superintendent. Until that time, the reference in correspondence and on the Board agenda for November 21, 1995 was to suspension.

Petitioner established, through cross examination of Mr. Yergalonis, that he had determined to seek expulsion after his initial conversation with the teacher involved, teachers who witnessed the incident and C. C. It is clear, however, from the record, that before proceeding to consider expulsion, the District continued the suspension in order to conduct the CST evaluation; accordingly, I **CONCLUDE** the Board's decision to proceed with expulsion proceedings was based on the determination that C. C. was not a classified student and, therefore, was ineligible for special education. The District and the Board sought to find a reason, other than defiance of authority, for C. C.'s behavior before considering the ultimate penalty of expulsion.

Finally, the adjournment of the December 18, 1995 expulsion hearing was requested by the Petitioner; the Petitioner was advised of the rescheduling of the hearing by letter sent by regular mail and certified, return receipt requested.

I **CONCLUDE** that the District complied with due process requirements throughout the pendency of this matter.

With respect to the position of Petitioner in her petition that the District failed to follow its own policy, Petitioner failed to address this issue in any cohesive manner during her presentation. In addition, she apparently relied on discrepancies in the various statements of witnesses of the incident. To the extent that such discrepancies may exist in the record before me, I **CONCLUDE** that they are not substantial and do not affect the credibility of the witnesses or the determination in this matter.

The statute under which the District proceeded, *N.J.S.A.* 18A:37-2.1 is clear; in a case where there has been an assault on a teacher, it is appropriate to consider expulsion as the penalty. The fact that he Board chose not to expel C. C. but to suspend him for a four month period of time is well within the discretion of the Board, based on the record before me.

Accordingly, I **CONCLUDE** that the action of the Rahway Board of Education in this matter was appropriate and should be **AFFIRMED.** It is, therefore, hereby **ORDERED** that the determination of the Board be and hereby is **AFFIRMED;** it is **FURTHER ORDERED** that the petition be **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 20, 1997
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

June 20, 1997
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUN 24 1997
DATE

Mailed to Parties:
Barbara A Harnes
OFFICE OF ADMINISTRATIVE LAW

jrp

APPENDIX

LIST OF EXHIBITS

R-1 Report of Suspension, dated October 3, 1995 (2 pages)
R-2 Letter to parent, dated October 5, 1995
R-3 Memo to Mrs. Cooley from Mr. Yergalonis, dated October 5, 1995
R-4 Letter dated October 17,1995 to parent from Dr. Anthony P. Cavanna, Superintendent of Schools
R-5 (a) Memo to Philip Morvitz from Bill Petrino, dated October 18, 1995
(b) Initial Individualized Educational Plan (IEP), dated November 7, 1995
(c) Memo to Dr. William Petrino from Dr. Philip Morvitz, dated November 13, 1995
(d) Letter to P. C. from Philip Morvitz, School Psychologist, dated November 13, 1995
R-6 Memo to Student Relations Committee from Anthony P. Cavanna, Superintendent of Schools, dated November 8, 1995
R-7 Page 14 of Minutes of Regular Meeting of Board of Education of Rahway, dated November 2, 1995
R-8 Letter to parent of C.C. from P. Morvitz, Guidance Counselor, Student Relations Committee, dated December 4, 1995
R-9 Letter to parents of C. C. from Dr. Anthony P. Cavanna, Superintendent of Schools, dated December 22, 1995

P-1 Statement of Mr. D. Spaulding - Re: Incident September 30

LIST OF WITNESSES

For Petitioner:
C. C.
P.C.

For Respondent:
Lara Selesner Moskowitz
Darren Spaulding
Edward Yergalonis

OAL DKT. NO. EDU 5546-96
AGENCY DKT. NO. 133-4/96

P.C., on behalf of minor child, C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, and relying upon the credibility determinations rendered by the Administrative Law Judge (ALJ), the Commissioner concurs that petitioner has failed to establish that C.C.'s suspension, under the circumstances herein, was arbitrary, capricious, unreasonable, or otherwise improper.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein, and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 4, 1997
DATE OF MAILING AUGUST 4, 1997

397-97

IN THE MATTER OF THE TENURE	:	
HEARING OF THERESA MILLER,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC	:	DECISION
COUNTY.	:	
	:	

AUGUST 5, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5962-96

AGENCY DKT. NO. 167-5/96

IN THE MATTER OF THE TENURE HEARING OF THERESA MILLER, STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY

Gregory G. Johnson, Esq., for petitioner

Mary J. Hammer, Esq., for respondent (Bucceri and Pincus, , attorneys)

Record Closed: June 19, 1997 Decided: June 23, 1997

BEFORE **MARIE P. SIMONELLI**, A.L.J.:

Petitioner brought tenure charges against respondent under *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:17-2.

The Department of Education transferred this matter to the Office of Administrative Law (the OAL) on June 18, 1996. The OAL scheduled a hearing for May 29 and 30, 1997.

Prior to the start of the hearing, the parties agreed to settle this matter. On June 19, 1997, they submitted the attached Stipulation of Settlement which sets forth the terms of the settlement.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 23, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

June 25, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

md

Gregory G. Johnson, Esq.
17 Academy Street, Suite 208
Newark, New Jersey 07102
201-642-0001
Attorney for the Paterson Public Schools

IN THE MATTER OF THE TENURE HEARING OF THERESA MILLER,

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSIAC COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 592-96
Agency Ref. No. 167-5/96

STIPULATION OF SETTLEMENT

This Agreement made this on May 29, 1997, by and between the parties, petitioner State-Operated School District of the City of Paterson ("District"), and respondent Theresa Miller, a tenured secretary.

WHEREAS, Theresa Miller ("Respondent") is a tenured secretary employed by the District;

WHEREAS, on or about March 13, 1996, tenure charges were filed against the Respondent based upon conduct unbecoming and neglect of duty;

WHEREAS, on April 4, 1996, the State District Superintendent certified the charges against the Respondent. On or About May 8, 1996, the charges were filed with the commissioner of Education;

WHEREAS, In May, 1996, the Respondent's attorney filed an Answer denying the charges with the Commissioner of Education; and

WHEREAS, in light of the nature of charges, and potential for protracted litigation, it is in the best interest of the parties to resolve the charges before the Commissioner of Education in the following matter;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. The Respondent admits to Charge One, part 2., submission of a leave request for jury duty which she did not report for, but denies the remaining charges. The Respondent agrees to the following disciplinary measures: (1) a six month suspension without pay, inclusive of the 120 day unpaid suspension previously served (May 8, 1996 to September 5, 1996) pursuant to *N.J.S.A.* 18A:6-14; and (2) an increment denial for the 1996-97 school year only. The remainder of the six month suspension will commence upon approval of this Agreement by the Commissioner of Education.

2. In light of the Respondent's employment history and performance, and weighing the evidence in this case, the District agrees to withdraw Charge One, part 1., false offer of employment, and Charge Two: Neglect of Duty.

3. The District agrees to reinstate the Respondent to a secretarial position, after the six month suspension is served, upon approval of the settlement agreement by the Commissioner of Education. The District's Personnel Office will notify the Respondent in writing of the expiration date of the suspension and the date to report to work.

4. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

5. This Agreement constitutes the full Agreement between the parties.

6. By entering this Agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now.

7. This Agreement is subject to approval by the State District Superintendent, Office Administrative Law, and Commissioner of Education.

FOR THE EMPLOYEE

Mary J. Hammer, Esq.
Attorney for Theresa Miller

Dated: June 4, 1997

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON

Dr. Laval S. Wilson,
State District Superintendent

Dated: 6/13/97

Gregory G. Johnson, Esq.

Dated: June 2, 1997

OAL DKT. NO. EDU 5962-96
AGENCY DKT. NO. 167-5/96

IN THE MATTER OF THE TENURE	:	
HEARING OF THERESA MILLER,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON, PASSAIC	:	DECISION
COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 5, 1997
DATE OF MAILING AUGUST 5, 1997

398-97

SHAKUUR SABUUR AND ASMAA ABDUS-SABUUR, individually and as natural parents and guardians *ad litem,* AND AMINAH ABDUS-SABUUR,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, THELMA SMITH, individually and as President of the Orange Board of Education AND BOARD MEMBERS ALICE DUNSTON, HARRIET L. JOHNSTON, LUZ CANTOR, CHARLES JACKSON, ROLAND SANON, AND BERNICE DAVIS, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

AUGUST 5, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12295-95
AGENCY DKT. NO. 178-5/.94

SHAKUUR SABUUR and ASSMAA ABDUS-SABUUR,
Individually and as Natural Parents and Guardians
***ad litum* and AMENA ABDUS-SABUUR,**
Petitioners,
v.
CITY OF ORANGE TOWNSHIP BOARD OF EDUCATION,
THELMA SMITH Individually and asPresident of the
Orange Board of Education and Board Members
ALICE DUNSTON, HARRIET L. JOHNSTON, LUZ CANTOR,
CHARLES JACKSON, ROLAND SANON and
BERNICE DAVIS, SUPERINTENDENT,
Respondents.

Hassen Ibn Abdellah, Esq., for petitioners

Mark A. Tabakin, Esq., for respondents,
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: June 20, 1997 Decided: June 20, 1997

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on December 8, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 20, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

June 25, 1997
DATE

Receipt Acknowledged:
DM Cantanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
Ten James Street
Florham Park, New Jersey 07932
(201) 301-0001
Attorneys for Respondent, Board of
Education of the City of Orange

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JUN 20 10 09 AM '97

SHAKUUR A. SABUUR and ASMAA ABDUS-SABUUR, individually and as Natural Parents and Guardian Ad Litem, and AMINAH ABDUS-SABUUR,	:	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY
Petitioners,	:	OFFICE OF ADMINISTRATIVE LAW
vs.	:	OAL DOCKET NO. EDUOA-12295-95N
CITY OF ORANGE TOWNSHIP BOARD OF EDUCATION, THELMA SMITH, Individually and as President of the Orange Board of Education, and BOARD MEMBERS ALICE DUNSTON, HARRIET L. JOHNSON, LUZ CANTOR, CHARLES JACKSON, ROLAND SANON, and BERNICE DAVIS, Superintendent,	:	AGENCY REF. NO. 178-5/94 **ADMINISTRATIVE PROCEEDING**
Respondents.	:	

STIPULATION OF SETTLEMENT AND RELEASE

The parties to this Stipulation of Settlement and Release ("Stipulation"), Shakuur A. Sabuur and Asmaa Abdus-Sabuur, individually and as Natural Parents and Guardian Ad Litem, and Aminah Abdus-Sabuur (hereinafter referred to collectively as "Sabuur" unless otherwise specified), the Orange Board of Education, individually and collectively, and Alice Dunston, Harriet L. Johnson, Luz Cantor, Charles Jackson, Roland Sanon, and Bernice Davis (hereinafter referred to collectively as the

"Board" unless otherwise specified), desiring to avoid the time and expense of continued litigation and further desiring to amicably resolve the above-captioned matter, and having negotiated in good faith prior to reaching agreement as to the terms of this Stipulation of Settlement, hereby set forth their agreement as follows:

1. The Board shall pay to Sabuur the lump sum of $7,500.

2. The Board shall expunge the personnel file of Shakuur A. Sabuur of any reference to the incident that occurred in or about December, 1992, as well as all documents relating to his termination of employment, including this Stipulation. The Board also shall expunge the student records of Aminah Abdus-Sabuur of any reference to the disciplinary action taken against her relative to the December, 1992 incident.

3. The payment contained in Paragraph 1 and the promises of expungement contained in Paragraph 2 are expressly contingent upon Sabuur withdrawing, with prejudice, their petition in the above captioned matter, docketed as OAL Docket No. EDUOA-12295-95N, Agency Docket No. 178-5/94, by executing and filing with the Commissioner of Education and the Office of Administrative Law a Notice of Withdrawal, thus forever releasing the Board from any and all claims arising under or relating in any way to the above docketed matter.

4. In consideration for the promises made hereunder, Sabuur forever releases the Board and each individual respondent from any and all claims arising under or relating in any manner

whatsoever to the above-captioned action. Sabuur specifically releases and gives up any and all future claims which she may have against the Board arising from or relating to the above-captioned action, including, *but not limited to*, claims arising under (1) the Constitution of the United States; (2) the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; (3) the Constitution of the State of New Jersey; (4) any express or implied contracts in effect; (5) any collective negotiations agreement(s); (6) federal or state common law; (7) the Education Laws of the State of New Jersey, N.J.S.A. 18A:1-1 et seq.; and (8) any federal, state or local statutes, ordinances and regulations.

5. This Stipulation is not and shall not in any way be construed as an admission by Sabuur. Nor shall it be construed as an admission by the Board, or any of its officials, officers, agents, attorneys, employees or representatives of the commission of any acts of wrongdoing whatsoever against Sabuur, by itself or any other person or entity, or that the Board, or any of its directors, officers, officials, agents, employees or representatives violated any federal or state constitutional prohibitions or any federal, state or local law, ordinance or regulation, or that any employment decision or action affecting Sabuur was the result of any acts which were unwarranted, unjustified, discriminatory, otherwise unlawful or in violation of an express or implied contract of employment, or in breach of any statute, regulation or public policy of the State of New

Jersey, but instead constitutes the good faith settlement of all matters and the Board specifically disclaims any liability to Sabuur or any other person or entity, on the part of itself, its officials, officers, officials, agents, employees or representatives. The parties have entered into this Stipulation for the sole purpose of resolving claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court or administrative agency and neither party shall purport to be the prevailing party in this action.

6. The parties covenant and agree that they will keep the terms, amount and existence of the agreement set forth in this Stipulation completely confidential, and that they will not hereafter disclose, except as may be required by law, any information concerning the existence or terms of this Stipulation to any person, partnership, corporation, association or other legal entity, except pursuant to a Court Order, subpoena disposition notice, written interrogatories or similar formal legal request for information that provides for the imposition of sanctions for non-compliance therewith, or with the written authorization of the Board.

7. This Stipulation represents the full and complete agreement of the parties hereto and may be modified only by a writing signed by all parties hereto. This Stipulation supersedes any and all prior or contemporaneous written and/or oral statements or representations.

3d

8. Should any provision of this Stipulation be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be part of this Agreement.

9. The parties acknowledge that they have consulted with their attorneys prior to executing this Stipulation and that they fully understand and accept the terms and conditions set forth herein.

WHEREFORE THE PARTIES HERETO SET THEIR HANDS.

Notary ATTORNEY AT LAW STATE OF NEW JERSEY

Notary

Notary

Shakuur A. Sabuur, individually and as Natural Parent and Guardian Ad Litem of Aminah Abdus-Sabuur

Asmaa Abdus-Sabuur, individually and as Natural Parent and Guardian Ad Litem of Aminah Abdus-Sabuur

Aminah Abdus-Sabuur

ORANGE BOARD OF EDUCATION

By:

Attest:

Secretary

Dated: March 4, 1997

OAL DKT. NO. EDU 12295-95
AGENCY DKT. NO. 178-5/94

SHAKUUR SABUUR AND ASMAA ABDUS-SABUUR, individually and as natural parents and guardians *ad litem,* AND AMINAH ABDUS-SABUUR,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, THELMA SMITH, individually and as President of the Orange Board of Education AND BOARD MEMBERS ALICE DUNSTON, HARRIET L. JOHNSTON, LUZ CANTOR, CHARLES JACKSON, ROLAND SANON, AND BERNICE DAVIS, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 5, 1997
DATE OF MAILING AUGUST 5, 1997

399-97

399-97

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board Green Township sought Commissioner's declaration concerning the application of the provisions of *N.J.S.A.* 18A:38-8.1 and of the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 *et seq.*, to two areas of controversy: 1) the right of sending district representative members on a receiving district's board of education to share executive session discussions of this body with the sending districts' boards and 2) the impact of these statutory provisions on the quorum requirements of the receiving district's board.

Having reviewed the parties' arguments advanced in this matter and in light of the interpretative clarification of *N.J.S.A.* 18A:38-8.1 provided by the May 30, 1997 decision of the Commissioner entitled *Board of Education of the Borough of Lincoln Park, Morris County v. Board of Education of the Town of Boonton, Morris County, Joy Northrop DeVincenzi, and Walter Angilly,* and by the July 24, 1997 decision of the Commissioner entitled *Board of Education of the Borough of Little Ferry, Bergen County v. Board of Education of the Village of Ridgefield Park, Bergen County*, the Commissioner declined to entertain the first issue as the *Lincoln Park* decision determined that, pursuant to *N.J.S.A.* 18A:10-1 and the OPMA, such practice of sharing executive session discussions would be impermissible. As to the second issue, the Commissioner found that with respect to the quorum and voting requirements discernment of such requirements necessarily flows from an understanding of the underlying duality of purpose of *N.J.S.A.* 18A:38-8.1. This statutory provision 1) grants the district entitlement to membership on the receiving district's board as a representative of the sending district, and 2) designates those board matters upon which the representative is eligible to vote. (*Lincoln Park*; *Little Ferry*) Thus, while the sending district's representative has limited voting rights in substantive matters before the board, in all other respects this individual shall function as a full member of the board. Given that the Newton Board herein was expanded to an eleven member Board with the addition of its two representative members, the quorum necessary to convene any meeting, pursuant to *N.J.S.A.* 10:4-8b, will at all times be six. Commissioner further found that voting requirements for particular substantive resolutions before the Board will vary. On all procedural matters and those substantive matters before the Board where the representative members are eligible to vote, the vote required to carry a motion will be based on a total membership of eleven. On those substantive matters where such representatives are not eligible to vote, the vote required to carry the motion will be based on a total membership of nine. Commissioner directed Newton to conform its policies and procedures with regard to quorum and voting requirements consistent with his declaration herein.

AUGUST 5, 1997

AGENCY DKT. NO. 54-2/97

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, David A. Wallace, Esq.

For Respondent, Friedman, Siegelbaum (Philip E. Stern, Esq.)

This matter comes before the Commissioner of Education by way of a Petition for Declaratory Judgment, pursuant to *N.J.A.C.* 6:24-2.1 *et seq.*, filed by Petitioner Green Township Board of Education (hereinafter "Green") on February 7, 1997. Green requests that the Commissioner construe the provisions of *N.J.S.A.* 18A:38-8.1 and the provisions of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.* as these apply to two areas of controversy between the within parties, specifically 1) the right of sending district representative members on a receiving district's board of education to share executive session discussions of this body with the sending districts' boards and 2) the impact of these statutory provisions on the quorum requirements of the receiving district's board. Respondent Board of Education of the Town of Newton (hereinafter "Newton") filed its Answer in this matter on March 7, 1997.

BACKGROUND

The within parties are engaged in a sending/receiving relationship, pursuant to *N.J.S.A.* 18A:38-8, whereby Green sends its high school students, grades 9 through 12, to Newton's High School. Newton also has an essentially identical sending/receiving relationship with the Andover Regional Board of Education with respect to that body's grade 9 through 12 pupils. As a consequence of the January 1995 enactment of *N.J.S.A.* 18A:38-8.1, which provides that a sending district whose students comprise at least 10 percent of the total enrollment of students in the receiving district shall have a representative on the receiving district's board of education, Newton's nine member board was increased to eleven members with the addition of a representative from each of these sending districts. *N.J.S.A.* 18A:38-8.1, in addition to granting sending districts entitlement to membership on the receiving district's board, also identifies four specific matters upon which these representatives are eligible to vote. As a consequence of this statutory directive, the within parties refer to the matters for which the two sending district representatives are eligible to vote, pursuant to this statutory provision, as "eleven member issues" and those matters for which these individuals are not eligible to vote as "nine member issues," a distinction which is even reflected on the agendas for Newton Board meetings where each motion is designated as either a "Motion (11)" or a "Motion (9)." (Petition for Declaratory Judgment at p. 2)

POSITION OF THE PARTIES

On the first issue herein, Green advances the position that if the Newton Board discusses an "eleven member issue" in executive session, the Green representative has a right, if

not a duty, to include this issue in a report to, and discussions with, the Green Board at an executive session of that body. (Green Petition for Declaratory Judgment at pp. 2-3)

Newton, on the other hand, posits that such report to, and discussions with, the Green Board are totally inappropriate, particularly with respect to Newton personnel issues which may require RICE notices. (Newton Reply at pp. 1-2)

With respect to the second question at issue, Green contends that "if a committee of the Newton Board meets to discuss a 'nine member issue,' the presence of five (5) Newton members *** (a majority of the nine (9) Newton members) represents a quorum and thus constitutes a Newton Board meeting within the meaning of the Open Public Meetings Act." (Green Petition for Declaratory Judgment at p. 3)

Newton, however, maintains that the Board is now an eleven member Board, requiring six members to constitute a quorum. As such it asserts that five members do not constitute a quorum, notwithstanding the issue discussed or the composition of the committees at issue.

The parties urge that the Commissioner resolve through declaratory judgment these sensitive and recurring areas of disagreement which they perceive as fundamental to their sending/receiving relationship.

COMMISSIONER'S DETERMINATION

I have reviewed the submissions of the parties filed in this matter and considered these in light of the interpretative clarifications of *N.J.S.A.* 18A:38-8.1 provided by the recently decided matters entitled *Board of Education of the Borough* of *Lincoln Park, Morris County v. Board of Education of the Town of Boonton, Morris County, Joy Northrop DeVincenzi and*

Walter Angilly, decided by the Commissioner May 30, 1997, and *Board of Education of the Borough of Little Ferry, Bergen County v. Board of Education of the Village of Ridgefield Park, Bergen County*, decided by the Commissioner July 24, 1997. Upon such review, it is apparent that the first issue raised in this matter, the question of whether sending district representative members on a receiving district's board may share executive session discussions of this body with their sending district boards, has been squarely addressed and resolved by the Commissioner's decision in *Lincoln Park*, wherein it was determined that, pursuant to *N.J.S.A.* 18A:10-1 and the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 *et seq.*, such a practice would be impermissible. (See *Lincoln Park* at pp. 19-23.) Thus, the Commissioner finds it unnecessary to entertain this portion of the within request for declaratory judgment.

With respect to the quorum and voting requirements necessitated by *N.J.S.A.* 18A:38-8.1 and the provisions of the OPMA, I find that discernment of such requirements necessarily flows from an understanding of the underlying duality of purpose of *N.J.S.A.* 18A:38-8.1. As was elucidated in *Lincoln Park* and reiterated in *Little Ferry*, this statutory provision 1) grants the sending district entitlement to membership on the receiving district's board of education as a representative of the sending district, *and* it 2) designates those matters before the board upon which the representative is eligible to vote. As such, while the representative of a sending district has limited voting rights in substantive matters before the board, in all other respects this individual shall function as a full member of the board. Therefore, the requirements necessary for quorum and voting must be amended to reflect the new *total* membership of the board. Given that the Newton Board herein has been expanded to an eleven member Board with

the addition of its two representative members, the quorum necessary to convene any meeting, pursuant to *N.J.S.A.* 10:4-8b, will at all times be six.

Notwithstanding that the quorum requirement to convene meetings remains constant, voting requirements will vary dependent upon whether the sending district representatives are eligible to vote on the issue at hand. Thus, on all procedural matters, as set forth in *Little Ferry, supra,* and on those substantive matters before the Board where the representative members are eligible to vote, the vote required to carry a motion will be based on a total membership of eleven. On those matters where such representatives are not eligible to vote, the vote required to carry the motion will be based on a total membership of nine.

Accordingly, the Newton Board of Education is hereby directed to conform its policies and procedures with regard to quorum and voting requirements consistent with the declarations herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

402-97

EDNA PRATICO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Vice Principal contended the Board refused to allow her to use accumulated sick days during sick leave due to a work-related injury. The issue herein was whether petitioner may elect to use her accumulated sick leave during the absence in question or whether she must accept temporary disability payments under the Workers' Compensation Act as directed by the Board.

ALJ concluded that since petitioner did not apply for workers' compensation benefits and exhausted her salary benefits pursuant to *N.J.S.A.* 18A:30-2.1, petitioner should have been allowed to exercise her discretion in using her accumulated sick leave to compensate for her absence while she recovered from surgery. ALJ ordered the award of $9,246 to petitioner for sick leave benefits she was denied and ordered the return of any workers' compensation benefits she received.

Commissioner granted summary decision to petitioner and directed the Board to pay petitioner the $9,246 owed. In the absence of bad faith, no pre-judgment interest was awarded.

AUGUST 6, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION

FOR SUMMARY JUDGMENT

OAL DKT. NO. EDU 2724-96

AGENCY DKT. NO. 91-3/96

EDNA PRATICO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

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

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, Council, George & Dortch, attorneys)

Record Closed: May 15, 1997 Decided: June 20, 1997

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 11, 1996, the petitioner filed her appeal before the Commissioner of Education. The petition *inter alia* alleged that the respondent, Trenton Board of Education (Trenton)

unjustifiably disallowed petitioner from utilizing any accumulated sick leave, directing her instead to obtain temporary disability payments under Workers Compensation in respect to a work-related injury. Respondent filed its answer before the Commissioner on April 2, 1996, essentially alleging that its actions in regard to petitioner's utilization of sick time and disability payments are entirely lawful and consistent with law. Thereafter, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A.* 52:14B -15 to *N.J.S.A.* 52:14F-1 to -13, on April 10, 1996. Following extensive prehearing discussions and conferences, counsel determined to submit the matter on cross-motions for summary decision and stipulations of fact. The record closed on May 15, 1997, when my office received the petitioner's reply memorandum.

THE FACTS

The facts are not in dispute in this matter. They are based upon a stipulation of the facts entered into between the parties and signed on April 15, 1997 by counsel. The petitioner was initially employed as a classroom teacher by Trenton beginning in the 1970-1971 school year. In the 1982-1983 school year Ms. Pratico was appointed to the position of Assistant Principal to the Stokes School. Several years thereafter she was assigned to the position of Vice Principal at Trenton High School, where she serves to this day.

In April of 1993, Ms. Pratico suffered a work-related injury causing her to be absent from her employment. She remained absent for the entire 1993-1994 school year and for this period continued to receive full compensation, pursuant to *N.J.S.A.* 18A-30-2.1. She returned to full time duties in or about August 1994.

In or about November 1995 the petitioner underwent surgery for the same work-related injury that she suffered in April 1993. She informed her superiors of the impending surgery before undergoing it and advised them that she would be utilizing her sick leave from the district until she returned to her employment. Petitioner is a member of the Trenton Administrators and Supervisors Association (TASA) whose agreement at Article XVI provides all administrators with the right to accumulate sick days. In November 1995 Ms. Pratico has sufficient sick days

accumulated to cover her absences following her surgery. She did not apply for disability as a result of her surgery in 1995; nevertheless, after going on leave on or about November 9th the Workers Compensation carrier for Trenton, the New Jersey School Board Association and Insurance Group, commenced mailing Ms. Pratico temporary disability payments in accordance with its procedures when an employee is on leave as a consequence of a work-related injury. Ms. Pratico began drawing sick days from her accumulated sick days with her surgery in November 1995. Ms. Pratico was out of work from November 9, 1995 through either March 7 or March 16, 1996. [1]

Petitioner's record indicates that through January 26, 1996 her absences were treated as personal illness days and taken from her accumulated sick days. Subsequent to January 29, 1996, her absences were treated as sick days, which are considered non-paid accident days. The temporary disability payments, which were made to the petitioner, totaled $7,573.28; of that amount $3.448 is being held in escrow by petitioner's workers compensation attorney and an additional $3,448 was forwarded to the respondent's workers compensation attorney on February 16, 1996. Also, a check in the amount of $677.28 was returned to Trenton's counsel, in an unopened envelope, from the school board insurance group on or about July 29, 1996. All the sums received by Ms. Pratico, in the form of disability payments, have either been returned to Trenton or its counsel or are currently being held in escrow by Ms. Pratico's workers compensation counsel, who is awaiting instructions from Trenton.

For the period January 28, 1996 through March 7, 1996, respondent ceased receiving compensation salary from Trenton. It was not until the end of January 1996 that respondent commenced taking the position that petitioner's absences should not be counted as sick days when, after receiving inquiries from the petitioner as to how she could return the disability payments she received for which she never applied, Trenton realized that petitioner was receiving temporary disability paychecks while concurrently receiving her regular paychecks through the use of sick days covering the same period. It is stipulated that the compensation which Ms. Pratico should have received in accordance with the agreed upon annual salary during the period between November 9th through March 7th was $27,738. The compensation she actually received

[1] Paragraph 14 of the settlement erroneously has a typographical error indicating both March 7 and March 20th. March 7 is the correct date. Her position was filled by a temporary appointment.

during the period was $18,492. The difference between the compensation she actually received and the compensation she would have received had a regular salary been paid through March 7, 1996 was $9,246.

Trenton has not returned any of the disability payments to Ms. Pratico which she forwarded to it, nor has Trenton paid to the petitioner any portion of the $9,246 salary differential which she claims she should have received as compensation.

ANALYSIS

The issue presented is whether Ms. Pratico may *elect* to use her accumulated sick leave during the absence at issue or whether she must accept the temporary disability payments under the workers compensation law as respondent has directed.

Petitioner argues that she has a statutory right to her sick leave and should be allowed to decide when to apply it to an absence. Respondent basically argues that to do so would "undermine the statutory requirements of the worker's compensation act". (Respondent's Brief at 5).

However, the "elective provisions of our statute (*N.J.S.A.* 34:15-8) were only intended to deny employees their traditional common law tort remedies." *Toland v. Atlantic Gahagan Joint Venture Dredge No. 1*, 57 *N.J.* 205, 207 (1970). There is nothing to suggest that the Worker's Compensation Act preempts the application of any other employment benefits. To the contrary, it has been held that although an employee cannot accept both unemployment and worker's compensation benefits simultaneously, the worker may elect the benefit that provides compensation closest to the original salary.

In *Khalil v. Revlon, Inc.*, 93 *N.J.A.R.2d* (WCC) 135, the petitioner sustained a work-related injury and was partially disabled. Because her employer could not accommodate her condition due to economic layoffs, petitioner became unemployed and collected unemployment benefits. While receiving these benefits, petitioner was awarded temporary disability benefits. The court found that a "miscarriage of justice would result if the award of duplicate benefits for the same period of time was permitted to stand. The legislature intended that an unemployed worker receive either Worker's Compensation temporary total disability, *N.J.S.A.* 34:15-12(a), Unemployment Insurance benefits, *N.J.S.A.* 43:21-1 *et seq.*, or temporary disability benefits, *N.J.S.A.* 43:2-25 for a work absence." *Id.*, at 135. The court also found that the petitioner would receive more money from unemployment benefits, and concluded, "When one looks to the beneficent purpose of both the wage replacement statutes, it would seem that the purpose of the entire statutory wage replacement system would be met if the petitioner were able to recover the maximum amount of compensation which most closely matches the wage loss." *Id.*, at 136.

In the area of education law, a statute has been promulgated governing the work absences of teachers in addition to those listed by the *Khalil* court, *supra*. *N.J.S.A.* 18A:30-1, *et seq*. This statutory allowance of sick leave "is not merely for the personal benefit of teachers, but is intended to promote the greater public good:"

> There is a public interest in allowing a teacher sick leave with pay and, indeed, in allowing her to accumulate unused sick leave. A sick teacher might, in the absence of available paid-leave time, continue to teach in order to obtain her salary. We think that such a person should not be encouraged to continue to work in those conditions and come into close dealing with school children."

Brockman v. Totowa Board of Education, 95 *N.J.A.R.2d* (EDU) 502, 504-03, quoting *Hackensack Bd. of Educ. v. Hackensack Educ. Ass'n*, 184 *N.J. Super.* 311, 318 (App. Div. 1982), certif. den. 91 *N.J.* 217 (1982).

The public interest at stake in *Brockman*, *supra*, is also implicated in this matter. Forcing petitioner to accept worker's compensation benefits, which provide for a rate of compensation lower than her original salary, rather than allowing her to exercise her discretion in using accumulated sick time, which provides for compensation at a rate equal to her original salary, produces the risk that petitioner may return to work while still injured in order to earn full salary. This risk threatens the interest expressed in *Hackensack, supra*. Furthermore, the beneficent purpose of *N.J.S.A.* 18A:30-1, *et seq.*, weighs in favor of providing petitioner with that compensation closest to her original salary. *Khalil, supra*. Petitioner, therefore, should be allowed to exercise her discretion in using her accumulated sick leave to compensate her for her absence while she recovers from the surgery.

Any amount petitioner received from worker's compensation has been held in trust by her attorney and returned to the compensation carrier. Petitioner should therefore be awarded the $9, 246.00 she was denied in sick leave benefits. She should not be awarded pre-judgment interest, however, as it appears respondent's suit was bona-fide and not instituted frivolously.

Accordingly, the motion by petitioner for summary decision be and is hereby **GRANTED**. It is therefore **ORDERED** that petitioner be award $9,246 which represented sick leave benefits to which she was entitled, absent prejudgment interest.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/20/97

DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/24/97

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 26 1997

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

ej

DOCUMENTS IN EVIDENCE

Joint Exhibits:

J-1 Stipulation of Facts, April 15, 1997

OAL DKT. NO. EDU 2724-96
AGENCY DKT. NO. 91-3/96

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

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and the reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.*

The Board's exception arguments challenge the legal basis on which the Administrative Law Judge (ALJ) supported his determination that petitioner's motion for summary decision should be granted in the instant matter. The Board contends that the ALJ ignored the Appellate Division's holding in *McIntosh v. De Filippo*, 282 *N.J. Super.* 171, 176 (1995) as to the exclusivity of remedies provided by the Worker's Compensation Act. (Board's Exceptions at p. 3) The Board maintains that "***since Petitioner's leave of absence is due to a work-related injury, all aspects of her compensation, permanent disability, and temporary

* It is noted that the Board also submittted a "response to the 'apparent' Cross-Exceptions filed on behalf of the Petitioner***." (Board's Submission of July 24, 1997)

disability, should be regulated by the standards set forth by the Legislature covering workers' compensation matters." (*Id.*)

The Board further asserts that the within matter concerns the interrelationship between *N.J.S.A.* 18A and *N.J.S.A.* 34. It posits that *McIntosh, supra*, and *Sharon Tompkins v. Hamilton Twp. Bd. of Ed.*, 11 *N.J.A.R.* 520 (1989)

> require [that] the application of *N.J.S.A.* 18A in a work-related injury matter must defer to the requirements of *N.J.S.A.* Title 34. Therefore, since *N.J.S.A.* 34:15-12(a) provides lesser monetary benefits in the form of temporary total disability payments than use of sick leave provided by *N.J.S.A.* 18A:30-1 *et seq.*, [the] Legislature has limited the Petitioner's benefits. (*Id.* at p. 5)

Lastly, the Board distinguishes *Brockman, supra*, from the instant matter. In *Brockman,* the Board recites,

> ***the teacher was unable to work and the Board's application for involuntary disability retirement was rejected by the Division of Pensions. The Commissioner, as well as the ALJ, felt that in that circumstance, she would not be receiving any form of compensation when her employer *** denied her use of her accumulated sick leave. Thus, it was ruled that a teacher who is sick (nonwork-related illness) and unable to work is entitled to use her sick leave. Clearly, in that situation, there is a real pressure on a teaching staff member to return to work because there is no source of income whatsoever. In the within matter, Petitioner does have a source of income, workers' compensation temporary disability benefits. (*Id.* at pp. 5, 6)

In reply, petitioner contends that the Board's position that she is barred from exercising her sick leave because she received benefits pursuant to *N.J.S.A.* 18A:30-2.1 is not supported by statute. Petitioner asserts that *N.J.S.A.* 18A:30-2.1 provides an additional benefit for employees who have suffered work-related injuries over and above the sick leave provisions provided by the same section of the statute. (Petitioner's Reply at p. 1) Moreover, petitioner

reasons that, once the maximum benefit of salary for up to one year is exhausted, it is logical that the employee would resort to drawing from her sick leave bank, which constitutes an earned benefit. (*Id.* at pp. 1, 2)

Petitioner does object, however, to the ALJ's failure to award pre-judgment interest in this matter. Petitioner contends "***there is no basis in law or fact for the Respondent to have taken the position it did in this case." (*Id.* at p. 2)

Upon careful and independent review of the record in this matter, the Commissioner affirms the ALJ's conclusion, for the reasons set forth herein. The Commissioner rejects the Board's view that *McIntosh, supra*, compels petitioner to seek compensation during the course of her absence from the provisions of the Workers Compensation Act. In *McIntosh*, the plaintiff was a member of the Old Tappan Volunteer Ambulance Corps and defendant De Filippo was the police officer providing dispatching services to Old Tappan. When the plaintiff arrived on an emergency scene to which she was dispatched by De Filippo, she was attacked and bitten by a dog. Plaintiff claimed that De Filippo failed to mention that there were vicious dogs on the premises. The question before the court was whether plaintiff and defendant De Filippo were co-employees at the time of the incident, so as to bar plaintiff's claim by the fellow-employee tort immunity provision of the Worker's Compensation Act. *McIntosh, supra*, at 174-177. The *McIntosh* Court highlighted *N.J.S.A.* 34:15-8, the provision of the Act which establishes that its remedies are exclusive. The Act provides:

> Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee.... *McIntosh, supra,* at 176, citing the Workers' Compensation Act, *N.J.S.A.* 34:15-8.

The Court further specified that the Act provides "immunity from suits brought by a co-employee arising from injuries at work." *(Id.)* However, as mandated by *N.J.S.A.* 34:15-8, the statute stipulates that "[i]f an employee experiences a compensable accident, he may not maintain a common law tort action against a fellow employee arising out of the same incident." *(Id.)* Thus, the exclusivity of remedies to which the *McIntosh* Court referred pertains to instances where a claimant who suffers a work-related injury elects to be satisfied by the Workers Compensation Act, and, in so doing, forecloses the possibility of other remedies which may be available.

In the instant matter, petitioner did not apply for benefits under the Workers Compensation Act, and, apparently, exhausted her salary benefits pursuant to *N.J.S.A.* 18A:30-2.1. Having exhausted those benefits, the Board maintains that, during her subsequent work-related injury leave, she was not entitled to use her sick leave, but was only entitled to disability payments pursuant to the Workers Compensation Act. (Board's Exceptions at p. 5) The Commissioner finds no support in the relevant statutory scheme for this position.

Sick leave is defined, in pertinent part, as "***the absence from his or her post of duty, of any person because of personal disability due to illness or injury ***." *N.J.S.A.* 18A:30-1. Notably, the statute does *not* qualify or limit the nature of the illness or injury.

Further, the Commissioner recognizes that "[t]he purpose of *N.J.S.A.* 18A:30-2 is to guarantee that a school district employee, who is absent from work due to an injury arising out of and in the course of employment, will receive his or her full salary for periods of absence up to one calendar year without losing annual or accumulated sick leave. This statute is meant to 'complement workers' compensation benefits for a strictly limited time period.'" *Mona J. Outland v. Monmouth-Ocean Education Service Commission*, 295 *N.J. Super.* 390, 395,

citing *Theodore v. Dover Bd. of Ed.*, 183 *N.J. Super.* 407, 416 (App. Div. 1982). However, the time limitation imposed by the Legislature may well be interpreted as a limit *not* on the employee's entitlement to receive her full salary, but on her entitlement to receive her full salary without having to draw from her annual or accumulated sick leave.

Inasmuch as petitioner rightfully accumulated sick days pursuant to Article XVI of the Agreement signed by the Board and the Trenton Administrators and Supervisors Association, and acquired a sufficient number of same to cover her absence, the Commissioner finds no basis on which to restrict the application of that sick leave because petitioner's injury was caused by an accident arising out of and in the course of employment.

Accordingly, the Commissioner affirms that petitioner must be granted summary decision in the instant matter. Like the ALJ, the Commissioner declines, however, to award petitioner pre-judgment interest, as there has been no showing of bad faith or deliberate violation of law on the part of the Board, as required by *N.J.A.C.* 6:24-1.16. The Board is hereby directed to pay petitioner $9,246, representing the amount of sick leave benefits which she was denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 6, 1997
DATE OF MAILING AUGUST 6, 1997

402-97

EDU #2724-96
C # 402-97
SB # 74-97

EDNA PRATICO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, August 6, 1997

For the Petitioner-Respondent, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Sumners, Council, George & Dortch
(Thomas W. Sumners, Jr., Esq., of Counsel)

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

Donald C. Addison, Jr., abstained.

January 7, 1998

Date of mailing JAN 09 1998

403-97

SUSAN ALBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning art teacher alleged the Board's reduction in her compensation for the 1996-97 school year and its failure to offer her a full-time elementary classroom teaching position violated her tenure rights.

ALJ concluded petitioner's tenure rights were violated when the Board failed to appoint her to one of the vacant elementary teacher positions. ALJ determined that petitioner was entitled to the full-time elementary teaching position because she was eligible for the appropriate endorsement at the time of the RIF. Summary decision on behalf of petitioner was granted. Board was ordered to pay petitioner back pay and other emoluments.

Reconciling the within matter with *Francey*, the Commissioner adopted the findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 7906-96
AGENCY DKT. NO. 273-7/96

SUSAN ALBERT,
Petitioner,
v.
BOARD OF EDUCATION OF THE SCOTCH PLANS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,
Respondent.

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

Casper P. Boehm, Jr., Esq., for respondent

Record Closed: June 5, 1997 Decided: June 18, 1997

This is a transcript of the administrative law judge's oral initial decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

BEFORE **ELINOR R. REINER**, ALJ:

Procedural History

On July 12, 1996, petitioner, Susan Albert, filed a petition of appeal with the Commissioner of Education alleging that respondent's reduction in petitioner's compensation for the 1996-97 school year and its failure to offer petitioner a full-time elementary classroom teaching position, violated petitioner's tenure rights. Respondent filed an answer on August 1, 1996, alleging that petitioner had failed to state a claim upon which relief could be granted. On August 13, 1996, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on August 23, 1996, and a prehearing telephone conference scheduled for October 1, 1996. A prehearing conference was held on that date at which time the issues were isolated and a hearing scheduled for June 17, 1997 at the Office of Administrative Law. In addition, the parties indicated that cross-motions for summary decision would be filed. Subsequent thereto the dates for submission of the joint stipulation of facts and cross-motions for summary decision were extended. On or about March 24, 1997, the parties filed a joint stipulation of facts and cross-motions for summary decision. Thereafter, the parties filed reply briefs. The record has now closed in this matter and it is ripe for determination.

Issue

At the prehearing the parties agreed that at issue is whether respondent violated petitioner's tenure rights by failing to appoint her to a full-time elementary classroom position. A sub issue is whether petitioner's notice to respondent in March 1996 that she was eligible for an elementary endorsement was sufficient to establish her tenure rights to the elementary classroom position.

Facts

The parties have stipulated to the requisite facts in this matter and the stipulation of facts (J-1 in evidence) is hereby incorporated by reference as my findings of fact.

Discussion

In New Jersey, state statutes grant teachers the right to tenure. The Tenure Act, *N.J.S.A.* 18A:28-1 to -18, defines the conditions under which teachers are entitled to the security of tenure. Tenure rights are designed to foster a competent and efficient school system by affording teachers and administrators a measure of security. *Viemeister v. Bd. of Ed. of Prospect Park*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Since it is of remedial purpose, the Tenure Act is to be liberally construed to achieve its beneficent ends. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 74 (1982). The burden of proving a right to tenure rests with the teacher. *Canfield v. Bd. of Ed., Borough of Pine Hill*, 51 *N.J.* 400 (1968).

N.J.S.A. 18A:28-5 describes the criteria which must be met in order for a teacher to acquire tenure: 1) work in a position for which a teaching certificate is required; 2) hold the appropriate certificate; and 3) serve the requisite period of time. *See Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 74 (1982). *N.J.S.A.* 18A:28-9 allows a board of education to reduce its teaching staff for reasons of economy. A reduction in force (RIF) opens the door to reemployment rights based on the seniority of the "riffed" teacher. *See N.J.S.A.* 18A:28-12. Here, there is no question that petitioner was a tenured teaching staff member, having taught art at the K-5 level for approximately ten years. While petitioner's position was not abolished, her hours were reduced. Such a reduction in hours constitutes a reduction in force. *Polo v. Bergen County Bd. of Ed. of Vocational Schools*, 92 *N.J.A.R. 2d* (EDU) 230, 232. *See also Popvich v. Wharton Bd. of Ed.*, 1975 *S.L.D.* 737, 745 (Comm'r Oct. 7, 1975).

At issue in the instant case is whether petitioner was entitled, by virtue of her tenure, to the position of elementary school teacher which became available for the following school year. Petitioner holds, as required, an instructional certificate pursuant to *N.J.A.C.* 6:11-3.1. Petitioner also holds an endorsement in art. *N.J.A.C.* 6:11-6.1(a) governs endorsements and provides as follows:

> Each teaching endorsement is required for the corresponding teaching assignment. Each endorsement is valid for all levels, except that the elementary endorsement is valid for grades nursery through eight.

The law is now well-settled that a tenured teacher with the appropriate certificate is entitled to tenure protection for all positions under that certificate and all endorsements thereto. "[T]enure is achieved in and tenure protection attaches to all endorsements upon a staff member's instructional certificate, and not just those under which the individual has actually served for the requisite period of time pursuant to *N.J.S.A.* 18A:28-5 or 18A:28-6." *Francey v. Salem Bd. of Ed.*, 96 *N.J.A.R.2d* (EDU) 347, 348 (St. Bd. of Ed), *aff'd* 286 *N.J. Super* 354 (App. Div. 1996). *Accord, Dennery v. Passaic County Bd. of Ed.*, 131 *N.J.* 626 (1993). *See also Ellicot v. Frankford Bd. of Ed.*, 251 *N.J. Super.* 342 (App. Div. 1991) (holding that tenured speech correctionist with educational services certificate was entitled to learning disabilities teacher-consultant position even though she never worked in that position because she enjoyed tenure for all positions under the educational services certificate); *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1987), *certif. denied*, 110 *N.J.* 512 (1988) (tenured elementary art teacher with instructional certificate and art endorsement was entitled to secondary art teacher position over non-tenured employee even though she had never taught art at the secondary level); *Capodilupo v. West Orange Bd. of Ed.*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. denied*, 109 *N.J.* 514 (1987) ("[A] tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification"). Thus, the New Jersey courts have consistently held that an educator

with tenure in a specific endorsement can extend or transfer that tenure to other endorsements that are subsumed under the same certificate.[1]

Here, petitioner claims a tenure right to an elementary teacher position. Petitioner thus seeks to extend her tenure protection under her instructional certificate to include not only the art endorsement, but also the endorsement she recently acquired in elementary education.

At issue in the instant case is whether petitioner can claim a tenure right to the elementary position when she completed the requirements for the relevant endorsement before the RIF but was issued the endorsement after the RIF took place. The issue of when tenure rights attach was recently decided by the Appellate Division in *Francey v. Salem Bd. of Ed.*, 286 *N.J. Super.* 354 (App. Div. 1996). In *Francey*, a tenured home economics teacher was laid off in a RIF. Two years later, Francey acquired an elementary endorsement to her instructional certificate and then claimed a tenure right to subsequent vacancies in elementary teacher positions. In the final agency decision, the Acting Commissioner noted that the "case is one of first impression, raising the threshold question of whether a tenured employee's rights to recall are frozen at the time of RIF or continually expandable through acquisition of subsequent additional endorsements." 92 *N.J.A.R.2d* (EDU) 449, 452. The Commissioner balanced the protectiveness of the tenure statutes and the Board's need for finality of employee entitlement decisions and concluded that:

> the date of an employee's RIF can be the only reasonable date certain on which the employee's rights can be reckoned for future entitlement purposes. To deprive boards of this certainty by permitting riffed staff to continually revise and expand their entitlements at will would at the very least pose an unreasonable administrative burden on the district, and, of more concern, would likely lead to amassing of endorsements following a RIF, reduce to chaos any attempt by a district to ascertain its legal responsibilities

[1] Note that pursuant to *N.J.S.A.* 18A:28-5, as clarified by *L.* 1996, c. 58, Section 1, tenure status is not transferable between the so called "separately tenurable" positions, that is, administrative and supervisory positions. Under the amended statute, tenure accrues in those positions only by actual employment and time served in that position.

> upon the arising of a vacancy, and unduly restrict boards in their efforts to provide a thorough and efficient education by choosing the most qualified staff for open positions.
>
> [*Id.* at 453.]

Thus, the Commissioner determined that a teaching staff member's tenure rights are fixed at the time of the RIF.[2] The State Board of Education affirmed the Commissioner's decision but modified the analysis somewhat. *See* 96 *N.J.A.R.2d* (EDU) 347, 348 (State Bd. of Ed.). The State Board confirmed that:

> Rights emanating from the achievement of tenure are triggered at the time of a RIF. *Edison Township Education Association v. Board of Education of the Township of Edison*, decided by the Commissioner of Education, 1984 *S.L.D.* 1073, 1083, *aff'd* by the State Board of Education, 1984 *S.L.D.* 1085, *aff'd*, Docket #A-2030-84T7 (App. Div. 1986). As a result, district boards are required to recognize the tenure rights of affected parties as they existed at the time of its action. *Parker and Pelegrino v. Board of Education of the Matawan-Aberdeen Regional School District*, decided by the State Board of Education, May 2, 1990.
>
> [*Id.* at 348.]

Further, the State Board found that there was no authority in the tenure statutes for a teaching staff member to accrue additional rights in a tenured position after dismissal in a RIF. *Id.* Therefore, in *Francey*, Francey's tenure rights and protections were triggered and fixed as of the date of the RIF and extended only to those endorsements on her instructional certificate at that time. *Id.* The State Board concluded that the subsequent acquisition of an elementary endorsement did not enlarge petitioner's tenure rights beyond those achieved by the date of the RIF. *Id.* Francey did not have a tenure right to the elementary teaching positions.

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[2] Note that a RIF is effective on the date the Board makes the RIF decision, not the date the RIF takes effect (*i.e.* the beginning of the next school year). *Marshall v. Neptune Bd. of Ed.*, Dkt. No. A-2595-85T1 at 7-8 (App. Div., March 10, 1987) (unreported); *Edison Township Education Association v. Board of Education of the Township of Edison*, 1984 *S.L.D.* 1073 (Comm. of Ed), *aff'd*, 1984 *S.L.D.* 1085, (State Bd. of Ed.), *aff'd*, Dkt. No. A-2030-84T7 (App. Div. 1986).

The Appellate Division affirmed the State Board of Education decision by deferring to the board's interpretation that tenure rights are fixed as of the date of a RIF.

> Here, the statute... is entirely silent as to whether the reemployment protections it accords are to be fixed as of the date of the RIF decision or may thereafter be expanded by the addition of subsequent endorsements on a teacher's teaching certificate. Given the absence of a contrary legislative directive, we give considerable weight to the Commissioner's and State Board's expertise, particularly since we think their interpretation is well-supported by cogent education policy consideration and is not discordant with the underlying legislative objectives to be served by the Tenure Act.
>
> [*Francey v. Salem Bd. of Ed.*, 286 *N.J. Super.* 354, 357 (App. Div. 1996.]

See also Johnstone v. Cinnaminson Bd. of Ed., 92 *N.J.A.R.2d* (EDU) 506 (following *Francey* and holding that the two teachers were not entitled to positions for which they received endorsements after being riffed).

In the instant case, petitioner was tenured under her instructional certificate with an endorsement in art. Anticipating a RIF, petitioner took the General Knowledge Examination in February 1996 in order to obtain an elementary teacher endorsement. In March 1996, petitioner notified the Board that she passed the qualifying exam and was now eligible for an elementary teaching position. At the same time but by separate letter, petitioner in fact applied for an elementary teaching position. However, petitioner did not receive her elementary endorsement until May 1996. In the meantime, on April 25, 1996, the Board voted on the RIF and agreed to eliminate one-half of petitioner's art position, reducing her to part time.

Following *Francey*, petitioner's tenure rights were fixed at the time of the RIF. Petitioner's tenure protection clearly entitles her to a position under the art endorsement to her instructional certificate. However, petitioner's elementary

endorsement may also be protected if she satisfied the requirements for the endorsement prior to the RIF but simply had not yet received the paperwork.

Petitioner gave notice to the Board on March 13, 1996 that she was eligible and qualified for the elementary endorsement, having taken and passed the General Knowledge Examination. By a second letter on the same date, petitioner also applied for the vacant elementary position for the upcoming school year. Petitioner requested in March that the Board complete a Priority Request Form to expedite the issuance of her certificate. Apparently, the Board did not do so. While the Board was under no obligation to expedite her certificate, statutory or otherwise, the Board was then on notice of petitioner's eligibility for the endorsement and potential tenure claim under that endorsement.

The Board may be required to honor all known and reasonable entitlements of a teaching staff member. In *Francey*, the Commissioner and the State Board of Education both held that "boards of education need not go to extremes to accommodate employment rights when all known and reasonable entitlements have been honored at the time of RIF." *Francey v. Salem Bd. of Ed.*, 92 *N.J.A.R.2d* (EDU) 449, 453, *aff'd*, 96 *N.J.A.R.2d* (EDU) 347 (State Bd. of Ed). Here, the Board stipulates that it knew of petitioner's eligibility for the elementary endorsement. The Board further stipulates that it knew petitioner was applying for an elementary position and petitioner in fact later interviewed for that position. The Board was on such notice beginning in March 1996, well before the RIF decision was made on April 23, 1996. Thus, the Board of Education was required to honor this known and reasonable entitlement at the time of the RIF that petitioner holds a tenure claim to an elementary position. *See also Johnstone v. Cinnaminson Bd. of Ed.,* 92 *N.J.A.R.2d* (EDU) 506, 508 ("Neither can the Board claim surprise or prejudice by the necessity to honor petitioners' entitlements...as it was fully aware of both their interest and certification status before it filled the disputed vacancies").

Moreover, to hold that petitioner was not entitled to an elementary position because she did not have the physical certificate in her possession is merely placing

form over substance. As indicated above, there is no question that petitioner was eligible and qualified for the elementary endorsement, having passed the requisite examination. Various school law decisions have held that eligibility for a certificate controls, not the actual possession of the certificate.[3]

In *Reinish v. Cliffside Park Bd. of Ed.*, 1965 *S.L.D.* 50, *aff'd*, 1966 *S.L.D.* 252 (State Bd. of Ed.), *aff'd,* 1966 *S.L.D.* 253 (App. Div.), petitioner, a guidance counselor, was not re-employed after six years of employment with the Board as a guidance counselor. Reinish claimed a tenure right generally as a teacher and asserted that the Board had a duty to reassign him to a teaching position for which he was qualified. Reinish was eligible for a teacher certificate in Social Studies but such certificate was never issued to him. In holding that Reinish must be reinstated as a teacher in the school district, the Commissioner of Education stated:

> Nor is there any merit in the argument that even though petitioner may have been eligible for the issuance of a certificate to teach Social Studies, none was issued to him. This is also consistent with usual practice. Application for a certificate is made when employment is obtained and for the particular license needed. Petitioner, having no need of a Social Studies certificate, could not be expected to apply for its issuance until he had need for it. *The fact that he qualified for such a certificate is enough.*
>
> [*Id.* at 54 (emphasis added).]

In *Kane v. Hoboken Bd. of Ed.*, 1975 *S.L.D.* 12, the Commissioner of Education held that even though a junior high school principal did not hold an elementary principal certificate, he was entitled to an elementary principal position because he was eligible

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[3] Each of these cases addresses eligibility for a certificate, not an endorsement. However, this is simply a misuse of the terminology. *See Howley v. Ewing Township Bd. of Ed.,* 6 *N.J.A.R.* 509, 513-514 (EDU 1982). In the older school law decisions, the term "certificate" was often used when "endorsement" was meant. Under the current regulations, there are only three kinds of certificates: 1) instructional; 2) administrative; and 3) educational services. *N.J.A.C.* 6:11-2.3. Endorsements are issued in specific fields, such as math, English or art, and attach to the certificate. *N.J.A.C.* 6:11-6.2. Both the appropriate certificate and endorsement are required to hold a teaching staff member position.

for that certificate. His eligibility for an elementary principal certificate at the time of the deadline for filing applications for the position was dispositive notwithstanding the fact that he did not receive the certificate until seven months later. In upholding that principal's right to the position, the hearing examiner stated: "[t]o hold that a candidate would be precluded from appointment to a position of principal because he did not have *in his possession* a specific certificate, while acknowledging he was eligible for it, would place form over substance." *Id.* at 17 (emphasis in original). This conclusion was adopted by the Commissioner who determined that a candidate's eligibility for proper certification is sufficient to qualify him or her for the position. *Ibid. See also Nangle v. Cherry Hill Bd., of Ed.,* 1986 *S.L.D.* 1; *Saad v. Dumont Bd. of Ed.*, 1982 *S.L.D.* 440, 445 ("The law is clear that eligibility for, instead of actual possession of, an appropriate certificate has been held sufficient to allow one to assume a position").

Further, the Commissioner of Education has held that time served by a teacher may count towards tenure where the teacher applied for but had not yet received a teaching certificate. *Givens v. Newark Bd. of Ed.*, 1974 *S.L.D.* 906. In *Givens,* the Commissioner determined that petitioner's service without the required certificate counted towards tenure where the petitioner's inability to obtain the certificate was due to administrative delay, not her own doing, and because the County Superintendent could have issued an interim certificate if he had chosen to do so. In so concluding, the Commissioner determined that "[f]airness alone dictates that such teachers ought not be penalized by the administrative delay which necessarily exists in processing great numbers of applications for certificates by teachers required to staff public schools serving nearly one-half million New Jersey school children." *Id.* at 908.

However, the same is not true where a teacher has not applied or is not otherwise eligible for a required certificate. In *Sydnor v. Englewood Bd. of Ed.*, 1976 *S.L.D.* 113, the Commissioner of Education held that the petitioner did not achieve tenure even though she served the requisite time because she was not certificated and had not even applied to the Board of Examiners for a teaching certificate. The State Board of Education affirmed (unpublished, 1984). In *Ledwitz v. Manalapan-Englishtown Bd. of Ed.*, 1987 *S.L.D.* 1963, the Commissioner of Education reversed the

ALJ and held that a teacher's time served did not count towards her tenure where she was not in fact eligible for a certificate in handicapped instruction because she did not have enough course credits. The Commissioner found that the delay in the issuance of the certificate was due only to petitioner's fault and that Ledwitz had misrepresented her possession and/or eligibility for certification as a handicapped teacher. *Id.* at 1987. The State Board of Education affirmed (unpublished).

In the instant case, petitioner was eligible for the elementary endorsement as of March 1996. The delay in the issuance of the certificate was administrative, not due to any fault on the petitioner's part. The fact that the actual paperwork of the endorsement was not received by petitioner until May 1996 does not interfere with her qualification and eligibility for an elementary teaching position. The case law makes clear that to hold otherwise is merely placing form over substance. Therefore, petitioner had a tenure right to the position of elementary teacher as she was eligible for an elementary endorsement at the time of the RIF.

Conclusion

The Board violated the petitioner's tenure rights when it failed to appoint her to one of the vacant elementary teacher positions. Petitioner is entitled to the full time elementary teaching position because she was eligible for the appropriate endorsement at the time of the RIF.

Order

It is hereby **ORDERED** that petitioner's motion for summary decision is granted. It is hereby **ORDERED** that petitioner receive back salary in the amount of $13,161.50 ($2,632.50) per month from September 1996 through January 1997, recompense for the cost of substituted dental insurance coverage, and seniority credit for full-time service from September 1996 through January 1997.

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

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

END OF TRANSCRIPT

I, Anna M. Leggett certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Reiner's oral decision as edited by the Administrative Law Judge for form but not substance, rendered in the above matter on June 5, 1997.

June 18 1997
DATE

Anna M. Leggett
ANNA M. LEGGETT, Secretary

June 18, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

June 25, 1997
DATE

D'Allentaraute/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

J-J-1	Stipulation of Facts with attachments J-1 through J-13

OAL DKT. NO. EDU 7906-96
AGENCY DKT. NO. 273-7/96

SUSAN ALBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Board's exceptions and the reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board challenges the decisions cited by the Administrative Law Judge (ALJ) which stand for the proposition that eligibility for a certificate is sufficient to qualify an individual for a position. (Board's Exceptions at pp. 1, 2) The Board asserts that these decisions no longer have effect in that they are inconsistent with the holding in *Francey, supra.*[1] The Board affirms its position that the holding in *Francey* precludes petitioner from succeeding on her motion for summary decision, notwithstanding the ALJ's statement "that 'petitioner's elementary endorsement may also be protected if she satisfied the requirements for the endorsement prior to the RIF but simply had not yet received the paperwork.'" (*Id.* at p. 2,

[1] The Board notes its objection to the use of the following decisions: *Reinish, supra, Kane, supra, Nangle, supra, Saad, supra, and Givens, supra.*

citing Initial Decision at pp. 7, 8) The Board maintains that *Francey* does not place significance on an individual's eligibility for an endorsement at the date of a RIF but, rather, places significance on an individual's legal status at the date of the RIF. (*Id.* at pp. 2, 3)

The Board further challenges the ALJ's apparent reliance on a portion of *Johnstone, supra*, which states that a board can be neither surprised nor prejudiced when it is notified of petitioners' interest and certification status prior to filling disputed vacancies. (*Id.* at p. 3, citing to Initial Decision at p. 8) However, the Board asserts that this statement was merely the Commissioner's recitation of petitioners' argument in *Johnstone*, and said position was ultimately rejected. (*Id.* at p. 3)

In reply, petitioner reiterates her contention that this matter is distinguishable from *Francey* for the following reasons: (1) With the undisputed knowledge of the District's administration, petitioner was fully eligible, and had applied, for the elementary endorsement more than one month prior to the RIF; (2) Petitioner's employment with the Board was reduced, but not terminated, as a result of the RIF; and (3) Although the Board had the opportunity to expedite issuance of petitioner's elementary endorsement, it failed to do so. Petitioner contends that this failure was a "deliberate attempt to thwart [her] tenure rights." (Petitioner's Reply at p. 2)

Petitioner additionally argues that she remained an employee of the Board after the RIF. She claims that her right to use her elementary endorsement attached when it was issued in May of 1996. However, at that point, petitioner notes, the Board had not yet voted on her 1996-97 assignment. Thus, petitioner reasons that when the Board acted on May 23, 1996 to

assign her to half-time position, it did so *after* her receipt of the actual certification document. (*Id.* at pp. 3, 4)

Finally, petitioner points to *Francey*'s discussion of the statutory language of *N.J.S.A.* 18A:28-12.

> ***That statute, as the court notes at 286 N.J. Super. 358, allows a claim [by a riffed teacher] "...whenever a vacancy occurs in a position for which such person *shall be qualified*" (emphasis added by the Court, citing N.J.S.A. 18A:28-12).
>
> The Court rejected *Francey*'s claim that "shall be qualified" was meant to apply to certificates acquired in the future. *** However, the Court does note that
>
> > "Qualified," in its ordinary sense, means: "[to have] complied with the specific requirements or precedent conditions...." *Webster's Third New International Dictionary Unabridged* 1858 (3d ed. 1981). *Francey, supra* at 358.
>
> (Petitioner's Reply at p. 4)

Thus, petitioner reasons that she was qualified because she complied with the specific requirements for obtaining her elementary endorsement prior to the RIF. Petitioner argues that she should not be barred from asserting her tenure rights "***because the printing of a document takes time." (*Id.* at p. 4)

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ's conclusion that the Board violated petitioner's tenure rights when it failed to appoint her to one of the vacant elementary teacher positions following a RIF in April 1996. (Initial Decision at p. 11) Where petitioner, prior to the RIF, undisputedly fulfilled the single requirement for obtaining her elementary endorsement, *i.e.* obtaining a passing score on the general knowledge examination, and duly applied for this endorsement;

where the Board was notified prior to voting on the RIF that petitioner was eligible and had applied for, but not yet received, her elementary endorsement, and where the Board does not assert that delay in receipt of the certification document was for any reason other than administrative burden, the Commissioner finds that petitioner's tenure protections and attendant rights as triggered by the RIF may properly encompass the elementary endorsement.

The Appellate Division in *Francey* analyzed the statutory construction of *N.J.S.A.* 18A:28-12, examining the purpose of, and policy considerations inherent in, the statute.

> ***N.J.S.A. 18A:28-12 is a reemployment statute. It looks to the reestablishment of a prior employment relationship. That relationship does not logically exist for additional endorsements or teaching certifications acquired after the employment relationship ends.
>
> ***When enacting the tenure laws for teachers, the Legislature was responding to concerns regarding those teachers who had devoted their efforts to an employment relationship with a local school district, and sought to protect such teachers from an arbitrary termination of that relationship.***
>
> These concerns govern a tenured teacher's rights while in the employment of a school board and afford protection thereafter for rights attained during that relationship. Whether the same considerations arise so as to extend tenure protection to an expansion of the scope of a teacher's teaching certificate, after the employment relationship has ended, is plainly a matter of policy. *** Thus, on the one hand, when a teacher is RIF'd, but, during employment with the school board, has earned tenure rights within the scope of a teaching certificate and all endorsements thereon, the teacher is entitled to preferred reemployment only to positions within that certificate and endorsements. On the other hand, like a distinct, separate teaching certificate, subsequently acquired endorsements do not fall into the scope of needed protection. *Francey*, *supra* at 359, 360, citations omitted.

Unlike the petitioner in *Francey*, petitioner herein took all necessary steps to expand the scope of her teaching certificate *while in the course of her relationship with the*

Board, and the Board was duly apprised of those steps well in advance of the RIF underlying this dispute. No claim has been made by the Board that the actual issuance of petitioner's elementary endorsement was anything other than a ministerial function of the Department of Education; petitioner's certificate having been duly processed in accordance with standard agency practice, the timing of her application simply resulted in the actual certificate document being issued shortly after the RIF. Under these circumstances, the Commissioner determines that a finding that petitioner was "qualified" to hold the full-time elementary position within the intendment of *N.J.S.A.* 18A:28-12 is not inconsistent with the Court's analysis in *Francey*.

Accordingly, the Commissioner determines to adopt the initial decision for the reasons expressed therein.[2] Petitioner's motion for summary decision is granted, and the Board is ordered to compensate petitioner, as outlined in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] To the extent the Board argues that the case law employed in the Initial Decision of the ALJ is without legal significance in the wake of *Francey*, the Commissioner notes that his determination is not based on those cases.

AUGUST 6, 1997
DATE OF MAILING AUGUST 6, 1997

403-97

EDU #7906-96
C # 403-97
SB # 77-97

SUSAN ALBERT,

PETITIONER-RESPONDENT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL HIGH SCHOOL DISTRICT, UNION COUNTY, : DECISION

RESPONDENT-APPELLANT.

Decided by the Commissioner of Education, August 6, 1997

For the Petitioner-Respondent, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Casper P. Boehm, Jr., Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We stress in so doing that our determination is predicated on the specific facts in the record of this case, which indicates that petitioner had satisfied the qualifications for an elementary education endorsement and submitted an application for such certification to the Department of Education prior to the Board's action to reduce its staff, and that the Board was aware of such circumstances at the time of its action.[1]

December 3, 1997

Date of mailing DEC 05 1997

[1] Contrast Johnstone and Heberley v. Board of Education of the Township of Cinnaminson, decided by the State Board of Education, October 5, 1994, aff'd, Docket #A-1271-94T2 (App. Div. 1996), in which a petitioning staff member had received an additional endorsement on her instructional certificate prior to the effective date of the reduction in force, but had not yet qualified for such certification at the time of the district board's action to reduce its staff.

404-97

TRACY SUMMERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,	:	DECISION
RESPONDENT	:	

SYNOPSIS

Petitioner, tenured teaching staff member, sought reinstatement to her position and back pay, alleging Board violated *N.J.S.A.* 18A:28-5, in refusing to allow her to rescind her retirement when she was denied acceptance into the Early Retirement Incentive Program.

Having considered the written communication between the parties, the ALJ concluded that petitioner did not resign or retire. ALJ concluded that petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to the operation of a valid resignation/retirement. Thus, because petitioner failed to qualify for that program, the ALJ concluded that no resignation/retirement occurred. ALJ concluded petitioner was entitled to reinstatement, back pay and benefits less mitigation from wages earned.

Commissioner concurred with the ALJ's analysis and determination that petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to her resignation/retirement from her tenured position and, because she failed to qualify for such program, no resignation/retirement occurred. Commissioner directed Board to reinstate petitioner to her position and to promptly compensate her for lost salary and emoluments owed for the period of her improper termination. The Board, however, was entitled to reduce this amount to the extent of unemployment benefits petitioner received during this period. Commissioner noted that it is well-settled in law that the burden to establish that petitioner did not put forth reasonable efforts to mitigate her damages during this period lies with the Board and the Board failed to satisfy its required burden of proof.

AUGUST 7, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1501-96
Agency Docket No. 460-11/95

TRACY SUMMERS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,
Respondent,

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

Louis C. Rosen, Esq., for respondent,
(Patino-Treat and Rosen, attorneys)

Record Closed: April 28, 1997 Decided: May 1, 1997

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Tracy Summers claims that she is entitled to continue her employment with respondent, Board of Education of the City of Union (Board).

Respondent asserts that petitioner resigned and/or retired from employment.

The matter was transmitted to the Office of Administrative Law (OAL) on February 2, 1996, as a contested case pursuant to *N.J.S.A.* 52:14B-1-15 and *N.J.S.A.* 52:14F-1-13. A hearing was held on December 19 and 23, 1996. Thereafter, the parties filed post hearing briefs. The record closed on January 23, 1997. The forty-five (45) day statutory period within which to file the initial decision with the Department of Education expired on March 9, 1997. Based on the administrative law judge's voluminous case load and hearing schedule an extension of time to complete the initial decision was granted. *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8. On April 21, 1993, the record was reopened to receive copies of the final stipulation of facts and the parties' exhibit lists. The documents were received on April 28, 1997 on which date the record closed.

The issues are (a) whether petitioner resigned or retired from employment and if so, can petitioner's action be rescinded?; (b) Whether petitioner is entitled to reinstatement, back pay, and other relief?

STIPULATED FACTS

The parties have agreed to a final stipulation of facts which are adopted as **FACT:**

1. Petitioner was employed by Respondent as a teaching staff member for a period of twenty-one years and four months.

2. Petitioner was properly certified throughout her employment with Respondent.

3. On April 19, 1994, Petitioner submitted a letter to Thomas Highton, superintendent of schools, in which she stated:

> I would like to leave Union City Education system in June of 1995, with an extension of the five year pension program, if possible! What is the procedure for doing so? How soon would it have to be sent. Where to, etc.,?

4. On April 25, 1994, Petitioner submitted a letter to Thomas Highton in which she stated:

> I am hereby requesting to retire with the window of opportunity in June, 1995.
> Thanking you for any consideration I remain,
> Tracy Summers Jefferson School.

5. In a letter of April 29, 1994, Respondent advised petitioner that she was required to submit an application for retirement to be processed by the State Division of Pensions and Benefits.

6. In January 1995, Respondent forwarded petitioner's certification and final salary to TPAF.

7. The document stated that Petitioner would have been employed for a total of 26 years, 4 months as of the expected retirement date of June 30, 1995.

8. On or about April 20, 1995, petitioner notified the state TPAF as follows:

> Due to the fact that I do not have 25 years of service and therefore will not be entitled to the five years buyout, I am rescinding my June 30, 1995 resignation.

9. On May 5, 1995, petitioner informed Asst. Superintendent Frank Vaccarino that she was rescinding her retirement due to an error in

calculations of her years of service. Petitioner's letter indicated that she had only 21.5 years of service. On May 16, 1996, Petitioner sent the same letter to board member Abraham Antun and the Board of Pensions.

10. By letter dated May 18, 1996, Asst. Superintendent Vaccarino informed Respondent that she had not complied with the Superintendent's oral direction of April 27, 1995, to submit a request to rescind her retirement to the Board.

11. Superintendent Highton placed Petitioner's request to cancel her retirement on the discussion section of his agenda for the Board's June 13, 1995 agenda session, a public meeting of the Board.

12. The Board discussed Petitioner's request at its caucus meeting in executive session on June 13, 1995. No motion was made on the request and no action was taken at that time.

13. On September 5, 1995, Petitioner appeared at her previous place of employment and remained there all day.

14. Petitioner appeared the next day for work.

15. At its September 28 public meeting, Respondent approved the payment of $5,536 to petitioner for accumulated sick days at retirement.

16. Petitioner received a check for accumulated sick days at retirement, minus applicable deductions, in the amount of $4,510.79, and cashed the check.

DISCUSSION AND CONCLUSIONS

Petitioner asserts that she submitted a notice of intent to retire under a retirement incentive program. She testified the term "extension of the five year pension program" used in her letter on April 19,1994, referred to an early retirement incentive then being offered by the Board. She "used the language in this letter because she felt it showed that her request was contingent on receiving the retirement incentive." (Petitioner's Brief at 1). Thus, Petitioner submits that a condition for retirement was based on the Early Retirement Incentive Program (ERIP).

Respondent argues that petitioner's letter constituted retirement and/or resignation "without condition". (Respondent's Brief at 1).

Regardless of respondent's construction of petitioner's letter, on April 28, 1994, the Board voted to approve Summers' request to retire under the Early Retirement Incentive Program. Indeed, the Board's letter states:

> Receipt is acknowledged of your communication whereby you are retiring from your position at Union Hill High School. Please be advised that at the regular meeting of the Union City Board of Education held on April 28, 1994, your retirement was accepted under the Early Retirement Incentive Program-Delayed Retirement Provision, effective July 1, 1995.
>
> Please be advised that you are requested to submit an application for retirement and the application must specify the retirement date as July 1, 1994 even though your employment will be continued. The actual retirement date and retirement benefit will be governed by the approved retirement date. Extensions cannot be processed by pension unless a retirement application is on file with the Division of Pensions and Benefits. If an application has not been filed as of this date, your prompt attention to this filing is critical.
>
> [J-4]

Pursuant to the instructions in the letter, Summers filed an application with PERS for early retirement.

In April 1995, the Division of Pensions informed Summers that she was not eligible for the early retirement program because she did not have the required service time. On May 5, 1995, Summers sent a letter to the assistant superintendent of schools which stated in part:

> This letter is to inform you that due to an error in calculations of my years of service that I am rescinding my retirement and will not be retiring as of June 30, 1995.

On May 18, 1995 Asst. Superintendent Vaccarino informed Summers that she had not complied with the Superintendent's oral direction of April 27, 1995, to ask the Board to approve her request to rescind her retirement. Further, Vaccarino directed Summers to "send a written request to the Board asking them to consider your change of heart." On May 31, 1995, the Division of Pensions granted Summers' request to cancel her Application for retirement.

Superintendent Highton testified that on June 13, 1995, the Board discussed Petitioner's past work history but took no formal action on her request to rescind her retirement/ resignation. Thereafter, "he notified Petitioner of the Board's inaction on her request when Petitioner called him after the agenda session." Respondent's Brief at 3.

Also, the record reflects that on June 13, 1995, the Board approved Summers' participation in a Computer Camp. Summers' appeared for work on September 5, 1995, the start of the 1995-96 school year. She was not assigned to teach and told that she no longer worked for the school. Summers returned to the Wilson School on September 6 and 7. On September 7, 1995, she received a hand delivered letter from the superintendent of schools which stated:

> Please be advised that you are not an employee of Union City Board of Education and as such you may not remain on Board property.
>
> If you do not vacate the premises immediately you will be charged with trespassing and be subject to police sanctions.

There is little difference between the efficacy of a retirement or resignation in terminating a teacher's employment. *See, Laing v. Edison Twp. Bd. of Ed.,* 1977 *S.L.D.* 422, 426 (The act of filing for retirement "terminated her employment just as effectively as the acceptance of a letter of resignation would have done."). To determine whether an employee has proffered an effective resignation, courts have applied the principles of contract law. An employee is said to have "offered" a resignation, while a school board "accepts" the offer. *Kozak v. Waterford Twp. Bd. of Ed.,* 1976 *S.L.D.* 633, 638. Thus, the offer once accepted by the school board creates a binding resignation, and can only be rescinded after acceptance if the school board agrees. *Ibid.* This is so even if another governmental entity separately agrees to rescind the resignation. *Laing, supra*, at 426.

Traditional defenses available to any contracting party are also available to a resigning teacher, e.g., mental incompetency, duress, or equitable defenses. *See, Knoblauch v. Point Pleasant Bd. of Ed.,* 1978 *S.L.D.* 761 (finding resignation ineffective due to board's knowledge of teacher's mental incompetency at time of resignation); *Brunnquell v. Scotch Plains-Fanwood Bd. of Ed.,* 1988 *S.L.D.* 327, 342 (It is "basic that a resignation from one's employment, thereby waiving all accrued rights to that employment, must be knowingly and voluntarily proffered without duress or coercion."); *Evaul v. Camden City Bd. of Ed.,* 35 *N.J.* 244 (1961) (resignation overturned on equitable grounds).

To determine whether Summers effectively resigned or retired I have considered as a useful guide ordinary contract principles. A resignation effectively terminates a teacher's employment if it is "offered by the teacher with intent to terminate his employment to the board or officer having the power to remove or dismiss, and it must be accepted strictly in accordance with the terms of the offer by the board having power to accept, acting as a board." *Kozak, supra*, at 638 (quoting 78 *C.J.S.* 1101, 1102). To require a board of education to accept a resignation strictly in accordance with its terms limits the board's power of acceptance by the existence of any conditions precedent.

"A condition precedent is a fact or event occurring subsequently to the making of a valid contract and which must exist or occur before there is a right to immediate performance, before there is a breach of contract duty or before the usual judicial remedies are available." *Moorestown Mgmt. v. Moorestown Bookshop,* et al., 104 *N.J. Super.* 250, 262 (Ch. Div. 1969).

Here, the writings between the parties indicate the existence of a condition precedent. Petitioner's first communication to the school board specified that she wished to retire "with an extension of the five year pension program, if possible." Because this initial communication is not written clearly, it is difficult to determine whether petitioner meant it to constitute an attempt to enter into negotiations or as an actual offer to resign/retire. Even if it is construed as an offer to resign/retire, it is difficult to know whether the "extension of the five year pension program" was meant to operate as a condition of the contract or merely an expression of hope or intent.

Ambiguous or uncertain terms are interpreted as a matter of fact. *Anthony L. Petters Diner, Inc. v. Stellakis,* 202 *N.J. Super.* 11, 27-28 (App. Div. 1985). By using the phrase "if possible", petitioner expressed her unconditional desire to retire in June 1995, with the possibility of receiving the ERI being an added benefit. However, in construing the "common intention of the parties to a contract, the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain." *Id.,* at 28. Summers credibly testified that this language was meant to condition her retirement on acceptance into the ERIP.

Regardless of the ambiguity of petitioner's writing, the terms of the retirement were clarified by the Board's letter to Summers. The letter notes that Summers' "retirement was accepted under the Early Retirement Incentive Program-Delayed Retirement Provision". The Board's writing, when coupled with Summers' stated intention, implies that the parties intended for petitioner to retire if she was accepted into the ERIP. Summers' acceptance into this program is an event that must occur

before any duty to perform under the agreement between petitioner and respondent arises. Because Summers was not eligible for the ERIP, petitioner's duty to terminate her employment never arose. If the Board wished to provide for petitioner's retirement regardless of her acceptance into the ERIP, they could have and should have so indicated in its letter to her. Thus, subsequent discussions had by the Board is unpersuasive.

The courts finding that an employee's resignation was wrongly accepted by a board of education have awarded the petitioner back pay and reinstatement. *See*, *Manzo v. Jersey City Div. of Health,* 92 *N.J.A.R.2d* (CSV) 117, 125, *rev'd on other grounds*, No. A-2872-91 & A-1326-92 (App. Div. Nov. 1, 1993); *Knoblauch, supra*, at 770; *Austin v. Mahwah Twp. Bd. of Ed.,* 1954-55 *S.L.D.* 98, 104.

Based on the above, I **CONCLUDE** that Petitioner did not resign or retire. I **CONCLUDE** that the intent of the parties is inferable from the writings between them. I **CONCLUDE** that Petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to the operation of a valid resignation/retirement. Because petitioner failed to qualify for that program, I **CONCLUDE** that no resignation/retirement occurred.

I **CONCLUDE** that Petitioner is entitled to reinstatement, back pay, and benefits less mitigation from wages earned.

ORDER

It is **ORDERED** that Petitioner be reinstated to her tenured position of employment

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

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

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

May 1, 1997
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

5/9/97
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

MAY 13 1997
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:
Tracey Summers

For Respondent
Thomas Highton

Exhibits:

Joint

J-1 Retirement Letter to T. Highton, dated April 19, 1994.

J-2 Retirement Letter to T. Highton, dated April 25, 1994.

J-3 Excerpt from Board of Education Minutes, dated April 28, 1994.

J-4 Letter from C. Johnson to T. Summer, dated April 29, 1994.

J-5 Request for Delayed Retirement (state form), dated April 29, 1994.

J-6 Division of Pensions to C. Johnson, dated June 1, 1994.

J-7 Form from Division of Pensions, dated July 9, 1994.

J-8 Certification of Service and Final Salary.

J-9 Letter from T. Summers rescinding Resignation, dated April 20, 1995.

J-10 Letter to F. Vaccarino rescinding Retirement, dated May 5, 1995.

J-11 Letter from Divison of Pensions advising ineligibility for Early Retirement, dated May 11, 1995.

J-12 Letter to A. Antun rescinding Retirement, dated May 16, 1995.

J-13 Letter to T. Summers from F. Vaccarino regarding request to Board, dated May 18, 1995.

J-14 Memorandum to T. Summers from Pensions cancelling Application, dated

May 31, 1995.

J-15 Memorandum to T. Summers from K. Bilbao regarding tentative Assignment, dated June 1, 1995.

J-16 Letter to T. Highton rescinding Retirement, dated June 8, 1995.

J-17 Form letter to T. Summers from T. Highton regarding District Certification, dated August 1995.

J-18 Demand Letter for T. Summers to leave School Premises, dated September 7, 1995.

J-18a Demand Letter for T. Summers to leave School Premises with return receipt from Summers.

J-19 Schedule A Salary Guides.

J-20 1994 and 1995 W-2 Statements, Unemployment Benefits.

J-21 Superintendent's Agenda for June 13, 1995 Caucus Meeting.

J-22 Public and Executive Session Minutes of Caucus Meeting, dated June 13, 1995.

J-23 Superintendents Agenda for September 28, 1995 Action Meeting.

J-24 Public Session Minutes, Action Meeting of September 28, 1995.

J-25 Memorandum from Divison of Pensions and Benefits to Certifying Officers, dated of February 1994.

J--26 Division of Pensions and Benefits Informatoinal Bulletin, dated October 1993.

J-27a Cost and Savings Worksheet provided by the Division of Pensions: Categories
J-27b I - III.

J-28 Division of Unemployment and Disability Insurance Notice, dated November 30, 1995.

J-29 Retirement Sick Leave Benefit Check, dated September 29, 1995.

J-30 Autopay Payroll Register, Retirement Sick Leave Breakdown Record.

Respondents

R-1 Board Information Flyer, dated October 1993.

R-2 Letter to Employees regarding Early Retirement Eligibility, dated October 18, 1993.

R-3 Board Informational Flyer regarding Deadline for Survey on Early Retirement, dated November 3, 1993.

R-4 Board Informational Flyer regarding Deadline for Survey Return, dated December 21, 1993.

R-5 UCEA Informational Flyer regarding Meeting with NJEA Pension Consultant on Early Retirement Program (undated).

R-6 Board Flyer announcing Early Retirement Incentive Program Seminar. (undated).

OAL DKT. NO. EDU 1501-96
AGENCY DKT. NO. 460-11/95

TRACY SUMMERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,	:	DECISION
RESPONDENT	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL)[1] have been reviewed. By letter dated May 19, 1997, counsel for the respondent Board requested and was granted a 10-day extension of the period within which to submit exceptions in this matter to allow him to procure and submit hearing transcripts. The Board's exceptions and petitioner's reply thereto were timely filed in accordance with the established schedule.

The Board initially excepts to the Administrative Law Judge's (ALJ) conclusion that petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to her retirement. Rather, it maintains that petitioner's letter of retirement submitted to the District, along with consideration of selected portions of petitioner's hearing testimony which it presents, clearly evidences that her actual intent was to unconditionally resign from the District

[1] It has been brought to the Commissioner's attention that in the last sentence of page 5 of the Initial Decision the reference to "PERS" should be corrected to read "TPAF."

because of her dissatisfaction with her teaching assignments and to, additionally, take advantage of the early retirement program, if possible. (Board's Exceptions at p. 3) The Board argues that, in reaching her erroneous conclusion here, the ALJ "exalt[ed] the unexpressed, potential subjective intent of Petitioner***" (*id.* at p. 4), and incorrectly accepted petitioner's testimony as credible while ignoring the credible testimony of its witness in this regard.

The Board next contends that even assuming, *arguendo*, that petitioner's retirement letter to the District was ambiguous, the ALJ erred in not applying requisite contract law principles which dictate that any ambiguity is to be construed against the drafter of the document, citing *Mautz v. J.P. Patti Co. et al.*, 298 *N.J. Super.* 13, 19 (App. Div. 1997); *Leonard & Butler, P.C. v. Evan M. Harris,* 279 *N.J. Super.* 659 (App. Div. 1995); *Michele Matthews, Inc. v. Kroll & Tract*, 275 *N.J. Super.* 101 (App. Div. 1994); and *In the Matter of the Estate of Alton Glenn Miller,* 90 *N.J.* 210 (1982) as its authority for this proposition. (Board's Exceptions at pp. 6-7)

The Board further argues that petitioner should be estopped from claiming anything other than a retirement status by virtue of the fact that she accepted and cashed a check for $5,536, representing payment for accumulated sick leave entitlement, a retirement benefit under the parties' collective bargaining agreement.

Finally, the Board urges that if ordinary contract principles are to be dispositive in this matter as espoused by the ALJ, in the event that it is ultimately determined that petitioner should be reinstated to her position, the public interest requires that such reinstatement should be without back pay due to petitioner's failure to mitigate damages. (Board's Exceptions at p. 9) It cites hearing testimony of petitioner which it asserts establishes that petitioner never completed

any application to teach during this period or earned any money but, rather "merely collected unemployment benefits and retirement benefits." (Board's Exceptions at p. 12)

In reply, petitioner posits that the Board's argument with respect to petitioner's intent to retire unconditionally is belied by the resolution that the Board expressly adopted (Exhibit J-4), accepting Summers' retirement under the Early Retirement Incentive Program. She argues that "[g]iven the clarity of the Board's action, it is completely disingenuous for the Board to claim now that the petitioner's request was not conditioned on entry into the Early Retirement Incentive Program; [t]he Board knew it, approved it and may not now assert a contrary position." (Petitioner's Reply at pp. 1-2) Further, she asserts that acceptance of the Board's contention that ambiguity in petitioner's initial letter should, pursuant to contract law, be construed against her and in favor of the Board would entail adoption of an extremely limited view of contract law and a total ignoring of the subsequent Board actions establishing that petitioner's intent to retire was conditional.

With respect to petitioner's acceptance of a check from the Board in September 1995, petitioner asserts that there is no reasonable basis on which to conclude that her acceptance of such check "constitutes the acceptance of retirement benefits so as to justify a forcible separation from employment." (Petitioner's Reply at p. 8) She posits that upon her restoration to employment, the sick leave bank should be restored by a set-off from her back pay damage award.

Lastly, petitioner asserts that although the Board argues the issue of mitigation, it has not met its burden of establishing a failure to mitigate. Citing *West Orange Supplemental Instructors Association v. West Orange Board of Education*, 92 *N.J.A.R.* 2d (EDU) 287 (Comm.

Ed.), aff'd in part, reversed in part, 301, 302 (State Board of Education) as authority, petitioner maintains that "***[t]he Board bears the burden of proving the existence of comparable jobs that Summers could have taken." (Petitioner's Reply at p. 9) In order to meet this burden, petitioner states that the Board would need to show the existence of positions for Speech and Drama Teachers "that would be available to a 50+ year old teacher with 21 years of experience that were not remote to the petitioner." (*Id.*) In that the Board failed to present any evidence on this issue, petitioner argues that it cannot now argue a failure to mitigate damages. Moreover, petitioner asserts that the record substantiates that she not only sought teaching positions during this period but also sought employment in the theater arts and, as such, has met her duty to mitigate damages. (*Id.*) Petitioner argues that the only mitigation applicable in the within matter would be unemployment compensation, which she contends would only arise if the Board reimburses the unemployment benefits. (*Id.*)

Upon a full review of the record in this matter, which included transcripts of the two days of hearings at the OAL,[2] the Commissioner agrees with the ALJ's analysis and conclusion that petitioner's acceptance into the Early Retirement Incentive Program was a condition precedent to her resignation/retirement from her tenured position and, because she failed to qualify for such program, no resignation/retirement occurred. As such, the action of the Board in refusing to continue the petitioner's employment was improper and she must, therefore, be immediately be reinstated to her position.

Notwithstanding the Board's protestations that petitioner's communication indicating her intent to retire was "ambiguous" and that it understood such to represent her

[2] It is noted that hearings in this matter were conducted on December 19 and 23, 1996.

unconditional intent to leave the District, its subsequent actions in this matter strongly belie such a contention. In this regard, the Commissioner notes that the minutes of the Board's April 28, 1994 meeting (Exhibit J-3) indicate that it acted on that date to accept what appears to be the unconditional retirement of certain individuals. (See Meeting Minutes at pp. 3 and 5.) Petitioner's retirement, on the other hand, was specifically considered and approved under the "Early Retirement Incentive Program - window of opportunity extension" (*Id.* at p. 7) Moreover, the Board's awareness with respect to the specifics surrounding petitioner's retirement was further confirmed in its April 29, 1994 letter to her which stated in pertinent part

> Receipt is acknowledged of your communication whereby you are retiring from your position at Union Hill High School. Please be advised that at the regular meeting of the Union City Board of Education held on April 28, 1994, your retirement was accepted under the Early Retirement Incentive Program-Delayed Retirement Provision, effective July 1, 1995.

As such, the Commissioner finds it amply established, through the Board's own actions, that it understood and accepted that there was a "condition" to petitioner's notice to retire, thereby effectively preserving to her the right to rescind such retirement if the operative condition did not come to pass. (See *Cutler et al. v. Board of Education Parsippany-Troy Hills,* N.J. Superior Court, Appellate Division, A-1464-90T3 (January 27, 1992)). This position is further buttressed, again through the Board's own actions, by events which transpired at its June 13, 1995 meeting. Although, admittedly, taking no action on petitioner's profferred recission of her retirement/resignation at this meeting, the Board did, however, act to approve petitioner's participation in a Computer Camp later that summer which petitioner, uncontrovertedly asserts she did, in fact, attend and for which she was compensated. The Commissioner concludes that this action, along with those previously noted, are totally inconsistent with the Board's

contention that it considered petitioner terminated from its employ as of June 30, 1995[3]. With respect to the Board's expressed disagreement with the credence given to testimony of the witnesses, the Commissioner finds no cause, based upon the full record before him, to call into question the credibility determinations made by the ALJ herein.

Turning to the issue of how principles of mitigation affect this matter, the Commissioner observes that, *N.J.S.A.* 18A:6-30 specifies

> Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom shall be entitled to compensation for the period covered by the illegal dismissal or suspension***.

Under the provisions of this statute, the within Board is required to reinstate the petitioner to her position and restore the back pay and emoluments which she would have received had the Board not acted improperly in discontinuing her employment. Case law in this area, however, has consistently held that, under common law principles, petitioner was under a duty to mitigate her damages during this period by making reasonable efforts to secure alternative employment, notwithstanding that she was improperly terminated from her position. See *Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1981 *S.L.D.* 759; *White v. Township of North Bergen*, 77 *N.J.* 538 (1978); *Mullen v. Board of Education of Jefferson Township*, 81 *N.J. Super.* 151 (App Div. 1963); *Miele v. McGuire*, 31 *N.J.* 339 (1960). The Commissioner observes that petitioner contends that she has met her burden in that she made a diligent search for employment, filling out applications and going on auditions for theater jobs in New York. (Tr. I, 155-22 to 156-15) She, additionally, testified that there were no openings in most of the

[3] The Commissioner observes that he is unpersuaded, given the circumstances existing in this matter, that petitioner's acceptance of a check from the Board in September 1995, can serve to effectively constitute her concession to "retirement" status and, thereby, serve as justification for her forced separation from employment. Such amount must, however, be set off against her ultimate damage award herein.

schools. (Tr. I, 158-7) The Commissioner further observes it is also well-settled in law that the burden to establish that petitioner did not put forth reasonable efforts to mitigate her damages during this period lies with the Board. (See *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981); *West Orange, supra, Zielenski, supra.*) To sustain its burden, the Board would be required, by the preponderance of the credible evidence, to establish that during the relevant period comparable employment opportunities were available to petitioner and she failed to take advantage of those opportunities. (*Goodman*; *West Orange*) In the within matter, although the Board charges that petitioner's damage award must be reduced due to her failure to expend reasonable efforts to mitigate her damages, it failed to satisfy its required burden of proof in support of this assertion. Merely arguing the possibility of a lack of reasonable mitigation, absent concrete evidence, renders the issue purely speculative. As such, there is no basis upon which the Commissioner can award the Board's requested relief in this regard.[4]

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. The Board is hereby directed to reinstate petitioner to her position and to promptly compensate her for lost salary and emoluments owed for the period of her improper termination. The Board, however, is entitled to reduce this amount to the extent of unemployment benefits petitioner received during this period.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[4] Although the unemployment benefits received by petitioner are to be deducted by the Board from the back pay due petitioner, and this will serve to "mitigate" her award, it is noted that such benefits are recoverable from the Board by the State. *Willis v. Dyer*, 163 *N.J. Super.* 152 (App. Div. 1978).

404-97

EDU #1501-96
C # 404-97
SB # 73-97

TRACY SUMMERS,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 7, 1997

For the Petitioner-Respondent, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Patino-Treat & Rosen (Louis C. Rosen, Esq., of Counsel)

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

January 7, 1998

Date of mailing JAN 09 1998

404-97

EDU #1501-96
C # 404-97
SB # 73-97

TRACY SUMMERS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, August 7, 1997

Decided by the State Board of Education, January 7, 1998

For the Petitioner-Respondent, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Appellant, Patino-Treat & Rosen (Louis C. Rosen, Esq., of Counsel)

Inasmuch as the Board's application fails to meet the standards that would entitle it to relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny its motion for a stay.

May 6, 1998

Date of mailing MAY 08 1998

405-97

405-97

S.G., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

AUGUST 8, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 951-97
AGENCY DKT. NO. 39-2/97

S.G., ON BEHALF OF MINOR CHILD, J.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,
Respondent.

Elizabeth Szabo, Esq., for petitioner (Somerset Sussex Legal Services, attorneys)

Michael J. Rogers, Esq., for respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: June 10, 1997 Decided: June 25, 1997

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 25, 1997, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to -13.

The parties now seek to have the matter withdrawn and dismissed with prejudice (see attached Order of Dismissal). Based on this representation, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED with PREJUDICE.**

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

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

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

June 25, 1997
DATE

Anthony J. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

6/27/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 2 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

SOMERSET SUSSEX LEGAL SERVICES
BY: Elizabeth Szabo, Esq.
Attorney for Petitioner
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1997 JUN 10 A 10:37

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

OAL Docket No. EDUOS 00951-97S
Agency Ref. No. 39-2/97

S.G. on behalf of Minor Child J.M.	:	
Petitioner	:	
vs	:	Civil Action
Somerville School District	:	ORDER OF DISMISSAL with Prejudice
Respondent	:	

This matter having been opened to the Court on application of Somerset Sussex Legal Services, attorneys for petitioner and Michael J. Rogers, Esq., attorney for respondent, and the parties having resolved the matter, and for good cause shown;

IT IS on this 13th day of June 1997

ORDERED that the Petition of S. G. on behalf of the minor child, J.M., and the Answer of the School District of the Borough of Somerville be and hereby are dismissed with prejudice.

HON. ANTHONY BRUNO ALJ

We hereby consent to the form and entry of the within Dismissal with Prejudice.

MICHAEL J. ROGERS
Attorney for Respondent

ELIZABETH SZABO
Attorney for Petitioner

SOMERSET SUSSEX LEGAL SERVICES
BY: Elizabeth Szabo, Esq.
Attorney for Petitioner
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

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STATE OF NEW JERSEY
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1997 JUN 10 A 10:37

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

OAL Docket No. EDUOS 00951-97S
Agency Ref. No. 39-2/97

S.G. on behalf of Minor Child J.M. :

Petitioner :

vs : Civil Action

Somerville School District : ORDER OF DISMISSAL
with Prejudice

Respondent :

This matter having been opened to the Court on application of Somerset Sussex Legal Services, attorneys for petitioner and Michael J. Rogers, Esq., attorney for respondent, and the parties having resolved the matter, and for good cause shown;

IT IS on this 13th day of June 1997

ORDERED that the Petition of S. G. on behalf of the minor child, J.M., and the Answer of the School District of the Borough of Somerville be and hereby are dismissed with prejudice.

HON. ANTHONY BRUNO ALJ

We hereby consent to the form and entry of the within Dismissal with Prejudice.

MICHAEL J. ROGERS
Attorney for Respondent

ELIZABETH SZABO
Attorney for Petitioner

SOMERSET SUSSEX LEGAL SERVICES
BY: Elizabeth Szabo, Esq.
Attorney for Petitioner
78 Grove Street
Somerville, New Jersey 08876
(908) 231-0840

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1997 JUN 10 A 10:37

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

OAL Docket No. EDUOS 00951-97S
Agency Ref. No. 39-2/97

S.G. on behalf of Minor Child J.M.	:	
Petitioner	:	
	:	Civil Action
Somerville School District	:	ORDER OF DISMISSAL with Prejudice
Respondent	:	

This matter having been opened to the Court on application of Somerset Sussex Legal Services, attorneys for petitioner and Michael J. Rogers, Esq., attorney for respondent, and the parties having resolved the matter, and for good cause shown;

IT IS on this 13th day of June 1997

ORDERED that the Petition of S. G. on behalf of the minor child, J.M., and the Answer of the School District of the Borough of Somerville be and hereby are dismissed with prejudice.

HON. ANTHONY BRUNO ALJ

We hereby consent to the form and entry of the within Dismissal with Prejudice.

MICHAEL J. ROGERS
Attorney for Respondent

ELIZABETH SZABO
Attorney for Petitioner

Somerset Sussex Legal Services

78 GROVE STREET
SOMERVILLE, NEW JERSEY 08876
(908) 231-0840
Fax: (908) 231-6780

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1997 JUN 10 A 10:36

Sussex County Office
P.O. Box 159
Newton, N.J. 07860
(201) 383-7400
Fax: (201) 383-3469

June 5, 1997

Diane K. Smith, Esq.
Executive Director

Anthony Bruno, ALJ
Office of Administrative Law
CN-049
Mercerville, NJ 08625

Re: SG on behalf of JM v. Somerville School District

Dear Judge Bruno:

Please find original and/or copy(ies) of the documents listed below:

_____Affidavit(s)	_____Judgment
_____Answer/Appearance	_____Notice of Equitable Distribution
_____Brief/Memorandum of Law	_____Notice of Motion
_____Case Information Statement	xxxx Order of Dismissal
_____Certification(s)	_____Request to Enter Default
_____Complaint	_____Stipulation
_____Consent Order	_____Summons
_____Counterclaim/Crossclaim	_____
_____Interrogatories	_____

With respect to this matter, would you kindly:

_____File	xxxx Consent and/or approve
_____File and return filed copy	xxxx Sign and return enclosures
_____Serve and return proof of service	_____Acknowledge receipt of enclosure on copy & return
_____Examine and retain for your records	_____Answer enclosed

Very truly yours

SOMERSET SUSSEX LEGAL SERVICES

BY: Elizabeth Szabo-lm

Elizabeth Szabo
Staff Attorney

ES/ml
Encl.
cc: Michael J. Rogers., Esq.

A United Way Agency

OAL DKT. NO. EDU 951-97
AGENCY DKT. NO. 39-2/97

S.G., on behalf of minor child, J.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Commissioner finds that although the ALJ characterized the initial decision as a dismissal, in that the dismissal was pursuant to the parties' application for same, this matter shall, instead, be considered a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 8, 1997
DATE OF MAILING AUGUST 8, 1997

4/16-97

416-97

D.Y., on behalf of minors, O.Y. and V.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 13, 1997

OAL DKT. NO. EDU 3822-97
AGENCY DKT. NO. 75-3/97

D.Y. , on behalf of minors, O.Y. and V.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on July 10, 1997, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 13, 1997
DATE OF MAILING AUGUST 13, 1997

417-97

417-97

PATRICIA VAN OSTENBRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
LINDA SPENCER,	:	
INTERVENOR.	:	
	:	

AUGUST 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8832-96

AGENCY DKT. NO. 416-9/96

PATRICIA VAN OSTENBRIDGE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,

Respondent,

AND

LINDA SPENCER,

Intervenor.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Rodney T. Hara, Esq., for respondent (Fogarty and Hara, attorneys)

Sanford R. Oxfeld, Esq., for intervenor (Balk, Oxfeld, Mandell and Cohen, attorneys)

Record Closed: June 20, 1997 Decided: July 1, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the appeal of Patricia Van Ostenbridge ("petitioner") to the Department of Education of her complaint alleging violations of her seniority rights by the Board of Education of the Township of Green Brook, Somerset County ("respondent"). The matter was

transmitted to the Office of Administrative Law on October 23, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 1, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

7/3/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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JUN 20 1 30 PM '97
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

FOGARTY & HARA, ESQS.
23 Highland Cross
Rutherford, New Jersey 07070
(201) 935-0440
Attorneys for Respondent

PATRICIA VAN OSTENBRIDGE, Petitioner, v. GREEN BROOK BOARD OF EDUCATION, Respondent.	STATE DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 416-9/96 OAL Docket No. EDUOR 08832-96S STIPULATION OF SETTLEMENT

WHEREAS, on September 11, 1996, the Public Employment Relations Commission (hereinafter referred to as "PERC") issued a complaint in response to an unfair practice charge filed by the Green Brook Education Association (hereafter referred to as the "Association") on behalf of Patricia Van Ostenbridge whose position of instructional music teacher was abolished by respondent, Green Brook Board of Education (hereinafter referred to as the "Board");

WHEREAS, on or about September 16, 1996, petitioner, Patricia Van Ostenbridge (hereinafter referred to as "Van Ostenbridge"), filed a verified petition of appeal with the Commissioner of Education which alleged an entitlement to a newly created position in the Green Brook School District (hereinafter referred to as the "District"), effective the 1996-1997 school year, by virtue of her tenure and seniority rights in the District;

WHEREAS, on December 2, 1996, PERC accepted as an amendment to the complaint the Association's allegation that the Board had abolished the music program and established the position of teacher of performing arts in retaliation against Van Ostenbridge exercising her rights under the New Jersey Employer-Employee Relations Act;

WHEREAS, the parties are desirous of resolving the claims filed by the petitioner and Association without having to resort to further litigation; and

WHEREAS, in settling the verified petition of appeal and the unfair practice charge, neither party is acknowledging the merits of the position taken by the other party in the proceedings before the Commissioner of Education and the Public Employment Relations Commission;

NOW, WHEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree as follows:

1. The Board agrees to pay Van Ostenbridge one half

of the annual salary she would have received if she was employed as a full time teaching staff member for the 1996-1997 school year and for five months of the 1997-1998 school year. There shall not be a deduction from this amount for any monies that she earned during the 1996-1997 and 1997-1998 school years. The sum of twenty three thousand seven hundred fifty and 00/100 dollars ($23,750.00) for the 1996-1997 school year and twelve thousand eight hundred seventy five and 00/100 dollars ($12,875.00) for five (5) months of the 1997-1998 school year shall be subject to applicable taxes, pension contributions and deductions from the source of wages. Pension contributions shall be paid in accordance with law. In no event shall Van Ostenbridge be responsible for any pension contributions in excess of the employee's share of pension contributions.

2. Van Ostenbridge shall receive credit for pension and seniority purposes for one and one half (1.5) school years of employment on a one-half (1/2) of full time basis.

3. The Board shall not be obligated to pay Van Ostenbridge any other benefits attributable to the crediting of one and one half (1.5) years of employment with the Board.

4. Van Ostenbridge waives any rights that she may have to the position of teacher of the performing arts. She shall, however, remain on the preferred eligibility list for services performed pursuant to the music endorsement on her instructional teaching certificate and be entitled to reemployment consistent with her tenure and seniority rights in

the District.

5. The Association agrees to withdraw, with prejudice, the unfair practice charge that it filed with the Public Employment Relations Commission, as amended, which bears docket number CO-H-95-339. Van Ostenbridge agrees not to file an independent unfair practice charge which pertains to any of the issues raised in CO-H-95-339 or the reduction or abolishment of the music teaching positions, the creation of the performing arts program and the hiring of another individual to the position of teacher of the performing arts.

6. Van Ostenbridge agrees to withdraw the verified petition of appeal with prejudice. The Association agrees not to file an independent verified petition of appeal which pertains to any of the issues raised in Agency Reference Number 416-9/96 and OAL Docket Number EDUOR 08832-96S or the reduction or abolishment of the music teaching position, the creation of the performing arts program and the hiring of another individual to the position of teacher of the performing arts.

7. Within thirty (30) days after the approval of this stipulation by the Commissioner of Education, the Board shall pay Van Ostenbridge back salary up to the end of the month the date the Commissioner of Education approves the Stipulation of Settlement. The balance of monies due Van Ostenbridge shall be paid to her in accordance with the regular payment schedule for certified employees in the District through January 31, 1998.

8. The undersigned represent that they have the requisite authority to sign this Stipulation of Settlement on behalf of their respective parties.

9. This Stipulation of Settlement shall be subject to the approval of the Commissioner of Education.

WITNESS:

Patricia G Shinf

Dated: 6/16/97

GREEN BROOK BOARD OF EDUCATION

By: [signature]

WITNESS:

Alice Champion

Dated:

Patricia Van Ostenbridge

PATRICIA VAN OSTENBRIDGE

WITNESS:

Alice Champion

Dated:

GREEN BROOK EDUCATION ASSOCIATION

By: Linda Pallard

WITNESS:

Patricia G Shinf

Dated: 6/16/97

Linda N Spencer

LINDA SPENCER

OAL DKT. NO. EDU 8832-96
AGENCY DKT. NO. 416-9/96

PATRICIA VAN OSTENBRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
LINDA SPENCER,	:	
INTERVENOR.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 14, 1997
DATE OF MAILING AUGUST 14, 1997

418-97

418-97

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3858-97
AGENCY DKT. NO. 60-2/97

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,
Respondent.

Fredric J. Sirota, Esq., for petitioner
(Wiley, Malehorn and Sirota, attorneys)

Robert M. Jacobs, Esq., for respondent,
(Winne, Banta, Rizzi, Hetherington & Basralian, P.C., attorneys)

Record Closed: June 23, 1997 Decided: June 26, 1997

BEFORE: **ELINOR R. REINER**, ALJ:

On February 13, 1997, petitioner, Ho-Ho-Kus Board of Education filed a petition of appeal with the Commissioner of Education requesting a determination of the proper pupil tuition rate to be charged by Midland Park to Ho-Ho-Kus for the school year 1994-95, including any adjustments for prior and subsequent years, the return of overpayment, interest, attorneys fees and costs. On or about March 27, 1997, respondent filed an answer denying certain of the allegations and alleging that the cost per pupil for 1994-95 as well as for all prior years was in compliance with the applicable

provisions of law. On April 11, 1997, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was assigned to the undersigned judge on May 21, 1997, and a telephone prehearing conference scheduled for July 7, 1997. Prior to the prehearing conference, settlement conferences were held between the parties and a settlement was reached. Thus, the prehearing conference was adjourned.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

June 26, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/2/97
DATE

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DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(201) 539-1313
Attorneys for Ho-Ho-Kus Board of Education

HO-HO-KUS BOARD OF EDUCATION, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	:	OAL Docket No. 03858-97N
MIDLAND PARK BOARD OF EDUCATION, Respondent.	:	Agency Ref. No. 60-2/97
	:	STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between the Ho-Ho-Kus Board of Education, with offices at 70 Lloyd Road, Ho-Ho-Kus, New Jersey 07423, (hereinafter referred to as "Ho-Ho-Kus") and the Midland Park Board of Education with offices at 31 Highland Avenue, Midland Park, New Jersey 07432 (hereinafter referred to as "Midland Park"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned state:

WHEREAS, Midland Park has provided high school education to Ho-Ho-Kus students for some years and Ho-Ho-Kus has paid tuition to Midland Park for the provision of high school education of Ho-Ho-Kus students; and

WHEREAS, the sending/receiving relationship between Ho-Ho-Kus and Midland Park has terminated and will phase out at the end of the 1998-99 school year; and

WHEREAS, there had arisen a disagreement between Ho-Ho-Kus and Midland Park as to the appropriate tuition for the school years 1994-95 through 1998-99; and

WHEREAS, Midland Park and Ho-Ho-Kus have recently shared information which has enabled them to establish appropriate tuition for the aforementioned years and resolve the dispute without the payment of additional expenses.

IT IS on this 12th day of ~~May~~ June, 1997, agreed that:

1. That amount paid by Ho-Ho-Kus to Midland Park for tuition for the 1994-95 and 1995-96 years is deemed to be final and no adjustment shall be made for any reason including that of certification of tuition costs by the Department of Education.

2. Tuition for the 1996-97 school year shall be $10,000.00 per pupil. The amount paid in excess of the foregoing, $45,500.00 as of June 1997, shall be charged against the June 1997 estimated tuition charge in the amount of $56,550.00. Thus, in June 1997 Ho-Ho-Kus shall pay Midland Park $11,050.00 in lieu of $56,550.00. No other adjustments shall be made with respect to the 1996-97 school year for any reason including that of Certification of Tuition by the Department of Education.

3. For the 1997-98 and 1998-99 school years, tuition shall be $10,200.00 per person. No adjustment shall be made for any reason including that of certification of tuition costs by the Department of Education to the foregoing except as to reflect increases or decreases from estimated enrollment, which

adjustments shall be made no later than June of each applicable school year.

4. Nothing in this agreement shall be deemed to constitute precedent, past practice or policy as to the rights of the school districts herein relevant but rather represents the desire of the parties to amicably resolve their dispute.

5. The above-captioned case shall be dismissed with prejudice; provided, however, that the parties acknowledge that their agreement to dismiss is subject to the approval of the Office of Administrative Law and the Commissioner of Education.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

HO-HO-KUS BOARD OF EDUCATION

Mr. Timothy Green
Board Secretary

By: William Brightly
Mr. William Brightly
President

DATED: 6/12/97

MIDLAND PARK BOARD OF EDUCATION

Board Secretary

By: Nancy C. Peck
President

DATED: 6/13/97

OAL DKT. NO. EDU 3858-97
AGENCY DKT. NO. 60-2/97

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and the initial decision rendered by the Office of Administrative Law (OAL) in the form of a joint stipulation of settlement have been reviewed.

After a careful and independent review of the full record in this matter and the terms of the settlement, the Commissioner is compelled to reject such agreement as it is currently structured, in that it does not comport with relevant State mandates.

Specifically, paragraphs one, two, and three indicate that no adjustments to the tuition rates, as determined, shall be made for any reason, including that of certification of tuition costs by the Department of Education. (Stipulation of Settlement at p. 2) The Commissioner finds that such provisions create the potential for violating *N.J.S.A.* 18A:38-19, which prohibits the board of education of a receiving district from determining a tuition rate in excess of the actual cost per pupil as certified by the Department of Education. Further, the Commissioner determines that paragraph two of the agreement directly contravenes *N.J.A.C.* 6:20-3.1(e) *et seq.*

which provides, in pertinent part, that contractual agreements established between sending and receiving boards of education

> shall require that all adjustments which shall be made because of a difference in cost or in the number of pupils sent shall only be made during the third school year following the contract year. *N.J.A.C.* 6:20-3.1(e)1.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further revision of the documents, consistent with the above concerns. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a plenary hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 14, 1997
DATE OF MAILING AUGUST 14, 1997

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BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

DECEMBER 12, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7992-97
OAL DKT. NO. EDU 3858-97 (on Remand)
AGENCY DKT. NO. 60-2/97

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,
Respondent.

Fredric J. Sirota, Esq., for petitioner
(Wiley, Malehorn and Sirota, attorneys)

Robert M. Jacobs, Esq., for respondent,
(Winne, Banta, Rizzi, Hetherington & Basralian, P.C., attorneys)

Record Closed: October 17, 1997 Decided: October 24, 1997

BEFORE: **ELINOR R. REINER**, ALJ:

On February 13, 1997, petitioner, Ho-Ho-Kus Board of Education filed a petition of appeal with the Commissioner of Education requesting a determination of the proper pupil tuition rate to be charged by Midland Park to Ho-Ho-Kus for the school year 1994-95, including any adjustments for prior and subsequent years, the return of overpayment, interest, attorneys fees and costs. On or about March 27, 1997, respondent filed an answer denying certain of the allegations and alleging that the cost

per pupil for 1994-95 as well as for all prior years was in compliance with the applicable provisions of law. On April 11, 1997, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge and thereafter a settlement was reached. An initial decision was filed with the Commissioner of Education on July 2, 1997. On August 14, 1997, the Commissioner rejected the settlement agreement because it did not comport with relevant State mandates. More particularly, the Commissioner determined that paragraphs one, two and three created the potential for violating *N.J.S.A.* 18A:38-19, which prohibits the board of education of a receiving district from determining a tuition rate in excess of the actual cost per pupil as certified by the Department of Education. Further, the Commissioner determined that paragraph two of the agreement directly contravened *N.J.A.C.* 6:20-3.1(e) *et seq.* As a result, the Commissioner remanded the matter to the OAL for further revision of the documents or if the parties were unable to agree on a modified agreement, a plenary hearing on the merits.

The matter was remanded to the Office of Administrative Law on September 4, 1997. It was assigned to the undersigned on September 15, 1997 and a prehearing conference scheduled for October 20, 1997. Prior to the prehearing conference, the parties advised that they had reached agreement on the terms of a modified stipulation of settlement which was consistent with applicable law and addressed the concerns raised by the Commissioner's August 14, 1997 decision. As a result, the prehearing conference was adjourned.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or their representatives' signatures.

2. The Stipulation of Settlement addresses the concerns expressed by the Commissioner of Education in his August 14, 1997 decision.

3. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

October 24, 1997
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

Oct. 28, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

WILEY, MALEHORN AND SIROTA
250 Madison Avenue
Morristown, New Jersey 07960
(973) 539-1313
Attorneys for Petitioner Ho-Ho-Kus Board of Education

HO-HO-KUS BOARD OF EDUCATION, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	:	OAL Docket No. EDU 7992-97
MIDLAND PARK BOARD OF EDUCATION, Respondent.	:	Agency Ref. No. 60-2/97
	:	STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between the Ho-Ho-Kus Board of Education, with offices at 70 Lloyd Road, Ho-Ho-Kus, New Jersey 07423, (hereinafter referred to as "Ho-Ho-Kus") and the Midland Park Board of Education with offices at 31 Highland Avenue, Midland Park, New Jersey 07423 (hereinafter referred to as "Midland Park"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned state:

WHEREAS, Midland Park has provided high school education to Ho-Ho-Kus students for some years and Ho-Ho-Kus has paid tuition to Midland Park for the provision of high school education of Ho-Ho-Kus students; and

WHEREAS, the sending/receiving relationship between Ho-Ho-Kus and Midland Park has terminated and will phase out at the end of the 1998-99 school year; and

WHEREAS, there had arisen a disagreement between Ho-Ho-Kus and Midland Park as to the appropriate tuition for the schoo years 1994-5 through 1998-99; and

WHEREAS, Midland Park and Ho-Ho-Kus have recently shared information which has enabled them to establish appropriate tuition for the aforementioned years and resolve the dispute without the payment of additional expenses.

IT IS on this ____ day of _____, 1997, agreed that:

1. That amount paid by Ho-Ho-Kus to Midland Park for tuition for the 1994-95 school year is deemed to be final and no adjustment shall be made, the Department of Education having previously certified the costs per pupil for tuition adjustment purposes for 1994-95 pursuant to the provisions of N.J.A.C. 6:20-3.1.

2. That amount paid by Ho-Ho-Kus to Midland Park for tuition per pupil for the 1995-96 school year, namely, $9,270.00 per pupil, shall be adjusted to an amount equal to the certified cost per pupil, if necessary, and only in the event that the tuition rate per pupil actually paid, $9,270.00, is in excess of the cost per pupil as ultimately certified by the Department of Education for the 1995-96 school year. Said adjustment, if any, shall be made in accordance with N.J.A.C. 6:20-3.1(e)(1).

3. Tuition for the 1996-97 school year shall be, pursuant to the parties' agreement, $10,000.00 per pupil. The said amount per pupil paid by Ho-Ho-Kus to Midland Park for tuition per pupil for the 1996-97 school year, namely $10,000.00 per pupil, shall be adjusted to an amount equal to the certified cost per pupil, if

necessary, and only in the event that the tuition rate per pupil actually paid, $10,000.00 per pupil, is in excess of the cost per pupil as ultimately certified by the Department of Education for the 1996-97 school year. Said adjustment, if any, shall be made in accordance with N.J.A.C. 6:20-3.1(e)(1).

4. For the 1997-98 and 1998-99 school years, tuition shall be $10,200.00 per pupil. The amount per pupil paid by Ho-Ho-Kus to Midland Park for tuition per pupil for the 1997-98 and 1998-99 school years, namely, $10,200.00 per pupil, shall be adjusted to an amount equal to the certified cost per pupil, if necessary, and only in the event that the tuition rate per pupil actually paid, $10,200.00 is in excess of the cost per pupil as ultimately certified by the Department of Education for the 1997-98 and 1998-99 school years. Said adjustments, if any, shall be made in accordance with N.J.A.C. 6:20-3.1(e)(1).

5. Nothing in this Agreement shall be deemed to constitute precedent, past practice or policy as to the rights of the school districts herein relevant, but rather represents the desire of the parties to amicably resolve their dispute.

6. The above-captioned case shall be dismissed with prejudice; provided, however, that the parties acknowledge that their agreement to dismiss is subject to the approval of the Office of Administrative Law and the Commissioner of Education.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals.

HO-HO-KUS BOARD OF EDUCATION

10/9/97

By: William C. Bruyns 10/9/97

MIDLAND PARK BOARD OF EDUCATION

By: Nancy Crona Peet

Dated:

OAL DKT. NOS. EDU 7992-97 and EDU 3858-97 (ON REMAND)
AGENCY DKT. NO. 60-2/97

BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the revised settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

DECEMBER 12, 1997
DATE OF MAILING DECEM BER 12, 1997

4/19-97

419-97

IN THE MATTER OF THE TENURE	:	
HEARING OF FELIX GUZMAN,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF UNION CITY, HUDSON	:	DECISION
COUNTY.	:	
	:	

AUGUST 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9642-96
AGENCY NO. 319-8/96

BOARD OF EDUCATION OF THE CITY OF UNION CITY,

Petitioner,

v.

FELIX GUZMAN,

Respondent.

Louis C. Rosen, Esq., for petitioner (Patino-Treat and Rosen, attorneys)

Sanford R. Oxfeld, Esq., for respondent (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: June 18, 1997 Decided: June 26, 1997

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

This matter was transmitted by the Department of Education to the Office of Administrative Law as a contested case in September 1996 as the result of charges filed by the Board against the respondent, a tenured custodian, for alleged unbecoming conduct. A prehearing conference was conducted on December 6, 1996 and a hearing was scheduled for April 25, 1997. On that date, although a hearing commenced, continuing discussions between the parties led to an amicable resolution and a Stipulation of Settlement was signed by respondent, his attorney and by the attorney for the Board. Since then, the agreement has been retained by me awaiting receipt of

a formal Board resolution adopting the same. That resolution has now been adopted and a copy sent to me which is attached hereto and made a part hereof.

I have reviewed the terms and conditions of the settlement as set forth in the agreement and **FIND** as follows:

1. The parties voluntarily have agreed to the terms of the settlement as evidenced by the signatures of respondent and both counsel.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 26, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7/2/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8, 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/mvh

It is hereby agreed by and between Felix Guzman and the Board of Education of Union City, in full ~~settlement~~ disposition of OAL Dkt No. EDUTH 09642-96N, Agency Ref. No.: 319-8/96, as follows:

1. The Board of Education will keep Felix Guzman (hereinafter "Guzman"), on the active payroll until and including April 30, 1997, so that Guzman will receive one additional pay check.

2 Guzman will receive pay for 52 accrued vacation days upon approval of this ~~document~~ agreement by both the Administrative Law Judge and the Commissioner of Education.

3. This document shall be treated as Guzman's irrevocable letter of resignation, effective May 1, 1997, in lieu of termination.

4. Guzman stipulates that the Board proved a prima facie case of conduct unbecoming against him and this resignation is in lieu of termination

5. The Board shall not challenge or oppose any application for unemployment compensation which Guzman may make.

6. Guzman understands that this ~~settlement~~ agreement must be approved by the Administrate Law Judge as well as the Commissioner of Educati

7. Other than as set forth above, the

Board has no obligations, financial or otherwise, to Guzman. And Guzman agrees to make no additional demands on the Board.

8. Guzman and the Board release any and all claims which either party has made or could have made arising out of Guzman's employment relationship with the Board. (This release does not apply to any existing ~~unemployment~~ workers compensation claims)

9. Guzman's signature to this document evidences that he has read same, has received the advice of counsel with respect to same, fully understands the terms of this document, and warrants that he has agreed to same without any other promises and inducements.

Gunther R. Oxtoby,
Witness

Felix Guzman

Louis C. Rosen,
For the Board

April 25, 1997
Date

RECEIVED
STATE OF NEW JERSEY
OFFICE OF THE N. LAW

JUN 18 11 07 AM '97

9

**RESOLUTION PRESENTED AT A PUBLIC MEETING
OF THE UNION CITY BOARD OF EDUCATION
HELD ON MAY 27, 1997**
16

WHEREAS charges of conduct unbecoming a staff member were filed against FELIX GUZMAN, a tenured custodial worker in the employ of the Union City Board of Education by Board Secretary Carl Johnson and served upon GUZMAN personally and by regular mail addressed to his last known residence on July 9, 1996; and

WHEREAS said staff member had an opportunity to respond to said charges in writing as provided by law; and

WHEREAS the Board carefully considered the tenure charges, sworn statement of evidence in support thereof, and appended evidence, and any and all papers filed with the Board Secretary in response thereto; and

WHEREAS counsel for the Board had advised the Board of its duty to deliberate and the determinations to be made prior to a vote on certification of said tenure charges; and

WHEREAS, the Board carefully considered all documents referenced above and found that (1) sufficient probable cause existed to credit the evidence in support of the tenure charges; (2) such charges, if true, warranted dismissal or reduction in salary; (3) GUZMAN should be suspended without pay pending determination of the Commissioner of Education; and (4) said charges should be certified and filed with the Commissioner and served forthwith on GUZMAN with proper notification of the Board's actions; and

WHEREAS said tenure charges came on for trial before Stephen Weiss, ALJ, on April 25, 1997; and

WHEREAS, following the testimony of Board Secretary Carl Johnson against GUZMAN, a tentative written resolution of the matter was reached in which GUZMAN offered his irrevocable letter of resignation, effective May 1, 1997, in lieu of termination; and

WHEREAS GUZMAN stipulated that the Board had proved a *prima facie* case of conduct unbecoming against him;

NOW THEREFORE BE IT RESOLVED that the Board hereby adopts and approves the proposed resolution of this matter, a copy of which is attached hereto and made part hereof as if set forth at length;

AND BE IT FURTHER RESOLVED that the Board secretary and counsel are empowered to take all acts and do all things necessary and proper to effectuate the intent of this resolution.

Carl Johnson, Board Secretary

Certified to be a true and correct copy
of a Resolution adopted by the Board of
Education at its meeting held on the
27th day of May 1997
16

3

OAL DKT. NO. EDU 9642-96
AGENCY DKT. NO. 319-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF FELIX GUZMAN,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
CITY OF UNION CITY, HUDSON	:	DECISION
COUNTY.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

However, it appears that the terms of the settlement have already been effectuated through respondent's resignation effective May 1, 1997. The parties are, therefore, admonished that settlement agreements of controverted matters are of no force and effect and may not be implemented absent the Commissioner's approval pursuant to *N.J.A.C.* 1:1-19.1.

COMMISSIONER OF EDUCATION

AUGUST 14, 1997
DATE OF MAILING AUGUST 14, 1997

420-97

420-97

IN THE MATTER OF THE TENURE	:	
HEARING OF RICO PAGE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF CAMDEN, CAMDEN COUNTY.	:	
_____	:	

AUGUST 14, 1997

AGENCY DKT. NO. 146-5/97

IN THE MATTER OF THE TENURE	:	
HEARING OF RICO PAGE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF CAMDEN, CAMDEN COUNTY.	:	
	:	

For the Board, Karen A. Murray, Esq.

This matter having been opened before the Commissioner of Education on May 7, 1997, through certification of tenure charges of abandonment of position, excessive absenteeism, including lateness, and insubordination with respect to a tenured clerk in the employ of the Board of Education of the City of Camden; and

The Commissioner having directed respondent by two notices[1] and by letter dated July 10, 1997[2] sent via regular and certified mail to file an Answer to the charges against him; and

As of this date, neither respondent nor any attorney on his behalf having filed an Answer to the tenure charges against him and each count of the charges against respondent having been deemed to be admitted; now therefore

IT IS ORDERED this 14 th day of August 1997 that summary judgment shall be granted to the Board and that respondent shall be dismissed from his tenured position as a clerk in the District's employ as of the date of this decision.

COMMISSIONER OF EDUCATION

[1] The first notice was dated May 8, 1997 and the return receipt card number Z-754-573-438 is dated May 14, 1997. The second notice was dated June 6, 1997 and the return receipt card number Z-754-573-456 is dated June 11, 1997.

[2] Although the letter sent by certified mail (Z-754-568-629) was returned unclaimed, there is no indication that the letter sent via regular mail did not reach respondent.

AUGUST 14, 1997
DATE OF MAILING AUGUST 14, 1997

4/21-97

421-97

L.R.C., on behalf of minor child, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5504-97

AGENCY DKT. NO. 175-5/97

L.R.C., ON BEHALF OF MINOR CHILD, R.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

L.R.C., *pro se*

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

Record Closed: June 26, 1997 Decided: June 30, 1997

BEFORE **MARIA MANCINI LaFIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 2, 1997, for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

OAL DKT. NO. EDU 5504-97

On June 10, 1997, the parties amicably resolved this matter. On June 26, 1997, the parties submitted the attached Settlement Agreement and Release which is incorporated herein by reference.

I have reviewed the record and the agreement and I **FIND**:

1. The parties have voluntarily agreed to resolve this matter as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that this stipulation meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

6/20/97
DATE

Maria M. LaFiandra
MARIA MANCINI LaFIANDRA, ALJ

OAL DKT. NO. EDU 5504-97

Receipt Acknowledged

7/2/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

SETTLEMENT AGREEMENT AND RELEASE

This Agreement is made and entered into as of this 10 day of June 1997, by and between the BLOOMFIELD BOARD OF EDUCATION (hereinafter referred to as "the Board) and R.G., by and on behalf of his mother, L.R.C. (hereinafter referred to as "R.G.").

WHEREAS,

A. R.G. is enrolled as a student in the Bloomfield Public Schools; and

B. On April 2, 1997, R.G. was involved in a fight in the Bloomfield Middle School; and

C. The Board has obtained an Order, to be signed by the Honorable Richard McGill, A.L.J., compelling the Child Study Team ("CST") evaluation of R.G.; and

D. Further pursuit of any present or future proceedings related to the April 2, 1997 incident, regardless of the outcome, would cause disruption to the education of R.G. and to the School community; and

E. It is in the best interests of the parties to resolve this matter permanently without further disruption;

NOW THEREFORE, in consideration of the mutual promises of the parties,

IT IS on this 10 day of June, 1997, agreed:

1. In return for compliance with this settlement, R.G. agrees to:

(a) Permit the entry of Judge McGill's Order compelling the CST evaluation of R.G., in the form annexed as Exhibit A, and refrain from any further appeal of that Order.

(b) Remain on home instruction for the remainder of the 1996-97 school year. Pending completion of his work, R.G. will be promoted to Bloomfield High School for the 1997-98 school year.

(c) Continue private psycotherapy during the summer, 1997 and provide reports to the Board as to R.G.'s status and prognosis.

(d) R.G. will withdraw his Petition of Appeal filed with the Commissioner of Education and his request for an emergent relief hearing in the action known as L.R.C. on behalf of minor child R.G. v. Board of Education of the Township of Bloomfield, Agency Ref. No. 175-5/97, OAL Docket No. EDUOS 05504-97N.

2. In return for R.G.'s compliance with this Agreement, the Board agrees to:

(a) Provide home instruction services to R.G. for the remainder of the 1996-97 school year.

(b) Promote R.G. to Bloomfield High School for the 1997-98 school year upon completion of 1996-97 school work.

(c) Remove all disciplinary records from R.G.'s pupil records. The pupil records, without discipline, will be forwarded to Bloomfield High School.

3. R.G. and the Board mutually agree to hold Judge McGill's CST Order in abeyance. If there are no further disciplinary incidents during the 1997-98 school year, the Order will not be implemented. However, upon R.G.'s first disciplinary incident during the 1997-98 school year, the Board will implement the Order and commence the CST evaluation without any objection by R.G.

4. The Board agrees to withdraw the criminal complaint filed with the Bloomfield Police against R.G. with regard to the April 2, 1997 incident. Both parties mutually agree to refrain from filing or prosecuting any further criminal charges in any forum against each other for conduct related to the April 2, 1997 incident.

5. R.G., in consideration of this Agreement, releases and forever discharges the Board and the Board's members, directors, trustees, officers, employees and assigns (the Board and the foregoing persons and entities are hereinafter collectively referred to as the "Releasees") from:

(a) Any and all claims asserted or which could have been asserted in the action captioned L.R.C. on behalf of minor child R.G. v. Board of Education of the Township of Bloomfield; Agency Ref. No. 175-5/97, OAL Docket No. EDUOS 05504-97N.;

(b) Any and all claims, charges or complaints asserted, or which could have been asserted concerning any aspect of the fighting incident of April 2, 1997 at Bloomfield Middle School of which R.G. was a participant, including all criminal, civil rights or civil damage claims.

Nothing in this release shall be deemed to bar the right of R.G. to pursue a claim to enforce the terms of this Agreement.

6. The Board, in consideration of this Agreement, releases and forever discharges R.G. from any and all claims asserted or which may be asserted against him related to any aspect of the April 2, 1997 incident. Nothing in this release shall be deemed to bar the right of the Board to pursue a claim to enforce the terms of this Agreement.

7. This Agreement shall be interpreted, construed and enforced pursuant to the laws of the State of New Jersey.

8. This Agreement sets forth the entire agreement between the parties hereto.

9. This Agreement shall not in any way be construed as an admission by the Board or R.G. of any liability, or of any unlawful acts whatsoever; and the Board and R.G. specifically disclaim any liability for any wrongful or unlawful acts whatsoever.

10. Both R.G. and the Board expressly acknowledge, represent and warrant that the terms and provisions of this Agreement are the only consideration for signing this Agreement; that no other promise or agreement of any kind has been made to or with any person or entity whatsoever to cause the signing of this Agreement; and that in executing this Agreement, R.G. does not rely and has not relied upon any representation or statement made by any of the Board's agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

11. This Agreement is expresly conditioned upon approval by the Board.

12. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

13. The signatories to this Agreement expressly acknowledge, represent and warrant that they have carefully read this Agreement and have fully reviewed and discussed its terms; that they have had the opportunity to discuss the terms of this Agreement with legal counsel; that they fully understand this Agreement's terms, conditions and significance; and that they have executed this Agreement voluntarily, and knowingly.

14. This Agreement is the entire agreement between the parties.

BLOOMFIELD TOWNSHIP
BOARD OF EDUCATION

By: Charles Nankivell
CHARLES NANKIVELL, President

Attest: Thomas E. Hayes, Secretary

Dated: 6/24/97

LUIS RIVERA-CASTRO

Luis E. Rivera Castro, uncle

Witness: Jiganasa Parikh

Dated: 10 June 1997

LUZ RODRIGUEZ CUESTA

Witness: Jiganasa Parikh

Dated: 10 June 1997

JIGANASA PARIKH
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JAN. 25, 2000

STATE OF NEW JERSEY)
:SS:
COUNTY OF ESSEX)

On 10, JUNE, 1997, before me personally came LUZ RODRIGUEZ CUESTA to me known and known to me to be the individual described in and who executed the foregoing Agreement, and she duly acknowledged to me that she voluntarily and knowingly executed the said Agreement, after having read and understood said document.

Luz Rodriguez - Cuesta

Jiganasa Parikh

JIGANASA PARIKH
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JAN. 25, 2000

STATE OF NEW JERSEY)
:SS.
COUNTY OF ESSEX)

On 16 June, 1997, before me personally came LUIS RIVERA CASTRO to me known and known to me to be the individual described in and who executed the foregoing Agreement, and he duly acknowledged to me that he voluntarily and knowingly executed the said Agreement, after having read and understood said document.

Luis E. Rivera Castro

Wife to R.G./advocate in EDS matter

Jiganasa Parikh

JIGANASA PARIKH
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JAN. 25, 2000

MARLON T. GIESER, PHD
543 VALLEY ROAD
UPPER MONTCLAIR, N.J. 07043
(201) 746-0084

N.J. LICENSED PSYCHOLOGIST
NO. 5101012

June 11, 1997

To Whom It May Concern,

This letter is to document that Richard Gonzalez has seen me for psychotherapy sessions on the following dates: May 13, May 20, and June 11. He is scheduled to continue weekly psychotherapy sessions over the summer.

Richard exhibits the capacity for adequate self-control for graduation ceremony attendance.

Sincerely,

Marlon T. Gieser, PhD

OAL DKT. NO. EDU 5504-97
AGENCY DKT. NO. 175-5/97

L.R.C., on behalf of minor child, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision incorporating a stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.[1] The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2]

COMMISSIONER OF EDUCATION

[1] It is noted that Term 11 on page four of the Settlement Agreement specifies that such agreement is conditioned upon the approval of the Board of Education. Because agency approval renders this settlement a final decision pursuant to N.J.A.C. 1:1-19.1(c)2, accord to its terms by all necessary parties must be accomplished prior to the Commissioner's approval. In that the record of this matter indicates that the Board approved the agreement at its meeting on June 10, 1997, the Commissioner finds that approval of the settlement may be granted.

[2] It is further noted that, while the within matter was transmitted to the OAL as an application for emergent relief, the terms of the agreement reach to the merits of the matter. Accordingly, this matter is deemed fully resolved.

AUGUST 14, 1997
DATE OF MAILING AUGUST 14, 1997

423-97

423-97 E

RADAR SECURITY, INC. AND ROSE LOCKMAN,

PETITIONERS,

V.

CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY AND ATLANTIC COAST ALARM, INC.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

AUGUST 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING MOTION

FOR EMERGENT RELIEF

OAL DKT. NO. EDU 6220-97

AGENCY DKT. NO. 265-7/97

RADAR SECURITY INC.,

AND ROSE LOCKMAN,

Petitioners,

v.

CUMBERLAND REGIONAL SCHOOL

DISTRICT, CUMBERLAND COUNTY

AND ATLANTIC COAST ALARM, INC.,

Respondents.

Thomas H. Ward, Esq., for petitioner (Albertson, Ward & McCaffrey, attorneys)

Samuel J. Serata, Esq., for respondent (Cumberland Regional School District, Cumberland County)

Patrick F. Geubtner, Esq., for respondent (Atlantic Coast Alarm Inc.,) (George K. Miller, Jr., attorney)

Record Closed: August 6, 1997 Decided: August 7, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

STATEMENT OF THE CASE

The petitioners claimed that the action of the Board of Education of the Cumberland Regional School District, in awarding a contract for a surveillance CCTV system to Atlantic Coast Alarm, Inc. acted improperly in that the requirements of the public bidding laws were not followed.. In this action, pursuant to *N.J.A.C.* 1:1-12.6(b), petitioners have requested emergent relief in the form of an order that no contract be entered until such time as a public bid process, done in compliance with the public bidding law, *N.J.S.A.* 18A:18A-4, is completed and an award made thereunder.

Petitioners, in their argument for emergent relief, did not request the award of the contract to Radar Security Systems, Inc.

PROCEDURAL HISTORY

The petitioners appealed to the Department of Education and on July 24, 1997 the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for oral argument on the motion for emergent relief on August 6, 1997 at 10:30 p.m. at the Office of Administrative Law, Quakerbridge Road, Hamilton, New Jersey.

DISCUSSION

The threshold issue raised was whether petitioner Rose Lockman has standing as a taxpayer of Cumberland regional School District (hereinafter referred to as "the District:). Ms. Lockman's certification states that she is a property owner and taxpayer of the District, and that she owns Derfield (sic) Village Antiques on Route 77, Deerfield, NJ. Ms. Lockman did not present the address of her residence. Ms. Lockman asserts that she is the owner of a business that

pays property taxes to the District. Therefore, I **FIND**, for purposes of this emergent motion, that Ms. Lockman does have standing to pursue this matter. This finding may be rebutted with an appropriate showing to the contrary, in an subsequent motion or in the plenary hearing..

The issue in this application for emergent relief is not whether the contract should have been awarded to another, but whether the District acted properly in not putting this contract out for public bid, and by treating the purchase and installation of a CCTV surveillance system to be an extraordinary unspecified service, exempt from the requirement for an open and public bid process. I **FIND** that District did not act properly by treating the purchase and installation of a CCTV surveillance system as an extraordinary unspecified service, exempt from the requirement for an open and public bid process, and that the District should have put this contract out for public bid.

On June 18, 1997, the District issued specifications entitled "Master Procurement Specification" for an access control system, a CCTV surveillance system, and an alarm system. These three items were not linked so that a proposal that addressed only one item would be deemed incomplete and therefore insufficient. Quotations for each item could be entered separately. The item here in question is the CCTV surveillance system.

The District declared the purchase and installation of a CCTV surveillance system to be an extraordinary unspecified service (hereinafter "EUS"), per *N.J.S.A.* 18A:18A-5(a)2, and on July 10, 1997, the District awarded the contract to Atlantic Coast Alarm, Inc. (hereinafter "Atlantic.")

An extraordinary unspecified service, as defined in *N.J.A.C.* 6:20-8.1, is a service which is specialized and qualitative in nature, requiring expertise, extensive training and proven reputation in the field of endeavor. An "extraordinary unspecified service" is an exception to open competitive bidding, and thus is to be construed narrowly. The use of this exception is limited by the provisions of *N.J.A.C.* 6:20-8.1(b), and by a requirement that the District Board of Education is required to state the supporting reasons for its action in the resolution awarding the contract.[1]

[1] To date, the Board has passed a resolution accepting the lowest bid (Atlantic's) for a CCTV surveillance system. No statement by the District Board of Education of the supporting reasons for its action was presented. No contract for a CCTV surveillance system has yet been signed.

The "extraordinary unspecified service" exception may not be used if precedents exist in the form of other school districts which have bid for such services ((b)3.), to show that bidding for such services is feasible - petitioner Radar asserts that it has won other bid contracts for such services (Petitioner's Exhibit C). The "extraordinary unspecified service" exception also may not be used if detailed specifications could be written ((b)4.) - the "Master Procurement Specification" was written for these services.

The District claims that the installation of security systems is an emergency, because a student was killed in school in April, 1997. Undoubtedly, security is a valid concern in today's society. The District acted properly in attempting to provide a secure, safe school environment. But security concerns are not a recognized exemption from the open public bidding law. Also, the purchase and installation of the access control system and the alarm system are not here challenged. Therefore, no ruling is here made on the propriety of the process by which these other two systems were awarded. Absent a challenge, purchase and installation of these two systems may proceed apace, and presumably they will be ready for the start of the new school year.

The District had (and still has) time to award the bid for a CCTV surveillance system through the public process set forth in *N.J.S.A.* 18A:18A-4. Any delay in the purchase and installation of the CCTV system occasioned by this Order should not be excessively burdensome. The completion of the public bid process can be accomplished within a few weeks, and there is still about a month left before the school year begins. A CCTV system can be installed after the school year commences.

The District mentioned its secrecy concerns if the details of its desired surveillance system were made known too publicly. To this Administrative Law Judge, it seems highly unlikely that someone intent on assaulting a school child would read a request for proposals of a surveillance system. In any case, the request for proposals would not contain the kind of technical information that would be useful in defeating a surveillance system, once installed.

Although the question was not put to me, it does not appear at this time that the purchase and installation of a CCTV system is the type of building construction that would require a prequalified or classified bidder.

As of July 10, 1997, Atlantic was not prequalified and was not classified. If indeed Atlantic's lack of a prequalification is merely due to a delay in the paperwork, Atlantic should shortly be in the position of being able to bid on the contract.

Also, respondent claims that petitioner Radar had installed a security system at Gloucester County Special Services School District, without going through the public bidding process. Petitioner claims that the system for the Gloucester County Special Services School District was different, and the situations dissimilar. Without the specific facts before me, no determination can be made that the situations were sufficiently similar, or if indeed Gloucester County Special Services School did validly employ the EUS exclusion.

Respondent also claimed that petitioner Radar's submission was insufficient because it did not cover maintenance and repair beyond one year. Since this ORDER does not award the contract to petitioner Radar, but instead directs an open, public bid, the adequacy or completeness of petitioner Radar's bid is not at issue.

The criteria for determination of an application for emergent relief have been set forth in *Crowe v. Degioia*, 90 *N.J.* 126, 132-34 (1982). Four standards are articulated:

1. The relief should not be granted unless it is necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages.

2. Such relief should not be granted when the legal rights underlying the claim are unsettled.

3. A preliminary showing of a reasonable probability of ultimate success on the merits must be made.

4. The relative hardship of the parties in granting or denying the relief sought should be considered.

If emergent relief were not granted, the District would contract with Atlantic and installation of the CCTV system would proceed. I **CONCLUDE** that money damages would not benefit petitioners if this happened, and respondent District could perhaps face the possibility of having one company start the installation, and another ultimately be awarded a properly-bid contract. The legal right underlying the claim, that all contracts, except those within the narrowly-defined exclusions in *N.J.A.C.* 6:20-8.1(b), be subject to open, competitive bidding, is indeed well-settled. Although petitioner Radar may not ultimately be awarded the contract, the ultimate success on the merits of the proposition that this contract should have been publicly bid is clear. The harm to petitioners, should the contract go through without public bidding, is considerable, while the District will only be required to bid the contract, as it should have done in the first place. The possibility of harm to Atlantic might be significant, but only if it cannot or does not enter the public bidding process. If Atlantic is able to "get its paperwork together" in time to qualify to enter the public bidding process, it may still be the lowest bidder and may yet be awarded the contract.

Therefore, pursuant to *N.J.A.C.* 1:1-12.6(b), I **ORDER** that the District enter into no contract for the provision of CCTV services until such time as a public bid process, done in compliance with the public bidding law, *N.J.S.A.* 18A:18A-4, is completed and an award made thereunder.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

August 7, 1997
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

OAL DKT. NO. EDU 6220-97
AGENCY DKT. NO. 265-7/97

RADAR SECURITY, INC. AND ROSE LOCKMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY AND ATLANTIC COAST ALARM, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter, including the audiotape of proceedings before the Administrative Law Judge (ALJ), and her Order on Motion for Emergent Relief have been reviewed. By letter dated August 8, 1997, from the Director of the Office of Controversies and Disputes, the parties were provided until close of business on Tuesday, August 12, 1997, to file exceptions to the Order, and until close of business on Wednesday, August 13, 1997, to file replies. The District's exceptions and Radar's reply were filed in accordance with the established timelines.

Notwithstanding that the District generally excepts to some of the legal and factual conclusions of the ALJ in this matter, it states that, because determination of these issues on their merits will require protracted hearings, and the timeline established by the District for the completion of this project can no longer be met, "[it has] determined to submit to the

recommendation of Judge Clark and attempt to publicly bid the contract with the provision that no work will be done after September 1, 1997, in the building except after 3:00 p.m., when the majority of the students are not present in the school." (District's Exceptions at pp. 1-2)

Upon careful and independent review, the Commissioner concurs with the ALJ, for the reasons well expressed in her decision, that petitioners have met the standards for the granting of emergent relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and, further, duly notes that the within District has acceded to the granting of such relief. Accordingly, the recommended Order of the ALJ granting petitioners' Motion for Emergent Relief is adopted, and this matter is hereby returned to the Office of Administrative Law for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 15, 1997
DATE OF MAILING AUGUST 15, 1997

425-97

425-97

RICHARD TIBERIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, tenured elementary school teacher, contended the Board's withholding of his salary increment for alleged unsatisfactory performance for school year 1996-97 was arbitrary, capricious and unreasonable.

ALJ found that although petitioner was given directives on setting up goals and objectives, his performance showed no significant improvement. Thus, the ALJ found that petitioner's unsatisfactory performance was reasonable basis for the Board to withhold his increment. Moreover, petitioner failed to meet his burden of proof, by a preponderance of credible evidence, that the Board's action was arbitrary, capricious and unreasonable.

Citing *Kopera*, the Commissioner adopted the findings and determination in the initial decision as his own.

AUGUST 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7688-96

AGENCY NO. 266-7/96

RICHARD TIBERIO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Richard Brigliadoro, Esq., for respondent

Record Closed: April 22, 1997 Decided: June 27, 1997

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Richard Tiberio, appeals from the action by respondent, Board of Education of the Borough of Totowa, Passaic County, (Board) withholding his salary

increment for school year 1996-97. Petitioner alleges that the Board's action was arbitrary, capricious, unreasonable and without good cause.

The matter was transmitted to the Office of Administrative Law (OAL) on July 31, 1996, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on March 27, 1997. The parties filed posthearing briefs and the record closed on April 22, 1997. The forty-five-day statutory period to file the initial decision with the Department of Education expired on June 6, 1997. A request for an extension of time to issue the initial decision was granted pursuant to *N.J.S.A.* 52:14B-10(c).

FINDINGS OF FACT

Based upon the testimonial and documentary evidence, I **FIND** the following relevant **FACTS**:

1. Tiberio is a tenured teacher in the Totowa Borough School District.

2. Tiberio holds a master's degree in guidance and school administration and has earned credits towards a doctorate. Tiberio is certified to hold the positions of administrator, classroom teacher, and social worker.

3. Tiberio has been employed as a physical education teacher, an assistant principal, a classroom teacher for sixth, seventh and eighth grades, a guidance counselor, and a member/case manager of a child study team[1] (CST).

4. Tiberio was employed by the Board from 1973 to 1991, when his teaching position was terminated due to a reduction in force (RIF).

[1] The CST is responsible for evaluating pupils for special education services. *N.J.A.C.* 6:28-3.1(a). Generally, the CST includes a psychologist, a learning disabilities teacher-consultant (LDTC), a social worker, and, under certain circumstances, a speech correctionist or speech-language specialist. *N.J.A.C.* 6:28-3.1(b).

5. The Board rehired Tiberio for the 1995-96 school year.

6. Tiberio was assigned to teach fourth grade at Washington Park School.

7. Teachers are evaluated in two areas, "Teaching Skills and Techniques" and "Planning and Classroom Organization." The evaluator records the teacher's performance on a "Classroom Observation Report." "Teaching Skills and Techniques" includes ten sections:

(a) presents objectives/tasks clearly;
(b) provides for individual needs;
(c) encourages pupil progress and growth;
(d) exhibits command of subject area;
(e) develops student responsibility;
(f) varies teaching methods;
(g) structures lesson presentation;
(h) utilizes effective questioning techniques;
(i) incorporates student responses and ideas;
(j) exhibits involvement and enthusiasm.

"Planning and Classroom Organization" includes six sections:

(a) prepares lessons thoroughly;
(b) attempts to achieve district's goals;
(c) organizes materials/resources;
(d) assesses pupils' academic progress;
(e) implements efficient classroom procedures;
(f) maintains adequate control for this learning situation.

The Classroom Observation Report may include the observer's narrative comments and suggestions.

8. On October 11, 1995, Dr. Vincent N. Varcadipane, principal of Washington Park School, evaluated Tiberio's teaching performance during a science lesson. In the area of "Teaching Skills and Techniques," Varcadipane rated Tiberio "satisfactory" in four

sections, "continued emphasis needed" in five sections, and "unsatisfactory" in one section. In the area of "Planning and Classroom Organization," Varcadipane rated Tiberio "satisfactory" in one section and "continued emphasis needed" in five sections. R-1.

9. On October 13, 1995, Varcadipane evaluated Tiberio's teaching performance during a reading lesson. In the area of "Teaching Skills and Techniques," Varcadipane rated Tiberio "satisfactory" in four sections, "continued emphasis needed" in three sections, and "unsatisfactory" in three sections. In the area of "Planning and Classroom Organization," Varcadipane rated Tiberio "satisfactory" in one section, "continued emphasis needed" in one section, and "unsatisfactory" in four sections. R-2.

10. On October 13, 1995, Varcadipane evaluated Tiberio's teaching performance during a math lesson. In the area of "Teaching Skills and Techniques," Varcadipane rated Tiberio "satisfactory" in six sections, "continued emphasis needed" in one section, and "unsatisfactory" in three sections. In the area of "Planning and Classroom Organization," Varcadipane rated Tiberio "satisfactory" in one section, "continued emphasis needed" in three sections, and "unsatisfactory" in two sections. R-3.

11. On October 16, 1995, Dr. Viktor J. Joganow, superintendent of the Totowa Borough School District, evaluated Tiberio's teaching performance during a math lesson. In the area of "Teaching Skills and Techniques," Joganow rated Tiberio "satisfactory" in two sections, "continued emphasis needed" in six sections, and "unsatisfactory" in two sections. In the area of "Planning and Classroom Organization," Joganow rated Tiberio "satisfactory" in two sections, "continued emphasis needed" in two sections, and "unsatisfactory" in two sections. R-4.

12. On February 19, 1996, Varcadipane evaluated Tiberio's teaching performance during an English lesson. In the area of "Teaching Skills and Techniques,"

Varcadipane rated Tiberio "satisfactory" in five sections, "continued emphasis needed" in one section, and "unsatisfactory" in four sections. In the area of "Planning and Classroom Organization," Varcadipane rated Tiberio "continued emphasis needed" in two sections and "unsatisfactory" in four sections. R-5.

13. On February 21, 1996, Varcadipane evaluated Tiberio's teaching performance during a math lesson. In the area of "Teaching Skills and Techniques," Varcadipane rated Tiberio "satisfactory" in five sections, "continued emphasis needed" in two sections, and "unsatisfactory" in three sections. In the area of "Planning and Classroom Organization," Varcadipane rated Tiberio "continued emphasis needed" in one section and "unsatisfactory" in five sections. R-6.

14. On February 26, 1996, Joganow evaluated Tiberio's teaching performance during a language arts lesson. In the area of "Teaching Skills and Techniques," Joganow rated Tiberio "satisfactory" in three sections, "continued emphasis needed" in five sections, and "unsatisfactory" in two sections. In the area of "Planning and Classroom Organization," Joganow rated Tiberio "satisfactory" in one section, "continued emphasis needed" in two sections, and "unsatisfactory" in three sections. R-7.

15. On March 11, 1996, Joganow evaluated Tiberio's teaching performance during a science lesson. In the area of "Teaching Skills and Techniques," Joganow rated Tiberio "satisfactory" in three sections, "continued emphasis needed" in three sections, and "unsatisfactory" in four sections. In the area of "Planning and Classroom Organization," Joganow rated Tiberio "continued emphasis needed" in three sections and "unsatisfactory" in three sections. R-8.

16. On April 25, 1996, Joganow notified Tiberio that the Board had accepted the administration's recommendation to withhold his salary increment for school year 1996-97. The notice stated the administration's reasons for recommending the action and

provided a "Job Target (Professional Improvement Plan)" for petitioner's "professional improvement." R-11.

DISCUSSION AND CONCLUSIONS

N.J.S.A. 18A:29-14 provides that a board of education may withhold "a teacher's salary increment for inefficiency or other good cause." Salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). Thus, the Legislature has vested local boards with the power to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Indeed, a decision to withhold an increment is a matter of management prerogative which the Legislature has delegated to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n*, 79 *N.J.* 311 (1979). Accordingly, the Commissioner is prohibited from substituting his judgment for that of the board.

The scope of review on appeal is limited to whether there exists a reasonable basis for the board's decision. The local board's exercise of discretionary powers may not be upset unless it is patently arbitrary, capricious, unreasonable or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). Thus, the Commissioner must determine: "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they were experts." *Id.* at 296-97. The burden of proving that the increment withholding was arbitrary, capricious, or unreasonable rests with the person challenging the decision. *Id.* at 297.

I have considered petitioner's many years of experience in education. He was employed by the Totowa School District for seventeen years with an "unblemished" record. Indeed, during his twenty-two years of teaching, his "teaching style, procedures and evaluations were consistently good." Petitioner's Brief at 2. Petitioner has

submitted copies of prior evaluations and letters from parents commending his performance. He believes that his experience entitled him "to acquit himself in his newly assigned fourth grade position." *Ibid.* Instead, on his return to the district in 1995 he was treated as if he were "a first year teacher." *Ibid.* For example, he was subjected to a series of "humiliating" observations and directives from the principal and superintendent.

Petitioner acknowledged that observation reviews and performance evaluations are subjective. However, he was surprised at the "administration's reaction to [his] performance." Petitioner's Brief at 3. Petitioner avers that "it is the administrator's job to set the standards and the teacher's obligation to strive to meet them." Petitioner's Reply Brief at 2. Petitioner maintains that the Board failed to establish clear teaching standards. Moreover, he was not given a professional improvement plan to inform him of the standards sought by the administration. Petitioner asserts that "[i]n the absence of such a guide, there was no basis to make fundamental changes in a teaching style and method that worked well for 22 years." *Ibid.* Thus, petitioner submits that the Board's expectation for "any employee to reach an unknown standard" was arbitrary, capricious, and unreasonable. *Ibid.*

The Board argues that it properly exercised its discretionary power to withhold Tiberio's increment for inefficiency or other good cause.

Petitioner testified that he has used the same teaching methods and styles since 1973. He acknowledged that Principal Varcadipane had met with him in October 1995 and March 1996. At the meetings, Varcadipane gave petitioner directives on setting up goals and objectives. Petitioner believed, however, that the standards applied to him were inappropriate. Petitioner also believed that Varcadipane focused narrowly on goals and objectives.

Varcadipane candidly acknowledged that he viewed Tiberio, upon his return to the Totowa School District and to a teaching assignment, as a first-year teacher. Tiberio had not previously taught fourth grade, thus Varcadipane observed Tiberio's performance several times during the school year, formally and informally. Varcadipane noted deficiencies in Tiberio's performance, and used follow-up observations to determine if improvement had been achieved. Varcadipane met with Tiberio on October 13, 1995, to discuss his assessment of Tiberio's performance during three lessons. Varcadipane believed that goals and objectives were an important learning guide and focused on those areas. He directed Tiberio to submit daily goals and objectives for each lesson. In a memorandum, he provided a detailed description of the information requested. R-12.

I reject petitioner's assertion that respondent's conduct, including the frequency of observations and the manner of prescribing corrective action, was contrary to the regulation. *N.J.A.C.* 6:3-4.3 requires that tenured teaching staff be evaluated annually. The purpose of an annual evaluation is to

> 1. Promote professional excellence and improve the skills of teaching staff members;
>
> 2. Improve pupil learning and growth; and
>
> 3. Provide a basis for the review of performance of tenured teaching staff members.
>
> [*N.J.A.C.* 6:3-4.3(b).]

Petitioner was evaluated eight times during school year 1995-96. During the second observation Varcadipane noted continued deficiencies in petitioner's performance and directed him to submit daily detailed lesson plans. Understandably, after twenty years of teaching without fault, petitioner felt burdened and humiliated by the criticism. Comparatively, the current administrators' standards and expectations may have been higher than the standards and expectations of the evaluators who had

observed Tiberio in past years. Tiberio's reliance on well-established teaching styles and techniques was unsatisfactory when viewed by administrators Varcadipane and Joganow.

Varcadipane considered Tiberio's cumulative performance, not merely one day's performance. Indeed, a teacher's performance on one day may not reflect overall ability. Thus, formal and informal observation of tenured staff who exhibit deficiencies is not contrary to the rationale requiring "the annual evaluation of all tenured teaching staff." *N.J.A.C.* 6:3-4.3(a).

Varcadipane acknowledged that Tiberio's students performed well on standardized tests. Further, the school received no complaints against petitioner from the students' parents. Varcadipane also distinguished teaching effectiveness from teaching styles. He believed that the teacher's effectiveness was the basis of the student's learning. Varcadipane sought to promote a standard of excellence in his teaching staff.

Varcadipane reviewed students' report cards before they were distributed. In a memorandum dated November 29, 1995, Varcadipane noted that Tiberio's comments on the report cards for the first marking period contained misspelled words, incomplete sentences, and punctuation errors. For example,

> #1. "*[C.] is a great student, works hard, is a pleasure in class.*" It should read: "[C.] is a great student, works hard, and is a pleasure in class."
>
> #4. "*He has a great Mom & Dad. Thanks for your help. Cupcakes.*" As mentioned above, leave this out. Send a separate note if you feel the need. Keep comments limited to student progress.
>
> #6. "*[J.] is doing very well, He work very well sometimes to fast. He is cooperative, and a real nice boy.*" First Sentence: Put a period instead of a comma after well: "[J.]

> is doing very well." Second part of the sentence does not make sense - "to fast" should be "too fast." No comma in the second sentence after "cooperative." I don't understand the last sentence: "He up the good work." I think you mean: "Keep up the good work."
>
> #11. "*[S.] is doing well, he works hard in class.*" "*If he works a little harder he can have straight A's.*" First sentence: [S.]'s name is [correct spelling]. Make this sentence into two: "[S.] is doing well. He works very hard." Or: "[S] is doing very well and he is working very hard." Last sentence: "if he works a little harder he has the potential to earn straight A's." To "have" straight A's sounds like you are going to give him all A's even without earning it through documentation.
>
> [R-13.]

Varcadipane found that fifteen out of nineteen report cards needed some form of correction, and he directed Tiberio to redo each report card. *Ibid.*

Additionally, in April 1996 Tiberio's report cards did not contain the requested BUG, Superstar, and Pizzazz Club award forms. The students who receive these awards in recognition of their academic achievements have their names published in the school newsletter and are invited to have a pizza lunch with the principal. Varcadipane reviewed the students' grades to determine who would receive the BUG and Pizzazz Club awards. Tiberio conceded that he did not timely submit the candidates for the Superstar award, but maintained that he did submit names for the BUG and Pizzazz Club awards. I agree with respondent that petitioner's omission was inexcusable. R-21. Petitioner's failure to submit candidates for the Superstar award meant that the significant academic achievements of at least one student went unrecognized. *Ibid.*

Petitioner's teaching performance was observed on three occasions by Superintendent Joganow. He met with Tiberio and Varcadipane on February 9, 1996. At the meeting the administration expressed its concerns over Tiberio's spelling

deficiency and how it would influence his students. In a memorandum to Tiberio, Joganow noted that at the meeting Tiberio had conceded that he "always had difficulty with spelling." R-24. Tiberio "reassured the administration that [he] would be more careful in reviewing all of [his] work in an effort to minimize these problems." *Ibid.*

Thereafter, Joganow reviewed student journals submitted by Tiberio. On February 29, 1996, Joganow wrote in a memorandum to Tiberio that the students' work contained "numerous errors including spelling, recognition of contractions, and the lack of quotation marks." R-23. Tiberio had not corrected these errors. Joganow wrote that Tiberio's "failure to specifically identify obvious errors sends a false impression to the students regarding their work." *Ibid.* He added that Tiberio's failure to "identify errors for the students will only perpetuate poor writing and spelling habits." *Ibid.* Joganow directed Tiberio to "make every effort to identify all errors for the students so they can learn not to repeat those errors in upcoming assignments." *Ibid.*

The purpose of *N.J.S.A.* 18A:29-14 is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Township, supra*, 79 *N.J.* at 321. An annual increment is not a statutory right; it is a reward for good performance. *North Plainfield, supra*, 96 *N.J.* at 594. Petitioner's overall performance for school year 1995-96 did not meet the standards of performance required by the school district. Varcadipane found deficiencies in Tiberio's performance. He met with Tiberio throughout the school year to discuss his assessment of the deficiencies and ways to improve petitioner's performance. After several meetings, Varcadipane found that Tiberio's goals continued to be unsatisfactory and saw no significant improvement in his performance.

Based on careful review of the record, I **CONCLUDE** that petitioner has failed to meet his burden of proof, by a preponderance of the credible evidence, that the Board's action was unreasonable, arbitrary, or capricious.

I further **CONCLUDE** that the Board had a reasonable basis for its decision to withhold petitioner's salary increment.

ORDER

It is hereby **ORDERED** that the Board's decision to withhold petitioner's salary increment for school year 1996-97 for unsatisfactory performance is **AFFIRMED** and the relief requested by petitioner is **DENIED**.

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

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

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

June 27, 1997
DATE

Mumtaz Bari Brown
MUMTAZ BARI BROWN, ALJ

Receipt Acknowledged:

7/2/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL • 8 1997
DATE

Barbara A Harris
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Exhibits:

P-1 Administrative Procedure - GCN Classroom Observation Reports.

P-2 Reference Letters for Richard Tiberio.

P-3 Correspondence addressed to Richard Tiberio.

P-4 and
P-5 Lesson Plans.

R-1 Administrative Procedure - GCN Classroom Observation Report.

R-2 Administrative Procedure - GCN Classroom Observation Report.

R-3 Administrative Procedure - GCN Classroom Observation Report.

R-4 Administrative Procedure - GCN Classroom Observation Report.

R-5 Administrative Procedure - GCN Classroom Observation Report.

R-6 Administrative Procedure - GCN Classroom Observation Report.

R-7 Administrative Procedure - GCN Classroom Observation Report.

R-8 Evaluation of Richard Tiberio, dated March 13, 1996.

R-9 Letter from Viktor J. Joganow, Ed.D., Chief School Administrator, to Richard Tiberio, dated April 17, 1996.

R-10 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated April 19, 1996.

R-11 Memorandum from Viktor J. Joganow, Ed.D., Chief School Administrator, to Richard Tiberio, dated April 25, 1996.

R-12 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated October 16, 1995.

R-13 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated November 29, 1995.

R-14 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated January 24, 1996.

R-14a Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated February 5, 1996.

R-15 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated February 8, 1996.

R-16 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated February 19, 1996.

R-17 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated March 4, 1996.

R-18 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated March 20, 1996.

R-19 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated March 22, 1996.

R-20 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated March 26, 1996.

R-21 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated April 18, 1996.

R-22 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated April 1, 1996.

R-23 Memorandum from Viktor J. Joganow, Ed.D., Chief School Administrator, to Richard Tiberio, dated February 29, 1996.

R-24 Memorandum from Viktor J. Joganow, Ed.D., Chief School Administrator, to Richard Tiberio, dated February 9, 1996.

R-25 Memorandum from Vincent N. Varcadipane, Ed.D., Principal, to Richard Tiberio, dated February 21, 1996.

OAL DKT. NO. EDU 7688-96
AGENCY DKT. NO. 266-7/96

RICHARD TIBERIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ). As the District properly instructs, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold his increment was unreasonable, based on the facts. *Kopera, supra.* He has failed to do so.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 15, 1997
DATE OF MAILING AUGUST 15, 1997

426-97

426-97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY, AND ALLIANCE COMPANY, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, unsuccessful bidder for gas burner conversion project at respondent Board's schools, contested the award of contract to respondent Alliance.

ALJ concluded that the bids submitted by both petitioner and respondent were defective and not in compliance with the statutory provisions found at *N.J.S.A.* 18A:18A-18 and *N.J.S.A.* 45:5A-9. Thus, the ALJ concluded that the bid submitted by Alliance and accepted by the Board was null and void and must be rejected. ALJ ordered the Board to re-advertise its bid in order that the acceptable lowest and responsible bid be in strict compliance with all relevant statutory provisions.

Commissioner adopted the initial decision and ordered the Board to rebid for the work.

AUGUST 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION AND ORDER

ON MOTION

OAL DKT. NO. EDU 4911-97

AGENCY REF. NO. 231-6/97

BUENA PLUMBING, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY AND ALLIANCE COMPANY, INC.,

Respondent.

Kimberly A. O'Brien, Esq., for petitioner (Capizola, Fineman & Lapham, attorney)

Louis J. Greco, Esq., for respondent Somers Point Board of Education

Michael Hedge, Vice-President, Alliance Company, Inc., *pro se*

Record Closed: July 2, 1997 Decided: July 7, 1997

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter comes before the Office of Administrative Law (OAL) through the Commissioner of Education (Commissioner) by the filing of a Verified Petition of Appeal by Buena Plumbing (Buena) together with Brief, Certifications and Exhibits seeking an Order setting aside a bid of the Alliance Company, Inc. (Alliance) and to enjoin the Board of Education of the City of Somers Point (Board) from awarding contracts for gas burner conversion at its Jordan Road School and its New York Avenue School to Alliance and award the contract to Buena, as the lowest qualified bidder. The matter was transmitted to the OAL pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Oral Argument on petitioner's application was heard on July 2, 1997, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The hearing record closed on July 2, 1997.

The relevant and material facts are not in dispute. Buena is a New Jersey corporation engaged in the business of plumbing, heating and air conditioning. Alliance is a New Jersey corporation doing business as a general contractor. In May of 1997, the Board advertised for bids for gas burner conversions at the Jordan Road and New York Avenue Schools. The specifications stated the bid required electrical work and that the electrical work was to be performed in accordance with all applicable local, state and other codes and ordinances.

Bids were submitted on June 13, 1997 and opened that same date. Respondent Alliance had the lowest total bid of $49,690 and petitioner Buena submitted the second lowest total bid of $51,600. Petitioner Buena was informed of the Board's intention to award the contract to respondent Alliance. The specifications for the project listed "Electrical Work" as a component of this project and stated "this subcontractor shall provide the necessary labor and material for all electrical work required under this contract." The specifications listed the electrical work involved in the project as including labor and materials for the following: new circuit breaker protection, run new conduit and wire in the boiler room, installation of burner control panel, operating and limit controls and gas burner wiring.

Petitioner argues among other things, that the Board and Alliance failed to comply with the Public Schools Contract Law, *N.J.S.A.* 18A:18A-18 and *N.J.S.A.* 45:5A-9 Contractors Law.

Under *N.J.S.A.* 18A:18A-18, all bids submitted for projects involving subcontractors for electrical work must contain the name and performance security of the subcontractor. Under *N.J.S.A.* 45:5A-9, a licensed electrical worker is required to perform the electrical work contained in the Board's specifications for the gas burner conversion. Alliance is not a licensed electrical contractor by the State of New Jersey. Petitioner argues, that since Alliance is not a licensed electrical contractor, it is precluded from performing the electrical component of the project and, therefore, must provide a subcontractor to perform the electrical component of the contract. Petitioner argues further that since Alliance failed to list an electrical subcontractor in its bid, its bid was materially deficient and must be rejected for failure to comply with the Board's specifications.

Petitioner admits it is likewise not a licensed electrical contractor. However, it asserts that it did list an electrical subcontractor in its bid submission as required by the bid specifications and New Jersey law.

Petitioner contends that the contract awarded to Alliance should be declared null and void and the contract awarded to Buena for the gas burner conversion as the lowest responsive and responsible bidder.

The Board argues, among other things, the Buena's bid did not include a performance security as required by *N.J.S.A.* 18A:18A-18. It asserts, therefore, that Buena's bid for the contract is as defective as Alliance's bid. The Board argues further, that it is not required to award the contract to the second lowest bidder but, rather, it may rebid the contract to insure its correctness.

CONCLUSIONS AND ORDER

In the Matter of Hillside Twp. vs. Sterin, 25 *N.J.* 317, 323 (1957) our Supreme Court held that all bids must comply with the terms imposed and any departure therefrom invalidates a nonconforming bid as well as any contract based upon it. If that were not the rule, the mandate for equality among bidders would be illusory and the advantage of competition would be lost. *In Meadowbrook Carting Co. v. Island Heights Borough* 138 *N.J.* 307 (1994), cited by the Board,

the Supreme Court relied, in part, upon its holding in *Hillside, supra.* and held that: "strict compliance is required, and a municipality generally is without discretion to accept a defective bid." *Id.* at 314.

The *Meadowbrook* Court went on to say:

> . . . As Justice Francis observed in *Hillside, supra.* "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way." 25 *N.J.* at 326, 136 *A. 2d.* 265.
>
> As a result, all bids must comply with the terms imposed, and any material departure invalidates a nonconforming bid as well as any contract based upon it. *Id.* at 323, 136 *A. 2d.* 265. "It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived." *Terminal Constr. Corp., supra.,* 67 *N.J.* at 411, 31 *A. 2d.* 327 (citing *Hillsides, supra.,* 25 *N.J.* at 324, 136 *A. 2d.* 265). *Id.* 314

I **FIND and CONCLUDE** that the bids submitted by Buena and Alliance are both defective and not in compliance with the statutory provisions found at *N.J.S.A.* 18A:18A-18 and *N.J.S.A.* 45:5A-9.

Consequently, I **CONCLUDE** that the bid submitted by Alliance and accepted by the Board is null and void and must be rejected. I **CONCLUDE,** moreover, the Board is required to re-advertise its bid for the gas burner conversion in its Jordan Road School and New York Avenue School in order that the acceptable lowest and responsible bid is in strict compliance with all statutory provisions attendant thereto. It is so **ORDERED.**

It is **FURTHER ORDERED** that petitioner's Motion for Temporary and Permanent Restraints against the Board is hereby **DENIED** and its Motion **DISMISSED.**

This tribunal does not retain jurisdiction of this matter.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to judge and to the other parties.

7/7/97
DATE

Lillard E. Law, Jr.
LILLARD E. LAW, ALJ

Receipt Acknowledged.

7/9/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 14 1997
DATE

Barbara A. Kerner
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 4911-97
AGENCY DKT. NO. 231-6/97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY, AND ALLIANCE COMPANY, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the bids submitted by both petitioner and respondent Alliance are defective and not in compliance with the statutory provisions found at *N.J.S.A.* 18A:18A-18 and *N.J.S.A* 45:5A-9 for the reasons expressed therein. The Commissioner further concurs that, consequently, the bid submitted by Alliance must be rejected and that the Board must readvertise its bid for the gas burner conversion project in strict compliance with all relevant statutory provisions.

Accordingly, the Commissioner adopts the initial decision of the OAL for the reasons expressed therein, ordering the Board to rebid for the work contemplated in accordance with the ALJ's instructions.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 19, 1997
DATE OF MAILING AUGUST 20, 1997

427-97

427-97

JOSEPH MULLER, KATHLEEN MULLER AND LOUIS MULLER,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7682-97
AGENCY DKT. NO. 232-6/96

JOSEPH MULLER, KATHLEEN MULLER AND LOUIS MULLER,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD,
Respondent.

Dennis G. Harraka, Esq., for petitioners
(Ferrara, Turitz, Harraka & Goldberg, attorneys)

Sidney A. Sayovitz, Esq., for respondent,
(Schenck, Price, Smith & King, attorneys)

Record Closed: July 9, 1997 Decided: July 9, 1997

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law on July 30, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 9, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

7/11/97
DATE

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DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1997
DATE

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OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
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FERRARA, TURITZ, HARRAKA & GOLDBERG, P.C.
505 MAIN STREET
HACKENSACK, NEW JERSEY 07601
(201) 489-8787
Attorneys for Petitioners

JOSEPH MULLER, KATHLEEN MULLER AND LOUIS MULLER Petitioners, vs. BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO. EDOUS 07682-96N AGENCY REF. NO. 232-6196 **STIPULATION OF SETTLEMENT**

THIS MATTER, having been brought before the Court by Ferrara, Turitz, Harraka & Goldberg, P. C., (Dennis G. Harraka, Esq. appearing), attorneys for Petitioners, Joseph Muller, Kathleen Muller and Louis Muller and Schenck, Price, Smith & King, (Sidney A. Sayovitz, Esq. appearing), attorneys for Respondent, Bergenfield Board of Education, and the Matter having been scheduled for a hearing on May 27, 28 and 30, 1997, and it appearing that the parties have reached an amicable resolution to this matter and wish to memorialize that settlement by the filing of this Stipulation, and in consideration of the mutual promises contained in this agreement, it is now stipulated and agreed as follows:

1. Petitioner, Joseph Muller (hereinafter referred to as "Joseph"), is currently enrolled as a full-time non-matriculating student at Bergen Community College and is taking a

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total of five (5) courses for the Spring 1997 semester, three of which are: English Skills, Algebra A and General Psychology.

2. If Petitioner, Joseph Muller, passes the three (3) courses set forth above: English Skill, Algebra A and General Psychology, Respondent agrees to graduate Joseph and issue his regular Bergenfield High School diploma as follows:

a. Through counsel for the parties, Joseph shall submit proof of passing of the three (3) courses to Respondent, Bergenfield Board of Education.

b. Respondent shall, within ten (10) days of receipt of such proof, graduate Joseph Muller, document his student records to reflect the same and shall immediately issue and deliver his regular Bergenfield High School diploma.

3. It is understood and acknowledged that Joseph's application as a matriculati student at Bergen Community College for the Fall Semester must be filed no later than July 1, 1997, time being of the essence. It is further understood that his ability to receive financial aid, without which he cannot attend another semester, is dependent upon his meeting the deadline and filing as a matriculating student. Accordingly, Respondent agrees that if Petitioner passes the courses as outlined herein, time will be of the essence for the issue of the diploma.

4. Upon receipt of the diploma and evidence that his records have been documented to reflect graduation, a Stipulation of Dismissal will be filed with the Court.

5. In the event that Petitioner, Joseph Muller, does not pass the three (3) courses as outlined above, this action will proceed to the hearing and all outstanding discovery requests will be complied with no later than four (4) weeks prior to the new scheduled hearing date or as

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otherwise directed by the Court.

ATTEST:

RESPONDENT, BERGENFIELD BOARD OF EDUCATION per 5/13/97 resolution of the Board.

DATED: 5/15/97

JOSEPH MULLER Petitioner

DATED: 5/28/97

KATHLEEN MULLER Petitioner

DATED: 5/28/97

LOUIS MULLER Petitioner

DATED: 5/28/97

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Attorneys for Petitioners

JOSEPH MULLER, KATHLEEN MULLER AND LOUIS MULLER Petitioners, vs. BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO. EDOUS 07682-96N AGENCY REF. NO. 232-6196 **STIPULATION OF DISMISSAL**

This matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

DATED: July 7, 1997

SCHENCK, PRICE, SMITH & KING

BY: _____
Sidney A. Sayovitz, Esq.
Attorney for Respondent

FERRARA, TURITZ, HARRAKA & GOLDBERG

BY: _____
Stanley Turitz, Esq.
Attorney for Petitioners

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OAL DKT. NO. EDU 7682-96
AGENCY DKT. NO. 232-6/96

JOSEPH MULLER, KATHLEEN MULLER AND LOUIS MULLER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 19, 1997
DATE OF MAILING AUGUST 20, 1997

428-97

428-97

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLOTTE WHITFIELD,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	
	:	

SYNOPSIS

Petitioning District certified tenure charges of neglect of duty, excessive tardiness and insubordination against respondent administrative secretary. Respondent contended charges constituted inefficiency and, as such, were to be dismissed for failure to comply with *N.J.S.A.* 18A:6-11.

ALJ concluded that the District accurately characterized respondent's practice of willfully engaging in personal activity during the work day despite warnings from her supervisor as neglect of duty rather than inefficiency. Such charge of neglect of duty was sustained as was the charge of excessive tardiness. ALJ dismissed the charge of insubordination as respondent did not engage in outright defiance of her supervisors. ALJ determined that respondent's tardiness and neglect of duty demonstrated a pattern which spanned an entire school year and interfered with the proper functioning of the office. Thus, the ALJ concluded dismissal was warranted. Respondent was ordered removed from her position of administrative secretary as of the date of her suspension.

Commissioner concurred with the ALJ's conclusions regarding the tenure charges, sustaining the charges of neglect of duty and excessive tardiness and dismissing the charge of insubordination. Commissioner also agreed with the ALJ's analysis concerning the appropriate characterization of the charges as neglect of duty not inefficiency. Moreover, the Commissioner concurred with the ALJ that the penalty of dismissal was warranted given the circumstances herein. Commissioner, however, ordered respondent's termination effective as of the date of his decision, rather than the date the District initially suspended her.

AUGUST 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9325-96
AGENCY DKT. NO. 308-7/96

IN THE MATTER OF THE TENURE HEARING OF CHARLOTTE WHITFIELD, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON.

Gregory G. Johnson, Esq., for State-Operated School District of the City of Paterson

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

Record Closed: April 11, 1997 Decided: July 9, 1997

BEFORE **RICHARD McGILL,** ALJ:

The State-Operated School District of the City of Paterson ("District" or "petitioner") filed charges against Charlotte Whitfield ("respondent"), who it employs as a tenured administrative secretary. The District seeks dismissal of respondent or a reduction in her salary. Respondent denies the charges.

PROCEDURAL HISTORY

The District filed the charges with the Commissioner of Education on July 29, 1996, and respondent filed an answer on August 16, 1996. The matter was transmitted to the Office of

Administrative Law on September 11, 1996 for determination as a contested case. A hearing was conducted on March 25, 26 and 27, 1997 at the Office of Administrative Law in Newark, New Jersey, and the record closed on April 11, 1997, upon receipt of briefs.

ISSUES

The charges in this proceedings are neglect of duty, insubordination and excessive tardiness. Respondent's defenses frame the issues in this matter. Respondent maintains that despite the District's use of terminology such as neglect of duty and insubordination, the factual allegations fall within the definition of "inefficiency" and that the District has failed to comply with procedural requirements set forth in *N.J.S.A.* 18A:6-11. Based upon the failure to comply with those procedural requirements, respondent contends that the charges must be dismissed. Respondent further contends that the District has failed to prove the charges of neglect of duty, insubordination and excessive tardiness. Lastly, respondent maintains that the facts in this matter do not warrant dismissal.

UNDISPUTED FACTS

The parties entered into a stipulation setting forth the following undisputed background facts in this matter:

1. The Paterson Public Schools hired the respondent as an Administrative Secretary, assigned to the Personnel Office, on August 3, 1987.

2. On May 1, 1994, the State District Superintendent implemented a reorganization wherein the respondent's position was changed to Administrative Secretary, Central Office.

3. On December 16, 1991, Deborah West was hired as Assistant to the Director of Personnel, Dr. John A. Nolan.

4. As the Assistant to the Director, Ms. West supervised the respondent, Birdie Gregory, and Lucille Gibson, secretaries in the Personnel Office.

5. On December 4, 1992, Dr. Nolan and Mrs. West (formerly Ms. Bonhannon) prepared a joint evaluation of the respondent. The respondent signed the evaluation instrument.

6. The respondent was transferred to an administrative secretary position, Central Office (Dr. [Benjamin H.] Williams' Office), effective May 1, 1994.

7. On July 11, 1995, the petitioner hired Joy Anne Friedman as the new Public Information Officer, replacing Charles Coligan.

8. During the 1995-96 school year, the respondent was assigned to work for Ms. Friedman and T.K. Wells, Principal on Special Assignment.

9. On June 26, 1996, the respondent was suspended with pay and served tenure charges.

SUMMARY OF EVIDENCE

The District presented the testimony of respondent's supervisor, Joy Anne Friedman, who is the Public Information Officer, and four other employees including Deborah West, who is the Assistant to the Director of Personnel; Stephen Cohen, who is the District Technology Planner; and two secretaries, Janira Steward and Carol Madsen. Respondent testified on her own behalf.

a. Joy Anne Friedman

Joy Anne Friedman began her employment with the District as the Public Information Officer on July 11, 1995. Her duties included regular contact with the press, preparation of speeches for the District Superintendent and reports for the New Jersey Department of Education, and communications with parents and other members of the community. Friedman's staff

included respondent, who was an administrative secretary. In addition to general secretarial duties, respondent was responsible for scanning newspapers for articles related to the District. Respondent was also required as part of a group of secretaries to answer telephones for a suite of offices.

Friedman spoke with respondent about tardiness in August 1995 and again in September 1995, but the problem grew worse. As a result, Friedman scheduled a meeting for November 13, 1995 with respondent and Assistant Personnel Director Deborah West and prepared a memorandum to respondent bearing the same date. Friedman's two main concerns were tardiness and respondent's failure to complete assignments. According to the memorandum, respondent was scheduled to work from 8:00 a.m. to 4:00 p.m., and she was supposed to scan the newspapers between 8:00 a.m. and 9:00 a.m. The purpose of this schedule was to provide Friedman with any newspaper articles that required her attention by the beginning of her work day. However, respondent was not completing this function in a timely manner, because she was not arriving for work on time. Additionally, Friedman often had early morning meetings outside the office. On numerous occasions, Friedman attempted to reach respondent by telephone for some type of assistance, but respondent was not in the office. Further, respondent's extended lunch hours, and random absences hindered Friedman's ability to perform her duties.

The memorandum further stated that respondent's work assignments were often not completed in a timely manner. Friedman attributed this situation to insufficient time spent in the office and far too much time spent on personal matters. Examples of personal matters included preparing respondent's resume, paying bills, working on church responsibilities and taking personal telephone calls.

As a result of the tardiness, Friedman changed respondent's work hours to 8:30 a.m. to 4:30 p.m. with newspapers duties to be completed by 9:30 a.m. Further, Friedman required respondent to give advance notice before taking personal or vacation time and to sign-in each day, accurately recording her starting time. Additionally, Friedman directed respondent to attend to her responsibilities concerning the upkeep of the fax machine and not to handle personal matters

during work hours. The memorandum concludes by stating that adverse personnel action will be taken if immediate improvement is not evident.

As of November 13, 1995, respondent had been tardy on twenty-six occasions detailed as follows: one hour and ten minutes on July 11, 1995; forty-five minutes on July 19, 1995; one hour on August 1, 1995; one hour on August 3, 1995; one hour and thirty minutes on August 15, 1995; twenty minutes on August 22, 1995; one hour and fifteen minutes on August 29, 1995; thirty minutes on September 6, 1995; thirty minutes on September 7, 1995; one hour on September 12, 1995; one hour on September 13, 1995; two hours on September 14, 1995; thirty minutes on September 15, 1995; twenty minutes on September 18, 1995; one hour on September 19, 1995; fifteen minutes on September 21, 1995; thirty minutes on September 22, 1995; four hours on September 25, 1995; one hour on September 26, 1995; thirty minutes on September 27, 1995; one hour on October 2, 1995; ten minutes on October 3, 1995; thirty minutes on October 10, 1995; thirty minutes on October 26, 1995; fifteen minutes on November 6, 1995; and twenty minutes on November 8, 1995. Initially, Friedman did not request explanations for respondent's tardinesses and respondent did not provide any. In September 1995, respondent said that her tardiness was caused by personal problems. Friedman acknowledges that on five or six occasions, she asked respondent to go to another location such as the print shop or the camera shop before reporting to the office. At the meeting on November 13, 1995, respondent did not give any further explanation for her tardiness. On occasion, respondent stayed late to make up for her tardiness.

One instance where respondent's tardiness impacted Friedman occurred in late September or early October 1995. Friedman was at a school and wanted a consent form faxed to her. Friedman telephoned her office, and another secretary informed her that respondent had not arrived at work. Later, Friedman asked respondent for an explanation, and respondent said that she had personal problems.

Respondent's duties included upkeep of the fax machine, which generally meant replacing the imaging film, and distribution of fax transmittals. However, the fax transmittals were not

being distributed in a timely manner. In addition, the fax machine was not being maintained such that the machine did not produce a transmittal when a message was received or the printing was so light that it could not be read. With respect to personal matters during work hours, Friedman noticed respondent paying bills, taking telephone calls and working on a church bulletin for an extended period of time, shortly before the meeting on November 13, 1995. Friedman thought that respondent should attend to these matters on her lunch hour or on breaks during the day. Friedman spoke with respondent informally about this matter several times before the meeting on November 13, 1995, because it was interfering with respondent's ability to complete her work in a timely manner.

The same type of conduct by respondent persisted after the meeting on November 13, 1995. After receiving complaints concerning fax transmittals from Dr. Laval S. Wilson, who is the State District Superintendent, and from Stephen Cohen, the District Technology Planner, Friedman looked into the matter and found that fax transmittals were sitting around for days at a time despite the fact that the fax machine was located only two or three feet from respondent's desk. Additionally, respondent had failed to replace the imaging film with the result that the visual quality of many of the fax transmittals was very poor. In some instances, the machine could not receive a message at all due to the lack of imaging film. When Friedman called this situation to respondent's attention, respondent said that she would take care of it. Friedman also saw respondent doing personal business during work hours on many occasions after November 13, 1995. Those activities included paying bills, working on a church bulletin and taking personal telephone calls.

Tardiness also continued to be a problem. From November 13, 1995 to February 7, 1996, when Friedman wrote another memorandum, respondent was tardy on nine occasions. The details are as follows: fifteen minutes on December 7, 1995; five minutes on December 8, 1995; fifteen minutes on December 12, 1995; five minutes on December 13, 1995; forty-five minutes on January 18, 1996; fifteen minutes on January 24, 1996; ten minutes on January 30, 1996; five minutes on February 1, 1996; and ten minutes on February 5, 1996.

There were two specific incidents at the beginning of February 1996 in which respondent failed to complete an assignment in a timely manner. One assignment related to New Jersey School Report Cards, which were prepared by the New Jersey Department of Education. The District was required to distribute these report cards to various governmental entities, the community and the public at large. Friedman had 100 copies of the report cards for each of thirty-six schools. Friedman gave respondent the task to collate the copies into packages containing one report card for each school. In giving respondent this assignment, Friedman stated that she needed the collated packages as soon as possible. According to Friedman, this task could be completed in several hours. By February 7, 1996, three weeks had gone by and respondent still had not completed the assignment. In the meantime, the District had received numerous requests for school report cards. As a result of respondent's failure to complete the assignment promptly, the report cards were not issued to the public in a timely manner creating a negative effect on the image of the District.

On February 1, 1996, Friedman instructed respondent to complete a critical work assignment related to the District's monitoring process by the New Jersey Department of Education by February 6, 1996. By the end of February 5, 1996, respondent had not touched the assignment, and on February 6, 1996, respondent called in sick. As a result of respondent's failure to complete the assignment and due to its critical nature, Friedman had to request temporary assistance from another staff member, thereby disrupting the activity of another department.

Friedman summarized the above course of events in a memorandum dated February 7, 1996. Friedman also mentions in the memorandum that respondent takes extended lunch hours, regularly provides incomplete telephone messages and has failed to relay several important messages from press representatives. The memorandum emphasizes that respondent's chronic tardiness, unreliability and attention to personal matters delayed the completion of time-sensitive work assignments and hindered the productivity of the office.

By memorandum dated April 2, 1996, Friedman reported to the Director of Personnel that respondent's work performance had not improved. After mentioning various concerns about respondent as well as complaints concerning poor telephone manners, Friedman requested that personnel action be taken against her.

Respondent's use of work time to complete personal business continued despite the warnings. On May 3, 1996, Friedman noticed that respondent spent the entire morning working on a college application for her husband. Respondent made no attempt to hide her actions and made at least one telephone call in the process. Between 11:00 a.m. and 11:30 a.m., Friedman asked respondent to put the application aside. Respondent began to bang things on her desk and then went to the restroom.

On that same date, Friedman had a priority assignment for the District Superintendent. The assignment involved preparation of a report to be accompanied by videotapes of a Board member speaking at a City Council meeting. The report had to be sent to the Department of Education in Trenton. Before lunch, Friedman gave respondent a portion of this assignment which required her to view various videotapes.

Respondent normally took one hour for lunch. On this day, however, respondent went to lunch at 12:10 p.m. but had not returned by mid-afternoon. Respondent did not have any work assignment on her lunch hour. If an employee is delayed returning from lunch, she should telephone her supervisor. Friedman was in her office writing the report, but she did not receive a call from respondent. As the afternoon progressed and respondent did not return from lunch, Friedman took two employees from other tasks and assigned them to this project. Friedman planned to have the report and videotapes hand-delivered to Trenton that afternoon.

Respondent returned from lunch at 3:40 p.m. Friedman discussed the situation with respondent, who stated that she was delayed returning to work by an accident on the highway.

Respondent began the assignment, but by the end of the work day, there were still more tapes to be viewed. By this time, it was too late to send the report to Trenton. As a result, the project was not completed until the following day.

Respondent's tardiness continued through the end of the school year. Respondent was tardy on ten occasions from February 7, 1996 to the end of the school year. The details are as follows: five minutes on February 26, 1996; five minutes on February 27, 1996; five minutes on March 1, 1996; five minutes on March 7, 1996; five minutes on March 18, 1996; ten minutes on March 22, 1996; five minutes on March 28, 1996; ten minutes on April 1, 1996; thirty-five minutes on April 10, 1996; and thirty minutes on June 14, 1996.

Employees were required to record the time that they arrived at work in a sign-in book. Two secretaries, Carol Madsen and Janira Steward, advised Friedman that respondent's entries were not accurate.

In late June 1996, Friedman completed an evaluation of respondent for the 1995-96 school year. The lowest of the five categories on the evaluation form is "unsuccessful," and the second lowest is "fair," which means less than satisfactory performance. Friedman rated respondent as unsuccessful in most areas including punctuality and fair in six areas. Respondent was tardy a total of forty-five times during the 1995-96 school year.

Friedman also rated respondent as unsuccessful with respect to telephone etiquette. In addition to hearing respondent speak inappropriately on the telephone, Friedman received complaints from various individuals. One complaint came from a newspaper reporter, who said that respondent was rude to her. Friedman spoke with respondent about this incident. Respondent did not deny it or apologize but was basically indifferent.

Friedman received a complaint from the Mayor, who said that respondent was not helpful. Friedman spoke with respondent and told her that calls from the Mayor were particularly sensitive

and that she should be helpful. Nonetheless, Friedman received additional complaints from the Mayor.

Similarly, Friedman received a complaint from the District Superintendent, who said that respondent was not helpful. Friedman told respondent to be particularly sensitive to calls from the Superintendent and that they were to be given priority. Nonetheless, Friedman received several complaints from the District Superintendent.

Friedman rated respondent as unsuccessful with respect to acceptance of criticism, because she became angry and hostile. With respect to dependability, Friedman also rated respondent as unsuccessful. Friedman emphasized that it is critically important to have a dependable secretary.

Friedman tried to dictate to respondent and found that respondent was writing in longhand. Respondent did not use shorthand. As a result, Friedman rated respondent as unsuccessful with respect to dictation. Likewise, Friedman rated respondent as unsuccessful with respect to spreadsheets, which were used to provide data for the compliance officer on subjects such as the dropout rate.

b. Stephen Cohen

As the District Technology Planner, Stephen Cohen oversees both the educational and business aspects of technology for the District. Cohen began his employment with District in 1969. Cohen's office is in the same area to which respondent was assigned.

The fax machine was located four or five feet from the door to Cohen's office and a similar distance from respondent's desk. It was respondent's duty to maintain the fax machine and ensure that it was operational. In order for the fax machine to function, it must have fax imaging film. One film will produce 100 to 150 fax transmittals.

In this particular office, one imaging film was good for approximately half a day. To ensure continuous operation, it was necessary to have at least two imaging films available in addition to the one in the machine. When down to one, respondent should call for another imaging film, which would be delivered the next day. The fax machine has an indicator such that it is readily observable when it is running out of film.

Problems with the fax machine occurred almost daily. On numerous occasions, the fax film ran out and was not replaced. When this situation occurred, it was possible that a fax transmittal could be lost. The lack of proper functioning of the fax machine posed problems for Cohen and others with respect to their daily responsibilities. Cohen did not keep any written records and he could not recall specific dates. However, Cohen stated that the fax machine was a constant problem.

Cohen spoke with respondent many times about the fax machine. Respondent said that she would take care of it and eventually she did. However, it could be hours or even days later when she corrected the situation. Cohen spoke with Friedman many times about respondent's failure to maintain the fax machine.

c. Janira Steward

Janira Steward is currently employed by the District as an administrative secretary. Steward began her employment with the District on March 1, 1995, as a temporary employee and substitute secretary and was assigned to an area where there were six secretaries. At that time, Steward worked for the Ombudsperson and the District Technology Planner, Stephen Cohen. Respondent's desk was very near Steward's. Steward became a permanent employee on March 11, 1996. Shortly thereafter, Steward was advised that she would be laid off effective July 1, 1996. However, Steward was assigned to Public Information Officer Friedman effective July 1, 1996, in effect replacing respondent.

Steward's hours of work as a secretary were 8:00 a.m. to 4:00 p.m., and at first, respondent worked the same hours. Secretaries were required to sign in and out upon arrival and departure. The sign-in book was located on a file cabinet approximately four or five feet from Steward's desk. Steward noticed that some secretaries were not signing in and that others were signing for an entire week at a time. During a meeting, Steward called this situation to the attention of the Assistant District Superintendent.

Steward observed respondent sign in late frequently. At the time, Steward was not Friedman's secretary, but if respondent was late, Steward would have to do respondent's work such as newspaper clipping. Steward was not certain of the exact number of times that respondent was late, and she did not know the reasons for the lateness. Steward discussed the situation with Friedman, who changed respondent's work hours to 8:30 a.m. to 4:30 p.m.

Steward observed respondent arrive late for work on several days at the end of April 1996 and not sign in. Steward wrote down the times when respondent actually reported to work. Respondent signed in for the dates in question a few days later, but the entries were not accurate. Steward discussed this situation with Friedman, who asked to see the sign in book.

Respondent's duties included maintenance of the fax machine, which was located approximately two feet from her desk. However, respondent did not carry out her responsibility with respect to the fax machine.

Respondent was given an assignment to collate school report cards. However, respondent did not complete this task, and Steward had to collate the school report cards.

Respondent took personal telephone calls during the work day. Steward knew that the calls were personal because they were long and involved a lot of laughter.

In May 1996, Friedman gave respondent an assignment which required her to view videotapes. When respondent did not return from lunch, Steward was asked to view the

videotapes and began the assignment. Respondent returned from lunch between 3:30 p.m. and 3:45 p.m. and at that point began to work on the assignment. Steward did not ask respondent why she was late returning from lunch.

d. Carol Madsen

Carol Madsen is employed by the District as a confidential secretary and is assigned to the Assistant Superintendent's office. Her work area is several desks away from respondent.

The secretaries signed in when they arrived and signed out when they departed from the office. The sign-in book was a few feet from her desk. Respondent worked from 8:00 a.m. to 4:00 p.m., and during the school year, her hours were changed to 8:30 a.m. to 4:30 p.m.

Madsen observed respondent sign in late on various occasions. Madsen's work hours were from 8:30 a.m. to 4:30 p.m., but for two days in August, she arrived at work at 7:30 a.m. Respondent arrived between 8:15 a.m. to 8:20 a.m., but she signed in at 8:00 a.m. Madsen reported to Friedman that respondent was falsifying her reporting time.

Respondent's tardiness became problematic. When respondent was late, Madsen had to call personnel and request assistance. Madsen and Friedman discussed the possibility of respondent making up her late time by working through lunch or at the beginning or end of the day. Madsen suggested changing respondent's work hours to 8:30 a.m. to 4:30 p.m.

Respondent had the responsibility to maintain the fax machine and distribute the fax transmittals. The Assistant District Superintendent complained about waiting two days for a fax transmittal, and other staff members complained as well.

Respondent was scheduled for lunch from 12:00 noon to 1:00 p.m., and Madsen went to lunch from 1:00 p.m. to 2:00 p.m. The lunch hours were scheduled so as to maintain telephone coverage. During one particular morning, Madsen asked respondent to go to lunch on time,

because Madsen had scheduled a doctor's appointment for her lunch hour. Respondent agreed but instead of going to lunch on time, she took a personal telephone call for thirty to forty-five minutes. Madsen reminded respondent at 12:15 p.m., but respondent continued her conversation. Madsen thought the incident showed a lack of concern for others in the office.

In May 1996, Friedman had an important assignment for the Assistant District Superintendent. Friedman assigned part of the task to respondent, but she did not return from lunch. As a result, Madsen had to take Steward off of other office work to do respondent's job.

e. Deborah West

Deborah West has been employed by the District since December 1991 and is now Assistant to the Director of Personnel. West is responsible for non-certificated positions and, as part of her duties, reviews recommendations for disciplinary action. When West began her employment, respondent was assigned to the personnel office as a confidential secretary.

Respondent continued to work as a confidential secretary in the personnel office during the 1992-93 school year. Respondent's duties included typing, word processing, clerical and minor administrative functions. West observed respondent during this period of time and prepared an evaluation of respondent for the 1992-93 school year, which she signed along with the Director of Personnel.

The five levels of performance on the evaluation form are "distinguished," "commendable," "competent," "fair" and "unsuccessful." Respondent was rated as commendable in four areas, competent in ten areas and fair in seven areas. Respondent did not receive any ratings as distinguished or as unsuccessful. Respondent was rated as only fair with respect to telephone etiquette and punctuality. According to West, respondent was repeatedly late at the beginning of the day and also returning from lunch. The comments refer to respondent's lack of patience with persons who call on the telephone and to her conducting her "homebuyers" business

during work hours. However, the overall evaluation refers to respondent as a valued employee and encouraged her to continue her high level of service.

West felt that respondent's work needed improvement and suggested that respondent consider the possibility of a transfer to another section. Initially, respondent was not receptive to the idea, but subsequently, respondent agreed to a transfer. Effective May 1, 1994, respondent was transferred to the central office as an administrative secretary.

In the central office, respondent was assigned to work for the public information officer. In November 1995, Public Information Officer Joy Anne Friedman brought to West's attention certain concerns about respondent's work performance. As a result, West met with Friedman and respondent in the personnel office on November 13, 1995. During the meeting, Friedman raised various concerns such as lack of punctuality, failure to complete work assignments and attending to personal matters during work hours. Respondent did not agree with Friedman's comments. Friedman wrote a memorandum dated November 13, 1995, detailing her concerns.

West had subsequent discussions with Friedman concerning respondent during the school year. On May 3, 1996, West received a report from Friedman that before lunch, she gave respondent a priority assignment and that respondent went to lunch at noon. By 3:20 p.m., respondent still had not called or returned from lunch. Friedman also advised that respondent had spent the entire morning preparing a college application for her husband. Later in the day, West met with the respondent, who stated that she had called her supervisor.

As a result, West sent a memorandum to the Director of Personnel in which she referred to the incident on May 3, 1996. West also stated that respondent's "continued abuse and defiance of employment policies and procedures, poor work quality and ethics, and blatant disrespect to her immediate supervisors is greatly affecting the progress of the Public Information Office." Based on these circumstances, West requested immediate dismissal action.

f. Charlotte Whitfield

Respondent testified that she began her employment with the Paterson public schools on August 3, 1987, as a secretary in the personnel office. Respondent worked in the personnel office, until she was transferred to the central office in May 1994. During the time that respondent was in the personnel office, she was never disciplined for any reason and never had her increment withheld. Respondent was not evaluated until December 1992. Respondent was not transferred for disciplinary reasons but rather because there were problems with the secretaries in the central office.

In the central office, respondent was assigned to Public Information Officer Chuck Coligan. Respondent's primary duties were to clip articles from newspapers, type press releases and answer the telephone. Respondent was assigned to Coligan, until he was transferred in February 1995. During the time that respondent was assigned to Coligan, she had no written evaluations, she was not subject to any discipline, and there was never discussion of any problems. From February 1995 to July 11, 1995, Dr. Williams was considered to be her supervisor. Similarly during this time, there was no evaluation, respondent was subject to no discipline, and there was no discussion of any problems.

On July 11, 1995, Joy Anne Friedman became the public information officer. Friedman increased respondent's duties in two respects. First, Friedman expanded the newspaper clipping to include the sports section as well as articles concerning other school districts. Respondent scanned four newspapers on Tuesday through Friday. On Mondays, there were twelve newspapers including weekend editions. Second, Friedman made respondent responsible for the fax machine effective August 16, 1995. Respondent's responsibilities were to ensure that fax transmittals were distributed to the receiving individual and to replace the imaging film.

On November 13, 1995, Friedman gave respondent a memorandum concerning her work performance, and a meeting was held on that same day. Friedman's main concerns related to tardiness, the fax machine, use of work time for personal matters and failure to complete work

assignments in a timely manner. Respondent thought her performance was good but did not argue with most of Friedman's concerns.

In regard to the fax machine, Friedman stated that people were not getting their fax transmittals. In response, respondent took steps to improve the situation. She made a fax box and distributed transmittals throughout the day. She received no complaints after this point in time. With respect to the imaging film, one extra box was kept under the machine and the others were kept in the basement of another building. Respondent had to make a telephone call to have another box delivered to the central office. It took some time to get the imaging film, but there were no long delays. Respondent states that both Friedman and Stephen Cohen were not telling the truth, when they testified that they spoke to her many times about problems with fax transmittals.

Another matter concerned use of work time for personal matters such as receiving telephone calls. Respondent did not dispute this point during this meeting, but respondent now states that she performed no personal tasks during the 1995-96 school year. Testimony to the effect that she used work time to pay personal bills, to prepare a church flyer on the school computer or to speak on the telephone with her husband was not true. Additionally, in regard to the incident in which Carol Madsen asked respondent to go to lunch at her assigned time, respondent states that she was not taking a personal telephone call on that occasion.

In regard to tardiness, respondent states that she was sometimes given an assignment which required her to stop at another location, such as the print shop, the camera shop or the resource center, prior to reporting to the central office. Under the sign-in procedure in effect until August 1995, respondent would sign-in at 8:00 a.m., even if she was on such an assignment. In August 1995, the procedure was changed such that respondent was required record the time when she actually arrived at the central office. Respondent usually went to these locations prior to reporting to work in the morning, but on occasion she stopped on her return from lunch.

Respondent discussed a number of days on which she was late on an individual basis. According to petitioner's records, respondent was late on twenty-six occasions from July 11, 1995 to November 13, 1995. Respondent's testimony indicates that during this period of time she went to the resource center four times and once to the camera shop. Respondent had four doctor's appointments, and she was late due to personal problems on four occasions. Respondent took a half day off on one date on which she is listed as late, and on three occasions, she called in stating that she would be late and made up the time.

According to petitioner's records, respondent was late on nineteen occasions through the balance of the school year. However, respondent states that she was late on only seven occasions. According to respondent, she went twice to the resource center, twice to the print shop and once to the bank, and on one occasion, she called in stating that she would be late and made up the time.

In regard to the testimony to the effect that respondent signed in on time on occasions when she was actually late, respondent states that she is not aware of any instance in which this happened.

Two incidents occurred in early February 1996. On February 1, 1996, Friedman gave respondent an assignment related to school monitoring reports to be completed by February 6, 1996. Respondent was about to start this task on February 5, 1996, but Friedman gave her another assignment. Then, respondent was sick on February 6 and 7, 1996. As a result, another employee completed the task.

Another assignment related to school report cards for each of the District's thirty-six schools. Friedman gave appellant the assignment to collate the report cards into piles that had one report card for each school. Friedman directed respondent to use the DeLuccia Room for this task. However, the DeLuccia Room was in use with the result that respondent did the collating two weeks later in Friedman's office. Respondent had no indication that she was not doing the job fast enough.

In a letter dated February 7, 1996, to respondent, Friedman mentions those two incidents as examples of unreliability and unacceptable work performance. The letter also mentions difficulties with the fax machine, incomplete telephone messages and continued tardiness. Because of these circumstances, Friedman advises that she is requesting that disciplinary action be taken against respondent.

In a memorandum dated February 1, 1996, to the Director of Personnel, Friedman requested that respondent's increment be withheld due to her unsatisfactory job performance. Respondent did not receive a copy of this memorandum. By memorandum dated April 2, 1996, to the Director of Personnel, Friedman again requested personnel action due to respondent's work performance. Respondent did not receive a copy of this memorandum.

On May 3, 1996, Friedman gave a respondent a critical assignment at 11:55 a.m. The task required respondent to view twenty videotapes and stop them a point where a particular individual began to speak. Respondent then had to prepare labels and envelopes.

At no time during that day or at any other time did respondent work on a college application. Respondent states that Friedman was not telling the truth, when she testified that respondent was working on a college application on May 3, 1996.

Respondent decided to complete some other work before going to lunch and with Friedman's approval went to lunch at approximately 1:00 p.m. Respondent proceeded to Montclair State College to drop off a financial aid application for her husband, who was a student there. The trip takes thirty to forty-five minutes one way, and she expected to be back by 2:00 p.m. to 2:15 p.m. However, on her return trip, respondent was caught in a traffic jam caused by an accident for approximately an hour and fifteen minutes. Respondent was unable to make a telephone call. The financial aid application was completed by respondent's husband. Respondent did not work on it at all.

Respondent returned from lunch at 3:30 p.m. and began to work on the assignment which had been started by another employee. Respondent completed the assignment at 5:30 p.m. and was able to contact Friedman, who said that they would discuss it in the morning.

As a result of this incident, Friedman sent a memorandum dated May 3, 1996, to the Director of Personnel, recommending disciplinary action against respondent. Respondent received a copy of this memorandum.

On June 26, 1996, Friedman completed an evaluation of respondent for the 1995-96 school year, and on that date respondent was suspended from her position. Respondent did not agree with the evaluation which she states was unfair to her. First, Friedman rated respondent as "unsuccessful" with respect to skills which were rarely if ever utilized. With respect to computer competency, Friedman rated respondent as "unsuccessful" in regard to "spreadsheet" and "communication." Respondent did an assignment based on a speadsheet only once during her employment, and she had no duties utilizing computer communication. Respondent also did not use "data base" on which she was rated as only "fair." Friedman also rated respondent as "unsuccessful" with respect to taking dictation. Respondent states that she did not have to take dictation, although she had no problem with speed writing. Similarly, Friedman rated respondent as "unsuccessful" with respect to production of basic reports even though it was not respondent's duty to produce reports.

Respondent states that she was also evaluated unfairly with respect to areas which were applicable. In regard to telephone etiquette, respondent states that reporter Roya Rafei complained to Friedman that respondent was rude to her. However, Friedman had instructed respondent not to interrupt her during a meeting. Rafei called on the telephone and wanted to speak with Friedman. Because of Friedman's instruction, respondent would not allow Rafei, despite her persistence, to speak with Friedman. As a result, Rafei complained to Friedman that respondent was rude. Respondent was not aware of any problems with respect to telephone etiquette concerning the Mayor or the Superintendent.

Friedman rated respondent as "unsuccessful" with respect to "professional attitude." Respondent states that she did not have a bad attitude. In regard to a rating of "unsuccessful" with respect to "punctuality," respondent states that she did not realize that this item was a serious concern.

LAW AND ANALYSIS

A tenured secretary holds her employment under tenure during good behavior and efficiency and may not be dismissed, suspended or reduced in compensation, except for neglect, misbehavior or other offenses. *N.J.S.A.* 18A:17-2. In the event of a dismissal, suspension or reduction in compensation, the school district must proceed in the manner prescribed in *N.J.S.A.* 18A:6-9 *et seq.* Various procedural safeguards are set forth in *N.J.S.A.* 18A:6-11, including requirements that the charges be set forth in writing and that the employee be given the opportunity to respond thereto. Additionally, if the charge is inefficiency, the school district must give the employee at least ninety days in which to correct and overcome the inefficiency. *N.J.S.A.* 18A:6-11. The school district must prove the charges by a preponderance of the believable evidence.

The first issue is whether the factual allegations in regard to the charges of neglect of duty, insubordination and excessive tardiness are supported by a preponderance of the evidence. Petitioner's witnesses were credible, and their testimony as summarized above is accepted as true. Respondent testified to the same general course of events, but her version conflicted with the testimony of petitioner's witnesses in certain key respects. In view of the credibility of petitioner's witnesses, respondent's testimony cannot be considered to be reliable.

In regard to the charge of excessive tardiness, petitioner alleged that respondent was late on forty-five occasions during the 1995-96 school year. Petitioner's exhibit shows that respondent was late on twenty-six occasions prior to the meeting on November 13, 1995, and nineteen times thereafter. Respondent offered explanations for a number of the latenesses. On various occasions, Friedman directed respondent to stop at another location before reporting to

the central office. This circumstance constitutes a legitimate excuse for lateness. Respondent's testimony indicates that she was sent to another location on five occasions prior to November 13, 1995, and five times thereafter. Accordingly, the unexcused latenesses should be reduced to twenty-one occasions prior to November 13, 1995, and fourteen times thereafter. Respondent offered other explanations such doctors' appointments or personal matters, but these circumstances do not alter the fact that she was late for work. Additionally, the fact that respondent made up the time or took time off does not alter the fact that she was tardy on certain dates.

Two other secretaries testified that respondent signed in on time, when she was actually late. However, this testimony was not sufficiently specific as to dates and times to be reliable.

It is noteworthy that the latenesses were considerably more egregious prior to the meeting on November 13, 1995. During the four-month period from July 11, 1995, to November 13, 1995, respondent was late on twenty-one occasions, averaging approximately five latenesses per month. The average length of the latenesses was fifty minutes. Subsequent to November 13, 1995, respondent had fourteen latenesses in a period of seven and a half months averaging two occasions per month. The average length of the latenesses was eight minutes.

Respondent's tardiness impacted her duties related to reviewing newspapers for articles related to school matters. Friedman directed respondent to complete this assignment between 8:00 a.m. and 9:00 a.m. so that Friedman would be aware of the articles at the beginning of her work day. Friedman's testimony to the effect that respondent frequently failed to complete this task in a timely manner was credible.

Friedman and Cohen testified at length concerning respondent's failure to carry out her responsibilities concerning the fax machine. Respondent stated that the testimony of Friedman and Cohen in regard to the fax machine was not true. Friedman and Cohen were credible witnesses, and their testimony is accepted as true.

The charges against respondent include allegations that she did not take accurate phone messages and that she failed to copy documents. Petitioner did not present evidence to support these allegations other than a letter dated February 6, 1996, from Friedman warning respondent about incomplete telephone messages.

Friedman testified to several specific instances where respondent failed to complete an assignment in a timely manner. In addition, Friedman stated that respondent took personal telephone calls and engaged in various personal activities during the work day. Friedman's testimony in regard to these matters was credible. With respect to the incident on May 3, 1996, the credible evidence indicates that respondent left for lunch at 12:10 p.m. and returned at 3:40 p.m. Further, the trip to Montclair State College and return takes one hour to one hour and fifteen minutes. The difference between the three and a half hours that respondent was away from her desk and the one hour and fifteen minutes of travel time is two hours and fifteen minutes. Respondent's claim that a traffic jam caused her to lose the additional time was not believable.

Another allegation concerned respondent's telephone etiquette. Friedman testified that she heard respondent speak in an unprofessional manner on the telephone and that she received complaints about respondent's telephone etiquette. In regard to this allegation, there is a certain lack of specificity as to the language used by respondent and the manner in which she spoke over the telephone. This is particularly true as to the complaints. Under the circumstances, the testimony concerning complaints should be limited to bolstering Friedman's credible testimony to the effect that she heard respondent speak in an unprofessional manner on the telephone.

Finally, petitioner alleges that respondent's various shortcomings continued despite warnings. In the memorandum dated November 13, 1995, Friedman warned respondent concerning tardiness, upkeep of the fax machine and use of work time to deal with personal matters. Additionally, by letter dated February 7, 1996, Friedman warned respondent concerning chronic tardiness, failure to complete assignments, attention to personal matters and failure to provide complete telephone messages.

Based upon the evidence presented at the hearing, I **FIND:**

1. Respondent had thirty-five unexcused latenesses during the 1995-96 school year.

2. Twenty-one of the latenesses occurred between July 11, 1995, and November 13, 1995, when Friedman warned respondent about her tardiness. On average, respondent was late four times per month for a period of fifty minutes.

3. After the warning, respondent had fourteen additional unexcused latenesses. On average, respondent was late twice per month for a period of eight minutes.

4. It was respondent's duty to review newspapers for articles related to school matters between 8:00 a.m. and 9:00 a.m. so that Friedman would be aware of the articles at the beginning of her work day.

5. Respondent frequently failed to complete this task in a timely manner, largely due to her latenesses.

6. It was respondent's responsibility to maintain the fax machine. As part of this responsibility, respondent had to replace the imaging film, which is needed to produce a legible fax transmittal. It was also respondent's responsibility to distribute fax transmittals.

7. Respondent failed to maintain the fax machine with the result that fax transmittals were frequently illegible and sometimes were lost. Respondent also frequently failed to distribute fax transmittals.

8. On numerous occasions, respondent used work time to engage in personal activities such as taking telephone calls, paying bills and working on a church bulletin.

9. In January 1996, Friedman gave respondent an assignment which required her to collate New Jersey School Report Cards for the District's thirty-six schools.

There were 100 copies of each report card. Respondent was supposed to collate the school report cards into packages containing one report card for each school. This task would take several hours to complete. In assigning this task to respondent, Friedman stated that she needed the collated packages as soon as possible.

10. Three weeks went by, and respondent still had not completed the assignment. During that time, the District had received numerous requests for the report cards. As a result of respondent's failure to complete the assignment promptly, the report cards were not issued to the public in a timely manner.

11. On February 1, 1996, Friedman instructed respondent to complete a critical work assignment related to the District's monitoring process by the New Jersey Department of Education by February 6, 1996. By the end of February 5, 1996, respondent had not touched the assignment, and on February 6, 1996, she called in sick. As a result, Friedman had to request temporary assistance from another staff member.

12. Friedman heard respondent speak on the telephone in an unprofessional manner on various occasions.

13. On May 3, 1996, respondent spent the entire morning working on an application for financial aid for her husband, who attended Montclair State College.

14. Between 11:30 a.m. and noon, Friedman gave respondent a priority assignment for the District Superintendent. The assignment required respondent to view videotapes of a City Council meeting and stop the tape when a particular individual was about to speak. The tapes and other material were to be sent to the Department of Education in Trenton that day.

15. Respondent went to lunch at 12:10 p.m. and drove to Montclair State College to deliver the application for financial aid. Respondent returned from lunch at 3:40 p.m.

16. In the meantime, another employee began the assignment. Upon her return, respondent took over the task and completed viewing the videotapes by 5:30 p.m. However, it was then too late to have the material delivered to Trenton. As a result, the project was not completed until the following day.

The next issue is whether respondent should have been charged with inefficiency instead of neglect of duty, insubordination and excessive tardiness. If so, the certification of charges would be defective because respondent was not given the ninety day period required by *N.J.S.A.* 18A-6.11 in which to correct any alleged deficiencies. In regard to this issue, it is noteworthy that one pertinent statute, *N.J.S.A.* 18A:17-2, provides that neglect may form a basis for dismissal, suspension or reduction in compensation.

Considering the totality of respondent's actions, it becomes apparent that her difficulties stem largely from a refusal to put aside personal matters during the work day. With respect to her tardiness, respondent attributed some her latenesses to doctors' appointments and "personal matters." The various instances in which respondent did not complete her assignments were largely attributable to the fact that she devoted work time to personal activities such as telephone calls, paying bills and working on the church bulletin. A particularly egregious instance occurred on May 3, 1996, when respondent spent the entire morning working on an application for financial aid for her husband. Then, despite having received a priority assignment from her supervisor, respondent departed for lunch at 12:10 p.m., drove to Montclair State College to deliver the application and did not return to work until 3:40 p.m. As a result, the priority assignment was not completed in a timely manner. Respondent's practice of willfully engaging in personal activity during the work day despite warnings from her supervisor, while her assignments, priority or otherwise, remained incomplete is more accurately characterized as neglect of duty than inefficiency. Therefore, respondent's contention that the charges must be

dismissed because she was not given a ninety-day period to correct any deficiencies must be rejected.

The first charge is neglect of duty. Based upon the above findings including the fact that respondent's difficulties result largely from her refusal to refrain from engaging in personal activities during the work day, I **CONCLUDE** that the charge of neglect of duty must be sustained.

The next charge is insubordination. Insubordination in this context is more akin to outright defiance than failure to comply with a direction to complete an assignment. *In the Matter of the Tenure Hearing of Mary E. Cummings*, 1974 S.L.D. 323, 329. Here, respondent did not engage in any conduct remotely resembling outright defiance of her supervisors. Therefore, I **CONCLUDE** that this charge must be dismissed.

The third charge is excessive tardiness. Here, respondent was late thirty-five times during one school year averaging approximately thirty minutes. Under the circumstances, I **CONCLUDE** that the charge of excessive tardiness must be sustained.

The last issue is whether dismissal is warranted under the circumstances of this case. Here, respondent's tardiness and neglect of duty demonstrate a pattern which spanned the entire school year. Further, her tardiness and neglect of duty interfered with the proper functioning of petitioner's Public Information Office. Therefore, I **CONCLUDE** that dismissal is warranted under the circumstances of this case.

Accordingly, it is **ORDERED** that:

1. The charge of neglect of duty is sustained.

2. The charge of insubordination is dismissed.

3. The charge of excessive tardiness is sustained.

4. Respondent be removed from the position of administrative secretary in petitioner's school district effective as of the date of her suspension.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 9, 1997
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

7/11/97
DATE

DNJ
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 15 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

am

APPENDIX

WITNESS LIST

For petitioner:

Deborah West
Janira Steward
Carol Madsen
Joy Anne Friedman
Stephen Cohen

For respondent:

Charlotte Whitfield

EXHIBIT LIST

J-1	Stipulation of Facts	Evidence
P-1	Evaluation dated December 4, 1992	Evidence
P-2	Memorandum dated November 13, 1995 from Joy Anne Friedman to Charlotte James	Evidence
P-3	Memorandum dated May 3, 1996 from Debra West to Philomena Pezzano and Louis Flora, Esq.	Evidence
P-4	Sign-in sheets for July 1995 through June 1996	Evidence
P-5	List of Tardies	Evidence
P-6	Memorandum dated May 3, 1996 from Joy Anne Friedman to Philomena Pezzano	Evidence
P-7	Letter dated February 7, 1996 from Joy Anne Friedman to Charlotte Whitfield	Evidence

P-8	Memorandum dated April 2, 1996 from Joy Anne Friedman to Philomena Pezzano	Evidence
P-9	Memorandum dated February 1, 1996 from Joy Anne Friedman to Philomena Pezzano	Evidence
P-10	Evaluation dated June 26, 1996	Evidence
R-1	Draft evaluation for 1992-93 school year	Evidence
R-2	Memorandum dated May 31, 1996 from Charlotte Whitfield	Evidence

OAL DKT. NO. EDU 9325-96
AGENCY DKT. NO. 308-7/96

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLOTTE WHITFIELD,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions essentially recast and reiterate the arguments advanced before the Administrative Law Judge (ALJ) in her post-hearing brief. She again asserts that notwithstanding the District's use of terminology such as neglect of duty and insubordination in titling the within charges, they are more appropriately categorized as inefficiency. As such, she urges that because the District has failed to comply with the procedural requirements of *N.J.S.A.* 18A:6-11, the charges must be dismissed. Respondent also renews her post-hearing brief discussion contending that the District has failed to establish its charges. Finally, respondent proffers that although the ALJ recommends termination as the appropriate penalty in this matter, he "fails to set forth [a] real analysis or reason justifying this penalty." (Respondent's Exceptions at p. 12) Respondent urges that the allegations against her do not rise

to the level of severity justifying dismissal, particularly in light of her over seven years of satisfactory service in the District.

Upon careful and independent review, the Commissioner concurs with the ALJ that the charges of neglect of duty and excessive tardiness against respondent have been established by the District. He, likewise, agrees that the charge of insubordination was not sustained and, therefore, must be dismissed. With respect to respondent's contentions concerning the appropriate characterization of the within tenure charges, the Commissioner finds such assertions without merit, rather he agrees with the ALJ's cogent analysis

> Considering the totality of respondent's actions, it becomes apparent that her difficulties stem largely from a refusal to put aside personal matters during the work day. ***Respondent's practice of willfully engaging in personal activity during the work day despite warnings from her supervisor, while her assignments, priority or otherwise, remained incomplete is more accurately characterized as neglect of duty than inefficiency.
>
> (Initial Decision at p. 26)

Finally, the Commissioner determines that respondent's protestation that her behavior does not warrant her termination and that the ALJ reached his determination in this regard without considering her prior record or advancing a reasoned analysis of why such penalty was appropriate given the circumstances herein, is unpersuasive. Rather, he concludes that the derelictions of duties outlined by the ALJ on pages 24-26 of the initial decision, along with the fact that, although respondent received written warnings from her employer about her various shortcomings and the disruptive effect they were having on office operations (see Exhibits P-2, P-7), she remained unwilling or unable to modify her behavior to an acceptable level, amply establish that termination from her position is the appropriate penalty in this matter. It is observed, however, that contrary to the conclusion of the ALJ, respondent's termination from her

position as a consequence of the within determination, is effective as of the date of this decision, rather than the date the District initially suspended her.

Accordingly, the initial decision of the OAL, as modified herein, is adopted as the final decision in this matter for the reasons expressed therein. Respondent is hereby terminated from her tenured position in the State-operated School District of the City of Paterson.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 19, 1997
DATE OF MAILING AUGUST 20, 1997

429-97

IN THE MATTER OF THE TENURE	:	
HEARING OF TAFT REED, STATE-	:	
OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

District filed tenure charges of unbecoming conduct against physical education teacher due to his arrest by State Police for illegal drug possession. In May 1997, respondent entered a guilty plea in Superior Court to one count of theft by deception, a crime in the third degree, which resulted in a forfeiture pursuant to *N.J.S.A.* 2C:51-2(a)(1), prior to the adjudication of the tenure charges. Remaining at issue, however, was respondent's claim for back pay and emoluments for the period beginning with the date of his suspension, October 29, 1996, to the date of respondent's voluntary resignation on December 1, 1996.

Respondent having failed to appear at hearing and having failed to keep in touch with his attorney, the ALJ granted summary judgment to the District, accepting the allegations set forth as uncontroverted and concluding that the District demonstrated a *prima facie* case of illegal drug and paraphernalia possession which constituted unbecoming behavior for a tenured teacher. ALJ ordered respondent dismissed from his position, effective October 29, 1996, the date of certification of charges.

Commissioner concurred with the ALJ that the uncontroverted allegations contained in the pleadings advanced by the District with respect to respondent's arrest by the State Police and subsequent charge of illegal drug and paraphernalia possession constituted unbecoming conduct and mandated his termination from his tenured position. Commissioner found that respondent could not claim entitlement to back pay and emoluments for the period of his suspension pursuant to *N.J.S.A.* 18A:6-8.3. Commissioner noted that had respondent not forfeited his tenured position in May 1997, his termination as a result of this decision would be effective as of the date of this decision, not the date of certification of charges as stated by the ALJ.

AUGUST 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 11677-96

IN THE MATTER OF THE TENURE HEARING OF TAFT REED, STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY

Gregory G. Johnson, Esq., for Petitioner State Operated School District of Newark

Robert T. Pickett, Esq., for Respondent Taft Reed

BEFORE **MARIA MANCINI LaFIANDRA**, ALJ:

Record Closed: July 2, 1997 Decided: July 10, 1997

STATEMENT OF THE CASE

The State Operated School District of Newark, Petitioner, filed tenure charges alleging unbecoming conduct against Taft Reed, Respondent, a tenured physical education teacher. Pursuant to the Certificate of Determination of Tenure Charges and Suspension of Employee without Pay, the District

Superintendent authorized the filing of charges with the Commissioner of Education and suspended Respondent without pay on October 29, 1996.

Respondent filed answer to the Statement of Charges on December 13, 1996. The matter was transmitted to the Office of Administrative Law on December 23, 1996, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 and was scheduled for a hearing on May 12 and 14, 1997. Prior to those dates, counsel for the District advised the undersigned Administrative Law Judge (ALJ) that Respondent had resigned, effective December 1, 1996, and requested a telephone conference to discuss the implication of the resignation on this tenure removal case.

Respondent's counsel represented that his client wished to resolve the matters; he had no desire to have a hearing. Counsel agreed to prepare a Stipulation of Settlement, a copy of which was received by the ALJ on April 14, 1997. The executed agreement was to be submitted on or about April 16, 1997; however, counsel requested several extensions which were granted. On May 14, 1997, both counsel were present before this ALJ on another matter in which both were involved and which had been scheduled in place of the instant matter on the representation that this matter would be settled. At that time, counsel for Respondent advised opposing counsel that he had been unable to secure Respondent's signature on the proposed agreement because Respondent had not been in contact with his attorney since some time in March, despite counsel's efforts to reach him which included an attempt to visit Respondent at home.

Counsel was instructed to contact his client by certified mail, return receipt requested, to advise him that if an executed agreement was not submitted by May 28, 1997, a summary decision would issue. Despite the warning of counsel that such a decision could adversely affect Respondent's

eligibility to receive continued pension benefits, Respondent did not sign the agreement until well after the deadline, and then only with unilateral modifications to which the District would not agree.

On May 14, 1997, Respondent entered a guilty plea in Superior Court to one count of theft by deception, a crime in the third degree. (*N.J.S.A.* 2C:20-4). The plea resulted in a forfeiture pursuant to *N.J.S.A.* 2C:51-2(a)(1), which rendered the tenure charges in the instant matter moot, as did the resignation of December 1, 1996, insofar as a determination in favor of the District would have resulted in termination. There are, however, outstanding issues of reimbursement and sick leave, according to counsel, for the period between October 29 and December 1, 1996, resolution of which a determination in this matter is required, according to counsel for the District.

Reed has been uncooperative in making himself available to his attorney; he has also failed to appear at scheduled times for hearing, albeit he was unaware of the dates and times of the hearing on account of his failure to keep in touch with his attorney, despite counsel's efforts to reach him; he failed to execute the Stipulation of Settlement in a timely manner. Accordingly, the allegations set forth in the verified pleadings are accepted as uncontroverted; therefore, they form the factual basis for summary decision in this matter.

FINDINGS OF FACT

I incorporate the following uncontroverted allegations in the pleadings as the factual determinations in this matter.

1. On or about January 29, 1993, Reed was arrested by the State Police for possession of a controlled dangerous substance (cocaine) in violation of

N.J.S.A. 2C:5-2 and 2C:35-10; and conspiracy to distribute a controlled dangerous substance (marijuana) in violation of *N.J.S.A.* 2C:5-2 and 2C:35-5a(1). (*See* State Police Investigation Report, including certified lab report attached hereto as Exhibit 1).

2. On May 18, 1993, Respondent was indicted by a Bergen County Grand Jury charging him with, among others, conspiracy to possess a controlled dangerous substance (cocaine) in violation of *N.J.S.A.* 2C:5-2 and 2C:35-10.

3. On or about April 15, 1994, by resolution of the Newark Board of Education, Respondent was suspended without pay pending the resolution of his indictment.

4. On October 14,1993, Respondent entered a guilty plea to possession of a controlled dangerous substance, *N.J.S.A.* 2C:35-5a(1)(g)(3). Respondent was then sentenced to two years' probation.

5. On March 9, 1994, the District notified Respondent of the automatic forfeiture of his teaching position. Respondent then sought to withdraw his guilty plea. By Order dated April 11, 1994, Superior Court Judge George Parsons permitted Respondent to withdraw his guilty plea because the Prosecutor's Office failed to advise him that his guilty plea would result in forfeiture of his teaching position. Respondent's attorney then filed a motion to suppress the evidence. The Court granted the motion on April 24, 1994, based upon the lack of probable cause by the State Police to search Respondent. On May 10, 1995, the Court dismissed the Indictment and Complaint against Respondent.

6. On September 8, 1995, the State District Superintendent suspended Respondent with pay pending the filing of tenure charges.

Tenure charges were filed and Reed was suspended without pay on October 29, 1996.

DISCUSSION AND CONCLUSIONS

A contested matter before an ALJ may be disposed of by summary decision using the same standard applied in Superior Court for summary judgment. *N.J.A.C.* 1:1-12.5. Recently, the New Jersey Supreme Court adopted the federal standard of review which encourages "trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 541 (1995). As a result of this ruling, the party opposing the motion for summary judgment must present a *prima facie* case in keeping with his burden of proof in order to thwart the motion. When, however, the evidence is so one sided that one party must prevail as a matter of law, summary judgment is appropriate. *Id.* at 540 (citation omitted).

In the instant case, the allegations contained in the pleadings are supported by documentary evidence, including a State Police Investigation Report, a request for Examination of Evidence by the State Police laboratory and a certified laboratory report.

The tenure charge of unbecoming conduct is based on an incident in which Respondent was arrested by the State Police and charged with illegal drug possession after a search of Reed disclosed that he had three bags of cocaine, three crack pipes and other drug paraphernalia in his possession. Reed also admitted to being in possession of these items.

I **CONCLUDE** that Petitioner has demonstrated a *prima facie* case of illegal drug and paraphernalia possession which constitutes unbecoming behavior for a tenured teacher. Since the evidential materials are uncontroverted either by way of a verified document executed by Respondent or by testimony, summary decision is appropriate in this matter.

Accordingly, Petitioner's oral application for summary decision made on May 14, 1997 and discussed with counsel for both sides at length during a telephone conference on July 2, 1997, is **GRANTED**. The tenure charges have been sustained and termination is appropriate.

Accordingly, it is hereby **ORDERED** that Mr. Reed's employment be and hereby is terminated, effective October 29, 1996.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 10, 1997
DATE

Maria M. LaFiandra
MARIA MANCINI LaFIANDRA, ALJ

Receipt Acknowledged:

July 16, 1997
DATE

D N Centanaites/fp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 11677-96
AGENCY DKT. NO. 520-11/96

IN THE MATTER OF THE TENURE	:	
HEARING OF TAFT REED, STATE-	:	
OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his independent review of the within record, the Commissioner concurs with the Administrative Law Judge (ALJ) that the uncontroverted allegations contained in the pleadings advanced by the District with respect to respondent's arrest by the State Police and subsequent charge of illegal drug and paraphernalia possession constitutes unbecoming conduct for a teacher, and mandates his termination from his tenured position. As such, respondent can claim no entitlement to back pay and emoluments for the period of his suspension pursuant to *N.J.S.A.* 18A:6-8.3.[1] The Commissioner observes, however, that, contrary to the finding of the ALJ herein, respondent's termination from his position as a consequence of this determination would be effective as of the date of this decision, rather than the date the District certified tenure charges against him.[2]

[1] It is noted that the sole period of time at issue herein is that from October 29, 1996, when the District certified charges against respondent and suspended him without pay, to December 1, 1996, when respondent voluntarily resigned from his position.

[2] In that respondent forfeited his employment, pursuant to *N.J.S.A.* 2C:51-2(a)(1), on May 14, 1997, removal from his position at this point in time is a moot issue.

Accordingly, the initial decision granting summary decision to the District, as modified herein, is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 20, 1997
DATE OF MAILING AUGUST 20, 1997

430-97

430-97

IN THE MATTER OF THE TENURE	:	
HEARING OF VALERIE GARDNER,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF	:	DECISION
HUMAN SERVICES.	:	
	:	

SYNOPSIS

Petitioner, Department of Human Services, certified tenure charges of unbecoming conduct/insubordination against special education teacher for her continued refusal to comply with directives that her students participate in regular education classes as part of the school inclusion program.

ALJ determined that although respondent was acting based on her honest belief in what was best for her students, insubordination and unbecoming conduct on behalf of any teacher cannot be countenanced since it disrupts the educational process and interferes with the basic purpose of the school. Respondent was found guilty of the charges; however, in view of her good disciplinary record, her reputation as a very good teacher, and her acting in good faith, the ALJ concluded that suspension without pay for a period of ten days was the appropriate penalty.

Commissioner concurred with the ALJ that the Department of Human Services sufficiently demonstrated that respondent was guilty of unbecoming conduct by her continued refusal to comply with direct orders that she participate in the school inclusion program, and that such conduct additionally constituted insubordination. Commissioner found that petitioner's decision to suspend respondent for ten days without pay was fair and appropriate.

AUGUST 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8512-96

AGENCY DKT. NO. 350-8/96

NEW JERSEY DEPARTMENT OF HUMAN SERVICES, OFFICE OF EDUCATION,

Petitioner,

v.

VALERIE GARDNER,

Respondent.

Jennifer Meyer-Mahoney, Deputy Attorney General, for petitioner (Peter Verniero, Attorney General of New Jersey, attorney)

Joseph A. Carmen, Esq., for respondent

Record Closed: May 30, 1997 Decided: July 11, 1997

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Department of Human Services, Office of Education, brings charges against respondent, a tenured teacher holding the position of Teacher 1, for unbecoming conduct. The matter was transmitted to the Office of Administrative Law (OAL) on September 30, 1996, for hearing as a contested case. The matter was scheduled for a telephone prehearing conference to

be held on November 19, 1996. Because of an attorney conflict, the telephone prehearing conference was rescheduled for November 20, 1996. On that date a prehearing conference was held and a Prehearing Order was entered on December 13, 1996, settling the procedures to be followed in this matter. The hearing was scheduled for February 7, 1997.

On February 7, 1997, the matter was heard and concluded. However, the record remained open to permit the attorneys the opportunity to submit closing arguments. Attorney for respondent submitted a written closing argument on March 11, 1997. When no closing argument was submitted by Deputy Attorney General Gottlieb who was representing petitioner at that time, various contacts were made to determine when such closing argument would be submitted. Eventually on May 21, 1997, a Letter Order was entered ordering that the record be closed as of May 30, 1997. When no additional submission was received by that date, the record closed on May 30, 1997.

FACTUAL DISCUSSION

Respondent does not deny that she refused to comply with orders and directives of her immediate supervisors to bring students assigned to her classroom to participate in regular education classes as part of the school inclusion program. Respondent challenges these orders and directives as being unreasonable since there were no written guidelines covering the implementation of the program, and the program was not included in the students' IEPs. Respondent also felt the that it was not in the best interests of and was detrimental to the students assigned to her class, and the directives were not being applied on an equal basis since educational technicians who refused to take part were not disciplined.

Barbara Newman testified that she is the School Administrator for Cumberland and Gloucester Day Training Centers and is respondent's supervisor. She holds the title Supervisor of Education Program I. Her duties and responsibilities are that of a school principal and she is responsible for the entire educational programs at both Centers. She indicated that respondent is a Teacher 1 at the Cumberland campus. Respondent runs a good classroom and does a good job.

Ms. Newman testified that the present policy of the Office of Education is for the mainstreaming of all students and for school inclusion. Its goal is to give student's access to all activities and facilities in the school and the community. It is believed that community integration and meaningful vocational training are essential for the inclusion of students in their communities. Under this theory all children are entitled to participate in regular education programs.

Ms. Newman indicated that she is a proponent of school inclusion. She identified a Curriculum Guide for Educational Programs in the Department of Human Services (P-1). This Curriculum Guide provides for the utilizing of community settings for training of skills, for student outings to teach the use of community recreation and leisure facilities and opportunities, to provide opportunities for student interaction with handicapped and non-handicapped students and families in the school and in the community, and to model appropriate interactions with handicapped students reflecting the manner in which non-handicapped students are treated. Ms. Newman also identified an Educational Mission Statement for the Cumberland Day Training Center (P-2). This Educational Mission Statement indicates that the goal of the school is to give students access to all activities and facilities in the school and in the community and that community intergration and meaningful vocational training are essential for the inclusion of students in their communities.

Ms. Newman identified a series of memos (P-3 through P-9) which indicate that 15 of the 16 Day Training Centers throughout the State are involved in school inclusion as part of their educational programming.

Ms. Newman testified that school inclusion was taking place prior to her being assigned to Cumberland and Gloucester. School inclusion or inclusion of the students in the regular education program can be requested by anyone, but the child study team must agree to it and the parent must consent to it. The teacher is primarily responsible for carrying out school inclusion. When school inclusion is appropriate it is mandatory for teachers.

Ms. Newman testified that the only teacher in the Cumberland Day Training Center who refused to participate in school inclusion of students in regular classrooms was respondent. This refusal started at the end of October or beginning of November 1995. Ms. Newman decided not

to mandate participation until the whole process was explained. As a result, in March 1996 an in-service was held to explain school integration and inclusion. She identified an outline for the in-service which she presented orally, and which respondent attended. Ms. Newman identified her outline for the presentation which she made (P-10). She testified that it was made clear at the in-service that it was mandatory for teachers to participate. It was also included in paragraph 10 of respondent's Performance Agreements for 1995 (P-11) and 1996 (P-12) wherein respondent was required to organize and provide appropriate community based instruction.

Ms. Newman testified that on March 27, 1996, she gave respondent direct order to accompany one of the students assigned to her to a school inclusion program, and respondent refused to go. As a result Ms. Newman prepared a memo to respondent dated March 29, 1996, concerning this refusal (P-13). She then met with respondent, a representative of the union and the Executive Director of the union in April 1996. At that meeting, respondent agreed to participate in school inclusion but on a rotating basis. As a result, a schedule of participation with the students in respondent's class was arranged on May 16, 1996 (P-14). She indicated that respondent never participated. She was scheduled to attend with a student on Thursday, May 6, 1996 (P-14), but she refused.

Ms. Newman testified that respondent's refusal was beginning to affect the morale of the other members of the staff. Ms. Newman issued a memo to the Employee Relations Officer on May 6, 1996 (P-15), and also issued a memo dated May 9, 1996, requesting disciplinary action for a refusal on the part of respondent which occurred on that day (P-16). Ms. Newman indicated that the students scheduled for the school inclusion program missed the program because of no other staff member being available. As a result, the student missed the opportunity for socialization with regular education students.

Ms. Newman testified that another incident occurred on May 14, 1996. Respondent again refused to participate in regular classroom inclusion (P-17). She again refused to participate on May 20, 1996 (P-18).

Ms. Newman also identified a memo dated May 20, 1996, when Ms. Newman gave respondent a direct order to go with a student and respondent answered no. As a result, Ms.

Newman gave respondent a written warning for insubordination, refusal to accept a reasonable order (P-20). Respondent's only response to this was "no comment". Ms. Newman indicated that when she indicated that she gave this written warning to respondent, she asked respondent if she would go in the future and respondent said "no". (P-21). Respondent again refused a direct order on May 22, 1996 (P-22). Respondent was again given a direct order to accompany a student on Wednesday, May 29, 1996 and she again responded "no". (P-23). As a result she was given an official reprimand for the incident of May 21 and May 22, 1996 (P-24). Ms. Newman testified to additional incidents of respondent's refusal to go and that respondent continued to refuse to participate in the school inclusion program through June 1996 (P-28 and P-29).

On cross-examination, Ms. Newman testified the students in respondent's class are severely and profoundly impaired. They are ages 10 to 13 but their intellectula levels range from 11 months to approximately two years of age. They attend age-appropriate fifth or sixth grade regular classes. She indicated that school inclusion is mandatory and teacher involvement is one of her requirements because the teacher is an educator. She indicated that respondent is involved in community inclusion but the problem is school inclusion. She indicated that technicians also participate in school inclusion in most Day Training Centers but one technician at Cumberland Day Training Center asked not to go. Technicians are in the classroom in the absence of teachers. She admitted that respondent asked for guidelines and before she would participate in school inclusion and, as a result, Ms. Newman gave the in-service presentation. She also referred respondent to the Educational Mission Statement for the Cumberland County Day Training Center (P-2) and to the provisions of *N.J.A.C.* 6:28. School inclusion is also in one of the student's IEPs.

Cynthia Brooks who was subpoenaed to be a witness, testified that she has been employed by Cumberland Day Training Center since July 1992. She has been a teacher since September 1980. She has known respondent for four and one-half years. She teaches a class in early elementary education, ages 3 to 7 and she take part in the inclusion program, somewhat. She testified that she initially recommended a student who was chosen to go to school inclusion. Respondent goes on field trips to the supermarket and library. She also indicated that community inclusion is not necessarily in the IEP. She explained that a school can provide more than the IEP but it cannot deliver less. She indicated that she views school inclusion as part of her job.

Donald Mangus, New Jersey Department of Human Services, Assistant Director of Employee Relations, testified that he administers the employee relations function. He has been with the Department of Human Services since 1976. He testified that he is familiar with respondent. He identified the Disciplinary Action Program of the Department (P-30). The booklet contains various infractions and recommended penalties. On page 5 of this document, insubordination is defined as intentional disobedience or refusal to accept reasonable order. It employs progressive discipline which he described as a corrective process. It is the imposition of successive steps of increasing penalties to try to correct an individual's behavior, and it was applied in this case. It is for this reason that the original 30 day suspension sought as a penalty in this matter has been reduced to a 10 day suspension. On cross-examination, Mr. Mangus indicated that the recommended penalties are firm and the Department attempts to follow them closely to avoid disparate treatment.

Valerie A. Gardner testified that she had a Bachelor of Science degree in Special Education and has a Teacher of the Handicapped certificate. She has been at Cumberland School for ten and half years. She was only subject to discipline about one year ago and she was given a written warning for violation of the sick leave policy.

Respondent testified that prior to March 1996, she accompanied a student one time. Her student are ages 12 to 14 and their intellectual level is such that they are exempt from any testing. They are severely and profoundly impaired and they have an I.Q. of 20 to 30, but they cannot be tested. Her job is very physical and it involves physical therapy, occupational therapy, positioning of the child, changing of diapers and taking care of medical problems.

Respondent testified that she is familiar with Barbara Newman. She indicated that prior to Barbara Newman, the program of school inclusion ceased. However, Barbara Newman said that the program is mandatory. When Ms. Newman made that statement, respondent asked her for something that said that the program is mandatory, and she has never received anything. She recalls saying that she would go to Superior Court to challenge the program. She refused to participate because she never received anything in writing. She indicated that it is reasonable to take children for school inclusion, but there are no guidelines as to what is reasonable. Presently

there is one student who attennds fifth grade music class, but he just sits there and there is no interaction with other students or with the teacher of the handicapped.

Respondent admitted to saying that she had no comment with respect to one of the incidents because she did not want to get into a confrontation with Ms. Newman. She asked to have a meeting with Ms. Newman and to iron things out but has still not received anything in writing. Another reason why she has refused to participate in school inclusion is because if she is supposed to be carrying out school inclusion, it should be brought up at an IEP meeting. If it is in the IEP, it causes people to be responsible and to carry out the provisions of the IEP.

On cross-examination respondent questioned the legality of the orders requiring that she participate in school inclusion. She testified that the child study team must okay school inclusion. She also testified that she has been at Cumberland Day School for ten and half years and has never received a direct order. She admitted to attending the in-service which explained the program and why, and she indicated that she tape-recorded it.

On rebuttal Ms. Newman identified two IEPs of two special education students in respondent's classes who are required to participate in mainstream or regular education classroom settings (P-31 and P-32).

LEGAL DISCUSSION AND ANALYSIS

The Commissioner of the Department of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. The discipline of tenured school employees is authorized by *N.J.S.A.* 18A:6-10, which generally provides that no tenured school employee shall be dismissed or reduced in compensation during good behavior and efficiency except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after written charges and a hearing.

The charges in this matter which were certified on August 14, 1996, by the Office of Education, New Jersey Department of Human Services, allege that respondent, a Teacher 1 at the Cumberland Day Training Center, Vineland, New Jersey, is charged with conduct unbecoming a

tenured employee. The specifications for the charges are that on June 11, 1996, she refused to accompany a student in her classroom to the school integration program, and continued to refuse the reasonable order made by her supervisor to participate in the community-based instruction program for the pupils at Cumberland Day Training Center. It is asserted that this constitutes conduct unbecoming a tenured employee.

Generally, in order for the charging party in a tenure hearing to prevail, the truth of the charges must be established by a preponderance of the credible evidence. *In re Phillips*, 117 *N.J.* 567, 575 (1990); *In re Polk*, 90 *N.J.* 550, 560 (1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962). In order to determine whether the petitioner met the elements of the charge in this matter, it is necessary to discuss what is intended by the term, "unbecoming conduct". There is no single definition of the term. In *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384-385 (1957), it was made clear that the touchstone of the charge is a teacher's fitness to discharge the duties and functions of the office or position. *In re Tenure Hearing of Grossman,* 127 *N.J. Super*. 13, 28-29 (App. Div. 1974), certif. denied, 65 *N.J.* 292 (1974).

There are numerous cases in which specific conduct was found to be unbecoming conduct. For example, the use of physical force by a teacher to maintain discipline was held to be unbecoming conduct. *In re Fulcomer*, 93 *N.J. Super*. 404 (App. Div. 1967). A teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct. *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super*. 737, (App. Div. 1988).

Outside the field of education, unbecoming conduct on the part of public employees is conduct which adversely affects the morale or efficiency of the agency of which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in the operation of governmental services, or which violates an implicit standard of good behavior. See, *City of Asbury Park v. Dep't. of Civil Service*, 17 *N.J.* 419 (1955). A finding of unbecoming conduct does not require that any specific rule or regulation have been violated but may be based primarily on a violation of an implicit standard of good behavior. *In re Emmons*, 63 *N.J. Super*. 136, 140 (App. Div. 1960); *Newark v. Massey*, 93 *N.J. Super*. 317, 323 (App. Div. 1967).

> In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), affirmed o.b. 131 *N.J.L.* 326 (E.&A. 1944). In that matter, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. See, *Redcay v. State Board of Education*, 128 *N.J.L.* 281, 282 (Sup. Ct. 1942).

The charges in this matter appear to indicate that the unbecoming conduct which respondent is alleged to be guilty of is insubordination and failure to cooperate in providing for the education of the students in respondent's charge. Insubordination, which is the disobedience and refusal to observe the orders and directions of duly constituted authority, has long been recognized as a valid ground for teacher discipline. *See, Harrison v. State Board of Education*, 134 *N.J.L.* 502 (Sup. Ct. 1946); *Cheeseman v. Gloucester City*, 1 *N.J. Misc.* 318 (Sup. Ct. 1923). The Court's decision in *Cheeseman* involved a school principal who refused to obey an order of transfer to another school on the basis that the transfer was illegal. In that matter, the Court indicated that Ms. Cheeseman could have accepted the transfer under protest pending her appeal, but instead chose to assume that her transfer was illegal and refused to comply. The Court indicated that in doing so she acted at her peril and that, since the order of transfer was determined to be legal, she was guilty of insubordination.

The language of the Court in *Pietrunti v. Bd. of Ed. Brick Tp.*, 128 *N.J. Super.* 149, (App. Div. 1974), cert. den. 419 *U.S.* 1057 (1974); certif. den. 65 *N.J.* 573 (1974), is instructive in the present matter. In that case, a tenured teacher who was the president of the local education association severely criticized the board of education and superintendent in an orientation day speech. The Court indicated that a teacher is expected to exhibit loyalty to the district in which he or she is employed and to cooperate with the administration in seeking the educational goal. A teacher is expected to show a reasonable respect for the authority of his or her employer. *Id.* at 165; *see also, Bd. of Educ., Tp. of Teaneck, Bergen County v. Wilburn*, 91 *N.J.A.R.*2d (EDU) 48, aff'd 92 *N.J.A.R.*2d (EDU) 328; aff'd A-4663-91 (App. Div., April 12, 1993). In that case, a teacher was found guilty of acts of insubordination when he willfully failed to comply with the

legitimate request of his supervisor to provide him with lesson plans as required by the policy of the district and the professional improvement plan to which he agreed.

In the present matter, although at one point in her testimony respondent denied that she was ever given a direct order, she does not deny that she refused to comply with orders and directives of her immediate supervisors to bring students assigned to her classroom to participate in regular education classes. Respondent challenges these orders and directives as being unreasonable since there were no written guidelines covering the implementation of the program, and the program was not included in the students' IEPs. Respondent also felt the that the directives were not being applied on an equal basis since educational technicians who refused to take part were not disciplined. She argues that the school inclusion program was not included in child study team evaluations until 1996 (P-31). She also felt that the school inclusion program was unreasonable since it is unreasonable to expect a 13 or 14 year old child with the mental capacity of a one or two year old because of a severe mental disability to take part in a seventh or eighth grade class. She pointed to the testimony of Cynthia Brooks who indicated that there is a lack of interaction with the regular class and the students just sit there until the class is over. Respondent also points out that Ms. Newman gave no specific evidence as to the relevancy of the program to the specific students in respondent's class who were affected. Finally, respondent argues that she did not refuse to participate for any personal gain or benefit, but only because of her honest beliefs.

The children assigned to respondent are severely disabled and are entitled to special education and related services under the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.A.* §§1400-1485. The primary purpose of this Act is to ensure that all disabled children will be provided a free and appropriate public education. 20 *U.S.C.A.* §1400(c). Such an education is provided through an individualized education plan (IEP), which is the cornerstone of the Act. The IEP is a written statement prepared by the school child study team, in consultation with parents, to address the unique needs of a particular child. 20 *U.S.C.A.* §1401(20). The Act makes it clear that removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 *U.S.C.A.* §1412(5)(B). In *Oberti v. Bd. of Educ. of Clementon*, 995 *F.*2d 1204 (3rd Cir. 1993),

the Third Circuit Court of Appeals made it clear that mainstreaming is the policy of the Act and analyzed the factors that must be considered by a child study team in making the determination whether the mainstreaming policy has been complied with.

It is not necessary to analyze the Act, the *Oberti* decision, or the specific facts related to children assigned to respondent in order to determine whether respondent was justified in refusing to carry out the orders and directives of her superiors. To hold a due process hearing in an effort to determine whether respondent should comply with an order or directive to bring a child to a regular education classroom would be a substantial waste of time and effort. Certainly, respondent could make known to the child study team and her superiors her specific objections to having those children in her charge participate in regular education classrooms. She should do this through reasoned discussions with the child study team, her superiors and the parents of the child. However, mainstreaming is the policy of the IDEA, and the removal of children with disabilities from the regular educational environment is only permitted when the disability is such that education in regular classes cannot be achieved satisfactorily. 20 *U.S.C.A.* §1412(5)(B). Since this is the case, it is up to the child study team, in consultation with the parents, to decide that a child with disabilities should not participate in regular education classes. It is not up to the teacher to unliaterally make this determination. Therefore, I **FIND** that respondent's refusal on June 11, 1996, to accompany a student in her classroom to the regular education classroom integration program of the Cumberland Day Training Center is clearly insubordinate and unbecoming conduct on her part. I **FIND** that respondent's continued to refusal to comply with the reasonable order made by her supervisor to participate in the community-based instruction program for the pupils at Cumberland Day Training Center is also insubordinate and unbecoming conduct on her part. I **FIND** that petitioner's dealings with educational technicians and their alleged refusal to participate is irrelevant as to this issue since respondent is an educator and the educational technicians are classroom aides. Therefore, I **CONCLUDE** that respondent is guilty of the charge of unbecoming conduct in this matter.

The next issue to be decided is the appropriate remedy or penalty based on the finding of guilt in this matter. In *In the Matter of the Tenure Hearing of Elizabeth Merkooloff, School District of the Twp. of Washington*, 1980 *S.L.D.* 1370, 1371, the Commissioner stressed again

that which he previously said in *Clinton F. Smith et al. v. Bd. of Ed. of the Boro of Paramus*, 1968 *S.L.D.* 62:

> The principal enunciated by the Court in *Bates v. Board of Education*, 72 *P.* 907 (Calif. Sup. Ct., 1903), and quoted with approval in *McGrath v. Burkhard*, 280 *P.2d* 864 (Calif. App. 1955), bears repeating here:
>
> The public schools were not created, nor are they supported, for the benefit of the teachers therein, . . . but for the benefit of the pupils and the resulting benefit to their parents and the Community at large. . . (at 67).

It was stated *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Twp. of Teaneck*, 1971 *S.L.D.* 284 at 296:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . and must accept the consequences of his actions.
>
> * * *
>
> The Commissioner's basic and fundamental concern must be in the welfare of the students in the Teaneck School System and, therefore, in the proper administration of that School System.

In this matter, it is clear to me that respondent is a very good teacher with a minimal disciplinary record. As I alluded at the hearing, the care and assistance which she provides to the severely and profoundly impaired students in her charge must be attended by unimaginable difficulties. I agree with respondent's counsel that respondent does not appear to have anything to gain by the position she took in this matter, and that she was acting based on her honest belief in what is best for her students. However, insubordinate and unbecoming conduct on the part of any teacher cannot be countenanced since it disrupts the educational process and interferes with the basic purpose of the school. Under normal circumstances, I would have considered a much more severe penalty than a ten day suspension. However, in view of respondent's good disciplinary record, her reputation as a very good teacher, and her good faith belief that she was acting in the best interests of her students, I **FIND** and **CONCLUDE** that respondent should be suspended for a period of ten days based on the finding of guilt in this matter.

DECISION AND ORDER

Based upon the foregoing I **FIND** respondent guilty of the charge of unbecoming conduct and I **ORDER** the imposition of a penalty of a ten day suspension.

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

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

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

July 11, 1997
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

July 16, 1997
DATE

Receipt Acknowledged:

D N Centanaitis/jc
DEPARTMENT OF EDUCATION

JUL 17 1997
DATE

Mailed to Parties:

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lam

APPENDIX

LIST OF WITNESSES

For petitioner:

Barbara Newman

Cynthia Brooks

Donald Mangus

For respondent;

Valerie A. Gardner

LIST OF EXHIBITS

For petitioner:

P-1 A Curriculum Guide for Educational Programs, Department of Human Services (1988)

P-2 Educational Mission Statement

P-3 Correspondence from Carol Graff, dated June 7, 1996

P-4 Correspondence from Maureen Malik, dated June 10, 1996

P-5 Correspondence from Jane Feibish, dated June 6, 1996

P-6 Memorandum from Kate Wolff, dated June 7, 1996

P-7 Memorandum from Rose Mary Strodel, dated June 11, 1996

P-8 Memorandum from Jo-Ann Colon

P-9 Memorandum from Mary K. Smith, dated July 23, 1996

P-10 Notes of In-Service presentation entitled School Integration

P-11 Performance Agreement, dated June 19, 1995

P-12 Performance Agreement, dated May 6, 1996

P-13 Barbara Newman memo, dated March 29, 1996

P-14 Barbara Newman memo to respondent, dated May 6, 1996

P-15 Barbara Newman memo to Ms. Askie, dated May 6, 1996

P-16 Barbara Newman memo, dated May 9, 1996

P-17 Lynette Solomon memo, dated May 13, 1996

P-18 Lynette Solomon memo, dated May 20, 1996

P-19 Barbara Newman memo, dated May 20, 1996

P-20 Barbara Newman memo, dated May 21, 1996

P-21 Barbara Newman memo, dated May 21, 1996

P-22 Barbara Newman memo, dated May 22, 1996

P-23 Barbara Newman memo, dated May 28, 1996

P-24 Notice of Official Reprimand, dated May 28, 1996

P-25 Lynette Solomon memo, dated June 5, 1996

P-26 Barbara Newman memo, dated June 5, 1996

P-27 Barbara Newman memo, dated June 6, 1996

P-28 Lynette Solomon memo, dated June 11, 1996

P-29 Barbara Newman memo, dated June 12, 1996

P-30 New Jersey Department of Human Services, Disciplinary Action Program booklet

P-31 IEP of M.K., dated October 17, 1996

P-32 IEP of M.K., dated October 13, 1995

OAL DKT. NO. EDU 8512-96
AGENCY DKT. NO. 350-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF VALERIE GARDNER,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF	:	DECISION
HUMAN SERVICES.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Department of Human Services has sufficiently demonstrated that respondent is guilty of conduct unbecoming a teaching staff member by her continued refusal to comply with direct orders that she participate in the school inclusion program, and that such conduct additionally constitutes insubordination. The Commissioner finds that the Department's decision to suspend respondent for ten days without pay is fair and appropriate.

Moreover, notwithstanding the ALJ's consideration of respondent's "***good faith belief that she was acting in the best interests of her students***" (Initial Decision at p. 12) in determining the appropriate penalty in this matter, the Commissioner stresses that, as the ALJ instructs, where a student's educational program is guided by the Individuals With Disabilities Education Act (IDEA), it is the student's parents and the school's child study team, in

consideration of relevant local and State policies and in collaboration with school staff, who determine a student's educational plan. "It is not up to the teacher to [unilaterally] make this determination." (*Id.* at p. 11)

Accordingly, the conclusions and order of the ALJ in his initial decision are adopted for the reasons expressed therein. Respondent is directed to serve her ten-day suspension, if she has not already done so.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 20, 1997
DATE OF MAILING AUGUST 20, 1997

431-97

EILEEN AUERBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MORRIS PLAINS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured social worker, appealed Board's determination to terminate her employment by a reduction in force and the contracting of her child study team services to Morris County Educational Services Commission, alleging such action was violative of *N.J.A.C.* 6:28-3.1(b).

ALJ found that pursuant to regulation, the Board is prohibited from contracting with an Educational Services Commission for the services of a core member of the child study team. The ALJ concluded that petitioner was entitled to full reinstatement for the 1996-97 year with no loss of rights and benefits and to restoration of retroactive compensation for the 1996-97 school year, less mitigation.

Commissioner adopted findings and determination in initial decision as his own and directed reinstatement of petitioner with back pay and emoluments, as appropriate, for the 1996-97 school year and thereafter. Commissioner additionally emphasized that the contracts and joint agreements through which a local board of education may provide child study team services if it elects not to employ its own team must be with *public* entities such as ESC's, jointure commissions or other school districts.

AUGUST 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9056-96
AGENCY DKT. NO. 284-7/96

EILEEN AUERBACH
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MORRIS PLAINS,
Respondent.

Louis P. Bucceri, Esq., for Petitioner
(Bucceri & Pincus, attorneys)

Paul H. Green, Esq., for Respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: June 11, 1997 Decided:, July 16, 1997

BEFORE: **MARIA LaFIANDRA**, ALJ:

Statement of the Case

Petitioner in this matter is appealing the decision of Respondent to terminate her tenured employment by a reduction in force (RIF) pursuant to *N.J.S.A.* 18A:28-9 and to contract with an Educational Services Commission for reasons of economy. The matter was received by the Department of Education on July 17, 1996; it was transmitted to

the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13 and was received by OAL on August 26, 1996.

Petitioner asserts a violation of *N.J.A.C.* 6:28-3.1(b) which mandates that the members of the CST be employees of the local district, as well as a violation of her tenure and reemployment and seniority rights pursuant to *N.J.S.A.* 18A:28-5, 11 and 12.

The parties agreed to certain facts as set forth below and to proceed with by way of motion and cross motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5.

Findings of Fact

The following facts were stipulated by the parties and are incorporated herein as the factual determinations in this matter. Both parties reserved their right to dispute the relevance of any fact stipulated as well as the weight to be attributed to any particular fact in the context of this litigation.

1. Petitioner Auerbach's employment history as an employee of the Board is as follows:

April-June, 1992	per diem Social Worker
1992-93	Social Worker - part time
1993-94	Social Worker - part time
1994-95	Social Worker - part time
1995-96	Social Worker - part time

2. Petitioner Auerbach was certified as a school Social Worker by the New Jersey Department of Education in April, 1977. (J-2)

3. Petitioner Auerbach alone performed all School Social Worker services in connection with the Respondent's Child Study Team throughout her years of employment.

4. Petitioner achieved tenure in Respondent's district by virtue of her service as a School Social Worker.

5. On June 11, 1996, Respondent voted to abolish the position of School Social Worker and terminate Petitioner's service as a district employee effective June 30,1 996.

6. Respondent's decision to abolish Petitioner's position was motivated by a desire to economize by contracting with the Morris County Educational Services Commission ('MCESC") for Child Study Team Social Worker services as proposed by Respondent's Superintendent of Schools. (J-1).

7. For the 1996-97 school year, the only Social Worker services provided in Respondent's district are those being provided by the MCESC, including all Child Study Team Social Worker services.

8. The individual performing school Social Worker service to the Child Study Team in Morris Plains for the 1996-97 school year received her School Social Worker certificate from the New Jersey Department of Education in May 1996.

9. For the 1996-97 school year, school Social Worker services have been provided to Morris Plains through its contract with the MCESC on a three (3) day per week, or .6 annual part-time basis.

10. MCESC provided social worker services to the Morris Plains district from August, 1996, through the present and will continue to do so through June 30, 1997, at least. For the period September, 1996, though June, 1997, Respondent has paid $23,880 to the

MCESC for Child Study Team Social Worker services. (J-4 through J-8).

11. Petitioner is the only person on the preferred eligibility seniority recall list for the position of Social Worker in the Morris Plains school district.

Discussion and Conclusions

A contested matter before an Administrative Law Judge may be disposed of by summary decision employing the standard applied in Superior Court for summary judgment. *N.J.A.C.* 1:1-12-5. A matter is ripe for summary decision when there is no genuine issue of material fact to be decided. *R.* 4:46-2.

In deciding such a motion, the judge is required to engage in analyzing and evaluating the evidential materials in light of the burden of persuasion which would apply if the matter went to trial. The nonmoving party must demonstrate that an issue of fact substantial enough to lead a rational finder of fact possibly to find in favor of the nonmoving party exists. *Brill v. Guardian Life Ins. Co. of Am.*, 42 *N.J.* 520, 540.

In this case, the parties prepared and executed a joint stipulation of the facts surrounding the issues in this matter; both conceded that only a decision on the applicable law remained; therefore, summary decision is appropriate. Petitioner filed a motion for summary decision on or about April 18, 1997. Respondent's response and Cross-Motion for summary decision followed.

In seeking summary decision, Petitioner, whose motion was filed first in time, relies on the statutory mandate requiring each board of education to provide for basic or "core" child study team (CST) services. The board may establish its own CST or it may contract with one or more boards of education or state agencies to provide the services. However, the statute requires that the CST consist of a school psychologist,

a learning disability teacher consultant and a school social worker. *N.J.S.A.* 18A:46-5.1. In addition, all members of the CST are required, by regulation, to be employees of the district board of education. *N.J.A.C.* 6:28-3.1(b).

Petitioner relies on three cases to support the position that a district board which determines to maintain its own CST must employ all the members of that team. In the first case, the regional board of education was compelled to reinstate the tenured members of the CST whose position had been reduced to part-time on account of a reduction in force. (RIF) The board contracted with an educational services commission for the services which had been vacated. The ALJ determined that the board never intended a reduction in force for economic reasons; its ultimate goal was to transfer the services provided by the CST to an outside provider. The initial decision was affirmed by the agency and by the Appellate Division. *Cochrane v. Watchung Hills Regional High School BOE*, 1985 *S.L.D.* 1978 (State Board of Educ.), *aff'd,* App. Div., Docket No. A2327-85T7 (12/22/86) (unpublished)

The second case, involved a tenured certified school psychologist on one of the local boards' CSTs who was subject to a RIF. Later, the board contracted with a private group to provide evaluation and diagnostic services, including psychological services. The ALJ in this case found that only when there is an existing CST, can a board contract out supplemental services, *Elson v. Hudson County Area Vocational-Technical Schools Board of Educs.*, 96 *N.J.A.R.* 2d (EDU) 229, *aff'd*, 96 *N.J.A.R.* 2d (EDU) 236.

The third case on which Petitioner relies is one which is factually most directly on point with the facts of this case. In *Vicenzo v. BOE of Twp. of Bedminster*, OAL Dkt. No. 06468-96S (Dec. 19, 1996), aff'd Commissioner of Education, February 5, 1997, Petitioner had been employed as a part-time social worker. The position was eliminated by a RIF; the district then contracted with an ESC to perform social histories. The ALJ found that the board's action violated the mandate of *N.J.A.C.* 6:28-3.1(b), which is the regulation upon which the instant matter is predicated. *Id.*

Respondent asserts that reliance on these three administrative cases is misplaced. First, Cochrane was decided before the decision in *Impey v. Board of Education of the Borough of Shrewsbury*, 142 *N.J.* 388 (1995), and, based on Respondent's analysis, is no longer good law with respect to the issue of whether the position of a tenured member of a basic CST, the members of which are employed by the district, and as defined in *N.J.A.C.* 6:28-3.1(b), can be subject to a reduction in force and the services contracted to an ESC.

Respondent also argues that the decision in *Elson* is inapposite to the instant case as well as the *Vicenzo* decision, discussed below, because the issue in *Elson* was whether a school district could contract with a private, approved clinic pursuant to *N.J.A.C.* 6:28-5.1(c)(1). Respondent makes the conclusory statement that *N.J.A.C.* 6:28-5.1, delineating the services which may be provided to district boards by approved agencies or clinics, is inapplicable to arrangements between school districts and public entities such as the ESC in this matter; however, Respondent fails to offer any analysis of the subject regulation or legal authority in support of this conclusion.

Respondent questions the relevancy of the determinations in *Cochrane* & *Elson* because they were issued before *Impey* was decided. While there is no question that a school district may effect a RIF for reasons of economy and enter into an agreement with an ESC to provide services formerly provided by an employee of the district, the issue in the case under consideration here is whether a school district can replace one member of its CST by contracting with an ESC to provide services. The services at issue here are those of a social worker, a member of the CST; the Petitioner in *Impey* was a speech correctionist.

The Court, in *Impey,* specifically found that speech correctionists are not members of the basic CST . *Id.* at 395. I find that a fair implication to be drawn from that determination is that, in light of *N.J.A.C.* 6:28-3.1(b), had the speech correctionist been a member of the core CST, the district would have been prohibited from contracting with an ESC for those services. I conclude, therefore, that, because of the

different status of the Petitioner in the instant matter and the Petitioner in *Impey*, the *Impey* decision is inapplicable to this case; therefore, the decision in *Cochrane, Elson,* and *Vicenzo* cases are relevant to deciding the issues presented here.

The *Vicenzo* case fails to acknowledge the broad sweep of *Impey,* according to Respondent and together with *Elson*, represents an incorrect decision which fails to acknowledge the persuasive and controlling authority of the Supreme Court decision, *Impey*. For that reason, Respondent asserts that neither case should be considered persuasive by this forum.

Respondent dismisses difference between the Petitioner in this case, a member of the CST, and the Petitioner in Impey, a speech correctionist, who, the Court determined was not a member of the basic CST, as a distinction without a difference. This is simply not so; every district providing special education services must have a CST, whereas, it is conceivable that the services of a speech correctionist may not be required. This difference between the two Petitioners is substantial. Respondent further asserts that a construction of the language in *N.J.A.C.* 6:28-3.1(b) which would require all members of the child study team to be employees of the district and which would prohibit a school district from providing child study team services through an ESC is in derogation of the school district's statutory and regulatory authority and should be declared void.

It is black letter law that an agency's interpretation of the regulations it promulgates in accordance with the enabling legislation are presumtively valid. Substantial weight and deference is generally accorded to an agency interpretation of the statute it is charged with enforcing and the regulations promulgated pursuant to the legislation *G.E. Solid State, Inc. v. Director, Div. of Taxation*, 132 *N.J.* 298, 306 (1993). (citations omitted) The burden of overcoming the presumption of validity rests with the party opposing the regulation, in this instance, the Respondent.

I **FIND** that the cases on which Petitioner relies are legitimate interpretations of the regulations at issue here as applied to the facts of this case insofar as all deal with members of the CST who were subject to a RIF; moreover, none limit the authority of a local district to contract with an ESC for a child study team. The only limitation imposed is the requirement that a district either employ all members of the CST or contract with an ESC to provide all members of the CST. Further, *N.J.A.C.* 6:28-3.1(b) defines an overall policy which addresses legitimate concerns engendered by the "split" team concept. (*Vicenzo, supra; Elson, supra.*). Accordingly, I **CONCLUDE** that Respondent has failed to overcome the presumption of validity accorded to the agency's interpretation of its regulations.

Respondent further asserts that a construction of *N.J.A.C.* 6:28-3.1 which would require all CST members to be employed by the district would effectively prohibit schools from exercising their statutory and regulatory authority to enter into joint agreements to provide educational services and would contravene the authority of a local board to effect a RIF for reasons of economy where a joint agreement might produce savings. The interpretation of the regulation is not so board as to *prohibit* districts from entering into joint agreements. The regulation and the interpretations at issue here address only the issue of the CST; the educational services to be provided by a district are far more numerous and broad than the services provided by the CST.

For the same reason, *i.e.,* the limitation of the regulation solely to the CST, it is not in contravention of the statutory authority of a local board to effect a RIF. It merely requires a different analysis of how savings can be achieved.

Because of the specific application of *N.J.A.C.* 6:28-3.1(b) to the CST as well as the interpretative authority which merely requires that a district make an initial decision either to employ a full CST or to contract with an ESC to provide the CST, I find that the regulation does not transgress, is not inconsistent with, nor does it contravene, legislative authority or purpose. Accordingly, I **CONCLUDE** that the interpretation of the regulation in *Vicenzo* is not *ultra vires*.

Finally, with respect to the interpretation of *N.J.A.C.* 6:28-3.1(b), Respondent asserts that a reconciliation between this regulation and *N.J.A.C.* 6:28-1.1(f) is required; therefore, there is a need for further rulemaking to clarify the issues. Based on the analysis set forth immediately above, it is clear that such a reconciliation is not required, nor is further rulemaking required.

Even if the Board did act in good faith in terminating the Petitioner for economic reasons, the fact remains that the termination is precluded under the regulation. Since Respondent, having determined to maintain its own CST, is prohibited from contracting with an ESC for the services of a single member of the team, the only other alternative is to fill the position of social worker with a qualified individual. Clearly, this board must employ a social worker; a vacancy does exist and has existed continuously since the termination of Petitioner's employment.

Based on the fact that she is the only candidate on the preferred eligibility seniority recall list, I **CONCLUDE** that Petitioner is entitled to full reinstatement for the 1996-97 year with no loss of rights and benefits. She is also entitled to restoration of retroactive compensation for the 1996-97 school year, less mitigation.

Accordingly, it is hereby **ORDERED** Petitioner's motion for summary decision be granted; it is further **ORDERED** that Petitioner be reinstated to her position of social worker for the 1996-97 school year with no loss of rights and benefits; it is further **ORDERED** that Respondent compensate Petitioner in the full amount of her salary, less mitigation. Respondent's cross motion for summary decision is denied.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

July 16, 1997
DATE

Maria LaFiandra
MARIA LaFIANDRA, ALJ

July 18, 1997
DATE

Receipt Acknowledged:
Deborah N. Cantavatis/fe
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 23 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

Joint Exhibits

J-1 Announcement re social workers' services, dated May 14, 1996

J-2 Certificate of petitioner

J-3 Agreement with MCESC, dated October 2, 1996

J-4 Invoice/Voucher, dated November 12, 1996

J-5 Invoice/Voucher, dated October 21, 1996

J-6 Invoice/Voucher, dated December 1, 1996

J-7 Invoice/Voucher, dated February 1, 1997

J-8 Invoice/Voucher, dated April 1, 1997

OAL DKT. NO. EDU 9056-96
AGENCY DKT. NO. 284-7/96

EILEEN AUERBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MORRIS PLAINS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and respondent's reply thereto were timely filed in accordance with *N.J.A.C.* l:1-18.4.

Respondent's exceptions recast and reiterate those arguments advanced before the Administrative Law Judge (ALJ) in post-hearing submissions, again, essentially, contending that *Impey*, *supra,* is controlling in this matter and that the interpretation of *N.J.A.C.* 6:28-3.1(b) espoused by petitioner and the ALJ is beyond the authority of the State Board of Education, absent clarification of the regulations by further rulemaking. The Commissioner concludes that respondent's exception issues were fully considered and addressed in the ALJ's initial decision and will not, therefore, be readdressed herein.

Upon careful and independent review, the Commissioner determines to adopt the recommended decision of the OAL, as he fully concurs with the ALJ's applied analysis and

conclusion. The Board's termination of the within petitioner, a tenured member of the "core" child study team, and its contracting of her duties to the Morris County Educational Services Commission, is violative of *N.J.A.C.* 6:28-3.1(b) and, as such, petitioner must be reinstated to her school social worker position.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein.* The Board is directed to reinstate petitioner to her former position as school social worker with back pay and emoluments, as appropriate, for the 1996-97 school year and thereafter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*In so affirming, the Commissioner stresses that the contracts and joint agreements through which a local board of education may provide child study team services if it elects not to employ its own team must be with *public* entities such as ESCs, jointure commissions or other school districts.

AUGUST 20, 1997
DATE OF MAILING AUGUST 20, 1997

431-97

EDU #9056-96
C # 431-97
SB # 78-97

EILEEN AUERBACH, :

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF MORRIS PLAINS, MORRIS COUNTY, : DECISION

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, August 20, 1997

For the Petitioner-Respondent, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Simon, Edelstein, Celso & Kessler (Paul H. Green, Esq., of Counsel)

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

February 4, 1998

Date of mailing FEB 06 1998

432-97

432-97 SEC

IN THE MATTER OF RODNEY BOND,	:	
ASBURY PARK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

AUGUST 20, 1997

IN THE MATTER OF	:	**Before the School Ethics Commission**
	:	
RODNEY BOND	:	**Docket Nos. C21-96 and C24-96**
Asbury Park Board of Education	:	**(Consolidated)**
Monmouth County	:	

PROCEDURAL HISTORY

This matter arises from two complaints filed separately by Barbara Lesinski and James G. Olson. In both complaints, complainants named the Asbury Park Board of Education (Board) as the respondent even though the allegations were against only Board members Rodney Bond and James Famularo. As set forth in its March 7, 1997 determination on probable cause, with the consent of complainants, the School Ethics Commission (Commission) considered the complaint to be filed only against Mr. Bond and Mr. Famularo. Additionally, since both complaints involved the identical events and individuals and made basically the same allegations, the Commission consolidated the complaints.[1]

In her complaint filed with the Commission on July 12, 1996, Ms. Lesinski alleged that Board member Rodney violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. when he voted in favor of allowing Solid gold Productions to use a school district facility to state a concert. Ms. Lesinski alleged that Mr. Bond resided in the same household with the concert promoter, Rayfield James, Jr., and that Mr. Bond would profit from the concert. Mr. Olson filed a similar complaint on July 30, 1996, alleging that Mr. Bond violated the Act because he had an interest in the concert and would profit from it. Mr. Olson likewise alleged that Mr. Bond and Mr. James resided at the same address. By Written Statement Under Oath filed on July 25, 1996, in answer to Ms. Lesinski's complaint, Mr. Bond admitted that he voted in favor of Solid Gold Productions' use of the facilities, but denied that this vote violated the Act. Relying on N.J.S.A. 18A:12-24(h), Mr. Bond answered that his vote did not violate the Act because he had no interest in Solid Gold Productions nor would he benefit in any way from the concert. Mr. Bond further stated that while Mr. James is a good friend of his, Mr. James in not an immediate family member within the definition of the Act and Mr. James, while he did not appear before the board in support of the application, likewise would receive

[1] In its March 7, 1997, determination on probable cause, the Commission dismissed the allegations against Mr. Famularo, finding that Mr. Famularo's vote did not violate the Act because he did not have a sufficient direct or indirect personal involvement with the concert promoter.

The Commission also dismissed the allegations concerning the Board attorney's, Kim Fellenz, Esq., failure to properly review the Board's facilities use policy when advising the Board on the Concert application. The Commission found that there was no probable cause to credit these allegations as they did not set forth any alleged violations under the act.

no benefit from the concert. On August 22, 1996, Mr. Bond filed virtually the identical Written Statement Under Oath in answer to Mr. Olson's complaint.

By letters dated December 27, 1996, the Commission advised Mr. Bond to appear before the Commission at its January 28, 1997, meeting. By letter dated January 14, 1997, Mr. Bond, through his attorney, advised the Commission that he would be unable to attend the Commission meeting due to a scheduling conflict. By letter dated January 16, 1997, the Commission rescheduled Mr. Bond's appearance for its February 25, 1997, meeting. On February 25, 1997, Mr. Bond had to leave before the Commission reached his case. Ultimately, the Commission determined that it was not necessary to its investigation to seek further information from Mr. Bond beyond that which was in his Written Statement Under Oath.

At its public meeting on February 25, 1997, the Commission orally found probable cause to credit the allegations in the complaints against Mr. Bond. The Commission memorialized this oral determination in a written finding dated March 7, 1997, and adopted the Resolution dated March 25, 1997. As set forth in its March 7, 1997, determination, the Commission concluded that the material facts were not in dispute and, therefore, advised Mr. Bond that he could submit, by April 7, 1997, a written statement to the Commission as to why his actions did not violate the Act and as to appropriate sanction should a violation be found. By letter dated March 21, 1997, and filed March 27, 1997, Mr. Bond submitted his arguments as well as supporting certifications. Mr. Bond also requested a copy of the record in the matter. By letter Dated May 5, 1997, the Commission provided Mr. Bond with the requested information and gave him additional time in which to submit a supplemental response should he so choose. Mr. Bond filed a supplemental response on May 19, 1997.

FACTS

The material facts in this matter, which are evident from the pleadings, testimony, and documents submitted, are undisputed. An Application for Permit to Use Public School Building dated March 12, 1996, (March 12 Application) was submitted to the Board. The March 12 Application lists Solid Gold Productions as the organization, with Charles Rouse and Rodney Bond as the contacts. The March 12 Application requests the use of the Asbury Park High School Football Stadium Field for a musical festival. The March 12 Application contains two signature lines at the bottom for sponsors and provides that "[t]he sponsors below agree to be responsible for any violation caused by non-compliance with the rules and regulations of the Board of Education." Each line provides space for "Name (Please Print)," "Signature," and "Address." Typed on the first line is "Solid Gold Productions" and the signature space next to it is signed by Charles Rouse who lists the address as 3701 Hwy. 33, Neptune, NJ 07753. The next line has printed "Rodney Bond" and is signed by Rodney Bond. The address space was left blank. Mr. Bond admits that he was a sponsor on the March 12 Application. He states that his intent was to assist his "good friend" with the planning and holding of the concert. As set forth in the Board's minutes for its March 18, 1996, meeting, Mr. Bond, Mr. Ray James,

and Mr. Charles Rouse appeared before the Board on that date in support of the March 12 Application. Mr. Bond and Mr. James reside at the same address. The Application was carried over to another meeting.

In April 1996, Mr. Bond was elected to the Board and sworn in as a member. Subsequently, on May 13, 1996, a new application on behalf of Solid Gold Productions (May 13, 1996 Application) was submitted to the Board for a proposed concert. The application form for the May 13 Application was identical to the form used for the March 12 Application. This time, however, the sponsors were not the same. Solid Gold Productions, Inc. was listed as the organization, but Toney Slaughter was now listed as the contact. The May 13 Application this time was signed only by Charles Rouse as sponsor. Although the date of the event was different, it still was the same event that was being proposed. The Board's minutes for the May 13, 1996, meeting state that the Board approved a Motion to Approve Solid Gold Productions' use of the high school football field for a music festival at a date to be determined. Mr. Bond made the Motion to Approve. Mr. Bond submitted a certification from himself, the School Board Secretary/Business Administrator, Dora E. Mylchreest, and Board President, Shelia Solomon, which stated that prior to moving and voting on Solid Gold Productions' May 13, Application, Mr. Bond advised the Board the he had divested himself of all interests in Solid Gold Productions and the he sought the advice of Board counsel who, after asking questions, ultimately advised him that he could vote on the Application.

ANALYSIS

Mr. Bond raised two procedural arguments which the Commission will address initially. First, Mr. Bond argues that once the Commission found probable cause, it was required to refer this matter to the Office of Administrative Law (OAL) for hearing. According to Mr. Bond, N.J.S.A. 18A:12-29(b) and (c) require the Commission to refer all cases to the OAL upon a finding of probable cause, regardless of whether there are material facts in dispute. In support of this argument, Mr. Bond relies on N.J.A.C. 1:1-4.1 which defines a "contested case" and states that a hearing in a contested case should be designed to resolve "...disputed questions of fact, law or disposition relating to past, current, or proposed activities or interests." Mr. Bond reasons that N.J.A.C. 1:1-4.1 supports his position because it refers to resolving matters other than disputed questions of fact. The Commission disagrees. The Commission is not required to transmit a matter to the OAL for hearing if there are no disputed material facts.

N.J.S.A. 18A:12-29(b) provides in relevant part:

> ...If the Commission determines that probable cause exists, it shall refer the matter to the Office of Administrative Law for a hearing to be conducted in accordance with the 'Administrative Procedure Act,' P.L.1968,c.410(C.52:14B-1 et seq.), and shall notify the complainant and each school official named in the complaint.

The language in N.J.S.A. 18A:12-29(c) specifically makes reference to the Administrative Procedure Act (APA). Accordingly, the relevant provisions of the APA must be considered when determining the Commission's obligation to refer complaints to the OAL for hearing. Pursuant to the APA, an agency head [2]retains full authority to determine whether a case is contested and to make final decisions in contested cases. N.J.S.A. 52:14F-7; In Re Uniform Adm'n Procedure Rules, 90 N.J. 85 (1982). The APA simply provides a mechanism for providing a hearing once the agency head has determined that a matter is contested and requires an evidentiary hearing. Valdez v. New Jersey State Bd. of Medical Examiners, 205 N.J. Super. 398, 404 (App.Div. 1995). As the Supreme Court noted in In Re Uniform Adm'n Procedure Rules, the APA and the OAL's rules implementing the APA "...do not interfere with the agency procedures for resolving cases, or to hear and decide contested cases." Id. At 105.

Given the agency head's authority concerning cases before it, Courts have found that an agency head's discretion to determine how to handle a particular case is not circumscribed by the use of "shall" in a statutory provision relating to transfer of cases to the OAL. In Hills Development Co. v. Bernards Tp., 229 N.J. Super 318 (App. Div. 1988) and In Re Township of Warren, 247 N.J. Super 146, (App. Div.), certif. denied 127 N.J. 557 (1992), the Appellate Division concluded that the use of the word "shall" in the statutory provision relating to transfer of matters to the OAL did not require the Council on Affordable Housing (COAH) to automatically refer objections to a municipality's affordable housing plan to the OAL for hearing. The Fair Housing Act, N.J.S.A. 52:27D-301 et seq., allows parties to object to a municipality's plan to provide affordable housing and provides in the relevant part, "[i]f mediation efforts are unsuccessful, the matter shall be referred to the Office of Administrative Law as a contested case defined in the 'Administrative Procedure Act', [citations omitted]." (emphasis added), N.J.S.A. 52:27D-316(c). The Appellants in Hills and Warren argued that use of the word "shall" required COAH to transfer automatically, without discretion, any unresolved objections to the OAL for a hearing. The Appellate Division in both cases dismissed those arguments and found that the Fair Housing Act's reference to the APA incorporated the APA's provisions which allow the agency head to determine whether a case involved contested material issues of fact, thereby making it a contested case requiring an evidentiary hearing.

While the language of the Act and the Fair Housing Act are not identical, Hills and Warren are nonetheless instructive. These cases demonstrate that, despite the use of the word "shall," referral of a matter to the OAL is within the agency's discretion when the statutory provision in question makes specific reference to the APA. Under the APA, the agency head retains the right in the first instance to determine whether a case is contested and requires an evidentiary hearing. The use of the word "shall" does not abrogate this authority.

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[2] "Agency head" in the case of the Act refers to the Commission as a public body. N.J.S.A. 52:14B-2(d)

Indeed, this interpretation of the Act is consistent with the function served by the OAL. The OAL was created to provide an independent agency to promote fairness and consistency in the conduct of administrative hearings before State Agencies. In Re Uniform Adm'n Procedure Rules, supra, 90 N.J. at 90-91. The role of the OAL is to conduct administrative hearings when there are factual disputes. Public Advocate Dep't v. Public Utilities Bd., 189 N.J. Super. 491 (App. Div. 1983) It is well established that where no disputed issues of material facts exist, an administrative agency need not hold an evidentiary hearing in a contested case. Cunningham v. Dept. of Civil Service, 69 N.J. 13, 24-25 (1975); Bally Mfg. Corp. v. Casino Control Com'n, 85 N.J. 325, 334 (1981). In such a case where there are no material facts in dispute, a party's right to a hearing is satisfied by giving the party the opportunity to provide written submissions. In Re Solid Waste Util. Cust. Lists, 106 N.J. 508,521 (1987).

Mr. Bond's reliance on N.J.S.A. 18A:12-29(c) and N.J.A.C. 1:1-4.1 is misplaced. N.J.S.A. 18A:12-29(c) provides that "[u]pon completion of the hearing, the Commission, by majority vote, shall determine whether the conduct complained of constitutes a violation of this Act or whether the complaint should be dismissed." As discussed above, the right to a hearing is satisfied by providing the respondent with the opportunity to submit his position in writing to the Commission. When there are no facts in dispute and thus no need for an evidentiary hearing, it certainly makes sense for the Commission to exercise its discretion to consider the matter directly rather than send the matter to OAL. Likewise, N.J.A.C. 1:1-4.1 offers no support for Mr. Bond's arguments. This regulation simply sets forth what kind of matters are to be considered contested cases. The fact that a contested case includes matters that involve questions of law is not dispositive as to whether an agency must refer a case to the OAL. As discussed above, the APA does not divest a State agency of its inherent authority to consider a matter itself.

In his March 21, 1997, submission in response to the finding of probable cause, Mr. Bond requests that the Commission allow board President, Shelia Solomon, Board Secretary/Business Administrator, Dora E. Mylchreest, and Board Vice President, John Moor to address the Commission. Mr. Bond submitted certifications from Ms. Solomon and Ms. Mylchreest with his response. Both certifications state that prior to the May 13, 1996, vote on Solid Gold Productions' application, Mr. Bond advised the board that he had divested himself of all interests in Solid Gold Productions and that he would not profit in any way from the concert. The certifications further state that Mr. Bond sought the advise of Board counsel as to whether he had a conflict and that the Board attorney, after questioning, advised Mr. Bond that he could vote on the application. Mr. Bond also submitted his own certifications which states the same. It is the Commission's understanding the Mr. Moor would provide the same information if he appeared before the Commission. The Commission finds that there is no need for the appearances of the above individuals. The Commission has the certifications. Accordingly, the Commission accepts that prior to the May 13, 1996, vote, Mr. Bond advised the Board that he had no interest in Solid Gold Productions and that the Board attorney advised Mr. Bond that he did not have a conflict that would disqualify him from voting on the May 13 Application.

With these procedural matters resolved, the Commission will now determine whether Mr. Bond's vote on Solid Gold Productions' May 13 Application violated the Act. For the following reasons, the Commission finds that Mr. Bond violated N.J.S.A. 18A:12-24(c) when he voted on the May 13 Application. This provision states:

> No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

This provision must be interpreted in accord with the legislative intent of the Act, which is to "ensure and preserve public confidence" in school officials. As the Legislature stated, "[t]hese board members and administrators must avoid conduct which is in violation of their public trust or which creates the justifiable impression among the public that such trust in being violated." In interpreting an identical provision of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., the New Jersey Supreme Court found that this provision requires a public official to discharge his duties with "undivided loyalty." MacDougall v. Weichert, 144 N.J. 380, 401 (1996).[3]

In this case, there certainly can be the justifiable public perception that Mr. Bond did not execute his duties with "undivided loyalty." Mr. Bond signed the March 12 Application as a sponsor. He appeared before the Board at a public meeting as an advocate for the Application on March 18, 1996. He has stated in his March 24, 1997, certification that one of the reasons he acted as a sponsor and advocate for the concert was to help his good friend Charles Rouse. Despite his involvement with the concert and the Application, On May 13, 1996, Mr. Bond voted in favor of the revised May 13 Application. This Application was for the same event except the revised May 13 Application had Mr. Bond's name removed as sponsor. In fact, Mr. Bond's name was not removed from the Application until May 13, the date he voted on it. Also, Mr. Bond had appeared before the Board on the original application less than two months before and it was only one month since he had been elected to the Board. Under these circumstances, there certainly is the justifiable impression that Mr. Bond's independence of judgement and objectivity were impaired and he should not have voted on the May 13 Application.

Mr. Bond's claims that he has no interest in Solid Gold Productions and that he would receive no benefit from the concert do not alleviate the problem. It certainly is reasonable for the public to perceive that Mr. Bond's independence of judgment or objectivity might be impaired when the application of his good friend, on which he initially was a sponsor and in support of which he appeared before the Board shortly before his election to the Board, comes before the Board for a vote. The Act does not

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[3] The Local Government Ethics Law was enacted to ensure public confidence in local government officials by providing a comprehensive scheme of ethical standards for local government officials. N.J.S.A. 40A:9-22.2. N.J.S.A. 40A:9-22.5 provides the standards of conduct and N.J.S.A. 40A:9-22.5(d) is identical to N.J.S.A. 18A:12-24(c).

require an actual conflict. Rather an apparent conflict is prohibited as well, as evidenced by the legislative intent, N.J.S.A. 18A:12-22. Likewise, the violation is not erased because Mr. Bond sought and received legal advise in which the Board attorney advised him that there was no conflict. While the Commission may consider the Board Attorney's advice in determining sanction, the violation still has occurred.

Mr. Bond also relies on Petrick v. Planning Board of the City of Jersey City, 287 N.J. Super. 325 (App. Div. 1996) and Monmouth Medical Center v. State Department of Health, 272 N.J. Super. 297 (App. Div. 1994) in support of his argument that no conflict existed when he voted on Solid Gold Productions' May 13 Application. Neither case supports Mr. Bond's position. Initially, it should be noted that neither case was decided under the Act. Rather, they involved an analysis of conflicts of interest under the common law principles. While cases such as these may offer some insight, they do not involve a comprehensive scheme to guide the ethical conduct of school officials.

In any event, neither case supports Mr. Bond's claim that his action did not violate the Act. As Mr. Bond points out, Petrick stands for the proposition that cases involving conflicts of interest must be evaluated on the particular facts of each case and the Courts should determine whether the circumstances could be interpreted to show that the public official could have been tempted to depart from his sworn duty. Relying on Petrick, Mr. Bond argues that his interest was sufficiently remote so as not to disqualify him from performing his duties as an elected official. As discussed above, in this case, the facts demonstrate that Mr. Bond's actions violated the Act. Mr. Bond voted on an application on which he initially had been a sponsor and on which he had appeared before the Board as an advocate, only one month before his election to the Board and only two months before he voted on it as a Board member. Furthermore, the application admittedly was an application of a close friend, which is one reason Mr. Bond initially became involved in the application. These facts certainly demonstrate a violation of N.J.S.A. 18A:12-24(c) and Petrick offers no support for concluding otherwise.

Likewise, Monmouth Medical offers no support for Mr. Bond's position. The relevant issue in Monmouth Medical was whether a member of the Health Care Administration Board who was also affiliated with a hospital seeking a certificate of need, should be disqualified from voting on regulations concerning cardiac care. As in Petrick, the Appellate Division noted that the circumstances of each case must be reviewed individually. In Monmouth Medical, the Court concluded that there was not conflict of interest because the member was not voting on a matter directly affecting her or the hospital with which she was affiliated. Rather, the Court noted that she was voting on general regulations. In this case, Mr. Bond voted on an application on which he initially had a direct involvement. His name was not removed from the May 13 Application until the day that he voted on the Application. Monmouth Medical does not support Mr. Bond's claim that his vote did not violate the Act.

In his Written Statement Under Oath, Mr. Bond also argued the N.J.S.A. 18A:12-24(h) applies to his vote and, therefore, he cannot be found in conflict. N.J.S.A. 18A:12-24(h) provides:

> No school official shall be deemed in conflict of these provisions if, by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group.

Mr. Bond argues that this provision applies because he would receive no monetary gain from the concert. This provision does not absolve Mr. Bond from the violation. As discussed above, the violation in this case in based on Mr. Bond's involvement with the application in question. The fact the he would not have received any money is not determinative. Indeed, if Mr. Bond were correct, any school official could vote on a matter where he has a direct or indirect personal involvement so long as he did not receive any monetary benefit. This is contrary to N.J.S.A. 18A:12-24(c).

DECISION

For the foregoing reasons, the Commission finds that Mr. Bond violated N.J.S.A. 18A:12-24(c) when he voted on Solid Gold Productions' May 13 Application. The Commission now will address the isue of appropriate sanction. Mr. Bond argues that the appropriate sanction in this case is a reprimand. In support of this argument, Mr. Bond states that he became involved with the event partially in an effort to improve the cultural and social life of Asbury Park. Mr. Bond further points out that prior to his vote, he advised the entire Board that he had divested himself of any interest in Solid Gold Productions and he sought legal advice from the Board attorney on whether he could vote on the May 13 Application.

The Commission agrees that a reprimand is the appropriate sanction in this case. Prior to his vote, Mr. Bond did disclose to the full board that he no longer was involved with the concert or the Application. More importantly, he did seek legal advice from the Board attorney to determine whether he could vote on the matter. In recognition of the fact that the Board attorney advised Mr. Bond that he could vote on the matter, the Commission recommends to the Commissioner of Education that a reprimand be imposed.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision -- C15-96/C26-96

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents and testimony given in support thereof; and

Whereas, the Commission concluded at its meeting of February 25, 1997, that there was probable cause to credit the allegations in the complaint that respondent violated the School Ethics Act; and

Whereas, the Commission memorialized this determination in a written finding dated March 7, 1997 inviting Mr. Bond to prepare a written statement in response setting forth why the Commission should not find him in violation of the School Ethics Act; and

Whereas, the Commission has concluded that Mr. Bond violated N.J.S.A. 18A:12-24(c) of the School Ethics Act for the reasons stated in a proposed decision; and

Whereas, the Commission has reviewed the proposed decision of its staff finding Mr. Bond in violation and recommending that the Commissioner of Education impose a penalty of reprimand; and

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 22, 1997.

Mary E. Torres
Acting Executive Director

AGENCY DKT. NO. 270-7/97

IN THE MATTER OF RODNEY BOND,	:	
ASBURY PARK BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission have been reviewed. Written comments were received on behalf of respondent; however, said comments did not address the recommended sanction.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter, in view of the Commission's determination, which is not reviewable by the Commissioner herein, that a violation of the Act occurred under the circumstances set forth in the decision.

IT IS HEREBY ORDERED that Rodney Bond be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 20, 1997
DATE OF MAILING AUGUST 20, 1997

432-97

SEC #C-21-96 and #C-24-96 (consolidated)
C # 432-97SEC
SB # 79-97

IN THE MATTER OF RODNEY BOND, :
ASBURY PARK BOARD OF EDUCATION, :
MONMOUTH COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the School Ethics Commission, July 22, 1997

Decided by the Commissioner of Education, August 20, 1997

For the Petitioner-Respondent, Geraldine Callahan, Deputy Attorney General
(Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Kim A. Fellenz, Esq.

The decision of the School Ethics Commission finding that respondent had violated the School Ethics Act and the decision of the Commissioner of Education imposing a reprimand against respondent as a result of such violation are affirmed for the reasons expressed therein.

May 6, 1998

Date of mailing MAY 08 1998

433-97

433-97

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12292-95
Agency Dkt. No. 438-11/95

MAHWAH TOWNSHIP BOARD OF EDUCATION
Petitioner,
v.
RAMAPO INDIAN HILLS REGIONAL BOARD OF EDUCATION,
Respondent.

Mark G. Sullivan, Esq., for petitioner
(Sullivan & Sullivan, attorneys)

Allan P. Dzwilewski, Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: July 10, 1997 Decided: July 16, 1997

BEFORE **SEBASTIAN GAETA, JR.**, ALJ:

This matter concerns which school district is responsible for the education expenses of a special education pupil.

On May 21, 1997, the parties appeared before the Office of Administrative Law and placed upon the record a settlement, arrived at with officials of the respective boards of education and counsel, which was subject to approval by the respondent Board of Education.

The terms of the settlement are:

1. The respondent, Ramapo Indian Hills Regional High School Board of Education shall pay to the petitioner, Mahwah Township Board of Education, the sum of forty-five thousand dollars ($45,000) in full settlement of the educational expenses through June 1997.

2. Respondent, Ramapo Indian Hills Regional High School Board of Education accepts responsibility as the school district of residence, as of June 23, 1997, for the pupil's education so long as he is resident within the school district.

By letter of July 8, 1997 counsel for the respondent advised that the Ramapo Indian Hills Regional High School Board of Education had approved the settlement.

I have reviewed the record and the terms of settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

July 15, 1997
DATE

SEBASTIAN GAETA, JR., ALJ

July 18, 1997
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 23 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 12292-95
AGENCY DKT. NO. 438-11/95

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO-INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 21, 1997
DATE OF MAILING AUGUST 21, 1997

435-97

435-97

TRENTON EDUCATION ASSOCIATION, on behalf of itself and all affected bargaining unit members,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6803-96

AGENCY DKT. NO. 285-7/96

TRENTON EDUCATION ASSOCIATION
ON BEHALF OF ITSELF AND ALL AFFECTED
BARGAINING UNIT MEMBERS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Thomas W. Sumners, Jr., Esq. for respondent (Sumners, Council, George & Dortch, attorneys)

Record Closed: July 9, 1997 Decided: July 14, 1997

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case involves a reduction in force (RIF) implemented by the respondent Board of Education of the City of Trenton (BOE) and petitioner Trenton Education Association's (TEA's)

claims in that regard. The parties have resolved their differences as shown in the attached Stipulation of Settlement and Dismissal which withdraws the claims set forth in the petition.

PROCEDURAL HISTORY

On July 18, 1997, the petition of appeal was filed and, on August 5, 1996, the answer to petition of appeal was filed with the Commissioner of Education. The matter was transmitted to the Office of Administrative Law (OAL), where, on August 12, 1996, it was filed as a contested case. N.J.S.A. 52:14B-2(b). The case was assigned to me and, on September 18, 1996, I forwarded a letter to the attorneys setting forth a schedule for discovery, hearing, etc. The case was the subject of a series of conferences and, on the record closed date, the Stipulation of Settlement and Dismissal was filed in the OAL.

FINDINGS AND CONCLUSIONS

I have reviewed the Stipulation of Settlement and Dismissal and I find and conclude that the parties have voluntarily agreed to the settlement and the settlement disposed of all issued in controversy.

ORDER

It is **ORDERED** that the claims set forth in the petition be deemed withdrawn and this matter returned to the Department of Education.

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

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

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

DATE

JOHN R. TASSINI, ALJ

July 16, 1997
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

TRENTON EDUCATION ASSOCIATION ON BEHALF OF ITSELF AND ALL AFFECTED BARGAINING UNIT MEMBERS, Petitioner, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDUOR 06803-96S STIPULATION OF SETTLEMENT AND DISMISSAL

The parties in this matter hereby agree that the within matter may be deemed settled and shall be withdrawn, subject to the conditions that;

A) The withdrawal of the Petition of Appeal shall not limit, restrict, waive, or abandon the right of any teaching staff member employed by Respondent, whether a member of the Petitioner Association's bargaining unit or otherwise, to file petitions or claims that their tenure or seniority rights were violated as a result of the reduction in force which is the subject of the within petition; and

B) This stipulation shall not constitute a limitation, restriction, or waiver of any defenses that the Respondent may

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

have to any such petition.

Zazzali, Zazzali, Fagella & Nowak
Attorneys for Petitioner Trenton
Education Association

Richard A. Friedman, Esq.

Sumners, Council, George & Dortch
Attorneys for Respondent Trenton
Board of Education

Thomas Sumners, Jr., Esq.

OAL DKT. NO. EDU 6803-96
AGENCY DKT. NO. 285-7/96

TRENTON EDUCATION ASSOCIATION, on behalf of itself and all affected bargaining unit members,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. The Commissioner finds that although this matter is characterized as an initial decision appending a Stipulation of Settlement and Dismissal, in that no settlement terms were included in the document signed by the parties, this matter shall, instead, be considered a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

AUGUST 21, 1997
DATE OF MAILING AUGUST 21, 1997

437-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES FREEMAN,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

AUGUST 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8590-96
AGENCY DKT. NO. 376-9/96

BOARD OF EDUCATION OF THE CITY OF TRENTON, COUNTY OF MERCER,
Petitioner,
v.
JAMES FREEMAN,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners Council George & Dortch, attorneys)

Michael T. Barrett, Esq., for respondent (Bergman & Berrett, attorneys)

Record Closed: July 17, 1997 Decided: July 18, 1997

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 4, 1996, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of settlement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. The settlement is fully consistent and in accordance with the public interest.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 18, 1997
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

7/24/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

SUMNERS COUNCIL GEORGE & DORTCH, P.C.
120 Sanhican Drive
P.O. Box 7824
Trenton, New Jersey 08618
(609) 393-6604
Attorneys for the Petitioner, Trenton Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
1997 JUL 17 A 9:18

IN THE MATTER OF THE TENURE CHARGES AGAINST JAMES FREEMAN, SCHOOL DISTRICT OF THE CITY OF TRENTON, COUNTY OF MERCER.	:	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL Docket No. EDUTH 08590-96S Agency Docket No. 376-9/96
	:	**SETTLEMENT AGREEMENT**

This Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and Respondent, James Freeman.

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 376-9/96, OAL Docket No. EDUTH 08590-96S; and

WHEREAS, the charges allege that Respondent struck a student, A.B., in his class on January 18, 1996; and

WHEREAS, the charges allege that Respondent pushed a student's desk over causing it to hit another student, C.W., on the leg and struck another student, R.S., on the hand with a ruler on February 19, 1996; and

WHEREAS, the charges allege that Respondent referred to a student, B.R., by a racial epithet on March 22, 1996; and

WHEREAS, the charges allege that Respondent used inappropriate force on a student, E.W., by pushing him several times on May 10, 1996; and

WHEREAS, the parties acknowledge there is substantial evidence which is relevant to and warrant this Settlement Agreement, in particular that:

1. There has been no prior disciplinary action against Mr. Freeman since his employment with the Petitioner, commencing September 1, 1991, due to work performance or inappropriate conduct, until the certification of these charges on August 29, 1996;

2. The allegations against Mr. Freeman occurred during the short time period of January 18, 1996 through May 10, 1996, and prior to that time, Mr. Freeman had been a capable employee for the Board but exhibited serious errors of judgment in addressing disruptive students in his class during this brief time period;

3. Mr. Freeman has agreed to accept disciplinary action in the form of a 90-day suspension without pay and increment withholding for the 1996-97 school year;

4. Mr. Freeman denies the above charges and further pleads substantial extenuating circumstances including provocation and failure of administrative supervision;

5. Mr. Freeman understands that the Commissioner of Education has the duty, pursuant to ***N.J.A.C.*** 6:11-3.6, to refer tenure decisions to the State Board of Examiners for possible revocation of his certificate.

6. The expeditious resolution of this matter will save both parties the cost and uncertainty of continued litigation.

THEREFORE, in consideration of the foregoing, the parties agree that the matter should be resolved based upon the following terms:

1. Mr. Freeman will not receive back pay for 90 of the 120-day period of suspension which occurred between August 30, 1996 and December 30, 1996 pursuant to ***N.J.S.A.*** 18A:6-11.

2. Mr. Freeman will not contest the Board's decision to withhold his increment for the 1996-97 academic year based upon the same allegations set forth in the tenure charges.

3. Mr. Freeman will resign from employment with the Board effective August 30, 1997.

4. The Board agrees to dismiss the tenure charges against Mr. Freeman.

5. The parties agree and covenant that neither party, nor any person, organization, or other entity on their behalfs will file any charge, claim, lawsuit against either party based upon the fact that the Board withheld Mr. Freeman's increment and filed tenure charges or that Mr. Freeman defended against those charges.

6. The parties recognize that each of them had input into drafting this Agreement and agree that if there should arise a dispute as to its terms, this Agreement shall not be construed against either party based upon the identity of its drafter(s).

7. The parties understand that this Agreement is contingent upon the approval of Administrative Law Judge Robert S. Miller and the Commissioner of Education, and if such approval is denied, the terms and contents of this Agreement shall not be admissible in any legal or administrative proceedings of any nature, and will be without prejudice to their positions in such proceedings, and that in such event the parties may again attempt to settle the matter in a manner which is satisfactory to the Commissioner of Education.

8. Mr. Freeman requests that the tenure hearing be held in abeyance in order to obtain approval of this Settlement Agreement by Administrative Law Judge Robert S. Miller and the Commissioner of Education, and he agrees that in accordance with ***N.J.S.A.*** 18A:6-14, he is not entitled to salary payments during the pendency of obtaining approval of this Agreement by the Administrative Law Judge and the Commissioner of Education, and if the Administrative Law Judge and/or Commissioner of Education reject this Agreement, he is not entitled to salary payments from the date of this Agreement until the time it takes for the Commissioner to render a decision on the merits of the tenure charges.

9. The parties warrant that this Agreement is entered into voluntarily, without any duress, or without any other promises or agreement not expressed herein, and with the understanding that neither party is compelled to do so, and that by entering into this Agreement each party waives their right to a hearing and disposition on the merits of the charges.

7/14/97
Date

Carole Deddy
Carole S. Deddy, Board Secretary
Trenton Board of Education, Petitioner

7/11/97
Date

Stephanie Moyer
Stephanie Moyer, President
Trenton Board of Education, Petitioner

7-8-97
Date

Michael T. Barrett, Esq.
Attorney for Respondent

July 8, 1997
Date

James Freeman
Respondent

OAL DKT. NO. EDU 8590-96
AGENCY DKT. NO. 376-9/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES FREEMAN,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF TRENTON, MERCER COUNTY.	:	DECISION
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed as a controversy before the Commissioner, subject to compliance with the terms of the settlement, and will be forwarded to the State Board of Examiners for action as it deems appropriate.

COMMISSIONER OF EDUCATION

AUGUST 21, 1997
DATE OF MAILING AUGUST 21, 1997

439-97

439-97

M.A.S., on behalf of minor child, V.S., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY, : DECISION

RESPONDENT. :

:

AUGUST 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 613-97

AGENCY DKT. NO. 2-1/97

M.A.S. ON BEHALF OF MINOR CHILD, V.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Respondent.

Diane K. Smith, Esq., for petitioner (Somerset County Legal Services, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: July 11, 1997 Decided: July 28, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from the petition of M.A.S. on behalf of minor child V.S. ("petitioner") to the Commissioner of the Department of Education seeking a tuition-free education in his district of residence, the Branchburg Board of Education Somerville School District ("respondent"). The matter was transmitted to the Office of Administrative Law on February 4, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 28, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

7/29/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 30 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

RECD
JUL 11 2 33 PM '97
STATE
OFFICE

DAVID B. RUBIN, P.C.
Attorney At Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(908) 767-0440
Attorney for Respondent

M.A.S. ON BEHALF OF MINOR CHILD V.S.,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	OAL DKT. NO. EDU 613-97 AGENCY DKT. NO. 2-1/97
v.	STIPULATION OF SETTLEMENT
BRANCHBURG BOARD OF EDUCATION,	
Respondent.	

The parties having amicably resolved their differences, the petition herein is withdrawn with prejudice on the following terms:

Petitioners, having continuously resided at The Branchburg Motel through the conclusion of the 1996-97 school year, are deemed residents of the Township of Branchburg for purposes of entitlement to a free public education from the Branchburg Township Board of Education during the 1996-97 school year, and for so long as they continue to remain residents of the Township of Branchburg within the meaning of N.J.S.A. 18A:38-1.

SOMERSET COUNTY LEGAL SERVICES
Attorneys for Petitioner

BY: _____
DIANE K. SMITH

DAVID B. RUBIN, P.C.
Attorney for Respondent

BY: _____
DAVID B. RUBIN

OAL DKT. NO. EDU 613-97
AGENCY DKT. NO. 2-1/97

M.A.S., on behalf of minor child, V.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

AUGUST 22, 1997
DATE OF MAILING AUGUST 22, 1997

441-97

441-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN FRITZ, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
WASHINGTON, GLOUCESTER COUNTY.	:	
_____	:	

AUGUST 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8030-95

AGENCY DKT. NO. 267-7/95

BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, GLOUCESTER COUNTY,

Petitioner,

v.

JOHN FRITZ,

Respondent.

Joseph F. Betley, Esq., for petitioner (Capehart and Scatchard, attorneys)

Steven R. Cohen, Esq., for respondent (Selikoff and Cohen, attorneys)

Record Closed: July 25, 1997 Decided: July 29, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from certified tenure charges filed against John Fritz ("respondent") by the Washington Township Board of Education ("petitioner"). The matter was transmitted to the Office of Administrative Law on August 7, 1995, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

As outlined in the attached letter from counsel for the petitioner, dated December 24, 1996, the Board of Trustees of the Teachers' Pension and Annuity Fund approved the respondent's ordinary disability retirement, effective March 1, 1996. In view of the retirement approval, the parties have settled the case and agreed to withdraw the case with prejudice, as indicated in the attached Stipulation of Dismissal.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 29, 1997
DATE

JEFF S. MASIN, ALJ
Receipt Acknowledged:

8/1/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 5 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachments

LAW OFFICES
CAPEHART & SCATCHARD, P.A.
FOUNDED 1876

DEC 20 10 21 AM '96
STATE OF NJ OFFICE OF

BLAINE E. CAPEHART
WILLIAM E. REIFSTECK
ALAN R. SCHMOLL
RICHARD T. DECOU □
TIMOTHY E. ANNIN ††
GLENN R. PAULSEN †
CHARLES A. RIZZI, JR.
PETER S. BEJSIUK *
JOHN H. GEANEY
JOSEPH F. BETLEY *
CARMEN SAGINARIO JR. †
F. J. FERNANDEZ-VINA *††
ROBERT J. HAGERTY *
LORA NORTHEN *
KELLY ANN DEVERY *
DENNIS M. MARCONI *
LYNN E. CULVER *
ALISON M. NISSEN *
HARRIS C. LEGOME *
LINDA A. GALELLA *
PAUL A. HEBERT *×
GEORGE M. MORRISON *
JOEL F. ABRAMSON

WILLIAM B. SCATCHARD, JR ††○
JOSEPH S. GEORGIANA
THOMAS H. MORGAN ††○
THOMAS J. MANNION, JR.
BRUCE L. HARRISON
ROBERT A. BAXTER ††
STEPHEN T. FANNON
BETSY G. LIEBMAN *
KEVIN L. FLANAGAN *
ROBERT A. HICKEN +
ANTHONY L. SCIALABBA *○*
PATRICIA L. DEE *□
MARY ELLEN E. SCHETTER *
ROBERT A. MUCCILLI ○
ALAN P. FOX *
CLAIRE Y. RINGEL *
ANTHONY T. DROLLAS, JR. †
JAMES G. PIETRAS
MARGARET A. CIPPARRONE *
STEPHANIE WALKER *
JODY L. WIEDEMANN *
SUSAN S. HODGES *

††CERTIFIED CIVIL TRIAL ATTORNEY
†RESIDENT TRENTON OFFICE

*ALSO PA. BAR
○ALSO D.C. BAR
□ALSO FLA. BAR
+ALSO CONN. BAR
×ALSO IND. BAR
◇ALSO N.C. BAR
*ALSO OHIO BAR

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TRENTON, N.J. 08608
(609) 394-2400

INTERNET ADDRESS:
http://www.capehart.com

REPLY TO MOUNT LAUREL

December 24, 1996

HONORABLE JEFF S MASIN
ADMINISTRATIVE LAW JUDGE
9 QUAKERBRIDGE PLAZA
TRENTON NJ 08625

RE: In the Matter of the Tenure of John Fritz vs. Washington Township Board of Education
OAL Docket No.: EDUTH 08030-95S; Agency Ref. No.: 267-7/95
Our File No.: 9240.612.95

Dear Judge Masin:

As you will recall, this office represents the Washington Township Board of Education. By Order of March 22, 1996, this matter was placed on the inactive status for purposes of Mr. Fritz pursuing an ordinary disability retirement with the Teacher's Pension and Annuity Fund. ("TPAF"). Please be advised that Mr. Fritz's ordinary disability retirement was approved by the TPAF effective March 1, 1996. Accordingly, it is respectfully requested that the tenure charges be reinstated from the inactive list for purposes of dismissal with prejudice. A Stipulation of Dismissal to be executed by both parties will be filed in the near future. If you will need any further documentation, please advise.

Thank you for your consideration and cooperation in this matter.

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.

Joseph F. Betley

JFB/cc
Enclosure
cc: Ms. Margaret Meehan
Steven Cohen, Esquire
ltrs>cc>491

RECEIVED
JUL 23 1 12 PM '97
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center, Suite 300
8000 Midlantic Drive - C.S. 5016
Mount Laurel, N.J. 08054
(609) 234-6800
Attorneys for Respondent, Washington Township Board of Education

JOHN FRITZ, Petitioner, vs. BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, GLOUCESTER COUNTY, Respondent.	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDUTH 08030-95S AGENCY DKT NO 267-7/95 **STIPULATION OF DISMISSAL**

IT IS HEREBY STIPULATED between the Petitioner, John Fritz, and the Respondent, Board of Education of Washington Township, Gloucester County, that the above-captioned tenure charges be reinstated to the active list, and that once reinstated, that the matter be withdrawn with prejudice.

SELIKOFF & COHEN, P.A.
BY Steven R. Cohen
STEVEN R. COHEN

CAPEHART & SCATCHARD, P.A.
By Joseph F. Betley
JOSEPH F. BETLEY

JUDGE JEFF S. MASIN, A.L.J.

pls>cc>492

OAL DKT. NO. EDU 8030-95
AGENCY DKT. NO. 267-7/95

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN FRITZ, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
WASHINGTON, GLOUCESTER COUNTY.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed.* The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal of this tenure matter as the record establishes that such withdrawal is appropriate and that the within respondent has been approved by the Teachers' Pension and Annuity Fund for an ordinary disability retirement. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

* It is noted that this matter was characterized as a settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his initial decision.. The Commissioner determines that because no settlement terms were brought to the record and the document signed by the parties was entitled a Stipulation of Dismissal, this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

AUGUST 22, 1997
DATE OF MAILING AUGUST 22, 1997

442-97

442-97

JOYCE FREI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 22, 1997

OAL DKT. NO. EDU 1018-97
AGENCY DKT. NO. 569-11/96

JOYCE FREI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 22, 1997
DATE OF MAILING AUGUST 22, 1997

443-97

443-97

DENNIS DUTTREY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 22, 1997

OAL DKT. NO. EDU 10204-96
AGENCY DKT. NO. 477-10/96

DENNIS DUTTREY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 22, 1997
DATE OF MAILING AUGUST 22, 1997

444-97

444-97

SHERRI FERRARA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE PASSAIC VALLEY REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 25, 1997

OAL DKT. NO. EDU 1190-97
AGENCY DKT. NO. 577-12/96

SHERRI FERRARA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC VALLEY REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 25, 1997
DATE OF MAILING AUGUST 25, 1997

445-97

445-97

MARY ANN SCHARF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 25, 1997

OAL DKT. NO. EDU 1344-97
AGENCY DKT. NO. 604-12/96

MARY ANN SCHARF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 25, 1997
DATE OF MAILING AUGUST 25, 1997

446-97

446-97

R.P. AND S.P., on behalf of minor children, :

:

PETITIONERS,

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF CLARK, UNION COUNTY,

:

RESPONDENT.

:

AUGUST 26, 1997

OAL DKT. NO. EDU 5537-96
AGENCY DKT. NO. 82-3/96

R.P. AND S.P., on behalf of minor children,	:	
	:	
PETITIONERS,		
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
	:	
RESPONDENT.		
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 26, 1997
DATE OF MAILING AUGUST 26, 1997

447-97

447-97

MARY ANN SIVOLELLA,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AUGUST 26, 1997

OAL DKT. NO. EDU 10935-96
AGENCY DKT. NO. 546-11/96

MARY ANN SIVOLELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 26, 1997
DATE OF MAILING AUGUST 26, 1997

448-97

448-97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY AND WEST JERSEY AIR CONDITIONING AND HEATING COMPANY, INC.,	:	DECISION
RESPONDENTS.	:	
	:	

AUGUST 26, 1997

OAL DKT. NO. EDU 843-97
AGENCY DKT. NO. 57-2/97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY AND WEST JERSEY AIR CONDITIONING AND HEATING COMPANY, INC.,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 26, 1997
DATE OF MAILING AUGUST 26, 1997

449-97

449-97

LOUISE SPRINGER AND PAUL TRAUTMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 26, 1997

OAL DKT. NO. EDU 7691-96
AGENCY DKT. NO. 251-6/96

LOUISE SPRINGER AND PAUL TRAUTMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 26, 1997
DATE OF MAILING AUGUST 26, 1997

450-97

450-97

JOAN MAAS, CATHY DYER AND ROSEMARY JULIANO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE FERRY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

AUGUST 26, 1997

OAL DKT. NO. EDU 11877-95
AGENCY DKT. NO. 399-10/95

JOAN MAAS, CATHY DYER AND ROSEMARY JULIANO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE FERRY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 26, 1997
DATE OF MAILING AUGUST 26, 1997

451-97

451-97

WILLIAM MORALES AND FURLONG AND KRASNY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

AUGUST 26, 1997

OAL DKT. NO. EDU 35-97
AGENCY DKT. NO. 595-12/96

WILLIAM MORALES AND FURLONG AND KRASNY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

AUGUST 26, 1997
MAILING DATE AUGUST 26, 1997

453-97

453-97 E

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, CUMBERLAND COUNTY, AND MATHIS CONSTRUCTION COMPANY,	:	DECISION ON MOTION
RESPONDENTS.	:	

AUGUST 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING APPLICATION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 6491-97
AGENCY DKT. NO. 279-7/97

BUENA PLUMBING, INC.,
Petitioner,
v.
CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, CUMBERLAND COUNTY, AND MATHIS CONSTRUCTION COMPANY,
Respondents.

Kimberly A. O'Brien, Esq., for petitioner (Capizola, Fineman & Lapham, attorneys)

Samuel Serata, Esq., for respondent Cumberland County Regional School District

Howard Butensky, Esq., for respondent Mathis Construction Company (Butensky & Pepe, attorneys)

Record Closed: August 15, 1997 Decided: August 18, 1997

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was commenced by Buena Plumbing, Inc., a New Jersey corporation, on August 4, 1997, with the filing of a petition of appeal and an application for temporary emergent relief. The petition alleged that the respondent Board of Education intended to award the contract for a water line extension for the Cumberland Regional High School to Mathis Construction Company, a bidder which (1) was not properly prequalified by the Division of Building and Construction as required by *N.J.S.A.* 18A:18A-26, and (2) is not a licensed master plumber and did not list a licensed master plumber as a subcontractor in its bid in violation of *N.J.S.A.* 18A:18A-18. The application for emergent relief sought, *inter alia*, an order enjoining the award and performance of the contract. The matter was transmitted to the Office of Administrative Law on August 4, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13.

Oral argument on petitioner's motion for temporary emergent relief was scheduled for August 8, 1997, at 2:00 p.m. at the Trenton office of the Office of Administrative Law. Pursuant to the request of counsel for the Cumberland County Regional School District, however, and with the consent of the other parties, the matter was rescheduled for 2:00 p.m. on August 15, 1997. Respondent Board of Education filed an answer and a letter memorandum in response to petitioner's application for emergent relief on August 14, 1997. Respondent Mathis Construction Company filed a letter memorandum in opposition to the application for emergent relief on August 7, 1997, and an answer to the petition on August 15, 1997. The parties appeared and oral argument on the motion was heard on August 15, 1997, whereupon the record closed.

FINDING OF FACTS

The facts relevant to a determination of this application are not in dispute and I therefore **FIND** the following as uncontested facts.

In May 1997, Cumberland Regional School District advertised for bids for a water line extension at the Cumberland Regional High School. The proposed construction will connect

the existing water system at the high school to the water main of Upper Deerfield Township. Bids were submitted on June 19, 1997, and were opened on the same date. Respondent Mathis had the lowest total bid, and petitioner Buena submitted the second lowest total bid. Respondent Board of Education announced its intention to award the contract to respondent Mathis. By letter dated June 20, 1997, petitioner Buena advised respondent Board Secretary of its position that "the provisions of the Public School Contract Law, 18A:18A-18 mandated the listing of subcontractors with the bid proposal. More specifically, Mathis Construction failed to list a plumbing subcontractor which is required on this project."

Mathis Construction Company, Inc., is prequalified by the Division of Building and Construction. Its prequalification certificate includes, *inter alia*, "underground water and utilities." Although the bid submitted by Mathis Construction Company made no mention of hiring a subcontractor, by letter dated July 2, 1997, Christopher D. Mathis, Corporate Secretary, advised respondent Board in pertinent part as follows:

> Please be advised that we intend to comply with Article 5, Section 2.5, page 00802-4 and will furnish a licensed plumber no later than 30 days after award of the Contract.
>
> When we do this type of work, we hire a Subcontractor whom is a licensed plumber. Again, we will supply the name within 30 days after award of the Contract.

The portion of the specifications referred to in the July 2, 1997, letter provides as follows:

> 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK
>
> 5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Engineer the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Engineer will promptly reply to the Contractor in writing stating whether or not the Owner or the Engineer, after due investigation, has reasonable objection to any such proposed

> person or entity. Failure of the Owner or Engineer to reply promptly shall constitute notice of no reasonable objection.
>
> 5.2.1.1 Not later than 30 days after date of commencement, the contractor shall furnish in writing to the Owner through the Engineer the names of persons or entities proposed as manufacturers of each of the products identified in the Specifications and, where applicable, the name of the installing Subcontractor.

The specifications do not elsewhere require a bidder to list the names of intended subcontractors in the bid. Petitioner Buena contends, however, that *N.J.S.A.* 18A:18A-18 requires bidders to list proposed subcontractors in this bid and concludes that since respondent Mathis did not do so and since respondent Mathis is not a licensed master plumber (all parties acknowledge that the specifications include the installation of a back flow preventer which will require a master plumber for installation) that the contract should be awarded to Buena Plumbing as the lowest qualified bidder. Buena seeks a temporary restraining order staying the awarding and performance of the contract pending a final determination of petitioner's legal challenge.

APPLICABLE LAW AND DISCUSSION

It is clear that petitioner, as an unsuccessful bidder, may not challenge the legality or sufficiency of the specifications pursuant to which respondent school board intends to award the contract to respondent Mathis Construction Company, Inc., the low bidder. *Camden Plaza Parking v. City of Camden*, 16 *N.J.* 150 (1954); *Waszen v. City of Atlantic City*, 1 *N.J.* 272 (1940); *Albert f. Ruehl Co. v. Bd. of Trustees, Industrial Ed.*, 85 *N.J. Super.* 4 (Law Div. 1964). The rationale of these holdings is "that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside." *Waszen, supra,* at 276. If petitioner had a problem with the clarity of the specifications, the time to raise that issue was before the bids were opened, not after.

The only requirement in the specifications concerning the listing of subcontractors requires the successful bidder to furnish in writing to the school board "the names of persons

or entities proposed as manufacturers of each of the products identified in the specifications and where applicable the names of the installing subcontractor." This information is to be provided not later than thirty days after the date of commencement. Petitioner Buena argues that this provision must be read in conjunction with *N.J.S.A.* 18A:18A-18 to mean that the successful bidder has thirty days to advise the school board which of the subcontractors listed in the original bid will be used to install which products produced by which manufacturers. *N.J.S.A.* 18A:18A-18 provides in pertinent part in this regard:

> In the preparation of plans and specifications for the construction, alteration or repair of any building by a board of education, when the entire cost of the work and materials will exceed the amount set forth in, or calculated by the Governor pursuant to, N.J.S. 18A:18A-3 separate plans and specifications shall be prepared for each of the following, and all work and materials kindred thereto to be performed or furnished in connection therewith:
>
> a. The plumbing and gas fitting work;
> b. The hearing and ventilating systems and equipment;
> c. The electrical work, including any electrical power plant;
> d. The structural steel and ornamental iron work;
> e. All other work and materials required for the completion of the project.
>
> The board of education or its contracting agent shall advertise for and receive, in the manner provided by law, (1) separate bids for each of said branches of work, and (2) bids for all the work and materials required to complete the building to be included in a single overall contract. There will be set forth in the bid the name or names of, and evidence of performance security from, all subcontractors to whom the bidder will subcontract the furnishing of plumbing and gas fitting, and all kindred work, and of the heating and ventilating systems and equipment, and electrical work, structural steel and ornamental iron work, each of which subcontractors shall be qualified in accordance with this chapter.

As pointed out by respondent Board in its responding papers, the purpose of this statutory requirement is evident from a further reading of the statute which requires the award of separate contracts for each branch of work when the sum total is less than the lowest responsible bid for all the work and materials. Both respondent Board and respondent Mathis

accurately point out, however, that *N.J.S.A.* 18A:18A-18 is not applicable to the within matter because the Board of Education is seeking bids for a project that does not involve the "construction, alteration or repair of any building." The subject contract is a water line extension unrelated to the construction, alteration or repair of any building. Accordingly, the language of *N.J.S.A.* 18A:18A-18 does not on its face apply to the within project. As further evidence that the Department of Education does not regard the within project as controlled by the provisions of *N.J.S.A.* 18A:18A-18, respondent Board has offered copies of its August 6, 1996 letter to John Garcia, the Acting Director of the Bureau of Facility Planning Services in the Department of Education, and his response dated August 9, 1996, advising that "construction of hook up to water main of Upper Deerfield Township" does not require review of the plans and specifications by the Bureau; if building construction were involved, *N.J.S.A.* 18A:18A-16 would require submission and approval for educational adequacy.

Based upon all of the foregoing, I **CONCLUDE** that there is no statutory requirement that bidders list intended subcontractors in the bids for this project. Furthermore, the specifications as issued required notification concerning specific subcontractors only after the award of the bid, and although petitioner's arguments concerning the logic and wisdom of such a requirement might otherwise be persuasive, as previously noted, if petitioner had a problem with the clarity of the specifications, the time to raise that issue was before the bids were opened, not after. The relief which petitioner seeks herein, an order from the Commissioner of Education enjoining the awarding and performance of the water extension contract requires a *prima facie* showing by petitioner, *inter alia*, of a reasonable probability of success on the merits. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and *Morris Cty. Transfer Station v. Franks Sanitation*, 260 *N.J. Super.* 570 (App. Div. 1992). Petitioner cannot make that required showing, and accordingly, the application is **DENIED**. Respondents may proceed with the awarding and performance of the contract.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

August 15, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

ml

OAL DKT. NO. EDU 6491-97
AGENCY DKT. NO. 279-7/97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CUMBERLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, CUMBERLAND COUNTY, AND MATHIS CONSTRUCTION COMPANY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this matter and the Order Denying Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record, including the audio tape of the hearing conducted at OAL on August 15, 1997, the Commissioner agrees with the findings and conclusion of the Administrative Law Judge (ALJ) for the reasons clearly articulated by her in the Order.

Accordingly, the recommended Order of the ALJ denying emergent relief is adopted as the final decision on motion and this matter is hereby returned to the OAL for such further proceedings which may be necessary to bring it to conclusion.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 29, 1997
DATE OF MAILING AUGUST 29, 1997

455-97

455-97 M

JAYSON OIL COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY AND C.J. VANDERBECK & SONS, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

AUGUST 29, 1997

AGENCY DKT. NO. 86-3/97

JAYSON OIL COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY AND C.J. VANDERBECK & SONS, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	
	:	

This matter was initially brought before the Commissioner of Education by a Petition of Appeal filed on March 7, 1997, seeking to recover damages in connection with a boiler replacement project which petitioner, a New Jersey corporation which sells heating oil and related equipment, was not awarded. By letter dated March 13, 1997, petitioner was given twenty days to present its arguments as to why this matter should not be dismissed, in that the Commissioner is not authorized to award such damages.[1] Petitioner failed to submit its arguments or to formally respond to the request for information. Accordingly, by letter dated April 25, 1997, the Commissioner dismissed this matter, pursuant to his authority under N.J.A.C. 6:24-1.9.

Now, upon petitioner's Motion for Reconsideration, this matter is again before the Commissioner. Petitioner filed a brief in support of its motion; the Board filed a reply brief.

[1] The record shows that petitioner received this notice on March 17, 1997.

Petitioner argues that, on or about July 16, 1996, it duly submitted a bid responsive to the Board's capital improvement project for boiler replacements at the Princeton Regional High School. Respondent Vanderbeck also submitted a bid for the project. Petitioner asserts it was the low-bidder on the project and that, on or about July 17, 1996, Vanderbeck submitted a protest to the Board alleging that petitioner's bid was "non-responsive and unqualified." (Petitioner's Brief in Support of Request for Reconsideration at p. 2) Petitioner contends that the Board then "rejected all bids based upon an alleged 'unexpected contingency' involving a structural problem" at its Littlebrook Elementary School. (*Id.*) The Board subsequently awarded the replacement project to Vanderbeck, without advertising for new bids. As a result, petitioner asserts it has suffered damages.

Petitioner acknowledges that *N.J.S.A.* 18A:18-46 specifically provides that

> No action for damages shall lie against the state board, any state official, or any board of education or any of its officers because of any action taken by virtue of the provision of this chapter. *N.J.S.A.* 18A:18A-46.

However, petitioner contends that since it was without knowledge that the Board awarded the contract to Vanderbeck until *after* the work had been completed, it was deprived of exercising its right, as the lowest responsible bidder, to immediately challenge the contract by filing a Motion for Emergent Relief or by requesting a determination hearing, the sole remedies available to it under the existing school law.

Petitioner further claims that the Board's award of the contract to Vanderbeck violates school law, in that Vanderbeck was not the lowest responsible bidder, and although *N.J.S.A.* 18A:18A-5 establiishes an exception to the requirement to advertise for bids, "the Board cannot deny that none of the provided exceptions apply in this matter." (*Id.* at p. 4) Thus,

petitioner concludes that the Board capriciously awarded the contract to Vanderbeck, leaving it without remedy. Petitioner continues,

> ***In such instances, the only logical remedy is to grant the lowest responsible bidder damages in the amount of lost profits that it would have received had it been awarded the contract. To do otherwise would permit school boards to arbitrarily and unjustly abrogate the overall purpose of competitive bidding, which is "to put all actual or potential bidders on the same footing." *** While granting damages is typically left for state courts, state courts "do not hear a school law matter until after the State Board of Education has rendered a decision . . . and the State Board has authority to review only a determination of the Commissioner of Education." *** However, once a petitioner files an administrative petition, as required by the school law in these matters, the petitioner is barred from bringing the same action in state court. Thus, the Commissioner should have the authority to grant damages in limited situations that are similar to the facts presented here. *** (*Id.* at pp. 5, 6, citations omitted)

In reply, and by certification of the School Business Administrator, the Board avers that, after advertisement of and receipt of bid packages for the boiler/burner replacement projects at Princeton Regional High School and the John Witherspoon School, which it refers to as the HVAC project, it was faced with "***the unexpected catastrophe of the collapse of classroom floor areas at the Littlebrook Elementary School." (Board's Affidavit of Daniel Swirsky in Support of Respondent's Brief in Opposition to Petitioner's Request for Reconsideration at p. 2) The Board asserts that the floors, which were concrete slabs on grade construction, "had begun 'sinking' with large voids also existing below the slabs." (*Id.*) The Board was unable to assess whether the collapse was a localized condition or whether the entire Littlebrook facility was on the verge of sinking. (*Id.*) Due to budgetary constraints, boiler/burner replacement projects at both the High School and the John Witherspoon School were canceled until the scope of the problem at Littlebrook could be determined. By letter dated

July 29, 1996, letters of rejection citing the need "to meet an unexpected contingency" were sent to all bidders on the project. (*Id.* at p. 3)

Thereafter, the Board hired Raise-It Concrete Co. of Allentown, Pennsylvania, to remedy the sinking floor areas at the Littlebrook Elementary School, and further determined by a subsurface soil analysis that the distress to the school was localized, rather than systemic, and was safe for occupancy. In August 1996, the Board's facilities staff advised that the risk of opening the high school for the 1996-97 school year with its aged HVAC system "posed too great a risk to the health and safety of school personnel and students because the supply of hot water would be affected as well as the capacity to heat the high school before the onset of the Fall and Winter months." (*Id.* at pp. 3, 4) Finding that there was insufficient time to prepare new bid specifications and rebid the project, the Board, on August 20, 1996, passed an emergency resolution authorizing "a 'partial replacement' HVAC project, which would complete only essential HVAC work at Princeton Regional High School." (*Id.* at p. 4) A contract was signed with Respondent Vanderbeck, a licensed contractor already "in place" working on completing a boiler replacement project at the Board's Valley Road Administration Building. *(Id.)*

The Board asserts that its contract with Vanderbeck was properly awarded on an emergent basis, pursuant to the provisions of *N.J.S.A.* 18A:18A-7 which allows for same. (Board's Brief at p. 5) Moreover, it reasons that, at the point at which it rejected all bids, "***Petitioner's status as lowest responsible bidder ceased to be an issue as a relevant or dispositive factor in the instant action." (*Id.* at p. 6) Thus, the rights and privileges which petitioner claims accompany its status as a lowest responsible bidder are not applicable. The

Board further asserts it is "ridiculous" for petitioner to contend that the Board would voluntarily seek to increase its financial burdens by awarded a contract to a higher responsible bidder. *(Id.)*

As to Vanderbeck's protest that petitioner's bid was nonresponsive and unqualified, the Board asserts that it rejected all bids before addressing Vanderbeck's protest. However, the Board reasons that "Vanderbeck's protest is the source of the Petitioner's motive for the filing of the instant action." (*Id.* at p. 7)

The Board avers that the purpose of the bidding statute, to protect the public interest by keeping costs to a minimum and preventing fraud, has not been frustrated. It rejected all bids in good faith when it was faced with the "unexpected catastrophe" at the Littlebrook Elementary School. (*Id.*) Accordingly, the Board requests that the Commissioner deny petitioner's request for reconsideration.

Upon review of the papers submitted, the Commissioner initially observes that, notwithstanding that the parties have reached to the merits of this matter by their arguments, *supra*, the immediate issue before him is whether petitioner has demonstrated that this matter warrants reconsideration. As such petitioner must show that, contrary to the Commissioner's determination of April 25, 1997, the Commissioner is authorized to hear and determine this matter pursuant to his general authority under *N.J.S.A.* 18A:6-9 and that *N.J.S.A.* 18A:18A-46 does not specifically preclude petitioner's action for damages. The Commissioner determines, however, that petitioner has failed to meet its burden.

The within Petition of Appeal seeks to recover damages from respondents for what petitioner posits to have been capricious action on the part of the Board. While petitioner may have been deprived of the opportunity to appeal on an emergent basis in order to obtain

injunctive relief, the Commissioner rejects the concomitant conclusion that this circumstance entitles petitioner to recover damages, notwithstanding the specific limitations of *N.J.S.A.* 18A:18A-46. The Commissioner observes,

> ***Ordinarily, we derive a statute's meaning by first looking to its plain language. *** If the language's meaning is clear and unambiguous, it will be given effect "absent any *specific* indication of legislative intent to the contrary."*** (emphasis in text) *Chase Manhattan Bank v. Josephson,* 135 *N.J.* 209, 225 (1994).

Here, petitioner points to no legal authority which would persuade the Commissioner that the plain language of *N.J.S.A.* 18A:18A-46 should be rendered a nullity. Moreover, our school law statute is buttressed by New Jersey decisional law which restricts the right of an unsuccessful bidder to recover money damages against a public body. Specifically, while an unsuccessful bidder may attack the award of a contract, that bidder may not recover money damages even if the challenge succeeds. See *M.A. Stephen Const. v. Borough of Rumson,* 125 *N.J. Super.* 67, 75 (App. Div. 1973), as cited in *Feriozzi v. City of Atlantic City*, 268 *N.J. Super.* 310, 315 (App. Div. 1993). As *Feriozzi* instructs,

> The reason why an unsuccessful bidder may not receive money damages, even if the challenge to the award of the contract succeeds, is to prevent the public from paying twice. It is the public interest, not the private interest of the bidder, which is paramount.*** *Feriozzi, supra*, at 316.

Accordingly, petitioner's Motion for Reconsideration is hereby denied. The decision of April 25, 1997 dismissing the within matter shall not be disturbed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

AUGUST 29, 1997
DATE OF MAILING AUGUST 29, 1997

4/57-97

JOHN FALOCCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON/VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMB ER 2, 1997

OAL DKT. NO. EDU 8797-96
AGENCY DKT. NO. 382-9/96

JOHN FALOCCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH HUNTERDON/VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 2, 1997
DATE OF MAILING SEPTEMBER 2, 1997

458-97

458-97

BARBARA FINKEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 2, 1997

OAL DKT. NO. EDU 7573-96
AGENCY DKT. NO. 180-5/96

BARBARA FINKEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 2, 1997
DATE OF MAILING SEPTEMBER 2, 1997

460-97

460-97

D.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 3, 1997

OAL DKT. NO. EDU 3668-97
AGENCY DKT. NO. 113-4/97

D.G., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

September 3, 1997
DATE OF MAILING SEPTEMBER 3, 1997

461-97

461-97

C.S., on behalf of minor child, O.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 3, 1997

OAL DKT. NO. EDU 11674-96
AGENCY DKT. NO. 475-10/96

C.S., on behalf of minor child, O.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 3, 1997
DATE OF MAILING SEPTEMBER 3, 1997

462-97

462-97

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 3, 1997

OAL DKT. NO. EDU 7068-96
AGENCY DKT. NO. 175-5/96

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 3, 1997
DATE OF MAILING SEPTEMBER 3, 1997

464-97

464-97

RALPH SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 4, 1997

OAL DKT. NO. EDU 7422-97
AGENCY DKT. NO. 214-6/97

RALPH SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 4, 1997
DATE OF MAILING SEPTEMBER 5, 1997

465-97

465-97

H.K. and A.K., on behalf of minor child, I.K., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY, : DECISION

RESPONDENT. :

:

SEPTEMBER 4, 1997

OAL DKT. NO. EDU 4723-97
AGENCY DKT. NO. 207-6/97

H.K. and A.K., on behalf of minor child, I.K.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 4, 1997
DATE OF MAILING SEPTEMBER 5, 1997

466-97

466-97

S.B.T. and R.A.T., on behalf of their minor child, S.M.T.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 4, 1997

OAL DKT. NO. EDU 1428-96
AGENCY DKT. NO. 9-1/96

S.B.T. and R.A.T., on behalf of their minor child, S.M.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 4, 1997
DATE OF MAILING SEPTEMBER 5, 1997

473-97

473-97

JAMES HUDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 8, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4966-96

AGENCY DKT. NO. 204-6/96

JAMES HUDSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,

Respondent.

Stephen B. Hunter, Esq., for the petitioner (Klausner & Hunter, attorneys)

Michael J. Gross, Esq., for the respondent (Kenny and Gross, attorneys)

Record Closed: July 17, 1997 Decided: July 18, 1997

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

This matter concerns the petition filed by James Hudson regarding the decision of the respondent to withhold his increments for the 1996-97 school year. The respondent denied the allegations in the petition, and on June 21, 1996, and the matter was sent to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I held a prehearing conference on July 30, 1996, and the matter was scheduled for a hearing on December 3 and 4, 1996. Prior to the commencement of the hearing, Stephen B. Hunter, Esq., on behalf of the petitioner, requested that the matter be adjourned since the parties were having settlement discussions. I adjourned the matter. The matter was rescheduled for May 15 and 30, 1997, since it had not settled. Prior to the hearing, Mr. Hunter informed me that the case was settled and I adjourned the hearing dates.

I received on July 17, 1997 the fully executed stipulation of settlement, which sets forth the terms of the settlement. This stipulation is attached and incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement, and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 18, 1997
DATE

BEATRICE S. TYLUTKI, ALJ

July 23, 1997
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUL 24 1997
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

KLAUSNER & HUNTER, ESQS.
63 East High Street
P.O. Box 1012
Somerville, N.J. 08876
(908) 685-1552
Attorneys for Petitioner, James Hudson

JAMES HUDSON, Petitioner,	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
vs.	: OAL DOCKET NO. 04966-96S AGENCY DOCKET NO. 204-6/96
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY, Respondent.	: STIPULATION OF SETTLEMENT

James Hudson, Petitioner, having brought this action before the Commissioner of Education seeking a restoration of his 1996-97 salary and adjustment increment from the Hazlet Township Board of Education in his capacity as a teaching staff member with the District; and

The parties having reached an amicable resolution to the matter without the need to proceed to hearing,

IT IS HEREBY AGREED as follows:

1. James Hudson's 1996-97 employment and adjustment increments shall be restored, retroactively, to September 1, 1996.

2. Hudson shall also receive his employment and adjustment increment for the 1997-98 academic year.

3. Hudson shall immediately submit an irrevocable letter of resignation for purposes of retirement effective March 1, 1998, with the Superintendent of Schools for the Hazlet Township Board of Education.

4. Hudson shall be assigned to a long-term substitute position in the District for that portion of the 1997-98 school year for which Hudson shall be employed by the District until the effective date of his letter of resignation for purposes of retirement, March 1, 1998.

5. Hudson shall withdraw, with prejudice, the Petition of Appeal before the Commissioner of Education, Docket No. 204-6/96.

James J. Hudson
James Hudson, Petitioner

Stephen B. Hunter, Esq.
Attorney for Petitioner

Richard Barney
Richard Barney, President of the Hazlet Township Board of Education, Respondent

Michael J. Gross, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 4966-96
AGENCY DKT. NO. 204-6/96

JAMES HUDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 8, 1997
DATE OF MAILING SEPTEMBER 8, 1997

474-97

474-97

JERRY NESTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning teacher, whose supervisory position was abolished, sought reinstatement to other supervisory position of Department Supervisor/Athletic Director, held by staff member with allegedly less seniority than petitioner.

ALJ found that pursuant to *N.J.S.A.* 18A:28-5, each administrative or supervisory position is to be treated separately for tenure and seniority purposes. Thus, petitioner did not have tenure in the separate supervisory position of Department Supervisor/Athletic Director. Moreover, the ALJ found that although the other individual (Ms. Ryan) was in the same situation as petitioner, when their seniority was calculated by including their length of service in "all categories in which he or she previously held employment" after obtaining tenure in a supervisory position and including the "full recognition of the previous years of service within the district" after tenure was obtained in the supervisory category, Ms. Ryan had greater seniority than petitioner and, therefore, greater seniority entitlement to the position in question. Petition was dismissed.

Commissioner found that petitioner had acquired tenure as a supervisor, as had Ms. Ryan. However, the Commissioner further found that neither petitioner nor Ms. Ryan maintained a seniority claim to the position in question, in that said position was a new one, and not merely a new title affixed to an existing position. Accordingly, the Board was free to exercise its discretion in selecting a person to fill the position. Commissioner concurred with the ALJ that absent a showing by petitioner that the Board's actions in selecting Ms. Ryan over petitioner were arbitrary, capricious, or unreasonable, the Board's decision was presumed valid and would not be disturbed. Commissioner further noted that the decision in *Nelson* and the resultant statutory amendment to *N.J.S.A.* 18A:28-5 clarifying the separately tenurable nature of the positions enumerated therein, did not apply to the facts in this matter, inasmuch as the positions which petitioner and Ms. Ryan held in the past, and the position to which they both laid claim herein were in the same separately tenurable category of supervisor. Commissioner dismissed petition.

SEPTEMBER 8, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6878-96

AGENCY DKT. NO. 321-8/96

JERRY NESTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

Francis X. Journick, Jr., Esq., for respondent (Wilentz Goldman & Spitzer, attorneys)

Record Closed: June 20, 1997 Decided: July 17, 1997

BEFORE **ROBERT S. MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, Jerry Nester (petitioner) seeks instatement, on the basis of tenure and seniority, to the position of "Department Supervisor/Athletic Director," which was established by the Board of Education of Old Bridge Township (respondent or Board of Education).

On August 19, 1996 the instant matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act. A telephone prehearing conference was held on November 7, 1996. The hearing itself was held on May 5, 1997. The record closed upon counsel's submission of legal memoranda.

The essential facts in this case are not in dispute, having been established by stipulations made by counsel at the outset of the hearing and by the credible testimony of 3 witnesses, including petitioner himself.[1] Accordingly, I set forth separately hereafter those facts that were stipulated and those supplementary facts that I have found after listening to and considering the testimony of the witnesses.

STIPULATED FACTS

1. In November 1968, petitioner Nester earned a teaching certificate with endorsements as secondary teacher of Biology, General Science, Physical Education and Health Education.

2. On September 1, 1969, Nester became employed by the Old Bridge Board of Education as a teacher of Science.

3. In June 1974, petitioner earned an Administrative/Supervisory Certificate with Principal and Supervisor endorsements.

4. On September 2, 1972, Nester earned tenure as a teacher.

5. On September 1, 1985, petitioner was appointed to the position of Athletic Director.

6. Effective July 1, 1994, petitioner Nester was appointed to the position of Administrator of Athletics and Intramurals.

7. The Administrator of Athletics position requires that the holder of the position maintain a valid Administrative/Supervisory Certificate with a supervisory endorsement.

---

[1] The 2 who testified besides petitioner were Andrew Korshalla (Superintendent of Schools of the Old Bridge Township School System) and Dona Ryan, who was appointed by the Board of Education to the position of "Department Supervisor/Athletic Director," the position sought by petitioner.

8. Effective June 3, 1996, as part of a reduction in force, Nester was returned to his former position as teacher.

9. In June 1968, Dona Floeck Ryan earned a teaching certificate with endorsements in Physical Education, Health Education and Driver Education.

10. On September 1, 1968, Dona Ryan was appointed to a teaching position within the Old Bridge school district. Ryan earned tenure as a teacher on September 2, 1971.

11. On May 1, 1974, Dona Ryan was appointed to the position of Department Chairperson of Physical Education.

12. From November 15, 1979 through March 15, 1980, Dona Ryan took a maternity leave of absence.

13. In May 1979, Ryan earned an Administrative/Supervisory Certificate with a supervisory endorsement.

14. On June 30, 1982, Ryan was returned to her former position as a teacher of physical education as apart of a reduction in force.

15. On March 1, 1988, Dona Ryan was appointed Department Chairperson of Physical Education.

16. On June 30, 1990, as part of a reduction in force, Dona Ryan was returned to her former position as Physical Education teacher.

17. On July 1, 1996, Dona Ryan was appointed to the position of Department Supervisor/Athletic Director. A Supervisory Certification is required for this position.

ADDITIONAL FACTS

During the 9 years (1985-1994) petitioner served as Athletic Director, his duties were primarily as follows: to interview applicants for coaching positions and to recommend coaches for new hires; to supervise the coaches and at the end of the year to evaluate them; to schedule games for athletic contests between and among schools; to discipline coaches if and when necessary; to "keep track" of gate receipts from such sports as football; to obtain and to pay persons to officiate at athletic contests; to prepare the athletic department budget, including allocating the monies that would be used for each sport; and to maintain equipment inventories.

Admittedly, petitioner's focus was extracurricular. He never evaluated teachers, and his evaluation of coaches was more of a formality then anything else. He was not involved in the regular educational program, viz., he did not prepare lesson plans, resolve classroom instructional problems, or serve as Department Chair for any of the regular educational programs. His bargaining unit was the Old Bridge Education Association (the teachers' union), rather than the Old Bridge Supervisors Association (the union representing Principals, Vice-Principals and other supervisors of instruction).

During her years as Department Chairperson of Physical Education, Dona Ryan's principal duties were: to supervise the 10 or 12 teachers of Physical Education and Health in Madison High School (1 of the 2 high schools in the Old Bridge school district); to develop and evaluate instructional programs; to observe and evaluate teachers; to help teachers improve their performance; to insure that proper and adequate supplies were received; and to interview and recommend new teaching hires.

Sometime in late 1993 or early 1994, the 2 separate Athletic Director positions were eliminated and 1 new position - - "Administrator of Athletics and Intramurals" - - was created. Effective July 1, 1994 petitioner was appointed to that position. In general, the duties of that position were to coordinate and supervise both extracurricular athletics and the intramural program. The new position, however, did not operate to the satisfaction of the Board of Education and, prior to July 1, 1996, it was eliminated. A new and different position, "Department Supervisor/Athletic Director," was created.

On July 1, 1996 Ms. Ryan was appointed to the latter position. Her duties included the following:

1. Develops the high school's athletic program and supervises physical education teachers in the development of instructional guides, course outlines and other curricular materials related to the physical education program.

2. Participates in interviewing and hiring of teachers and coaches as assigned.

3. Evaluates performance and makes recommendations regarding personnel assigned by principal or central office administrators.

4. Coordinates department operations and acts as liaison between the department and administration, guidance and other departments.

5. Checks lesson plans regularly to insure that curriculum requirements are being met and that available materials are being utilized.

6. Supervises assigned personnel, makes classroom visitation, provides follow-up consultation and provides assistance in the solution of instructional problems.

Most of Ms. Ryan's time (about 60%) she devotes to the educational aspect of the position; the remainder she spends on the extracurricular (athletics) part.

The duties of this newly created position are far more similar to the duties and responsibilities of the position of "Department Chairperson of Physical Education" (held at one time by Dona Ryan) than to the position of "Athletic Director" (held for 9 years by petitioner).

ISSUES AND ANALYSIS

The essential question in this case is whether petitioner has sustained his burden of proving that he has a greater entitlement to the position of "Department Supervisor/Athletic Director" than does Dona Ryan, the person whom the Board of Education has appointed. For the reasons to be expressed hereafter, I am of the opinion that this question must be answered in the negative.

Petitioner's argument proceeds from the assumption that he acquired tenure and seniority rights as a supervisor in his prior position of "Athletic Director" and "Administrator of Athletics and Intramurals." This assumption is disputed by respondent, who argues that the evidence clearly establishes that petitioner performed few, if any, supervisory functions in those job titles. Thus, says respondent, since it is duties performed, rather than the title of the position that is controlling, Effenberger v. Toms River Regional Board of Education, 95 N.J.A.R. 2d (EDU) 66, 69 (Comm'r Ed.), aff'd 95 N.J.A.R. 2d (EDU) 203 (St. Bd. Ed. 1995), petitioner did not acquire tenure and seniority as a supervisor. The position in question is admittedly supervisory in nature.

It is unnecessary to decide this issue, and I will not do so. Assuming that petitioner did acquire tenure in the 2 aforementioned positions, he is not automatically entitled to the

"Department Supervisor/Athletic Director" position. Pursuant to *N.J.S.A.* 18A:28-5, tenure "accrues only by the employment in [a specific] administrative or supervisory position [and does] not extend to any other administrative or supervisory position." The recent amendment to *N.J.S.A.* 18A:28-5 clarifies the legislative intention that each administrative or supervisory position be treated separately for tenure and seniority purposes. Nelson v. Board of Education of Township of Old Bridge, 148 N.J. 358, 370 (1977). Thus, regardless of whether petitioner obtained tenure in other previous positions, he does not have tenure in the separate supervisory position of "Department Supervisor/Athletic Director."

Similarly, if petitioner does have seniority because of his service in prior positions, that seniority cannot be used to claim an entitlement to the "Department Supervisor/Athletic Director" position. Pursuant to *N.J.A.C.* 6:3-5.1(l), each supervisory title in the school district is a separate category for seniority purposes. The effect of treating each supervisory title as a separate category is that seniority will accrue separately in each specific supervisory title held, and seniority accrued in one supervisory title cannot be used to support an entitlement to a position under a separate supervisory title. *N.J.A.C.* 6:3-5.1(b). Thus, even if he accrued seniority as "Athletic Director" and/or "Administrator of Athletics and Intramurals," petitioner's seniority based upon his service in those positions does not entitle him to the position at issue in this case.

Although Ms. Ryan may be in the same situation as petitioner, i.e., not automatically entitled to the "Department Supervisor/Athletic Director" position, the Board of Education was faced with choosing between 2 employees, neither of whom had a superior entitlement. The Board of Education was then entitled to exercise its discretion in choosing Ms. Ryan, Chammings v. Rockaway Township Board of Education, 93 N.J.A.R. 2d (EDU) 891, 895 (Comm'r of Ed. 1993), so long as its discretion was not abused, and there has been no showing whatever of that. Furthermore, the Board's choice under these circumstances is entitled to a presumption of validity. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd 46 N.J. 581 (1966); Kopera v. West Orange Board of Education, 60 N.J. Super. 280, 294 (App. Div. 1960). This presumption of validity has clearly not been overcome.

Additionally, if one assumes that both petitioner and Ms. Ryan have tenure and seniority rights to the position in question, then their respective seniority will determine which of them is

entitled to the position. Seniority is determined according to "the number of academic or calendar years of employment, or fraction therefore, as the case may be, in the school district, in specific categories," *N.J.A.C.* 6:3-5.1(b), and includes any period of employment in the district prior or subsequent to acquiring tenure in a category, even after a move from that category. *N.J.A.C.* 6:3-5.1(c) and (h). Accordingly, if petitioner and Ms. Ryan both have tenure and seniority rights with respect to the "Department Supervisor/Athletic Director" position, a simple mathematical calculation reveals that Ms. Ryan has greater seniority and therefore a superior entitlement to the position.

As noted above, pursuant to *N.J.A.C.* 6:3-5.1(h), seniority for both petitioner and Ms. Ryan is calculated by including their length of service in "all categories in which he or she previously held employment" after obtaining tenure in a supervisory position. Further, the computation of seniority includes the "full recognition of the previous years of service within the district" after tenure is obtained in the supervisory category.

Ms. Ryan's seniority is calculated beginning with her appointment to the "Department Chairperson of Physical Education" (May 1, 1974), or, at the latest, when she obtained her administrative certificate with supervisory endorsement while in that position (May 1979), through the date on which the "Department Supervisor/Athletic Director" position was filled (July 1, 1996), minus her maternity leave (November 15, 1979 through March 15, 1980). This gives her seniority of 21 years and 10 months, at the most, or 16 years and 10 months at the least.

Petitioner's seniority is calculated as beginning upon his appointment to the "Athletic Director" position (September 1, 1985) through the date on which the "Department Supervisor/Athletic Director" position was filled (July 1, 1996). This gives petitioner seniority of 10 years and 11 months.

In short, Ms. Ryan's seniority is greater than petitioner's by a minimum of 5 years and 11 months. Thus, she has the greater seniority entitlement to the position.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that petitioner is not entitled to the position of "Department Supervisor/Athletic Director" and that his petition should therefore be **DISMISSED.** It is so **ORDERED.**

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

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

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

July 17, 1997
DATE

Robert S. Miller
ROBERT S. MILLER, ALJ

Receipt Acknowledged:

July 23, 1997
DATE

D.M. Artamatis/pe
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

tmp

WITNESSES

For petitioner:

Jerry Nester

For respondent:

Andrew Korshalla

Dona Ryan

EXHIBITS

Joint:

J-1 Stipulation of Facts with attachments

OAL DKT. NO. EDU 6878-96
AGENCY DKT. NO. 321-8/96

JERRY NESTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board submitted exceptions in support of the initial decision of the ALJ, which submission is merely a verbatim reiteration of its arguments raised at the OAL and, therefore, will not be summarized herein.

Upon careful and independent review of the record in this matter, which included a transcript of the proceedings conducted on May 5, 1997 at the OAL, the Commissioner determines that petitioner is not entitled to instatement in the position of Department Supervisor/Athletic Director, for the reasons set forth herein.

Initially, the Commissioner finds that petitioner has acquired tenure as a supervisor, pursuant to *N.J.S.A.* 18A:28-5 and 18A:28-6, by virtue of his employment as an Athletic Director, from 1985 to 1994, and as the Administrator of Athletics and Intramurals, from 1994 to 1996. Despite the parties' apparent dispute about the certification requirement for

the position of Athletic Director, the job description for that position, on its face, required a "Master's Degree with Supervisor's Certificate." (Exhibit J-1, attachment A) Additionally, the parties have stipulated that the Administrator of Athletics and Intramurals position required that the holder of the position maintain a valid administrative certificate with supervisory endorsement. (Initial Decision at p. 2) In spite of the Board's characterization of these positions as "clerical in nature," (Board's Exceptions at p. 4), petitioner was required to interview applicants for coaching positions, to recommend coaches for new hires, to supervise coaches and to evaluate coaches at the end of the year. (Initial Decision at p. 3) Moreover, coaches are certificated teachers, (*N.J.A.C.* 6:29-3.3 *et seq.*) notwithstanding that their depth of participation in the District's educational program varies from that of classroom teachers. This conclusion is buttressed by the legislative history of the statute requiring that athletic directors hold endorsements as supervisors. The Legislature therein affirmed that

> Athletics have become an increasingly significant component of the educational program in every school in the State. With the expanding emphasis on athletics has come a multidimensional expansion in the supervisory responsibilities and duties of athletic directors. These supervisory responsibilities include recruiting, selecting and evaluating coaches and trainers, ordering equipment, maintaining inventories, establishing crowd control and safety, reviewing eligibility, providing transportation and scheduling comprehensive physical examinations. (*P.L.* 1991, *c.* 17, Senate Education Committee Statement to Senate, No. 2343, April 26, 1990)

The Commissioner additionally finds that Ms. Ryan, too, has acquired tenure as a supervisor. Here, the record indicates that, although Ms. Ryan was appointed to the position of Department Chairperson of Physical Education in 1974, the job description for Department Chairpersons did not, until September 11, 1979, require that the holder possess a supervisor's

endorsement. (Exhibit J-1, attachment C; Transcript at p. 72) Ms. Ryan's tenure as a supervisor, therefore, could not begin to accrue before September 11, 1979. (*N.J.S.A.* 18A:28-4) Initially, she served as Department Chairperson until June of 1982, thereby satisfying the time requirement set forth in *N.J.S.A.* 18A:28-6 for obtaining tenure pursuant to a transfer or promotion. Thus, her tenure accrued because she was employed for the requisite time period as a Department Chairperson *and* because, as of 1979, she was required to hold, and did in fact possess, an administrative certificate with a supervisory endorsement. Moreover, the record clearly supports the conclusion that the functions of the Department Chairperson after September 11, 1979 were supervisory in nature.[1]

With respect to the determination of tenure rights, the Commissioner clarifies that neither petitioner's nor Ms. Ryan's membership in a particular bargaining unit is dispositive:

> ***Tenure is created by statute, and the Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, defines with specificity the conditions under which teaching staff members are entitled to the security of tenure. *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 72 (1982). Tenure supersedes any contractual terms, and whether a teaching staff member is entitled to the protection of tenure never depends on the contractual agreement between the staff member and the employing board. *Id.*, at 72, 77. Rather, in order to obtain tenure, the precise statutory conditions must be met. *Zimmerman v. Bd. of Educ. of Newark*, 38 *N.J.* 65, 72 (1962). *John Zachau v. Burlington County Vocational and Technical Schools, Burlington County,* decision by State Board of Education September 4, 1996, rejecting petitioner's claim that the particular bargaining unit in which he was represented was material to the determination of his statutory tenure rights. Slip Opinion at p. 4.

The Commissioner next finds that, having acquired tenure as a supervisor, petitioner accumulated just under nine years of seniority as an Athletic Director, and just under

[1] The Commissioner does not herein make a determination with respect to the nature of Ms. Ryan's job functions as Department Chairperson prior to September 11, 1979, since that period of time cannot, in any event, count toward her acquisition of tenure as supervisor, in that she was not properly certified. (*N.J.S.A.* 18A:28-4)

two years of seniority as the Administrator of Athletics and Intramurals (*N.J.A.C.* 6:3-5.1(l)10i) as of July 1996, when the new position of Department Supervisor/Athletic Director was created. Likewise, as a tenured supervisor, Ms. Ryan had accumulated over 16 years of seniority in the title of Department Chairperson of Physical Education (*N.J.A.C.* 6:3-5.1(l)10i) as of July 1996.[2]

Further, notwithstanding the Board's assertions that the functions of the new position are "substantially similar" to those of the Department Chairperson of Physical Education (Board's Exceptions at pp. 11-15), the Commissioner finds that the record supports the conclusion that the position of Department Supervisor/Athletic Director is a new position, not merely a new title affixed to an existing position, which represents a fairly balanced blend of the job duties formerly performed by the Department Chairperson of Physical Education *and* the Athletic Director. (Initial Decision at p. 5; Transcript at p. 77) Accordingly, neither petitioner nor Ms. Ryan maintained a seniority claim with respect to the new position, and the Board was, therefore, free to exercise its discretion in selecting the person to fill the position. As the ALJ properly noted, absent a showing by petitioner that the Board's actions in selecting Ms. Ryan over petitioner were arbitrary, capricious, or unreasonable, the Board's decision is presumed valid, and will not be disturbed.

Finally, the Commissioner notes that the decision in *Nelson, supra*, and the resultant statutory amendment to *N.J.S.A.* 18A:28-5 clarifying the separately tenurable nature of the positions enumerated therein, do not apply to the facts in this matter, inasmuch as the positions which petitioner and Ms. Ryan held in the past, and the position to which they both lay

[2] The Commissioner notes that this calculation covers the time period of September 1979 through July 1996, less the four-month period Ms. Ryan was on maternity leave.

claim now, are in the same separately tenurable category of supervisor.[3] The Commissioner, therefore, does not reach to the ALJ's discussion in this regard.

Accordingly, the Commissioner determines to affirm the conclusion of the ALJ, for the reasons expressed herein. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3] The Commissioner herein notes that the job description for the position of Administrator of Athletics and Intramural, facially indicates that the holder is required to maintain "A Principal's Certificate." (Exhibit J-1, attachment B) However, inasmuch as the parties have stipulated that the position required a supervisor's endorsement, the Commissioner accepts that stipulation as determinative in this matter.

SEPTEMBER 8, 1997
DATE OF MAILING SEPTEMBER 8, 1997

475-97

475-97

IN THE MATTER OF THE TENURE HEARING	:	
OF GARLETTE PARKMAN CLEMONS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
	:	

SEPTEMBER 9, 1997

AGENCY DKT. NO. 229-6/97

IN THE MATTER OF THE TENURE HEARING	:	
OF GARLETTE PARKMAN CLEMONS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
	:	

For the Board: Sumners, Council, George & Dortch
(Thomas W. Sumners, Jr., Esq.)

This matter having been opened before the Commissioner of Education on June 24, 1997, through certification of tenure charges of excessive absenteeism, abandonment of position and other just cause against a tenured secretary of the Board of Education of the City of Trenton; and

The Commissioner having directed respondent via both certified and regular mail on June 27, 1997, the certified copy being signed for on July 1, 1997, to file an answer to the tenure charges against her; and

The Commissioner having sent such notice again on July 21, 1997 and August 6, 1997, via regular and certified mail (with the certified copy of the July 21 notice being signed for on July 23, 1997 and the certified copy of the August 6, 1997 being returned unclaimed); and

Respondent having failed as of this date to comply with the directive of the Commissioner, so that each count of the charges against her is deemed to be admitted; now therefore

IT IS ORDERED this 9th day of September, 1997 that summary judgment shall be granted to the Board, and Garlette Parkman Clemons shall be dismissed from her tenured position as a secretary in the Board's employ as of the date of this order.

COMMISSIONER OF EDUCATION

SEPTEMBER 9, 1997
DATE OF MAILING SEPTEMBER 9, 1997

477-97

477-97

LEE MARCHETTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 12, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1739-97
AGENCY DKT. NO. 610-12/96

LEE MARCHETTI,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF NEWARK,
Respondent.

Arnold S. Cohen, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Derlys Maria Gutierrez, Esq., for respondent,
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 23, 1997 Decided: July 23, 1997

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on February 7, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

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

July 23, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

7/30/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 1997
DATE

Barbara A Harnell
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

JUL 23 12 50 PM '97

LEE MARCHETTI,

Petitioner,

v.

NEWARK PUBLIC SCHOOLS,

Respondent.

OAL DKT. NO. EDU 1739-97

AGENCY DKT. NO. 610-12/96

SETTLEMENT AGREEMENT

The parties in the above matter, having amicably resolved their dispute, agree as follows:

1. Lee Marchetti will be reinstated to a tenured teaching position at the Newark Public Schools, in accordance with her teaching certificate, effective September 1, 1997.

2. Ms. Marchetti will retain her accrued seniority in effect at the time of the commencement of her terminal leave on September 1, 1996. Ms. Marchetti will not accrue seniority for the period of time from September 1, 1996 through September 1, 1997.

3. Ms. Marchetti will retain accrued sick days that were not used for the terminal leave which she took from September 1, 1996 through January 31, 1997.

4. Ms. Marchetti waives all rights she may have to back pay, monetary damages or other compensation and attorneys' fees and waives any and all other claims she may have had against the Newark Public Schools.

5. Ms. Marchetti agrees that she will not apply for terminal leave at any future date.

6. This agreement does not constitute an admission of liability by the Newark Public Schools.

7. This agreement shall not be construed as precedent in any future or pending action against the Newark Public Schools.

8. The parties understand and agree that it is Ms. Marchetti's obligation to notify the Teachers Pension and Annuity Fund (TPAF) advising of her reinstatement effective September 1, 1997, and that all necessary pension adjustments are issues to be resolved by her and by the TPAF and not the responsibility of the Newark Public Schools.

DATED: July 23, 1997

For Petitioner:

Lee Marchetti

Arnold S. Cohen, Esq.
(Balk, Oxfeld, Mandell & Cohen, attorneys)

For Respondent:

Derlys M. Gutierrez, Esq.
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A., attorneys)

OAL DKT. NO. EDU 1739-97
AGENCY DKT. NO. 610-12/96

LEE MARCHETTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1997
DATE OF MAILING SEPTEMBER 12, 1997 -4-

478-97

478-97

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,

PETITIONER,

V.

A.H.S., J.E.D. AND I.H.S.,

RESPONDENTS.

J.E.D., parent and guardian of I.H.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY AND WILLIAM CLARK, SR., SUPERINTENDENT OF SCHOOLS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In consolidated matters, Board challenged domicile of minor pupil, I.H.S. and sought tuition payment, while parent challenged District's determination that I.H.S. was not domiciled in the District.

ALJ determined that even though I.H.S. resided at his father's home on a temporary basis, I.H.S. intended to remain permanently with his natural mother and legal guardian, J.E.D. Thus, the residence of his mother, which was in the District, was his domicile. Petition and cross-petition were dismissed.

Commissioner adopted findings and determination in initial decision as his own.

SEPTEMBER 12, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12012-93 & EDU 2208-94
AGENCY DKT. NO. 408-12/93 & 400-11/93
CONSOLIDATED

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,
Petitioner,
v.
A.H.S., J.E.D. AND I.S.,
Respondents.

---

and
JOANNE E. DEVINE PARENT AND GUARDIAN OF IAN HANS SCHNUG,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY AND WILLIAM CLARK, SR. SUPERINTENDENT OF SCHOOLS,
Respondents.

Steven S. Glickman, Esq., for petitioner, Board of Education of the Borough of Roselle Park
(Ruderman & Glickman, attorneys)

Diana K. Zollner, Esq., for respondents, Alfred Schnug, Joanne Devine and Ian Hans Schnug

Record Closed: June 3, 1997 Decided: July 24, 1997

BEFORE **IRENE JONES**, ALJ:

This matter involves the petition of the petitioner, the Board of Education of the Borough of Roselle Park and the cross petition of the respondent, Joanne E. Devine, parent and guardian of Ian Hans Schnug. On December 6, 1993, the Board of Education filed a petition with the State Department of Education to remove a student, Ian Schnug from its school district. The petition further requested that the respondents A.H.S., J.E.D. and I.S., and be assessed resident tuition as of the date of enrollment to the date of departure, additional investigation, court costs and legal fees. On December 16, 1993, the Department of Education transmitted the petition to the Office of Administrative Law for a hearing as a contested case. The matter was assigned OAL docket no. EDU 12013-93.

On November 30, 1993 the respondent, Joanne Devine filed a cross petition with the State Department of Education alleging that Ian Schnug be immediately readmitted to Roselle Park Public School System and compensatory education for the time that he was denied admission into the District's schools. The petition further requested that an Order be issued from the Commissioner that would prohibit expulsion of any student from the system until there is first an opportunity to rebut the charges. On March 9, 1994, the Commissioner transmitted the cross-petition to the OAL for hearing and possible consolidation with OAL Docket No. EDU 12013-93.

On April 4, 1994, the cross petitioner, requested that the matters be consolidated. A prehearing conference was held on February 17, 1994. The request to consolidate the matters was granted. Further, the parties' request to schedule this matter for settlement conference was also granted. A settlement conference was held on April 26, 1994. Subsequently, the parties were not able to resolve the entire controversy. Telephone conferences were conducted and the matter was scheduled

for a plenary hearing on December 9, 1996 and that date was adjourned for good cause.

On June 3, 1997 a hearing was held and the parties submitted Joint Stipulations.

FINDINGS OF FACT

Based on stipulation of the parties, I **FIND** the following **FACTS**:

1. Ian's legal guardian is his natural mother, Joanne E. Devine, who presently resides at 111 Columbus Place, Roselle Park, New Jersey. Ms. Devine's domicile is undisputed.

2. In a legal action, Civil Action Complaint Docket No. FD-20-001207-94E, Ms. Devine was granted legal custody.

3. Alfred Schnug is Ian's putative father. Alfred Schnug has visitation rights.

4. Under the Consent Order for Support, Docket No. 30-D-285, which are treated liberally by both parents.

5. Ian Schnug attended grades K through five in the Elizabeth public schools, while living with his mother in that district.

6. Ian began the sixth grade enrolled in the Westfield public schools, still living with his mother, but transferred because their new living arrangements were unexpectedly terminated. During the period that Joanne Devine was technically homeless, Ian resided with his father and attended the Union public schools, where he completed the sixth grade. At that time, the Union school district resisted enrolling Ian because his father did not have legal custody. When

Joanne Devine obtained an apartment in Roselle Park in 1992, Ian enrolled in the Roselle Park public schools.

7. While attending school in Union, Ian Schnug lived at 387 Spring Street, Union, New Jersey, with his father.

8. On or about August 31, 1992, Joanne Devine presented to the appropriate representatives of the Roselle Park School district a sworn statement from her landlord stating that she and Ian were living at 111 Columbus Place, Roselle Park, New Jersey.

9. During the beginning of eight grade, Ian Schnug informed the Roselle Park School District nurse that he was living with his father in Union, New Jersey. The nurse then forwarded this information to the Roselle Park School District attendance officer, who initiated a residency investigation.

10. Due to Ms. Devine's attendance at college courses on weekday evenings, Ian Schnug spent considerable time at his father's residence during the school semester in question. This was deemed by both parents to be in the best interest of Ian as a temporary solution to providing care to Ian while his mother attended school.

11. Roselle Park Board of Education policy provides that "No child shall be registered as a student in the school district unless the child maintains his or her residence in the district. "Residence" is defined pursuant to *N.J.S.A.* 18:1-1 to mean domicile."

12. In October 1993, on four (4) separate occasions, the Roselle Park residency investigator surveilled the residence of Joanne Devine at 111 Columbus Place, Roselle Park, between 7:30 a.m. and 8:30 a.m., and never observed Ian Schnug exist this residence, although Ian Schnug was in attendance at Roselle Park High School.

13. On three (3) separate occasions in October and November 1993, the Roselle Park residency investigator observed Ian Schnug being picked up by Joanne Schnug in front of Roselle Park High School and driven to 387 Spring Street, Union, New Jersey, where Ian Schnug existed the vehicle and entered the residence.

14. On four (4) separate occasions in October and November, 1993, the Roselle Park residency investigator surveilled Alfred Schnug's residence at 387 Spring Street, Union, New Jersey, observed Ian Schnug existing this residence and being driven to Roselle Park High School.

15. On November 17, 1993, Mr. Clarke posted a letter to Ms. Devine which stated "Through our investigation process, we have determined that your son is not a resident of Roselle Park."

16. At a meeting with Mr. Clarke on November 23, 1993, both parents contended that Ian Schnug was domiciled at 111 Columbus Place, Roselle Park, New Jersey. Both parents confirmed that Ian had spent more time at his father's address during the semester in question than was usual, but that he was not domiciled at that address.

17. "Domicile" is the place where an individual had his permanent home or principal establishment, to where, whenever he is absent, he has the intention of returning.

18. "Domicile" is "The one technical pre-eminent headquarters, which a result either of fact or fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it may be determined."

19. "Every person has at all times only one domicile, and no person has more than one domicile at a time."

20. Residence is not equal to domicile since a person can have many transient residences where he may be temporarily found but only one domicile which is the residence to which he always intends to return and to remain permanently.

21. The residence to which Ian Schnug always intends to return and where he intends to remain permanently is that of his natural mother and legal guardian, Joanne Devine.

22. Ian's residing at his father's home on a temporary basis in no way constitutes domicile, since domicile is not equal to residence.

23. Ian's domicile is 111 Columbus Place, Roselle Park, New Jersey.

FINDINGS AND CONCLUSIONS

Based on the above **FACTS**, I hereby **FIND** that Ian Schnug is domiciled and has a residence in the petitioner's school district. I further **FIND** that he is lawfully entitled to attend school in the district where he is domiciled and resides at with his mother.

Based upon the Stipulations and the fact that Ian Schnug has continued to be educated in the Roselle Park School District with the exception of a one week period prior to the filing of the petition by the Roselle Park Board of Education due to a miscommunication, I **FIND** no violation of law on the part of either the Roselle Park Board of Education or Joanne Devine as alleged in the respective Petitions. Thus, I **FIND** and **CONCLUDE** that there is no longer a justiciable controversy and therefore the petition and cross petition are hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/24/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

7/30/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 1997
DATE

Barbara A Harnack
OFFICE OF ADMINISTRATIVE LAW

sej

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,

PETITIONER,

V.

A.H.S., J.E.D. AND I.H.S.,

RESPONDENTS.

J.E.D., parent and guardian of I.H.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY AND WILLIAM CLARK, SR., SUPERINTENDENT OF SCHOOLS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs that I.H.S. is domiciled with his mother, J.E.D., his custodial parent, within the District, so as to permit him to attend school in the District, free of charge, pursuant to *N.J.S.A.* 18A:38-1a.

Accordingly, the initial decision of the OAL dismissing the Petition of Appeal and the Cross-Petition of Appeal is adopted as the final decision in this matter. The Board is hereby ordered to continue to admit I.H.S. into its public school system, free of charge, so long as there is no change in J.E.D.'s circumstances that would alter her son's entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1997
DATE OF MAILING SEPTEMBER 12, 1997

479-97

RORY FREEDMAN AND LORRAINE HENNESSY,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, former students at Park Ridge High School in 1992 who were barred from participating in year-end school ceremonies, including graduation, due to consumption of alcoholic beverages, challenged the Board's policy on alcohol consumption, contesting regulations referenced as "Prom/Snowball" regulations. Petitioners contended the regulations were illegal, *i.e.* contrary to certain statutory provisions.

ALJ found that the relief sought by petitioners in the current matter was the same as that sought by petitioners' parents in 1992. The ALJ in the prior matter considered petitioners' arguments and found that the regulations were not illegal and inconsistent with the Board's policies. That decision was affirmed by the Commissioner and the State Board. The State Board's decision, which urged rephrasing of the policy, was affirmed by the Appellate Division and the Supreme Court denied certification. Although the prom regulations in effect in 1992 did not specifically address the possession/consumption of alcohol or drugs during travel to a prom, which subject is addressed in the current regulations, it is clear that the legality of the Board policy barring a student from attending graduation ceremonies because he/she consumed and/or possessed alcohol or drugs during travel to a prom was considered, and upheld, in the prior litigation. Thus, the ALJ was convinced that the issues raised by petitioners herein were litigated and determined in prior relevant proceedings. Therefore, the ALJ concluded that *res judicata* and collateral estoppel should be applied in the current matter against petitioners. Board's motion for summary decision was granted; petitioners' cross-motion for summary decision was denied. Petition was dismissed.

Commissioner concurred with and adopted as his own the findings and conclusions of the ALJ and, thus, accepted her recommended decision dismissing the within Petition of Appeal on the basis of *res judicata* and collateral estoppel.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11110-95

AGENCY DKT. 353-8/95

RORY FREEDMAN AND

LORRAINE HENNESSY,

Petitioners,

v.

BOROUGH OF PARK RIDGE

BOARD OF EDUCATION,

Respondent.

Rory Freedman, petitioner, *pro se*

Lorraine Hennessy, petitioner, *pro se*

Allan P. Dzwilewski, Esq., for respondent
(Green & Dzwilewski, P.A., attorneys)

Record Closed: December 9, 1996 Decided: July 25, 1997

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

Rory Freedman (Freedman or petitioner) and Lorraine Hennessy (Hennessy or petitioner) filed a petition with the State Department of Education (DOE) on August 31, 1995, contesting certain regulations promulgated by the Board of Education (Board or respondent) of the Borough of Park Ridge (Park Ridge). Respondent filed an answer on September 18, 1995. The DOE transmitted the matter to the Office of Administrative Law (OAL) on September 22, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was conducted, by telephone, on January 24, 1996, at which time hearings were scheduled for July 1996. Telephone conferences were subsequently conducted throughout the proceedings. Numerous orders, addressing various motions, were issued by this judge. Several were reviewed, and upheld, by the Commissioner of the DOE (Commissioner). All orders are incorporated herein.

The Board filed a motion for summary decision on May 13, 1996. Various replies and responses were subsequently filed by the parties. Petitioners filed a cross-motion for summary decision on October 9, 1996. The last motion paper was filed on November 1, 1996. This judge issued a final order on December 9, 1996, on which date the record was closed. The deadline for the issuance of an initial decision was extended.

NATURE OF THE CASE

The regulations in question address the consumption of alcohol applicable to Park Ridge High School (High School), which regulations are referenced as "Prom/Snowball" regulations (Prom Regulations). In their initial petition, petitioners argued that paragraphs 1 and 12 of the Prom Regulations are illegal, *i.e.*, contrary to certain statutory provisions. Paragraph 1 restricts the use or possession of any

alcohol/drugs on school property or at school functions, which restrictions are applicable to the use or possession of alcohol/drugs prior to a prom, at any pre-prom activity, and during travel to a prom. Paragraph 12 of the Prom Regulations mandates that the High School implement action against any individuals who attempt to attend a prom in an unsatisfactory condition and/or are found to be in possession of alcohol and/or drugs.

Petitioners filed an amendment to their petition on February 20, 1995. The Board filed a responsive position, arguing that petitioners should not be permitted to amend their initial petition. I issued an order on March 26, 1995, granting petitioners' request to amend their petition.

In their amended petition, petitioners requested a determination that paragraphs 1 and 12 of the Prom Regulations violate respondent's Substance Abuse Policy 5131.6 and, again, a determination that the pertinent provisions of the Prom Regulations are unlawful. Petitioners also requested awards of compensatory and punitive damages, interest, costs, and any such other relief as the Commissioner may deem just and proper.

In its motion for summary decision, respondent argues that *res judicata* and collateral estoppel are applicable to the current matter.[1] Petitioners reiterate the positions articulated by them in their initial and amended petitions and also argue that *res judicata* and collateral estoppel are not applicable to the current matter. The issue, broadly, is whether the motions should be granted.

[1] Respondent's Prom Regulations have previously been considered by various tribunals. The applicable prior proceedings are referenced in the findings of fact articulated hereinafter.

FINDINGS OF FACT

Based upon a review of the motion papers, as well as relevant decisions, I **FIND** the following to be facts.

Petitioners were seniors at the High School as of June 1992 and were minors at that time. On June 5, 1992, petitioners consumed champagne in a privately rented limousine or "party bus" while traveling to their senior prom. *R.F. v. Park Ridge Board of Education*, 93 *N.J.A.R. 2nd.* 79, 80 (EDU) (*Park Ridge*). *See also*, Appendix 1 to petitioners' brief in opposition to respondent's motion, p.1 (petitioners' brief). Petitioners were under the legal age for drinking alcoholic beverages at that time. (*Park Ridge, supra*, at 80).

At that time, the Board's substance abuse policy prohibited, in part, the use by students of illegal substances at all times in school buildings, on school property, and at any activity sponsored by and under the supervision of school officials. (*Ibid.*) Pursuant to this policy, respondent's Superintendent developed the Prom Regulations. Those applicable as of June 1992 prohibited, in part, students from hosting or attending pre-prom/snowball parties where alcohol/drugs would be served. School officials reserved the right to inspect limousines chauffeuring students to and from a prom if there were a reasonable suspicion of alcohol/drug consumption. (*Ibid.*) The regulations also provided that any student or guest who violated them would be asked to leave the prom. The content of the Prom Regulations in effect as of June 1992 is as stated in Appendix 6 to petitioner's brief.

As a result of their consumption of alcoholic beverages, petitioners were directed to leave the prom and were barred from participating in year-end school ceremonies, including graduation ceremonies, which were scheduled for June 18, 1992. (*Park Ridge* at 80. Appendix 1, pp. 1-2).

On or about June 17, 1992, petitioners, individually, and by their parents, filed a complaint with the DOE, seeking an order from the Commissioner allowing petitioners to participate in graduation ceremonies. The content of the petition is as stated in Appendix 3 to petitioner's brief. In an order on application for emergent relief, dated June 18, 1992, Administrative Law Judge (ALJ) Bruce R. Campbell denied petitioners' requests. The content of this order is as stated in Appendix 1. Judge Campbell's order was affirmed by the Commissioner on June 18, 1992. (*Park Ridge*, *supra*, at 79).

In an initial decision issued October 19, 1992, ALJ Edith Klinger, who was assigned at the time to preside over the preliminary matter, granted a motion for summary decision by respondent. (*Park Ridge, supra)*. The Commissioner affirmed. (*Id.* at pp. 81-82).

The State Board of Education (State Board) issued a decision on May 5, 1993, affirming the Commissioner's decision. *R.F., et. al and L.H. et. al v. Bd. of Ed. of the Bor. of Park Ridge*, 93 *N.J.A.R.* 2nd. 416 (EDU). The State Board's decision was affirmed by the Appellate Division, No. A-5058-92 (App. Div. November 22, 1993), and certification was denied by the State Supreme Court, 135 *N.J.* 469 (1994). 93 *N.J.A.R.* 2nd. 416 (EDU).

The Board subsequently modified its Prom Regulations in certain respects. The content of the current regulations is as stated in the attachment to respondent's letter brief in support of the Board's motion for summary decision (Current Regulations). The Board's substance abuse policy is as stated in Appendix 7 to petitioners' brief.

On August 31, 1995, petitioners, who have now reached the age of majority, and who are no longer students in respondent's district, filed a petition with the Commissioner, arguing that the Current Regulations are unlawful in certain respects. (Order denying Meredith Freedman's motion, p. 3.) The DOE transmitted this matter to the OAL for determination as a contested case.

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. The school laws address substance abuse policies of local boards of education.

Every board of education is required to establish a substance abuse program in elementary and secondary schools. Each district is also required to develop a written policy statement outlining its program in certain respects, including discipline of pupils who are substance abusers. *Id.* at §40A-10.

Each board, in addition, is required to adopt and implement policies and procedures for the evaluation, referral for treatment, and discipline of students involved in incidents of possession of abusive substances on school property or at school functions, or who demonstrate significant symptoms of the use of such substances on school property or at school functions. *Id.* at §11.

The applicable statutory provisions also mandate certain procedures to be followed by educational personnel of any public school in the State when it appears to such individuals that a pupil may be under the influence of the substances in question. *Id.* at §12 (Supp 1997). For purposes of these provisions, '(S)ubstance' is defined as alcoholic beverages, controlled dangerous substances, as defined in certain statutory provisions, anabolic steroids, or any chemical or chemical compound which releases vapors or fumes creating a condition of intoxication, inebriation, excitement, stupefaction, or "dulling of the brain or nervous system." *Id.* at §9.

The doctrine of *res judicata* provides that a cause of action once finally determined between parties on the merits by a tribunal with jurisdiction cannot be relitigated by the parties, or their privies, in a new proceeding. *Roberts v. Goldner*, 79 *N.J.* 82 (1979) (*Roberts*). Collateral Estoppel, in contrast, precludes relitigation of questions 'distinctly put in issue' and 'directly determined' adversely to the party against

whom estoppel is asserted. *Eatough v. Bd. of Medical Examiners*, 191 *N.J. Super.* 166, 175 (App. Div. 1983) (citations omitted) (*Eatough*). Doctrines such as *res judicata* and collateral estoppel are applicable in administrative proceedings. *City of Hackensack v. Winner*, 82 *N.J.* 1 (1980).

It is clear that both Judges Campbell and Klinger considered the substantive merits of arguments by petitioners that the pertinent Prom Regulations were contrary to applicable statutes, including any arguments relevant to the Board's substance abuse policy. Judge Campbell specifically found that petitioners were not likely to proceed on the merits. (Appendix 1, p.4).

The relief sought by petitioners in the proceedings before Judge Klinger is the same as that sought in the current matter. *See, Park Ridge at 79.* Judge Klinger considered petitioners' arguments that the prior regulations were illegal and inconsistent with the Board's policies. As found, Judge Klinger's decision was affirmed by the Commissioner and the State Board. The State Board specifically noted in this respect:

> Although we recognize that there is no relief that could be granted to petitioners' children and that graduation has passed, our decision does not rest on those grounds. Rather, our review of the papers filed in this appeal reinforces our conclusion that, for the reasons expressed in the decision below, the Board was entitled to summary judgment based on the merits of the case. 93 *N.J.A.R.* 2nd (EDU) 416.

The State Board agreed with Judge Klinger's observations, regarding the Prom Regulations then under consideration, that although '. . . what the policy says is clear. It might have been phrased better,' but '. . . it is absolutely clear. . . there was adequate warning. . .' *Ibid.* "However, to reduce the possibility of misunderstanding in the future concerning the wording of the Board's policy," the State Board went on to "urge the Board to review its written policy to determine if it can be phrased better." *Ibid.* The State Board's decision was affirmed by the Appellate Division, and the State Supreme Court denied certification. *Ibid.*

As found, respondent subsequently amended the Prom Regulations in certain respects. The main differences between the current and prior regulations are that the current regulations specifically address the use or possession of alcohol/drugs prior to a prom and any pre-prom activities, and during travel to a prom, and specifically provide that such restrictions apply to all students and guests who attend a prom, regardless of age; and state that a student is deemed to be in an unsatisfactory condition if any alcohol/drugs is consumed at a prom, prior to a prom, at any pre-prom activity, or during travel to a prom.

Although the Prom Regulations in effect in 1992 did not specifically address the possession/consumption of alcohol or drugs during travel to a prom, which subject is now referenced in the Current Regulations, it is clear that the legality of a Board policy barring a student from attending graduation ceremonies because he/she consumed and/or possessed alcohol or drugs during travel to a prom was considered, and upheld, in the prior litigation. Appendix 1, pp.1-2. *Park Ridge, supra.* 93 *N.J.A.R.* 2nd. (EDU) 81-82. 93 *N.J.A.R.* 2nd. (EDU) 416.

I am persuaded that the issues raised by petitioners in the instant matter pertinent to paragraphs 1 and 12 of the Current Regulations were litigated and determined in the prior relevant proceedings.

I am also persuaded that petitioners were privy to their parents who were designated as petitioners in the prior litigation. *See, Roberts, supra.*, and *Save Our Schools Ass. et al. v. Bd. of Ed., Bloomfield*, 1988 *S.L.D.* 1 (*Save Our Schools*). Judges Campbell and Klinger, as well as the Commissioner and the State Board, all recognized that relief was being requested in the prior litigation on behalf of petitioners and that, in fact, relief could only be given to petitioners. Appendix 1, p.4. *Park Ridge, supra.,* at pp. 80-81. 93 *N.J.A.R.* 2nd (EDU) 81. 93 *N.J.A.R.* 2nd (EDU) 416. Parenthetically, it is noted that the Commissioner does not have authority to grant punitive damages, nor attorney costs and fees. 93 *N.J.A.R.* 2nd. (EDU) 81.

There is no question that the tribunals considering the matter in the prior litigation had jurisdiction and that the substantive issues raised in the current proceeding were finally determined on the merits. I am therefore persuaded that *res judicata* should be applied against petitioners in this proceeding.

For the reasons discussed in relation to *res judicata*, I am also persuaded that collateral estoppel should be applied. The issues raised by petitioners in the current matter were put in issue and directly determined adversely to them in the prior litigation. *See, Save Our Schools, supra.* Petitioners' arguments that the decisions in the prior litigation addressed the clarity, not the legality, of the Prom Regulations and that *res judicata* and collateral estoppel cannot be applied because the prior litigation addressed the original Prom Regulations, not the revised ones, are without merit.

A motion for summary decision may be granted if the papers and any discovery demonstrate that no genuine issue exists regarding any material fact and that the moving party is entitled to prevail as a matter of law. The decision may be rendered if the papers and discovery, in addition to any affidavits, demonstrate that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5.

The material facts in the current matter are clearly not in dispute. For the reasons discussed hereinabove, I am persuaded that the Board's motion for summary decision should be granted and petitioners' cross-motion for summary decision should be denied. At this judge's request, the parties filed supplemental post-hearing letter memoranda addressing the question of whether petitioners have standing in the current matter. Although respondent's arguments in this respect have merit, it is not necessary to decide this question in light of my conclusions regarding the application of *res judicata* and collateral estoppel.[2]

[2] I note in this respect that petitioners presented no affidavits that they are currently residents or tax payers of Park Ridge.

CONCLUSIONS

I **CONCLUDE** that *res judicata* and collateral estoppel should be applied in the current matter against petitioners, that respondent's motion for summary decision should be granted, that petitioners' cross-motion for summary decision should be denied, and that Hennessy's and Freedman's petition should be dismissed with prejudice.

ORDERS

It is hereby **ORDERED** that respondent's motion for summary decision be and is hereby **GRANTED**, petitioners' cross-motion for summary decision be and is hereby **DENIED,** and Hennessy's and Freedman's petition filed with the DOE in the current matter be and is hereby **DISMISSED**, with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

7/30/97

DATE

DNA

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 31 1997

DATE

Barbara A Harned

OFFICE OF ADMINISTRATIVE LAW

njf

OAL DKT. NO. EDU 11110-95
AGENCY DKT. NO. 353-8/95

RORY FREEDMAN AND LORRAINE HENNESSY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions essentially recast and reiterate the arguments advanced in their brief in opposition to respondent's motion for summary judgment advanced to the Administrative Law Judge (ALJ) prior to her decision in this matter, which the Commissioner finds were addressed and considered by the ALJ and will not be revisited herein.[1]

Upon an independent review of the record in this matter, the Commissioner concurs with and adopts as his own the findings and conclusion of the ALJ and, thus, accepts her recommended decision dismissing the within Petition of Appeal on the basis of *res judicata* and collateral estoppel. A thorough assessment of the submissions in this matter make it clear that no

[1] It is observed that the Board's reply exceptions urge the Commissioner to reach to the issue of standing in this matter. He declines to do so in that he concurs with the ALJ that such a determination is unnecessary herein.

new substantive issue has been raised by these petitioners, notwithstanding their arguments to the contrary. That the within Board regulations differ from the ones challenged in the 1992 matter before the Commissioner is of no import here in that the gravaman of petitioners' allegation in both instances vis-a-vis these regulations is identical, *i.e.*, they challenge the Board's legal authority to discipline students consuming alcohol in transit to the prom. Confirmation that the substantive merits of petitioners' arguments have previously been litigated and determined is fully evident from the Commissioner's decision in the prior matter, *R.F., et al. and L.H., et al. v. Board of Education of the Borough of Park Ridge*, 93 *N.J.A.R.* 2d (EDU) 79; aff'd State Board of Education 416; aff'd Appellate Division, No. A-5058-92 (App. Div. November 22, 1993); *cert.* den. 135 *N.J.* 469 (1994), wherein he specifically stated:

> ***the Commissioner cannot express strongly enough his agreement with the ALJ's determination that the Board's assessing the penalties it did against the pupils in question was in accord with its regulations, education policy and state law. Let there be no misunderstanding of the Commissioner's conviction in this regard: be it a sip, a slug, or a keg of alcohol consumed on the way to, during or following a school-sponsored event, such behavior as exhibited by these teenaged students, who were fully cognizant of the consequences that could flow from their voluntary act, cannot and will not be sanctioned, excused or mitigated in the face of the Legislature's clear intent as stated in *N.J.S.A.* 18A:37-1[2] and reflected in the Board's policy on prom deportment, "that the public schools of the State of New Jersey will act to 'help control the problem of youth/alcohol abuse, especially in the school.' (Senate Education Committee Statement)" *G.L.H., by his guardians ad litem, G.H.H. and G.R.H. v. Board of Education of the Hopewell Valley Regional School District et al., Mercer County*, 1987 *S.L.D.* 891, 901, aff'd as moot State Board 906.
>
> Further, as bespoken by the ALJ and embodied in case law, the Board's disciplinary authority in such situations extends beyond the four corners of the school building, to include school functions that take place off premises. See, e.g., *A.F. by her guardian ad*

[2] The Commissioner notes that consideration of this matter under the provisions of *N.J.S.A.* 18A:40A-11 would in no way alter his determination.

> *litem B.M.H. v. Board of Education of the Township of Holmdel, Monmouth County*, 1991 *S.L.D.* 914. Moreover, ***such activities as attending a school-sponsored prom or graduation ceremonies are special privileges. As such these privileges can be revoked for infractions of school rules, of school policy and of state law.***Thus, the Commissioner finds the Board was entirely within its discretionary authority and exhibited no abuse of such authority in assessing the penalties at issue herein. *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7 (1946), aff'd State Board 15, aff'd 135 *N.J.L.* 329 (Sup. Ct. 1947), aff'd 136 *N.J.L.* 521 (*E. & A.* 1948). (at 82)

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein. Respondent's motion for summary decision is hereby granted and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1997
DATE OF MAILING SEPTEMBER 12, 1997

479-97

EDU #11110-95
C # 479-97
SB # 81-97

RORY FREEDMAN AND LORRAINE HENNESSY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, ET AL., BERGEN COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, September 12, 1997

For the Petitioners-Appellants, Rory Freedman and Lorraine Hennessy, pro se

For the Respondents-Respondents, Schwartz, Simon, Edelstein, Celso & Kessler (Allan P. Dzwilewski, Esq., of Counsel)

This matter had its genesis in June 1992, when Rory Freedman and Lorraine Hennessy, who are the petitioners in this case, were high school seniors in the Borough of Park Ridge. At that time, the Board took disciplinary action against them based on a determination that they had consumed alcoholic beverages in a limousine on the way to the prom in violation of the Board's policy against the consumption of alcohol at any school activity. Because petitioners were minors, Meredith Freedman, who is petitioner Freedman's mother, brought the challenge to the disciplinary action on their behalf, together with one of Lorraine Hennessy's parents.

JAN. 7, 1998

Adopting Administrative Law Judge (ALJ) Bruce R. Campbell's determination, the Commissioner denied the emergent relief which had been sought on behalf of petitioners. The Commissioner also adopted ALJ Edith Klinger's subsequent determination granting summary decision to the Board on the merits of the matter. The State Board affirmed the Commissioner's decision on May 5, 1993, and the Appellate Division affirmed the State Board's determination of November 22, 1993. The New Jersey Supreme Court declined to review the matter and denied certification, thereby ending that litigation.

On August 31, 1995, petitioners initiated the current matter by filing a petition with the Commissioner of Education challenging the Board's revised regulations relating to substance abuse. By motion filed on November 15, 1995, Meredith Freedman moved to amend the petition to include her as a party so that she could participate in the matter. In that petitioners were no longer minors, the ALJ denied that motion.

On July 25, 1997, the ALJ issued her initial decision, recommending that res judicata and collateral estoppel be applied against petitioners and that the Board's motion for summary decision dismissing the petition should be granted.

By decision of September 12, 1997, the Commissioner adopted the ALJ's findings and conclusion and accepted her recommendation to dismiss the petition on the basis of res judicata and collateral estoppel. In doing so, the Commissioner found that petitioners in this case had not raised any new substantive issue and that the merits of the arguments that petitioners were making in this case had been litigated and decided in the prior matter.

On appeal to the State Board, petitioners contend that the decision to dismiss that matter on the grounds of res judicata and collateral estoppel is erroneous because that matter considered the legality of the original prom regulations, but not the revised regulations which are the subject of their petition in this case. Petitioners argue that the revised prom regulations are invalid because N.J.S.A. 18A:40-11 and the Board's substance abuse policy do not provide for disciplining students who consume alcohol while traveling to a school activity or in their home prior to arrival. Petitioners also claim that the revised regulations are in violation of the due process and equal protection clauses of the United States Constitution.

In addition, petitioners have moved to recuse from consideration of this matter all members of the State Board who participated in the State Board decision of May 5, 1993, arguing that they do not believe that such members would act any differently in the current matter and contending that "[in] essence, the State Board members would be passing judgment on their own decision." Petitioner's letter brief of November 15, 1997, at 2.

Initially, we deny petitioners' motion to recuse all State Board members who participated in the May 1993 decision. Quite simply, petitioners have failed to provide any legitimate basis for such recusal.

Upon review of the arguments submitted in this appeal, we affirm the determination of the Commissioner to dismiss the petition. As the ALJ and the Commissioner properly concluded, principles of collateral estoppel preclude petitioners from relitigating any issue which was litigated on their behalf and decided in the prior matter. Moreover, we conclude that petitioners lack the standing to challenge the

Board's revised prom regulations. Petitioners have long since graduated from high school and have failed to identify any interest in the Board's revised prom regulations on their part which would justify allowing them to litigate this matter any further. N.J.A.C. 6:24-1.1.[1]

January 7, 1998

Date of mailing JAN 09 1998

[1] We note that because petitioners' challenge does not appear to involve any actual controversy arising from the revised prom regulations, their petition may be properly characterized as one for a declaratory ruling under N.J.A.C. 6:24-2.1. We also note that the determination to entertain such petitions lies within the discretion of the Commissioner. Id.

480-97

480-97

A.W. and M.W., on behalf of minor child, N.W.,:

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, : DECISION

:

RESPONDENT.

:

SEPTEMBER 12, 1997

OAL DKT. NO. EDU 580-97
AGENCY DKT. NO. 41-2/97

A.W. and M.W., on behalf of minor child, N.W.,:		
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 12, 1997
DATE OF MAILING SEPTEMBER 12, 1997

484-97

484-97

SOUTH RIVER EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 16, 1997

OAL DKT. NO. EDU 10205-96
AGENCY DKT. NO. 435-9/96

SOUTH RIVER EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1997
DATE FO MAILING SEPTEMBER 16, 1997

485-97

485-97

NORMA L. JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 16, 1997

OAL DKT. NO. EDU 11885-96
AGENCY DKT. NO. 485-10/96

NORMA L. JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 16, 1997
DATE OF MAILING SEPTEMBER 16, 1997

486-97

PHYLLISANNE PESCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 16, 1997

OAL DKT. NO. EDU 9640-96
AGENCY DKT. NO. 342-8/96

PHYLLISANNE PESCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTGEMBER 16, 1997
DATE OF MAILING SEPTEMBER 16, 1997

487-97

THEODORE PARKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, former Risk Manager, challenged the District's abolishment of his position which he held for 18 years and sought reinstatement to the position of Insurance/Risk Manager. The District contended statute mandated that State-operated districts abolish central administrative positions as part of the reorganizational process, *N.J.S.A.* 18A:7A-44(c).

ALJ found that pursuant to statute, employees whose positions are abolished *shall* not retain tenure or seniority rights in the abolished position. Thus, the State-operated district is under no obligation to rehire an employee whose position was abolished as a result of reorganization. ALJ found that petitioner had no basis on which to bring a claim for rehire. ALJ granted the District's motion for summary decision. Petition was dismissed. (Petitioner's rights to other non-central positions are properly brought before the N.J. Department of Personnel, Division of Human Resource Management.)

Commissioner adopted findings and determination in initial decision as his own.

SEPTEMBER 16, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1019-97

AGENCY DKT. NO. 572-12/96

THEODORE PARKER,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Theodore Parker, *pro se*

Monica D. Palestis, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 3, 1997 Decided: July 31, 1997

BEFORE **MARIA MANCINI LaFIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner, an employee of the district for 23 years, is challenging the determination of Respondent, a State Operated School District, to abolish the position of Risk Manager which Petitioner occupied for 18 years. Respondent asserts that the actions taken by the District were mandated by the statute requiring that State operated

school districts abolish central administrative positions as part of the reorganization process, *N.J.S.A.* 18A:7A-4(c), and has made application for summary decision. Petitioner submitted a brief in opposition to the application and Respondent replied.

Where there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law, summary decision may be employed for disposition. *N.J.A.C.* 1:1-12.5; *Contini v. Bd. of Educ. of Newark,* 286 *N.J. Super.,* 106, 121 (1995). In determining an application for summary decision, the judge must review the evidentiary materials presented in a light most favorable to the non-moving party, here, the Petitioner, and must determine whether there is sufficient evidence to permit a rational fact finder to resolve a disputed issue of fact in favor of that party. *Brill v. Guardian Life Ins. Co.,* 142 *N.J.* 520, 523 (1995).

DISCUSSION AND CONCLUSIONS

Summary decision is appropriate in this case because the parties agree on the relevant facts:

> the Petitioner's position was abolished as a required
> when the State took over the Newark school system; and
>
> the petitioner was not rehired by the superintendent.

Petitioner, however, raises the legal issue which requires determination. That issue is whether, under the statutory provisions governing the creation and operation of State operated school districts, Petitioner is entitled to reinstatement to his position with back pay and full benefits.

Respondent asserts that the governing statute is clear on its face: the position of Risk Manager is a central administrative position the abolition of which is within the contemplation of the statute; the Superintendent of a State-operated school district may

hire a person whose position is abolished, based on the needs of the reorganized district and the evaluation of such person; no employee whose position is abolished by operation of this statutory provision shall retain any right to tenure or seniority in the positions abolished in accordance with the provision of the statute. *N.J.S.A.* 18A:7A-44(c) (emphasis supplied).

Before proceeding to resolution of the legal issue, Petitioner's assertion that Respondent failed to provide adequate answers to his interrogatories which hindered his ability to respond to this application for summary decision must be addressed. Review of the interrogatories propounded reveals that Petitioner did, in fact, seek information which was not relevant to the issue of this case; nor was the information sought calculated to lead to the production of admissible evidence. The decision in this factual context rests solely on statutory interpretation, upon which the information sought by Petitioner through interrogatories has no effect.

Petitioner does not challenge the abolition of the position of Risk Manager. Instead, he predicates his appeal on the fact that he was not rehired to fill the position of Insurance/Risk Manager created in the reorganized school district. Review of *N.J.S.A.* 18A:7A-44(c) reveals that employees whose position is abolished shall not retain tenure or seniority rights in the abolished position. This provision coupled with the permissive language indicated above, that a superintendent "may" rehire an individual whose position is abolished, is the explicit authority for the superintendent of a State operated school district to deny rehiring a central administrative staff employee upon reorganization.

Petitioner further asserts that, because he received a good evaluation and there is, apparently, a need within the district for an Insurance/Risk Manager, the decision of Respondent to terminate his employment and not to rehire him was not made in good faith. Once again, the permissive language of the statute with respect to rehiring as well as the statutory language which explicitly states that employees whose positions are abolished "shall not retain any rights to tenure or seniority" in the abolished position

are controlling. Accordingly, I **CONCLUDE** that a State operated district is under no obligation to rehire an employee whose position was abolished as a result of reorganization.

The statutory language also establishes that Petitioner has no basis on which to bring a claim for rehire. The language of the statute is clear; individuals whose positions are abolished and are not rehired in the discretion of the reorganized district's superintendent shall be given either 60 days' pay or 60 days' notice in lieu of pay, which shall be in lieu of bringing any other claim based on the abolition of the position.

The parties agree that the statute permits the assertion of civil rights claims "for discrimination." See also, *Cirasa v. State Operated School District of the City of Paterson,* 95 *N.J.A.R. 2d* (EDU) 141, aff'd. State Bd. of Educ., 95 *N.J.A.R. 2d.* (EDU) 149. In addition, an individual whose position has been abolished may, pursuant to statute, assert violation of certain contractual rights as well as a claim to any position or to placement on a preferred eligibility list for any position for which the employee may be entitled by virtue of tenure or seniority within the district. *N.J.S.A.* 18A:7A-44(c). This petition, however, is devoid of any claim of a civil rights violation; therefore, that issue is not before this forum. With respect to contractual issues related to benefits to which petitioner may be entitled, as Respondent observes in its reply brief, resolution of such issues is through the mechanism delineated in the collective bargaining agreement.

Last, Petitioner raises the issue of his rights to other non-central administrative/supervisory positions within the State Operated School District of the City of Newark. These displacement and bumping rights issues are properly brought before the N.J. Dept. of Personnel, Division of Human Resource Management, *N.J.A.C.* 4A:8-2.1 *et seq.* The fact that the union may have appealed a final decision of that agency on behalf of several of its members and the appeal has not yet been determined, does not provide a basis for denying summary decision in this matter, the

sole issue of which is whether Petitioner is entitled to reinstatement in the position of Insurance/Risk Manager.

In opposing a motion for summary decision, the non-moving party must demonstrate that an issue of fact exists which, upon resolution, is substantial enough that the non-movant may prevail. The Petitioner in this case has not met this burden. Accordingly, the Respondent's for summary decision is granted. It is hereby **ORDERED** that this petition be and hereby is **DISMISSED** with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 31, 1997
DATE

Maria M. LaFiandra
MARIA MANCINI LaFIANDRA, ALJ

Receipt Acknowledged:

8/5/97
DATE

D.A. Castaniatis/lc
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

dgi

OAL DKT. NO. EDU 1019-97
AGENCY DKT. NO. 572-12/96

THEODORE PARKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that abolishment of petitioner's central administrative position was mandated by *N.J.S.A.* 18A:7A-44(c)* as part of the District's reorganization as a State-operated District and, subsequent to this reorganization, the State-operated District was under no obligation to rehire petitioner.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons articulated therein. Summary decision is granted to the State-operated District and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that on page 2 of the initial decision this applicable statutory provision is incorrectly referenced as *N.J.S.A.* 18A:7A-4(c).

SEPTEMBER 16, 1997
DATE OF MAILING SEPTEMBER 16, 1997

488-97

488-97

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMASINA LEMON,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

Board (now State-operated District) certified tenure charges of unbecoming conduct against respondent teacher for alleged corporal punishment, as well as excessive absenteeism.

Having considered the record and the credibility of witnesses from numerous days of hearing, the ALJ found the charges of conduct unbecoming and the subsidiary portion of excessive absence to be fact. ALJ found that several incidents of physical intervention by respondent rose to the level of corporal punishment. In addition, respondent's absences were found to impede the educational goal and cause an interruption in delivering services to the students. ALJ noted that respondent's unsatisfactory evaluations, as well as refusal to comply with directives, was not inefficiency but, rather, conduct unbecoming a teacher. ALJ concluded that the Board sustained by a preponderance of credible evidence, the charges of conduct unbecoming, as well as other just cause. Further, the ALJ concluded that the seriousness of the charges when contrasted against respondent's mitigating evidence, remained of such overwhelming weight as to require respondent's dismissal. ALJ ordered respondent dismissed.

Having conducted his own careful and exhaustive review of the record, which included transcripts from ten days of hearing at the OAL, as well as respondent's exceptions, the Commissioner determined to affirm the ALJ's conclusion with modification as to some of the ALJ's factual findings. Commissioner initially affirmed the Order rendered by the ALJ upon interlocutory review on March 24, 1997, which denied respondent's Motion to Dismiss the within matter for the District's asserted failure to comply with the requisite procedural mandates for bringing tenure charges. Commissioner dismissed the charges which seemed to be charges of inefficiency as the District did not comply with the procedural safeguards identified in *N.J.S.A.* 18A:6-11. Commissioner affirmed the ALJ's conclusion that the District sustained by a preponderance of credible evidence its charges of unbecoming conduct and other just cause. Commissioner emphasized that by her proven inappropriate physical interventions with students, her insubordination and her excessive absenteeism, respondent was guilty of conduct unbecoming a teacher. Citing *Dusel* and *Courtney*, the Commissioner concurred with the ALJ's recommendation of dismissal. Commissioner ordered respondent dismissed from her tenured teaching position in the District as of the date of this decision and referred the matter to the State Board of Examiners for further appropriate action.

SEPTEMBER 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO EDU 9264-95

AGENCY DKT NO. 163-5/95

IN THE MATTER OF THE TENURE HEARING OF THOMASINA LEMON, STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY

Gregory G. Johnson, Esq., for petitioner

Eugene Liss, Esq., for respondent
(Robert T. Pickett, Esq. on the post-hearing brief)

Record Closed: March 24,1997 Decided: August 1,1997*

BEFORE **MARYLOUISE LUCCHI-MC CLOUD**, ALJ:

PROCEDURAL HISTORY

This matter concerns tenure charges brought against respondent, Thomasina Lemon, and served upon counsel for the respondent on February 9,1995. A special Board of Education meeting was held on May 2,1995 at which time a determination to certify charges against the respondent was made. On May 4,1995 Virginia Haskins Devane, Executive Director for the Board of Education of the City of Newark, filed a Certificate of Determination and certified the charges against respondent, Thomasina Lemon, with the Commissioner of Education. An answer was not filed by respondent

with the Department of Education until three separate notices had been sent from the Department of Education, the last of which was dated July 14, 1995. This answer was finally filed with the Department on July 25, 1995. In the interim, the Newark school district was placed under State operation by order of the State Board of Education dated July 5,1995.

On August 15, 1995, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on non-sequential days between June 5, 1996 and December 9, 1996. The record remained open for posthearing submissions by the parties at their request to be simultaneously submitted on or before January 21,1997 with any responsive filing on or before January 28, 1997. During this time frame a post hearing motion was filed and a request to hold the record open for determination of that motion was granted. As a result the record did not close until March 24, 1997. Extensions of time to file the initial decision in this case were granted for good cause due to sick leave involving surgery to the Administrative Law Judge (ALJ). This extended the time to file until August 6, 1997.*

TESTIMONY

During the course of the case R. L. B., Jr. testified. He was 13 years old at the time of the hearing and had been taught by respondent Lemon in 1993. He stated that he was not "disciplined too much" but that on one occasion he was talking with M. D. and said a curse. Respondent asked who had said the curse and one of the students identified R. L. B., Jr. He stated that Ms. Lemon hit him with a ruler on the left arm approximately eight times and then told the witness and M. D. to go into a coat closet and remain there. The witness testified that he had observed Ms. Lemon take out a

ruler and hit other students although he was unable to say how many times other than it occurred more than once.

The witness confirmed that he had no other complaints about Ms. Lemon prior to this incident but that he did complain to his mother, who called the school. R. L. B., Jr. did acknowledge that Ms. Lemon was a good teacher and taught him right from wrong.

M.S.H. also testified. This child was 11 years old at the time of the testimony and had previously been taught in the fourth grade at the 14th Avenue School by Ms. Lemon. He stated that on one occasion Ms. Lemon was angry and put her hands on his neck and pushed him into a classroom. At that time other students were coming to class from lunch. They were lining up and according to the witness some were misbehaving. He testified that there were nail marks on his neck from when he was pushed into the class. When this occurred, he was near the door. At the end of the school day he told the principal and he also told his mother who came to school the following day. He confirmed that he was not grabbed in any other location on the body. When this incident occurred, he testified that he was not causing any type of disturbance but that he was trying to get Ms. Lemon's hands off his neck.

Sylvia Ward, who is the mother of S. M. H. also testified. She stated that her son had come home during his fourth grade year and stated that Lemon had pulled his ear and that he had nail marks. As a result of this conversation, she called the principal, Ms. Barillari, but at that point Ms. Lemon had left for the day. A meeting took place the following day at which time the witness stated that she was very upset and had come to fight.

M. T. was also a fourth grade student of Ms. Lemon at the 14th Avenue School. He stated that on one occasion he was grabbed by the right arm and thrown into a chair. He testified that he did not know why this occurred, only that his arm hurt. The only person he told was his mother and as a result she came to the school. He testified that he never saw Ms. Lemon physically grab or touch other students as she did to him.

He did state that she had pushed E. B., another student, and that his head hit a wall. E. B. then started crying.

The witness agreed that when he was grabbed and put into the chair, there were rules in the class as to when one could stand or must be sitting. He testified that he had gotten up to get paper. At that time, the "paper monitor" who usually gave out paper was not there. He testified that she did not request that he be seated before the incident. The witness also testified that during the school year, Ms. Lemon had taken a musical instrument away and other privileges although he could not remember what had caused this to occur. He stated that these events were, however, before the incident involved with him being grabbed and placed in the chair.

Maxima Rodriquez, the mother of M. T., stated that she used to go to the school frequently to speak with Ms. Lemon regarding her child. She stated that she never spoke with Ms. Lemon about the incident of grabbing her son although she did speak with the principal the following day. After speaking with Ms. Barillari, she was informed that the principal would talk with Ms. Lemon. She herself did not speak with either Ms. Lemon nor Ms. Barillari after that.

Paula Greenberg, a teacher at the 14th Avenue School, testified. She has worked for the Newark district for 20 years and is a second grade teacher. During the 1991-92 school year, the witness observed Ms. Lemon cursing and threatening Ms. Barillari and her daughter. As a result, she wrote a narrative. (P-16E)

At the time of the incident she stated that she was approximately 8 to 10 feet from Ms. Lemon who was cursing at Ms. Barillari. She stated that she heard the words "white motherfucker;" "son of a bitch" and "I am going to get your daughter too." This occurred when the witness was signing out. She states that she wrote the document because she was extremely upset and not in anticipation of any hearing which might occur. She confirmed that she did not give the statement to anyone. She did recall an investigator from the Newark Board of Education talking to her after she wrote the

narrative. She did not tell Ms. Barillari that she had this. She acknowledged that she did not know what the actual subject of the conversation was between the two.

Ms. Greenberg testified that she has a professional relationship with Ms. Barillari, although not a personal one, and that Ms. Barillari, as principal, is responsible for her professional evaluations.

The witness described that Ms. Lemon was in the hallway and Ms. Barillari was in an office and the two were approximately 18 to 20 feet apart when this took place. She stated that students were in the area as well as some teachers. Prior to this incident, the witness testified that she had seen Ms. Lemon be abusive to students although she neither wrote this up nor reported it to Ms. Barillari or anyone else. She acknowledged that since that time she has never seen Ms. Lemon act in an abusive manner to Ms. Barillari.

The witness stated that it was her opinion that the behavior compromised professionalism. She was aware that Ms. Lemon was the NTU building representative. She stated that she had never had conversations with Ms. Lemon regarding smoking, teaching or taking children anywhere specific for punishment. She testified that she and respondent had enjoyed a speaking relationship but that Ms. Lemon had stopped speaking to her approximately five or six years previously.

The witness stated that during the verbal altercation Barbara Dawkins, Shirley Givens, Shanda Faison and Louise Fusco were present. She recalls Barbara Dawkins standing in front of Ms. Lemon trying to calm her down.

K. M. M., who was 11 years old as of the time of the hearing, also attended the 14th Avenue School and had Ms. Lemon as her teacher in fourth grade. S. M. H. as well as M. T. were students in the class with her. She testified that she did not see Ms. Lemon hit S. M. H. but did state that Ms. Lemon would touch S. M. H. on the arm. She also testify that Ms. Lemon hit E. B. by grabbing him by the upper arm and swinging

him into a wall. She testified that it was his back that made contact with the wall. E. B. began to cry.

The witness also testified that she saw Ms. Lemon hit several students in the arm when they would not do work or be quiet. She saw Ms. Lemon hit A.; S.M.H.; M.T. and E. B. On cross examination the witness testified that S. M. H. was a bad student and would talk back, that he would some times hit students, walk around and misbehave. She stated that Ms. Lemon had a problem with S. M.H. nearly daily. As far as E. B., who was in her class, she stated that he often was not doing his work and talked back to Ms. Lemon. The witness stated that respondent at no time touched her with a ruler. On redirect she testified that she did recall that S. M.H. had been hit by Ms. Lemon with a ruler. She stated that he was talking or arguing with a friend first.

N. W. also testified that she had had Ms. Lemon in fourth grade. She was in the same class with S. M. H. and E. B. She stated that she did not recall observing Ms. Lemon hit any students with a ruler but she did remember that when S. M. H. and another student, L., would misbehave, Ms. Lemon would hit them with her open hand on their arm. She also remembered E. B. misbehaving but states that she never saw Ms. Lemon hit or touch him.

The principal of the 14th Avenue School, Alyson Barillari, also testified at length. She stated that there are currently 240 students attending the 14th Avenue School. The school is a kindergarten to fourth grade school and also runs nine special education classes. There are 65 staff members, 10 teachers, 9 special education teachers and one crisis teacher. As of the time of her testimony, it was her 25th year with the Newark school district. She had been vice-principal in several other schools and in March 1991 she came to the 14th Avenue School. It was at this location that Ms. Lemon was assigned to her building.

The witness testified regarding an incident on September 22, 1994 involving Ms. Lemon, E. B., S. M. H., L. J. and M. T. She stated that when an incident occurs

involving physical mismanagement of students, she is required to call the assistant superintendent's office and that, as principal, she has 48 hours to investigate the situation. She stated that Sylvia Ward came to see her about S. M. H. and that after this conversation she began filling out forms for the Division of Youth and Family Services (DYFS). M. T.'s mother also came in approximately one hour later stating that her son had been physically mismanaged. M. T. also named another child, E. B., and he was called down and told the witness that he had been thrown into a wall, the day before. She also received information from Ms. Hanley, who was a crisis teacher, that L. J. had been mismanaged on the same day.

Upon receiving the information, Ms. Barillari contacted the Institutional Abuse Unit of DYFS. She also reported this to Mrs. Nelms, the assistant superintendent. She received a call from Ms. Shaw, who is a screener with DYFS, within approximately two hours recommending that the four students be removed with Ms. Lemon's class. She then went to Ms. Lemon's class and told Lemon that she had no discretion. The students were removed to another class, and a letter was written to the parents. The letter was given to the students to take home.

The witness also testified regarding the attendance record of Ms. Lemon. In 1989-90, her total absences for the school year were 25. (P-22a). In the 1990-91 school year, she reflected a total of 20.5 absences. (P-22b). In the 1991-92 school year, a total of 35 days of absence were reflected. (P-22c). The witness began at the 14th Avenue School in March 1991. She testified that the 1991-92 absences had a significant impact and caused problems with continuity of program and instruction. In 1992-93, 27 days of absence were reflected (P-22d) and the 1993-94 total absences including absences without pay reflected 43 days. (P-22E). The witness stated that the absence record shows a pattern of nonattendance. In April 1994 the witness wrote a memo to Ms. Lemon regarding an application for allotment from the professional improvement fund. This stated that he could not sign the application for allotment based upon "excessive absences this school year." (P-24).

The witness also had both formal and informal observations of Ms. Lemon in her teaching capacity. She did an annual evaluation as well. The witness states that her evaluation, based on everything, was that Ms. Lemon's performance was unacceptable. In May 1992 the witness had sent a memo to the respondent regarding lack of plan book submission. (P-5). This memo dealt with five separate occasions upon which the witness states that no plan books and lesson plans were submitted as required. The witness testified that lesson plans are extremely important because they are the foundation from which everything functions. They are used for conformity, standardized testing guidelines and other things which must be covered. On the opening day of school, at which respondent was present, all teachers are informed that their plan books must be submitted every two weeks. At the time of the memo at least ten weeks had elapsed without submission of any lesson plans. The witness also recalled a November 15, 1991 post observation conference at which she discussed the necessity of the plan book with respondent. The plan book which is to be submitted every two weeks must be submitted prior to the lessons. That way they are used as a curriculum guide. She stated that she also had other conversations with respondent regarding lesson plans.

Subsequently the witness also a memo to Ms. Lemon dated June 8, 1992 regarding additional lesson plans which had not been submitted. No lesson plans had been submitted between March 27, 1992 and June 8, 1992.

On March 5, 1992 the witness sent a memo to the respondent regarding insubordination. The witness explained that the district participates in African-American History Month and that Ms. Lemon was participating in securing speakers. She had requested biographical sketches of the different speakers who would be speaking to students on March 6, 1992. This was requested so that information about the speakers could be disseminated to the children prior to the event. She had originally spoken with respondent approximately one month previously. On March 4, 1992, she specifically asked for information regarding the speakers to be heard two days later. According to the witness Ms. Lemon said that it was at home and that she

would bring it. She did not bring it and on March 5, 1992 and wrote a letter to Ms. Barillari stating that she would not meet with Ms. Barillari concerning insubordination until after the March 6, 1992 date. (P-6c). She also did not provide the information to Ms. Barillari at any time prior to the assembly.

Ms. Barillari discussed the matter with her supervisor, Ms. Nelms, and a conference was set up between Nelms, Barillari and Lemon.

The witness also testified to having had problems with Ms. Lemon regarding the issue of a locked classroom door. She stated that a memo was sent to Ms. Lemon (P-10a) regarding Ms. Lemon's continued locking of the classroom door. By doing so the children were able to exit but others, including the principal, were not able to get in. The witness stated that on October 4, 7 and 28, 1993 she went to Ms. Lemon's class but could not get in because of the locked door. This also occurred on November 18 and 30, 1993 as well as December 1 and 7,1993. Prior to the memo being sent in December 1993, the witness stated that she had had conversations with Ms. Lemon in which she told her that it was a violation of policy as well as state statute to lock a classroom door. She also testified that a copy of a document entitled "State of New Jersey, Department of Education; Fire Drills and Fire Protection" was attached to the memo and is required to be posted in every classroom.

Prior to the December 16, 1993 memo, the witness also sent a memo on December 1, 1993 directing Ms. Lemon to unlock the door and leave it unlocked at all times and stating that Ms. Lemon would be subject to disciplinary action. After that memo, the witness returned on December 7, 1993 and the classroom door was still locked. A prior memo from November 30, 1993 specifically told Ms. Lemon that a locked classroom door was considered a safety hazard and directed her to have it unlocked at all times. (P-10E). Prior to this another memo had been sent on October 28, 1993 directing her to leave the classroom door locked whenever children are present and that lack of compliance would result in disciplinary action. She testified that some of the memos were handed to her personally. The witness went through

other memos on the same topic and also recalls having spoken with Ms. Lemon between seven and nine times regarding this. The witness recalls at least 15 or more incidents of finding a locked classroom door with students inside. At no time did Ms. Lemon ever state that she would not comply but, according to the witness when told that it was a fire hazard, said loudly "that's not what I was told."

Barillari also testified regarding a memorandum and the events which surrounded quarterly test results that were not submitted in time and had to be hand scored. Ordinarily they are scanned; however, they were not received by the May 4,1992 deadline and as a result had to be hand scored. She also testified that they had not received quarterly results and that tests form a part of student's grade. Report cards which were due in Barillari's office on April 29, 1992 and had not been received. She also discussed communication as well as a memo regarding disciplining of students and the need for supervision. An example she gave was that she had seen approximately six students standing outside Ms. Lemon's locked classroom door. During the year Ms. Barillari had also determined that other students were not being supervised such as those coming back from the playground. The six who were observed outside the classroom door and were not supervised had apparently been told not to report to the playground. Barillari waited with the six students and saw other students return from the playground and join them. According to her, Ms. Lemon never advised the office or Barillari that she wanted to discipline students.

The witness also testified regarding conduct which she characterized as a threatened assault against herself. She stated the incident took place on May 14, 1992 between approximately 2:40 p.m. and 3:00 p.m. At this time school hours were between 8 a.m. and 2:45 p.m. Barillari first encountered respondent in the main office after a public address announcement saying that mentoring elections for the next day were canceled. The election had been scheduled between 8 a.m. and 8:10 a.m. on May 15, 1992 by Ms. Lemon who had not consulted with Barillari. The witness was in her office and Ms. Lemon was in the hallway. It was from that location that Lemon was screaming and said that Barillari should come out of her office and that she wanted "to

kick her ass." According to Barillari, Ms. Lemon also stated that she would "get her daughter" and called her a "white motherfucker." She later reported the incident to a security guard, Ms. Nelms and the police.

Barillari also testified that there was a problem regarding an unsupervised student who had an accident in a classroom. She testified that L. L. was injured when Ms. Lemon left her class unsupervised. Barillari responded and remained with the student for approximately ten minutes. She stated that a procedure had been established with Ms. Lemon prior to this that if she had to leave either the teacher next door could assist her or she could notify the main office so that supervision could take place. According to the incident report, Ms. Lemon was quoted as saying that she was in the teacher's restroom when the incident occurred. Barillari stated that the established practice was that a nearby teacher was alerted and then the office and that this was not done.

Barillari also recounted a problem with Ms. Lemon smoking in the front doorway. When this occurred it was during dismissal of special education students and Ms. Lemon had one foot in the school straddling the doorway and the other foot out. She observed Lemon lighting the cigarette and testified that there is no smoking in the school.

Additionally Barillari testified that there was a policy that when someone was to be absent that staff member was responsible to contact the school, either the day before the absence or before 7:30 a.m., identify themselves and the reason for their absence. This was in order to get appropriate substitutes for instructional purposes. February 25, 1994 was to be the day of a post observation conference and Ms. Lemon did not notify anyone until 8:45 a.m. that she would be absent. At that time the witness had to get the children in Ms. Lemons' class herself and had to split those children among other classes.

Ms. Barillari testified that she did observe Ms. Lemon on June 6, 1992, at which time she was teaching reading. There were work book exercises, however, the lesson activity did not, according to Barillari, speak to a specific skill. The problems that she found during the observation involved noncompliance with lesson plan submissions. She requested the lesson plan book and was told that it was not available. She indicated that teacher characteristics were unsatisfactory in that materials were used unsatisfactorily and the lessons seemed conceived "on the spot." It also involved unrelated matters. The total time of the observation was approximately 50 minutes. She also found the area of teacher enthusiasm to be unsatisfactory. The students read silently and then were asked questions and the lesson was devoid of any stimulation. There was no stated objective and the children randomly gave answers. They never knew why an answer was wrong and according to the witness is was a totally inappropriate lesson. An overall rating of unsatisfactory was given and a number of attempts to schedule the post observation conference were unsuccessful.

Another observation took place between 9:45 a.m. and 10:45 a.m. on December 1, 1993. The overall rating given was unsatisfactory. Upon arrival Ms. Barillari indicated that she was there for formal observation. She asked for the plan book and respondent told her to take a seat. This happened three times and respondent's tone was rude and discourteous. At no time during the observation did she provide the lesson plans.

A subsequent teacher observation was done by someone from outside the district. A March 11, 1994 evaluation was performed by Robert O'Bannon.

Ms. Barillari confirmed on cross examination that she may have met Ms. Lemon prior to beginning in 1991 at the school at a political function at which they exchanged pleasantries. In the spring of 1992 a grievance was filed regarding discretionary funds. At a building committee meeting they discussed the discretionary funds and this took place between herself and Ms. Lemon and others present. The committee consisted of the principal, respondent and another individual. After this, Ms. Lemon did not interact with Barillari.

In the spring of 1991 at orientation there was no discussion as to the matter of assignment. A posting was made by Barillari that all assignments were subject to change. Changes by posting moved fourth grade teachers from the second to the third floor and that included respondent. Barillari received a call at home from Ms. Nelms the night before school was to begin saying that the superintendent directed that she move Ms. Givens and Ms. Lemon back to their floor.

Barillari stated that she copied the NTU and administration because she had been informed that the policy was to copy the union and the administration regarding anything of a potentially disciplinary nature. She did acknowledged that some of the memos that were copied were not things which would subject Lemon to potential discipline or reprimand but were copied for informational purposes. She stated that between September 1991 and 1994 she did write letters regarding disciplinary matters on other teachers and also copied the NTU and members of the administration.

The witness stated that a September 1991 observation of Ms. Lemon involved controversy and Barillari withdrew the observation after consultation with someone in labor relations.

On cross examination Barillari referred to the situation in which a student was injured while Ms. Lemon was not in the classroom. She stated that the respondent told the teacher in the classroom next door that she was leaving the classroom. Barillari went on to say that the policy is to use the intercom and advise the office. She did recall Lemon contacting the office on several other occasions when she had to leave but did not recall her contacting them on this occasion. She conceded that it was possible that she might not be in the office when a particular teacher called in. There was, however, a log book in September 1992. Barillari also checked with the teacher next door who confirmed that Lemon had told her she was going to the bathroom. She said that if teachers called she covered classes herself on numerous occasions.

Barillari confirmed that as a result of the verbal confrontation following the question of mentoring elections, criminal complaints were filed by both herself and Ms. Lemon against each other. Both sides stipulated that those charges were ultimately dismissed in municipal court on April 26, 1993 when both sides withdrew the complaints with prejudice.

Although Barillari ordinarily does the observations of the teachers, in 1994 she requested that an outside evaluator be brought in.

Robert O'Bannon, Jr. who is the assistant director of the Teaneck Board of Education and was a principle in Newark before moving to the Teaneck Board of Education, testified. He had spent 26 1/2 years with the Newark district. While building principle, he did classroom observations and had received training through the district as well as with the State program. On March 11, 1994 Mr. O'Bannon observed respondent's classroom and recorded his observation in a standard observation report (P-31). After the evaluation he signed the document as did Ms. Barillari, however, Ms. Lemon refused to sign it.

O'Bannon stated that the lesson was not focused and there was no clarity or plan in the lesson itself. In the second page of his observation, he delineated areas of strength as well as areas needing attention. The areas needing attention listed were "planning" and "lesson implementation." He stated that he was unable to figure out what the lesson was about and that Lemon seemed to move from one thing to another. He gave suggestions for planning and lesson implementation in the report. A discussion was held at the post observation conference which included Ms. Lemon's union representative. Ms. Lemon's union representative asked O'Bannon to rescind the report. He offered to come back and do another evaluation but he would not rescind the report.

He testified that when he was called in to do the evaluation he had no preconceived notions but assumed that the teacher might have received an

unsatisfactory rating causing a request for an outside evaluator. He acknowledged that when the observation began he asked for the lesson plans and he reviewed them. He stated that the lesson plans were not clear and did not focus on what was intended by the lesson. He characterized the lesson as an "attempt" at a reading lesson. He also stated that he had never worked in any department in Newark with Ms. Barillari nor had he worked on any projects with her that he recalled.

The petitioning district also presented testimony of Anzela K. Nelms, who is the assistant superintendent of the district and responsible for all aspects of the needs of the individuals schools. She has 31 years of employment with Newark public schools.

Nelms testified that in the spring of 1990, the principal was a Mr. Megaro and he had expressed concerns over Ms. Lemon's conduct with her on several occasions. He had put a list of concerns in writing. She also received an evaluation from Megaro. Nelms outlined a number of memos that were sent and meetings that she had with Ms. Lemon and her NTU representative.

Nelms also discussed the district's absence policy as well as the teacher attendance improvement program that was in place. She stated that principals were directed to list attendance problems on annual evaluations. She pointed out that in Ms. Lemons' case, attendance problems were noted on annual evaluations. She stated that even if a medical certificate was presented an absence was not exempted from district attendance policy. Nelms testified that between 1989 and the 1994-95 school year, the attendance improvement plan was in effect and that if a teacher was absent more than five days, a letter would go out, more than nine days a letter would go out, and a conference could be held with the teacher and a vice-principal to try and develop a plan. These initial stages were to iron out the process. She stated that she knows that Lemon received letters and had monitoring in place and that the attendance improvement plan (AIP) was part of monitoring. Nelms stated that workshop days and conferences were excused absences and administrative days were excused days as were funeral days and person days. She stated that sick days presented a situation

where some were not held against a teacher for the AIP. A long term illness consisting of five days or more required the teacher to come in with a doctors' excuse. These were counted as sick days.

The witness recalled Lemon coming to her on a number of occasions regarding incidents such as concerns about the door to her classroom.

Respondent testified on her own behalf and has been with the Newark School System for 27 years. Over the years, in addition to teaching, she has been a participant in the PTA, recreation programs, has organized talent shows, picnics and bake sales and also was instrumental in programs for black history month. She has also been a union participant since early on.

Respondent stated that she first met Ms. Barillari on March 22, 1991, in Old Bridge. On March 25, 1991 Ms. Barillari started and a meeting took place that Ms. Lemon described as hostile. She said that Ms. Barillari did not speak during the meeting although afterward a number of people came up to her.

Respondent states that initially she had an excellent rapport with Ms. Barillari. She states that she helped Miss Barillari.

Ms. Lemon recalls that in 1991 there were two meetings at which she asked if there would be any changes in classrooms and was told that there would not. Respondent states she knows of no teacher asking for a room change and that would require time. Lemon stated that she also had decorated her classroom for opening day as did other teachers. Upon arrival at the school in September 1991, she found that her room had been changed. Other teachers were also upset with room changes because they had made preparations. Ms. Lemon states that she went to Barillari, both individually and as a union representative. Lemon began a grievance and advised Barillari that she was doing so. She states that Barillari told her to do whatever she

had to do. Subsequently, all classroom changes were rescinded by the superintendent.

The witness states that between March 1991 and the filing of her grievance, she had an excellent rapport with Barillari. However, after the grievance, she complained that Barillari was neither professional nor cooperative with her.

Also in September 1991 an observation took place of Lemon by Barillari and as a result of this she filed a grievance which caused the observation to be rescinded. She states that her prior evaluations including one in June 1990 by a prior principal were satisfactory.

Lemon described the March 1992 situation involving the black history month assembly. She stated that she ordinarily would have put the program on in conjunction with another teacher who had been out ill for a prolonged period. She ultimately received the date of March 6, 1992 from Barillari which she needed for the speaker who was to be Congressman Donald Payne. She testified that she told Ms. Barillari the name of the guest speaker and other people who would participate prior to the program. She states that Ms. Barillari walked a memorandum regarding insubordination into her classroom and gave it to her. She confirmed that Barillari did request biographical sketches of speakers. She states that she told Barillari that she had a student who would give oral biographical information during the play. She states that she could not make the information known to Barillari on March 5, 1992 which was the day before the assembly because she was busy with preparation for the play. She states that she was involved the black history month presentation in the two subsequent school years and Ms. Barillari did not participate or review information before the program was given.

Lemon states that the incident involving students outside her classroom was not the result of her leaving them unsupervised. She states that she does escort her students by going down to the playground and bringing them up. The students in the

cafeteria are supervised by an aid and she states that these students came up on their own.

According to Lemon, the mentoring elections were set up and are run by the NTU building representative, the position that she occupied. She had set up the date of May 14, 1992 between 8 a.m. and 8:15 a.m. She states that Barillari made an announcement on May 14, 1992 that the mentoring election would take place the following day at approximately noon. Lemon was scheduled to be out of the building with students at a different school. Lemon testified that she went to speak with Ms. Barillari and that it was Barillari who was yelling and Lemon herself, at no time, raised her voice or yelled back. At the end of the conversation she spoke with Willy Hutchinson, who was in charge of the mentoring program, and told him that Barillari had changed the time to one when she would be out of the building. He told her to inform Barillari there would be no elections. She testified that she knocked on Barillari's door and told her this from the doorway. She also informed the candidates that there would be no election based upon what Hutchinson told her. On May 18, 1992, the next school day after the proposed election date of May 15, 1992, Lemon came to school and came in contact with Ms. Nelms, the assistant superintendent. She was told that she could not remain in the building. She states that she went to the union office and was told by Mrs. Nelms that charges were made by Barillari stating that Lemon had threatened her. Lemon denies doing so. On June 1, 1992 Ms. Lemon returned to the 14th Avenue School. Approximately two or three days after that she received a notice that her annual increment was to be withheld. Lemon testified that from September 1992 on she saw what she characterized as a pattern of harassment based upon the memos sent to her by Barillari.

Lemon says that the incident regarding L. L. as being injured in the classroom when unattended, was when she had gone to the lavatory and was gone for only a short period of time. Upon returning she observed Barillari and had no idea what happened to L. L. She states that she felt that Barillari was harassing her.

Lemon also denies smoking in the school building while discharging students to buses. She states that she did smoke outside of the front door at the top of the steps.

Lemon explained that she had locked her classroom door and kept the classroom door locked from the inside from when Barillari started in 1991 on. Each memo was dropped off regarding the door being locked. Lemon testified that the reason for locking the door is safety. She occupies a classroom across from a stairwell exit. Between 1988 and 1991 she indicates that there were memos regarding stolen pocketbooks, things taken from the nurses' office, intruders and persons without a pass. According to Lemon after Ms. Barillari asked in writing that she unlock the door, she went to the union and while waiting for a resolution, she continued to keep the door locked until she received a memo from Ms. Nelms. She pointed out that the locked door did not keep students from exiting but did keep others with entering.

Lemon denies ever having hit R. B. with a ruler and states that he never presented a behavior problem. With respect to E. B., she characterizes the incident as a fight having almost broke out between E. B. and M.T. while lining up. She states that E. B. was not in his proper place and she took his arm. He jerked away and as a result hit the wall. She states that she was brought up on DYFS charges as a result of this.

With respect to M. T., she states that he was well behaved initially but subsequently had to be disciplined by removing him as student counsel representative as well as from instrument classes. She states that she never touched M. T. or pushed him into a cloakroom. According to Lemon, S. M. H. did have to be disciplined by keeping him in at lunch or after school. However, she states she never touched him or any other student other than E. B. She states that she never struck or touched other students.

Lemon described the attendance improvement program and states that her understanding was that if you had a doctor's note for any days that they were excused from the attendance improvement program. In 1990-91 school year she states she

provided the school with approximately ten doctors' letters. In the 1991-92 year she states that she was not in the attendance improvement program because she had medical notes. The same held true for the 1992-93 and 1993-94 school years.

Lemon states that from the time that she began teaching in approximately 1990 until June 1991, she never was late submitting a plan book. In September 1991 she acknowledges that she was late in submitting her plan book because she did not have teachers' guides and she had not received textbooks. She also acknowledged having clerical work to turn in.

Lemon described the evaluation process and provided copies of evaluations from the 1982-83 school year through the 1989-90 school year. She also states that in June 1991, she was evaluated by Barillari and at no time prior to this did she receive an unsatisfactory rating. She disputes the accuracy of the evaluation (P-26). She also disagreed with the unsatisfactory evaluation in May 1992. (P-30). The witness states that the June 10, 1992 unsatisfactory evaluation (P-29) was the first unsatisfactory that she had received and that this evaluation was undertaken while the complaints were pending between herself and Barillari. Lemon also disagreed with the unsatisfactory evaluation done by the out evaluation, Robert O'Bannon. (P-31). Additionally, she disagreed with the December 1, 1993 evaluation by Barillari which also rated her as unsatisfactory.

On cross examination Lemon acknowledged that she did not remember how many times Barillari had spoken to her and informed her that she was not to lock her classroom door. She also recalled memos instructing her not to lock the door. She acknowledged that Barillari had specifically directed her not to lock the door and that as principal Barillari had the authority to have her comply with reasonable directives. She states that Willy Hutchinson told her to wait and see what Ms. Nelms said about the situation. Hutchinson was her NTU representative but Barillari was Lemon's supervisor.

Lemon also acknowledged that she failed to comply during the 1991-92 school year with submitting plan books on time. She does state, however, that the plan books were submitted late. Lemon states that regarding the program on African-American heritage, Barillari gave her a date for the program and also did request biographical information regarding the speaker. She acknowledges that she did not provide Barillari with biographical information and feels that it was not reasonable to request such information.

Lemon discussed the question of attendance and the total number of yearly absences requested by the records. Although she recalls receiving a copy of an unsatisfactory rating (P-29), that also indicated attendance problems, she states that her absences did not, in her opinion, have an adverse effect on teaching. In the 1993-94 school year there were approximately 43 absences and she states that those did not adversely affect teaching. Lemon stated that according to contract she is permitted fifteen sick days per year, however, there is a provision for people who have more and that three days of leave without reasons per year are permitted. Although additional days are permitted if reason warrants. She testifies that her absences were due to things such as the flu, an upper respiratory problem and hypertension. She states that her hypertension became worse and that absences from March 25, 1994 to the end of the school year were due to hypertension.

Lemon also acknowledged having turned in a late class register but that it was handed in time to go out.

Angie Armour testified that she is a basic skills teacher and also does remediation and standardized testing. She stated that she has observed Lemon and her class and that her classroom was always colorful, the children well mannered and respectful and on appropriate occasions privileges were taken away. She also stated that between 1990 and 1995 she observed educational progress in her position and noted that Ms. Lemon had very few retentions.

Sherlene Gibbons testified that she occupied a classroom near that of Ms. Lemon. The witness had an extended absence in the Fall of 1991 and Spring of 1992. She states that between the 1988-89 school year and the 1993-94 school year, she observed Lemon's bulletin board to be reflective of what was going on in the classroom and conducive to learning. She would frequently visit the classroom and found it conducive to education. She states that Lemon had an excellent rapport with her students, that she took time, was caring and supportive.

J. L., a 12-year-old seventh grader, testified that he was in fourth grade with Ms. Lemon. He stated that he had perfect attendance that particular year. He also knew R. B. and described him as disruptive and "goofy" in class. He states he never saw Lemon push, shove, strike or place students in cloakrooms.

Louise Fusco also testified and was the project coordinator for the Title I Program. In the 1991-92 school year, she was at the 14th Avenue School as were Lemon and Barillari. She testified regarding the May 14,1992 disturbance in the hallway. She stated that she recalled that Ms. Lemon present and somewhat agitated around 2:30 or 2:45. There were a number of people in the area but that she does not recall Lemon her using any form of profanity but does not whether know whether she did or did not.

Sherlene Gibbons testified that she has been a teacher in Newark at the 14th Avenue School and has been with the Newark district for 18 or 19 years. She knows Ms. Lemon personally and has worked with her for several years. She testified that on May 14, 1992 Lemon was at school and was upset and was talking. She stated that Lemon might have used profane statements but that she did not know. She states that she never tried to physically restrain Lemon. She did not know why Lemon was upset, only that she was upset Barillari.

Patricia Evans who is a cashier at the cafeteria in the 14th Avenue School testified that aids are responsible in the cafeteria for the students during lunch and at

the end they go on the playground. The aids remain responsible. She did state that classes do not go back on their own.

Catherine McNeil testified that in 1994 she began as a volunteer aid with kindergarten. She brings children in from the playground and would also take notes to Lemon and see how she was doing. She characterized the class as consisting of girls who were well behaved and boys who sometimes misbehaved on the playground. She acknowledged that she volunteered three to three and one-half hours, five days per week, and that she was not located in Ms. Lemon's classroom. She testified she never saw fighting in the classroom and that she never saw the principal enter the class.

N. P., a 13-year-old eighth grade student who also had been a fourth grade student of Ms. Lemon, testified that Ms. Lemon had taught her in the 1992-93 school year. She stated that she did not recall if Lemon disciplined students and stated that she never saw Lemon hit children with rulers or put them in closets. She acknowledged having been absent several times in the 1992-93 school year and also stated that L. L. was a classmate, although she did not recall any accident or incident occurring with respect to L. L.

FINDINGS OF FACT

Having listened to the testimony and observed the demeanor of the witnesses and having taken into account all of the evidence in this case I **FIND** that this case turns solely and exclusively on the credibility of the witnesses.

I **FURTHER FIND** the following to be fact:

1. Thomasina Lemon is tenured teacher employed by the State Operated School District of Newark. She has been employed by that district since the early 1970's.

2. Respondent struck R. L. B. on the arm with a ruler and placed him in a cloakroom as discipline.

3. Put her hands on the neck of S. M. H. and pushed him into a classroom leaving demonstrable fingernail impressions on his neck.

4. Grabbed M. T. by the arm and forcefully put him into a chair and grabbed E. B. by the arm and in the ensuing motion caused E.B. to hit his head against the wall.

5. On May 14, 1992 respondent acted in an unprofessional manner by using loud language and profanity as well as threats against the principal of the school in front of students and staff.

6. Respondent ignored written and verbal directives to follow New Jersey statutes and regulations regarding the locking of classrooms during the school day. Although specifically directed by Principal Barillari to leave her classroom door open, Lemon did not do so.

7. For the evaluation years of 1992, 1993 and 1994, respondent has received unsatisfactory evaluations. Observations were conducted both by Principal Barillari and by an outside evaluator.

8. Out of a total of nine teacher observation reports between 1991 and 1994, respondent received eight unsatisfactory observations.

9. Suggestions as to changes in instructional methods contained in teacher observation reports were not implemented.

10. Respondent has not complied with mandated deadlines for submission of lesson plans, registers and other administrative requests for information.

11. During 1990-91 school year, respondent was absent 20.5 days.

12. During the period from 1991 to the end of the 1992 school year, respondent was absent 35 days.

13. During the school year 1992-93, respondent was absent a total of 27 days.

14. During the 1993-94 school year, respondent was absent a total of 43 days.

15. Respondent's pattern of absences are excessive and causes interruption in instructional continuity requiring the use of substitute teachers to continue classroom instruction during her absence.

16. No testimony of any nature was elicited regarding any instance of physical abuse or physical mismanagement in 1994.

DISCUSSION

As indicated above, this case turns solely and exclusively on the credibility of the witnesses as observed in the hearing along with other documentary evidence which was presented. The burden upon the Board of Education is to prove the tenure

charges by a preponderance of the credible evidence. *School District of the City of Paterson v Eddie Lee Harrell*, 186 *S. L. D.* 356, 358. In this case the school district has, as demonstrated by the findings of fact above, proved the substance of the tenure charges by as preponderance of the credible evidence. It should be noted that the tenure charges were brought by way of separate counts all alleging conduct unbecoming as well as excessive absenteeism. While not all individual subsections have been found as fact, the charges of conduct unbecoming and the subsidiary portion of excessive absence have been found to be fact.

The undersigned has been in the position to observe each and every witness and assess their credibility. What has become abundantly clear in this case is that differences have existed over time between the principal and the respondent. Notwithstanding those differences, there have been severe breaches in respondent's comportment with respect to responding to directives. The testimony of Ms. Lemon regarding the incident surrounding the cancellation of the mentoring elections that she never raised her voice nor engaged in any profanity whatsoever was not credible. There is testimony from other witnesses that either they did not hear the respondent's raised voice or that respondent did raise her voice. One witness, specifically recalls the very words that the respondent used which included offensive content and threats. These statements were made in front of other people within ear shot of students and are not acceptable professional comportment for a teacher. They clearly are insubordination when the object of them is the teacher's supervisor and are made in the presence of students and faculty.

The 1992-93 school year was marked with several incidents of physical intervention on the part of Ms. Lemon. Respondent, in her posthearing submission, points out that the degree of discipline imposed must be directly related to the circumstances presenting themselves. While to some degree that is accurate, the situations described here involve inappropriate conduct. The hitting of any student with a ruler, the placing of the hands of a teacher on the neck of the child and leaving marks on his neck, as well as physically moving any child by either grabbing the arm to

remove him from a line or by grabbing an arm and forcefully placing a child into a seat, are all incorrect ways of managing students. They do, in fact, rise to the level of corporal punishment. It is not the resulting injury incurred by the child but the actual imposition of the corporal punishment that is of grave concern.

In addition to failing to comply with deadlines, mandates and directives, Ms. Lemon has been absent on an ongoing, every increasing basis from the 1990-91 school year. Respondent took the position, apparently, while testifying that if absences were excused or for a medical purposes, they did not count in determining whether they are excessive. That is not and has not been the criterion for whether or not absences are excessive. The criterion is whether or not the absences are such that they impede the ability to deliver a free and appropriate education to students. Absences which are medically justified may still be considered to be excessive because they interfere with the instructional program by requiring the hiring and putting in place of substitutes to take on the normal classroom duties of the absent teacher. The question is whether or not the absences impede the educational goal and cause an interruption in delivering services to the students. In the case the absences are sufficient and excessive to the point that the educational goal is impeded. That, taken in conjunction with the unsatisfactory evaluations, make clear that her students have not received the educational benefit that is expected to be derived in the classroom.

Counsel for respondent argues that the second count of the tenure charges which deals in large part with absences and other conduct which might be characterized as unbecoming must be dismissed because absences and unsatisfactory performance, in respondent's view, amount at most to insufficiency which must be charged separately under *N.J.S.A.* 18A:6-11. This would trigger the procedural safeguards found in the statute and which were not used here. That is an incorrect reading of what is being charged. Count II of the charges restates by reference each and every allegation contained in the first count as if reproduced at length and then discusses both unsatisfactory evaluations as well as refusal to comply with directives such as the locked door, submission of lesson plans and substitute plans as well as

excessive absenteeism. Whether taken alone the unsatisfactory ratings might be subject to a charge of inefficiency which would trigger the provisions in respondent's brief is not the only thing which is at issue in Count II. While it does not have a subject heading under Count II, the excessive absences alone are sufficient for dismissal as falling under the language "for other just cause" found in 18A:6-10. The failure to comply with directives is not inefficiency but rather conduct unbecoming a teacher.

Based upon the findings and the conduct in this case, the Board has sustained, by a preponderance of the credible evidence, the charges of the conduct unbecoming as well as other just cause The seriousness of the sustained charges, when contrasted against respondent's mitigating evidence, remains of such overwhelming weight as to require the dismissal of respondent Lemon.

CONCLUSION

As a result, I **CONCLUDE** that dismissal pursuant to *N.J.S.A.* 18A:6-10 is appropriate in this case.

ORDER

It is hereby **ORDERED** that respondent be dismissed for engaging in conduct unbecoming a teacher and that she therefore be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

8/1/97
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

Aug. 5, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 8 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

*(FV)mxl

APPENDIX

Witnesses

For petitioner:

R. L. B., Jr.
S. M.H.
Sylvia Ward
M. T.
Maximina Rodriguez
Paula Greenberg
K. M. M.
N. W.
Alyson Barillari
Robert O'Bannon Jr.
Anzella Nelms

For respondent:

Thomasina Lemon
Louise E. Fusco
Sherlene Mae Gibbons
Patricia Evans
Catherine McNeil
Alvin Hill
N.P.
Angie Allen Armons
J.L.

Evidence

PETITIONER'S EXHIBITS

P-1(ID)	Increment Denial for 1994-95 school year - 5/18/94
P-2	Recommendation of increment denial - 5/19/1994
	*(P-3 no exhibit proffered)
P-4	Incident report re: pupils E.B., S.H., L.J., M.T. - 9/22/94
P-5	Memo re: failure to submit plan book - 5/13/92
P-6	Memo re: insubordination and assembly speakers - 4/15/92

P-7	Memo re: insubordination conference - 4/16/92
P-8	Memo by Nelms re: insubordination conference - 5/11/92
P-9	Memo re: failure to submit lesson plans - 6/8/92
P-10	Memo re: insubordination for locking classroom door - 12/16/92
P-11(a&b)	Note re: 4/27/92 tests and report cards; 4/30/92 note
P-12	Memo re: leaving students unattended - 3/18/92
P-13	Memo re: refusal to attend post observation conference - 5/22/92
P-14	Memo and Incident Report re: conduct unbecoming a professional - threats, use of profanity - May 14,1992
P-15	Incident Report to School Operations - May 14,1992
P-16a	Report by William Glover re: Terroristic Threats - May 15, 1992
b	Statements by Jo Lardieri
c	Statements by Georgiana Furr
d	Statements by Anita Kubicka
e	Statements by Paula Greenberg
P-17	Letter by Nelms re: conduct unbecoming - May 18,1992
P-18	Notice to faculty re: elections for mentors - May 11,1992
P-19	Memo re: smoking in doorway - September 11, 1992
P-20	Memo re: unsupervised classroom/L.L -September 23, 1992
P-21	Incident report re: L.L. - September 23, 1992
P-22a	Absence records - 1989-90
b	" " - 1990-91
c	" " - 1991-92
d	" " - 1992-93
e	" " - 1993-94
P-23	Diagram
P-24	Memo - April 29, 1994
P-25 (ID)	Observation - September 20, 1991
P-26	Observation October 28, 1991
P-27	Diagram of witness office and area
P-28a	Memo to Nelms - March 4, 1994
b	Memo re: observation to Lemon - February 16, 1994
c	List of absences -attached to P-28a
P-29	Memo dated June 10, 1992 and attachments
P-30	Memo dated June 16, 1992 and attachments
P-31	Teacher observation report dated March 11, 1994
P-32	Teacher observation report dated December 1, 1993
P-33	Memo Lemon to Megaro - February 5, 1990
P-34	Letter to Nelms from Megaro with attached memo - March 22, 1990

RESPONDENT'S EXHIBITS

R-1	Agreement between the Board of Education of the City of Newark and the Newark Teacher's Union Local 481 ATF/AFL-CIO
R-2	June 1, 1993 Teacher Annual Evaluation Report of Lemon

R-3 (ID)	Driving abstract of Allison Barillari
R-4	September 11, 1991 Letter from Barillari to Lemon re: School Improvement Participation
R-5	September 17,1991 Letter from Barillari to Lemon re: intercom
R-6	October 24, 1991 Letter from Barillari to Graves
R-7	Principals Grievance Letter dated October 9, 1991
R-8	September 24,1991 Letter of Barillari to Lemon
R-9	"Rules for the Conference"
R-10	June 1984 Teacher Annual Evaluation - report of Lemon
R-11	June 1985 " " " " " "
R-12	June 1986 " " " " " "
R-13	June 1987 " " " " " "
R-14	June 1988 " " " " " "
R-15	June 1989 " " " " " "
R-16	June 1990 " " " " " "
R-17	Photo - Lemon classroom Fall 1992

OAL DKT. NO. EDU 9264-95
AGENCY DKT. NO. 163-5/95

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMASINA LEMON,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF NEWARK, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Having conducted his own careful and exhaustive review of the entire record in this matter, which included transcripts from the ten days of hearing at the OAL, as well as each of the exceptions advanced by respondent, the Commissioner determines to affirm the conclusion of the Administrative Law Judge (ALJ), with modification and some elaboration upon her factual findings, as set forth herein.

The Commissioner initially affirms the Order rendered by the ALJ upon interlocutory review on March 24, 1997, which denied respondent's Motion to Dismiss the within matter for the District's asserted failure to comply with the requisite procedural mandates

for bringing tenure charges.[1] The Commissioner so affirms for the reasons articulated by the ALJ in her Order, and further notes that the record shows that respondent, who was represented by an attorney during the period in question and throughout the proceedings, was duly notified on three occasions that the then Board of Education had repeatedly failed to vote to certify tenure charges on the dates expected, but nevertheless still planned to do so. (Respondent's Exceptions, Exhibits D, E and F) Respondent's attorney raised no objection to the delay. Neither did respondent's Answer to the tenure charges dispute the District's apparent delay in certifying those charges. Finally, to the extent respondent had a viable claim in this regard, her counsel was provided the opportunity by the ALJ to file a Motion to Dismiss, but failed to timely do so.[2] Respondent's attorney's continued protest that he was without the necessary information to file such a motion, notwithstanding his knowledge of the purported violation, is disingenuous. (Tr. June 10, 1996 at 3, 4)

The Commissioner also accepts the ALJ's recitation of the facts as developed and elicited during the testimony of the various witnesses, notwithstanding respondent's contention that the ALJ's recitation of testimony is erroneous, or that the purported omissions in said recitations are significant. The Commissioner finds that "even assuming *arguendo* that [respondent's] allegations of factual error were correct in their entirety, they would in no way serve to alter the overwhelming balance of evidence in this matter." *In the Matter of the Tenure Hearing of Christine Pellagatti,* 93 *N.J.A.R.* 2d (EDU) 121, 125. Further, the Commissioner finds no basis in the record on which to overturn the credibility assessments rendered by the ALJ.

[1] Respondent contends that the District failed to certify tenure charges to the Commissioner within 45 days of serving them upon respondent, in accordance with *N.J.S.A.* 18A:6-13.

[2] As the record shows, respondent's counsel was, on June 10, 1996, provided ten days in which to file a Motion to Dismiss. (Tr. June 10, 1996 at 7) He failed to file said motion in a timely manner, and instead, filed a Motion to Dismiss on January 27, 1997, after the record closed.

As to the ALJ's factual findings set forth on pages 24 and 25 of the initial decision, the Commissioner affirms the first finding, as herein modified:

> 1. Thomasina Lemon is a tenured teacher employed by the State Operated School District of the City of Newark. She has been employed by the District since 1970. (Tr. July 25, 1996 at 7)

In accordance with testimonial and documentary evidence, the Commissioner next modifies the ALJ's second, third and fourth factual findings as follows:

> 2. Respondent struck then-fourth-grade student R.L.B. with a ruler about four times and placed him in a cloakroom for approximately one-half hour as discipline. (Tr. June 5, 1996 at 45-47) Respondent also hit M.D. with a ruler about eight times and sent him to the cloakroom for discipline. (*Id.* at 42-44)
>
> 3. In September of 1994, (Petitioner's Exhibit P-4), respondent put her hands on the neck of S.M.H. and pushed him into a classroom leaving demonstrable fingernail impressions on his neck. (Initial Decision at p. 24)
>
> 4. In September of 1994, respondent grabbed M.T. by the arm and forcefully put him into a chair and grabbed E.B. by the arm and, in the ensuing motion, caused E.B. to hit his head against the wall. (*Id.*) The District contacted the Institutional Abuse Unit within DYFS, and four children were removed from respondent's class. (Initial Decision at p. 7; Tr. June 6, 1996 at 53; Petitioner's Exhibit P-4)

The Commissioner determines that the above factual findings support the conclusion that respondent's physical interventions were inappropriate. There is "sufficient corroboration among the witnesses to sustain" such a finding. See *In the Matter of the Tenure Hearing of Millicent Smith,* 93 *N.J.A.R.* 2d (EDU) 729, 739. The Commissioner is cognizant that

> Physical and verbal abuse of students falls within the broader category of "unbecoming conduct." *In re Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). *N.J.S.A.* 18A:6-1 prohibits school employees from inflicting "corporal punishment" on a student, without precisely defining that term. However, the statute provides clarification of its meaning by authorizing the use of such force as

> may be "reasonable and necessary" to quell a disturbance threatening injury to others; to obtain possession of weapons or other dangerous objects; for the purpose of self-defense; or for the protection of persons or property. Generally, the Commissioner equates "corporal punishment" with "any punishment causing or intending to cause bodily pain or suffering." *Craze v. Allendale Bd. of Ed.*, 1938 *S.L.D.* 185, 186. *In the Matter of the Tenure Hearing of Charles Courtney*, 92 *N.J.A.R.* 399, 403.

In the instant matter, the Commissioner cannot find that the harsh physical interventions were in any way reasonable or necessary, in accordance with statutory parameters, particularly in view of the age of the students. (*Id.*)

The Commissioner next adopts, without modification, the fifth, sixth and tenth factual findings as follows:

> 5. On May 14, 1992 respondent acted in an unprofessional manner by using loud language and profanity as well as threats against the principal of the school in front of students and staff.
>
> 6. Respondent ignored written and verbal directives to follow New Jersey statutes and regulations regarding the locking of classrooms during the school day. Although specifically directed by Principal Barillari to leave her classroom door open, Lemon did not do so.
>
> 10. Respondent has not complied with mandated deadlines for submission of lesson plans, registers and other administrative requests for information. (Initial Decision at p. 24)

The Commissioner determines that these findings clearly constitute insubordination. Here, he observes that "[i]nsubordination is synonymous with disobedience, it is an unwillingness to submit to authority. It is more than being merely argumentative or fractious." *In re Smith, supra*, at 731. The Commissioner finds particularly disturbing the events of May 14, 1992, in that respondent's unprofessional conduct is all the more offensive when displayed before other staff and students. See *Morris School District Board of Education v. Christine Brady*, 92

N.J.A.R. 2d (EDU) 410, 412. This "***is not the conduct pupils should be encouraged to emulate." (*Id.* at 420) He further notes that respondent's flat denial of the events which occurred on this date, in the face of specific and largely uncontroverted testimonial and documentary evidence to the contrary, is simply not credible.

The Commissioner notes that the seventh, eighth and ninth factual findings of the ALJ are as follows:

> 7. For the evaluation years of 1992, 1993 and 1994, respondent has received unsatisfactory evaluations. Observations were conducted both by Principal Barillari and by an outside evaluator.
>
> 8. Out of a total of nine teacher evaluation reports between 1991 and 1994, respondent received eight unsatisfactory observations.
>
> 9. Suggestions as to changes in instructional methods contained in teacher observation reports were not implemented. (Initial Decision at pp. 24, 25)

Here, the Commissioner agrees with respondent's argument that these findings emanate from charges which sound predominately in inefficiency, and that said charges, therefore, trigger the procedural safeguards identified in *N.J.S.A.* 18A:6-11. That is, the charged employee must be provided at least 90 days in which to overcome the inefficiency before the charge may properly be certified to the Commissioner. See *Bd. of Ed. of the Township of Teaneck, Bergen County v. Willburn*, 91 *N.J.A.R.* 2d (EDU) 48, 58, aff'd 92 *N.J.A.R.* 2d (EDU) 328, aff'd Dkt. No. A-4663-91 (App. Div. April 12, 1993). In that the record does not evidence the District's compliance with the procedural mandate, the Commissioner determines to dismiss the charges found at 3a, 3b, 3c, and 5 of the Second Count. He further determines not to reach to the ALJ's seventh, eighth and ninth factual findings, as noted, *supra*, as well as the related analysis in the initial decision.

The Commissioner next affirms, with elaboration, the ALJ's findings with respect to respondent's record of absenteeism:

> 11. During the 1990-91 school year, respondent was absent 20.5 days.
>
> 12. During the period from 1991 to the end of the 1992 school year, respondent was absent 35 days. Her absences caused problems with the continuity of instruction; respondent's substitute plans were often unavailable or not up to date. (Initial Decision at p. 7; Tr. June 6, 1996 at 58)
>
> 13. During the school year 1992-93, respondent was absent a total of 27 days.
>
> 14. During the 1993-94 school year, respondent was absent a total of 43 days. Petitioner was notified by memorandum dated April 27, 1994 that, due to her excessive absences, she would not be approved for use of funds for professional improvement, in that such use would require her to be out of the building once again. (Initial Decision at p. 7; Tr. June 6, 1997 at 62; Petitioner's Exhibit P-24)

With respect to these absences, respondent argues, *inter alia*, that they are not excessive when one considers that an employee is permitted 15 sick leave days by contract.[3] Respondent also argues that the District did not duly notify her of her problematic absentee record, in accordance with its policy. However, the Commissioner rejects these assertions, in that an employee's absenteeism may be considered excessive even though related to legitimate health problems, where such absences negatively impact on students, and where the teacher was advised that her attendance needed improvement. *State-Operated School District of the City of Jersey City v. Pellecchio*, 92 *N.J.A.R.* 2d (EDU) 267, 271, aff'd 93 *N.J.A.R.* 2d (EDU) 30. In the

[3] Respondent's contract provided for a total of 15 sick leave days per year, and an additional 10 sick leave days for employees with 25 years of service. (Exhibit R-1 at p. 41) Respondent, however, did not have 25 years of service as of the time of her noted absences. Testimony further established that the sick leave days were cumulative. (Tr. June 11, 1996 at 17)

instant matter, respondent's principal testified that, on numerous occasions, when respondent was returning from sick leave, she requested documentation from respondent to substantiate her use of sick time, but did not receive such documentation.[4] Principal Barillari further attested that she spoke with respondent in this regard, that she sent her communications in accordance with District policy,[5] and that respondent also attended conferences, along with her union representative, to discuss these issues. Principal Barillari indicated that, once the conferences were held, respondent would produce the requested documentation covering the period of time in which she had been out sick. (Tr. June 11, 1996 at 19-21) The Commissioner further notes the Annual Evaluation Report prepared by Principal Barillari for respondent dated June 10, 1992 which indicated that her attendance needed improvement (Exhibit P-29), as well as the testimony presented by Assistant Superintendent Nelms establishing that respondent received notice of her attendance problems, as per the District's policy. (Tr. December 11, 1996 at 43)

Recognizing that "[t]he point at which absenteeism is judged to be chronic falls within the prerogative and discretionary authority of the Board subject to a determination by the Commissioner of Education ***," *In the Matter of the Tenure Hearing of Blanche Sheets, School District of the Township of Colts Neck, Monmouth County,* 1979 *S.L.D.* 790, 798, the ALJ's fifteenth factual finding is affirmed as follows:

> 15. Respondent's pattern of absences [is] excessive and causes interruption in instructional continuity requiring the use of substitute teachers to continue classroom instruction during her absence.

[4] Principal Barillari later clarified that these were, indeed, requests, in that District policy does not compel the employee to provide such documentation under all circumstances. (Tr. June 11, 1996 at 20)
[5] The Attendance Improvement Plan.

As to the ALJ's final factual finding that "[n]o testimony of any nature was elicited regarding any instance of physical abuse or physical mismanagement in 1994," (Initial Decision at p. 25), the Commissioner sets aside this finding as inconsistent with the record and with the factual findings, *supra*, at numbers three and four.

Finally, the Commissioner affirms the ALJ's conclusion that the District has sustained, by a preponderance of credible evidence its charges of unbecoming conduct and other just cause. The Commissioner herein reiterates that by her proven inappropriate physical interventions with students, her insubordination and her excessive absenteeism, respondent is guilty of conduct unbecoming a teaching staff member. As to the appropriate penalty, the Commissioner has considered respondent's apparently sound teaching record and her extended employment within the District, but nonetheless concurs with the ALJ's recommendation that respondent be dismissed from her tenured position in the State-Operated School District of the City of Newark. The Commissioner recognizes that fitness for a particular position requires a balancing of interests. *In the Matter of the Tenure Hearing of Arlene Dusel,* 1978 *S.L.D.* 526, 531. "Unfitness for a position in the school system may be shown by a single incident, if sufficiently flagrant, but is 'best shown by numerous incidents.'" *In re Courtney, supra*, at 403, citing *Redcay v. State Bd. of Ed.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1934), aff'd 131 *N.J.L.* 326 (E. & A. 1944). The Commissioner finds that the totality of the testimonial and documentary record clearly supports the ALJ's conclusion.[6]

In reaching this conclusion, the Commissioner underscores the now axiomatic language of a prior tenure decision maintaining that

[6] To the extent the initial decision may be read to suggest that any of the factual findings may independently constitute sufficient grounds for dismissal, said affirmation is specifically disavowed.

> [teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. *** *In the Matter of the Tenure Hearing of Jacque L. Sammons,* 1972 *S.L.D.* 302, 321.

The Commissioner herein notes with concern that respondent's instances of unbecoming conduct toward her pupils are serious and should not be discounted. "School officials need not wait until some child is badly injured before removing a teacher prone to violence." *In re Courtney, supra,* at 403. Respondent's pattern of absences is sufficiently high to raise serious concerns about her professional commitment and responsibility, see *In re Courtney* at 402, and her defiance of authority and disregard for established procedures and mandates of the District serve to interfere with smooth District operation. Taken together, the evidence demonstrates that her removal is warranted.

Accordingly, the initial decision of the OAL is affirmed, as modified herein. Respondent is dismissed from her tenured teaching position with the District as of the date of this decision. This matter is further referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against her certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 17, 1997
DATE OF MAILING SEPTEMBER 17, 1997

488-97

EDU #9264-95
C # 488-97
SB # 82-97

IN THE MATTER OF THE TENURE	:	
HEARING OF THOMASINA LEMON,	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

Decided by the Commissioner of Education, September 17, 1997

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

For the Respondent-Appellant, Robert T. Pickett, Esq.

The decision of the Commissioner of Education dismissing respondent from her tenured employment is affirmed for the reasons expressed therein. In so doing, we reject respondent's contention that we should dismiss the charges against her at this point on the procedural grounds that the district board did not certify those charges to the Commissioner within 45 days, as required by N.J.S.A. 18A:6-13.[1] We stress that on June 10, 1996, the Administrative Law Judge ("ALJ") expressly provided respondent with the opportunity to file a motion to dismiss the tenure charges on this basis, requiring only that she file the motion within ten days. Tr. 6/10/96, at 3-8. Respondent,

[1] We note that the State Board directed the creation of a State-operated school district in Newark on July 5, 1995, subsequent to the certification of the instant tenure charges.

FEB. 4, 1998

however, failed to file such a motion, and did not do so until January 27, 1997, more than seven months later and after completion of the extensive hearings in this matter.

We deny respondent's request for oral argument as not necessary for a fair determination of this matter. N.J.A.C. 6:2-3.2.

February 4, 1998

Date of mailing FEB 06 1998

489-97

ALICE H. YUCHT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, media specialist who was riffed, alleged the Board wrongfully hired another individual to fill an educational media specialist position in violation of her recall rights.

ALJ found that the individual hired for the new position would serve as both a media specialist/librarian and a teacher of elementary subject matter. ALJ determined that petitioner was certified to teach English in the elementary schools, but she presented no information which suggested that she had the necessary endorsement to teach mathematics. Thus, she was not qualified for the new position that included teaching math. Moreover, the Board did not have to bifurcate the position to suit petitioner's areas of endorsement. Petition was dismissed.

Commissioner concurred with the ALJ that the Board's dual certification requirement was proper. Commissioner agreed with the ALJ that absent a showing that the Board violated state law, administrative code or acted arbitrarily, the Commissioner will not interfere with the Board's decision to combine the library/media and instructional duties into one position. Petition was dismissed.

SEPTEMBER 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10767-96S
AGENCY DKT. NO. 522-11/96

ALICE H. YUCHT,

Petitioner,

v.

MILLTOWN BOARD OF EDUCATION,

Respondent.

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

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: July 29, 1997 Decided: August 6, 1997

BEFORE **JEFF S. MASIN**, ALJ:

Alice Yucht was employed by the respondent Board of Education as a media specialist. She was terminated as the result of a reduction in force ("RIF") effective June 30, 1994. In March 1996 the Board advertised for a combined school librarian and elementary school teacher. The Board ultimately hired Tammy Simons for the position. Mrs. Yucht filed a petition with the Commissioner of Education, alleging that the Board had violated her tenure rights when it failed to offer this position to her. The Commissioner transferred the contested case to the Office of Administrative Law ("OAL") on December 6, 1997. The matter was scheduled for hearing on April 30, 1997, before an administrative law judge, but on April 10 it became apparent that that judge would have to recuse himself. The case was then reassigned to this judge and scheduled for

hearing on July 7, 1997. The parties thereafter agreed that the dispute could likely be resolved based on the documentary record, and cross-motions for summary decision were filed. The last brief was received on July 7, and supplemental material requested by this judge was submitted thereafter. The record is deemed closed as of the last submittal on the requested information on July 29, 1997.

BACKGROUND OF THE DISPUTE

The advertisement issued by the Board for the position eventually filled by Ms. Simons was published in the Sunday Ledger on March 3, and March 10, 1996. It read

MEDIA CENTER
SPECIALIST

New Facility!
Milltown Schools (K-8)

Finalize plans for our new, multi-media center/computer lab.

Certificates: school librarian or equivalent and elementary teacher

Send letter, resume, copies of certificates and transcripts to: Dr. Bertram Nussbaum, Kilmer School, Church St., Milltown, NJ 08850 by March 25. AA/EOE.

The posting for "All Staff," dated February 5, 1996, provided that the position was

1. Librarian

Full-time, commencing for the 1996-97 school year due to retirement of the current librarian.

- K-8 position
- service two schools
- accept related club responsibilities
- help finalize and implement plan for the new Parkview School computer lab/library/media center
- availability to teach general elementary program class(es) as schedule permits

See the draft job description for further details.

The Job Description for the "Librarian/Media Specialist (commonly, "the librarian")" identifies the qualifications required as including

> Certification in the State of New Jersey as any of the following: (1) Educational Media Specialist, (2) Associate Educational Media Specialist, or (3) such other appropriate certification as may be required by the New Jersey Department of Education, and (4) with preference considered for those also possessing an Elementary School Teacher certificate

The "Performance Responsibilities" for the position included

> 2. Developing lesson plans in order to adapt and teach the curriculum to the needs of the pupils including but not limited to library skills, computer education, and general elementary education as the master schedule permits, in cross curricular and interdisciplinary formats

The job description for the position held by Mrs. Yucht prior to her being riffed, which was designated as "Librarian/Media Specialist," listed no specific qualifications other than "as determined by State certification requirements."

According to the letter received from counsel for Mrs. Yucht in response to my request for clarification, she "is the holder of a Teacher of English endorsement which authorizes her to teach English in all public schools." She is also certified as a "Professional Librarian" and an "Educational Media Specialist."

DISCUSSION

The Board of Education determined that it would employ someone to fill two functions. The hire would serve both as a media specialist/librarian and would also teach subject matter material in the elementary grades. According to the submissions from the parties, Mrs. Yucht is certified to teach English in the elementary schools, but she has presented no information which suggests that she has the necessary certification to teach mathematics. Indeed, in her counsel's

response to the Board's letter brief, he appears not to contest that she is not qualified for the teaching assignment which includes math teaching, but instead he argues that she should at least receive a half-time position at the Joyce Kilmer School, where the current hire does not teach, but serves only in the media specialist capacity.

Based upon the evidence and the arguments of counsel, I am convinced that Mrs. Yucht could not expect to have received the position advertised by the Board. The job description for the new position of Librarian/Media Specialist specifically called for a person to perform duties including: "general elementary education as the master schedule permits, in cross curricular and interdisciplinary formats." This description did not limit the teaching assignment to English, and Mrs. Yucht's endorsements do not permit her to teach mathematics in the elementary grades. Thus she was not qualified for the position's responsibilities. As for the possibility of splitting the position, so that Mrs. Yucht could hold the Joyce Kilmer position, which apparently does not currently require the holder to teach classroom subjects, and someone else could be hired to hold the position at Parkway School, such as Ms. Simons (who holds an elementary school certificate along with her emergency school librarian certificate), clearly this was not the choice which the Board made. The Commissioner is traditionally loath to interfere in decisions made by local Boards of Education as to the structure of employment positions unless they violate the law or act in bad faith. Here, the Board might have chosen to split the position, but its determination to hire one individual to fill the spot certainly does not constitute an arbitrary, unreasonable or illegal action. The fact that the hired individual can both teach elementary school and serve in the media specialist/librarian capacity affords the Board flexibility. The Board has the "predominant responsibility to maintain a thorough and efficient system of education" and it need not bifurcate positions to suit the "desires and maximize its scheduled course offerings to coincide with (petitioner's) areas of certification." *Fitzpatrick v. Weehawken Township Board of Education, N.J. App.Div*, June 16, 1982, A-3278-80T3 (unpublished) at 3-4; *Davis v. Board of Education of Ewing Township*, EDU 6539-84 (March 14, 1985), adopted by Commissioner of Education (April 29, 1985), adopted by State Board (September 4, 1985); *Hart v. Board of Education of Ridgefield,* OAL DKT. 9002-86 (June 25, 1987) *adopted* by Commissioner of Education (August 4, 1987.

ORDER

The petitioner has failed to establish that she has any right to the position she now seeks. The Board did not violate her tenure or seniority rights. Her petition is therefore **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 6, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

DNA 8/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

Exhibit A Job Description for Librarian/Media Specialist (commonly, "the librarian"), adopted 2/13/96

Exhibit B Memo to All Staff from Walter Boright, Superintendent, regarding posting of position, dated February 5, 1996

Exhibit C Teaching Schedule

Exhibit D No. 2 Daily Plan Book and Record of Instruction for Elementary and Secondary Schools for Tammy Simons 1996-97

FOR THE RESPONDENT:

Schedule A Librarian/Media Specialist Job Description, adopted 3/6/80

Schedule B Handwritten memo to Pat Ash, AAO, from Walter Boright, Sup't, dated March 4, 1996, with copies of advertisements for job position Media Center Specialist

Schedule C Page 1 of Job Description for Librarian/Media Specialist (commonly, "the librarian")

OAL DKT. NO. EDU 10767-96S
AGENCY DKT. NO. 522-11/96

ALICE H. YUCHT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the Administrative Law Judge (ALJ). Notwithstanding the significance which petitioner places on the Board's stated "preference" for a candidate who possessed an elementary endorsement to the instructional certificate,* the Commissioner notes that the advertisement, as posted in the newspaper clearly states that the candidate must hold such an endorsement. Moreover, as petitioner notes in her exception arguments, it is the duties attending the position in question which determine whether the

* As contained in the listing of qualifications in the job description. (Initial Decision at p. 3)

elementary endorsement was properly considered to be a requirement. In that the performance responsibilities clearly anticipate the holder of the position to "[develop] lesson plans in order to adapt and teach the curriculum to the needs of pupils including *** general elementary education as the master schedule permits, in cross curricular and interdisciplinary formats" (Initial Decision at p. 3), the Commissioner cannot find that the Board's dual certification requirement is improper. As the ALJ correctly notes, that the Board decided to combine the library/media and instructional duties is not a decision in which he will interfere, absent a showing that the Board has violated state law, administrative code or has acted arbitrarily. The Commissioner concurs with the ALJ that such is not the case.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 17, 1997
DATE OF MAILING SEPTEMBER 17, 1997

489-97

EDU #10767-96S
C # 489-97
SB # 84-97

ALICE H. YUCHT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MILLTOWN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 17, 1997

For the Petitioner-Appellant, Klausner, Hunter & Rosenberg (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Borrus, Goldin, Foley, Hyman & Stahl (Anthony B. Vignuolo, Esq., of Counsel)

Alice H. Yucht (hereinafter "petitioner") was employed by the Board of Education of the Borough of Milltown (hereinafter "Board") as a librarian/media specialist until her position was abolished as the result of a reduction in force effective June 30, 1994. It is undisputed that the petitioner had achieved tenure as a result of such employment. On November 6, 1996, the petitioner filed a petition of appeal with the Commissioner of Education alleging that the Board had violated her tenure rights when it failed to reinstate her in a newly-created position of "Librarian/Media Specialist" for the 1996-97 school year. The job description for that position required certification "as any of the following":

July 5, 2000

> (1) Educational Media Specialist, (2) Associate Educational Media Specialist, or (3) such other appropriate certification as may be required by the New Jersey Department of Education, and (4) with preference considered for those also possessing an Elementary School Teacher certificate.

Exhibit A, in evidence.

The responsibilities for the position, as listed in the job description, included:

> Developing lesson plans in order to adapt and teach the curriculum to the needs of the pupils including but not limited to library skills, computer education, and general elementary education as the master schedule permits, in cross curricular and interdisciplinary formats.

Id.

The petitioner held the following certifications: Teacher of English, Professional Librarian and Educational Media Specialist. The job description for her abolished librarian/media specialist position specified its "Primary Function" as: "Assumes responsibility for the instruction of assigned students in accordance with the district and school's instructional goals approved by the Board of Education as well as the comprehensive management of the library/media center." Schedule A, in evidence.

On August 6, 1997, an administrative law judge ("ALJ") recommended dismissing the petition, concluding that the petitioner had failed to establish any entitlement to the newly created position. The ALJ found that the job description specifically included instructional duties in general elementary education and that the petitioner was not qualified to perform such responsibilities since her instructional certification was in English rather than elementary education. The ALJ further found that the Board's decision to combine the various functions into a single position was not arbitrary, unreasonable or illegal, observing that the Board was not required to "bifurcate positions to suit the 'desires and maximize its scheduled course offerings to coincide with (petitioner's) areas of certification.'" (Citations omitted.) Initial Decision, slip op. at 4.

On September 17, 1997, the Commissioner adopted the findings and conclusions of the ALJ and dismissed the petition. The Commissioner indicated that he:

> cannot find that the Board's dual certification requirement is improper. As the ALJ correctly notes, that the Board decided to combine the library/media and instructional duties is not a decision in which he will interfere, absent a showing that the Board has violated state law, administrative code or has acted arbitrarily. The Commissioner concurs with the ALJ that such is not the case.

Commissioner's Decision, slip op. at 9.

The petitioner filed the instant appeal to the State Board.

After a careful review of the record, we affirm the decision of the Commissioner as modified herein.

On the basis of the record before us, including the job description and the actual duties identified by the parties, we find that the newly-created position constituted an unrecognized position title requiring both an instructional and an educational services certificate. While the county superintendent is charged with responsibility in the first instance for determining the appropriate certification for service in an unrecognized position title based upon the specific duties required to be performed, N.J.A.C. 6:11-3.3(b), the State Board of Education has the ultimate administrative authority for determining certification requirements.[1] South River Education Association v. Board of Education of the Borough of South River, decided by the State Board, November 4, 1987, aff'd, Docket #A-1695-87T8 (App. Div. 1990); Pezzullo v. Board of Education of the Township of Willingboro, decided by the State Board, March 1, 1989, appeal dismissed, Docket #A-4006-88T1 (App. Div. 1989).

[1] We note that there is no indication in the record that the job description for the newly created position was submitted to the County Superintendent for approval and determination of the appropriate certification as required for unrecognized positions.

In this instance, we agree that the duties of the newly-created position as reflected in the record before us are of such character as to require possession of a teaching certificate in elementary education in addition to an appropriate educational services endorsement in order to be qualified to perform such functions.[2]

We find, in addition, as pointed out by the Board, that the newly created position is substantially different from the petitioner's abolished position in that it requires instruction in general elementary education. The petitioner's instructional certification in English, which permits her to "teach English in all public schools," N.J.A.C. 6:11-6.2(a)7, does not authorize her to teach "general elementary education...in cross curricular and interdisciplinary formats," as provided in the job description, including mathematics, the subject area assigned to the position in 1996-97. Exhibits C and D, in evidence.

Consequently, as modified herein, we affirm the decision of the Commissioner to dismiss the petition.

Attorney exceptions are noted.

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

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[2] We reject the petitioner's argument, reiterated in her exceptions to the report of our Legal Committee, that an elementary endorsement is not required for the position since the job description adopted by the Board indicated only a "preference" for such certification. As previously stated, it is the county superintendent who is charged in the first instance with the responsible for determining the appropriate certification for service in an unrecognized position. It is that determination, made on the basis of the specific duties required to be performed in the position, which is determinative. We remind the Board in that regard that an unrecognized position title is required to be submitted annually to the county superintendent for review. N.J.A.C. 6:11-3.3(b).

490-97

490-97

ANTHONY ALFERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, teaching staff member who retired in 1995, sought restoration of sick days following work-related injury. Board contended petition was filed untimely.

ALJ determined that the petition was filed untimely as petitioner did not file within 90 days after the workers' compensation judgment. Summary judgment was granted to the Board; petition was dismissed.

Commissioner adopted findings and determination in the initial decision as his own while noting that since the State Board decision in *Verneret,* wherein a petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 must file a petition with the Commissioner of Education within 90 days of the Board's action which has the effect of denying such benefits to petitioner, specifically directed that this decision concerning timing of claims be applied *on a prospective basis only*, the controlling legal authority applicable herein was that which existed prior to *Verneret.* Commissioner found that, given the prior law which required a petition be filed after a determination from the Division of Workers' Compensation, petition herein was untimely as petitioner did not file until more than 4-1/2 months beyond the entry of petitioner's workers' compensation Order for Judgment. Petition was dismissed as untimely.

SEPTEMBER 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION FOR

SUMMARY DECISION

OAL DKT. NO. EDU 676-97

AGENCY DKT. NO. 560-11/96

ANTHONY ALFERI,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for the petitioner (Balk, Oxfeld, Mandell & Cohen attorneys)

Francis X. Journick, Jr.,, Esq., for the respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: June 25, 1997 Decided: August 5, 1997

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

This matter concerns the petition filed by the petitioner, Anthony Alferi, seeking the restoration of sick days following a work related injury. The respondent, the Board of Education of the Township of Old Bridge, Middlesex County (Board) alleged that the petitioner is not entitled to the restoration of any sick days and that the petition was not filed timely in accordance

with N.J.A.C. 6:24-1.2(c). On February 7, 1997, the Commissioner of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I had telephone conferences with the parties on March 6, 1997, and May 30, 1997, and the parties agreed to submit briefs on the threshold issue of whether the petition was filed in a timely manner. The parties submitted briefs, and the record closed on June 25, 1997.

UNDISPUTED FACTS

On October 11, 1991, the petitioner sustained a work related injury and was absent from his teaching position consecutively from October 15, 1991, through November 27, 1991, and intermittently thereafter. The Board paid the petitioner his full salary for these absences and deducted the days from the petitioner's accrued sick days

The respondent gives each teaching staff member a notice, at the beginning of each school year, of the number of unused sick days that the individual has accrued. The petitioner received such notices, including a notice at the commencement of the 1994-95 school year. The petitioner retired on July 1, 1995.

On December 11, 1991, the petitioner filed a workers' compensation claim seeking recovery for his work related injury and specifically asking for the restoration of "all sick days petitioner was forced to use because of a work related injury" (Exhibit A, attached to the respondent's brief, dated May 29, 1997). A workers' compensation judgment was entered on April 4, 1996. It was determined that the October 11, 1991 injury was work related but the judgment did not grant the petitioner any award for temporary disability for time missed from work due to the compensable injury (Exhibit B, attached to the respondent's brief, dated May 29, 1997).

On August 14, 1996, the petitioner spoke to Nancy M. Mongon, an employee of the Board, and requested the restoration of the sick days which were used for his 1991 work related injury. Ms. Mongon told the petitioner that he was not entitled to the restoration based on the

provisions of the workers' compensation judgment. Ms. Mongon prepared a memo on August 14, 1996, memorializing her conversation with the petitioner (Exhibit C, attached to the respondent's brief, dated May 29, 1997).

On November 21, 1996, a petition was filed on behalf of the petitioner with the Commissioner. It was acknowledged by the petitioner that this petition was filed ninety-nine days after his August 14, 1996 conversation with Ms. Mongon. In a certification attached to the petitioner's brief, Sanford R. Oxfeld, Esq. stated that he was handling the matter at the time and that he had to fly to California since his son was involved in a very serious car accident on November 7, 1996. Mr. Oxfeld filed the petition immediately upon his return to New Jersey.

ARGUMENTS OF THE PARTIES

Both parties agree that a motion for summary decision on the issue of timeliness is appropriate since there are no factual disputes material to this issue. N.J.A.C. 1:1-12.5; Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The issue in this matter is whether the petition was filed within the time period set forth in N.J.A.C. 6:24-1.2(c). This section provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing.

The Board argued that the enforceability of the ninety day rule has been clearly established by the courts and that such a provision is necessary in order to provide finality in education matters, Kaprow v. Board of Education of Berkeley Twp., 131 N.J. 572, 583 (1993). The Board argued that the petition should have been filed within ninety days after he became aware that the Board had used his accrued sick days for his work related injury since cases have held that the ninety days starts after notice of the Board's action and not after the disposition of the petitioner's workers' compensation claim, Veneret v. Bd. of Educ. of Elizabeth, 92 N.J.A.R. 2d (EDU) 191, modified and affirmed, 95 N.J.A.R. 2d (EDU) 134 (State Bd. of Educ. Jan. 4, 1995); McKeon v.

Bd. of Educ. of Elizabeth, 97 N.J.A.R. 2d (EDU) 120 (Commissioner of Ed., October 8, 1996). Based on the facts, the Board argued that the petitioner was aware that his accrued sick days were used when he filed the workers' compensation claim on December 11, 1991, and that the petition in this matter was clearly filed out of time.

Even if the ninety day period were to run from the date of the workers' compensation judgment or the date of the petitioner's conversation with Ms. Mongon, the Board argued that the petition was still not timely.

Further, the Board argued that there is no reason to relax the ninety-day rule in this matter since there are no compelling circumstances justifying such a relaxation, Medeiros v. School District of Jersey City, 97 N.J.A.R. 2d (EDU) 276, 280 (State Bd. of Educ. Jan. 8, 1997).

In his response, the petitioner argued that the ninety day period started to run after the conversation between the petitioner and Ms. Mongon on August 14, 1996, and that the ninety-day rule should be relaxed in view of the stressful personal situation of Mr. Oxfeld. The petitioner noted that N.J.A.C. 6:24-1.15 allows the Commissioner to relax the ninety-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice" and argued that not relaxing the ninety-day rule would penalize the petitioner for Mr. Oxfeld's family problem. I concur with the petitioner's argument that the ninety-day should be relaxed but only if the ninety-day period started to run after the petitioner's conversation with Ms. Mongon.

The petitioner argued that this matter is distinguishable on the facts from the Kaprow, Veneret and McKeon decisions. Further, the petitioner noted that the Veneret decision states that the holding should only have prospective application and that it is therefor not applicable in this matter.

In its reply, the Board argued that even if the petitioner was not foreclosed by not filing his petition within ninety days after he filed the workers' compensation claim pursuant to the ruling in the Veneret case, the petitioner was foreclosed since he did not file the petition within ninety days after the workers' compensation judgment which did not restore his sick days. The Board argued that there was no basis for the petitioner to assume that the Board would restore his

sick days after the workers' compensation judgment. The Board argued that the time for filing the petition began to run on April 4, 1996, the date of the workers' compensation judgment, and lapsed on July 5, 1996.

I agree with the respondent's argument that the ninety day period started to run with the filing of the workers' compensation judgment, and that the petitioner has presented no compelling reason to relax the ninety-day rule.

Therefore, I **CONCLUDE** that this matter was not filed in a timely manner pursuant to N.J.A.C. 6:24-1.2(c), and I **ORDER** that the matter be dismissed with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 5, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

8/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NO. EDU 676-97
AGENCY DKT. NO. 560-11/96

ANTHONY ALFERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of petitioner and those of the Board were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

The parties' exceptions present no substantive additional arguments over and above those advanced before the Administrative Law Judge (ALJ) in the Board's motion for summary decision and petitioner's submission in opposition to such motion and, therefore, will not be presented herein.

Upon an independent review of the record in this matter, the Commissioner is in accord with the ALJ's conclusion that the 90-day period within which petitioner should have filed the instant Petition of Appeal began to run on April 4, 1996, the date of his workers' compensation judgment, and lapsed on July 5, 1996, rendering the instant petition, filed on November 21, 1996, untimely and requiring its dismissal. Despite his concurrence with this

ultimate conclusion of the ALJ, the Commissioner finds that further explication with respect to the reasoning surrounding this finding is necessary.

Initially, the Commissioner observes it is clear that, with the advent of the State Board's decision in *Verneret v. Board of Education of the City of Elizabeth, Union County*, 95 *N.J.A.R.* 2d (EDU) 134 (decided January 4, 1995), "***any petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 must file a petition with the Commissioner of Education within 90 days of the district board's action which has the effect of denying such benefits to petitioner." (*Verneret* at 135) Although it is undisputed that at the time the within petitioner filed his workers' compensation claim on December 11, 1991, he was fully aware that the Board had charged his accumulated sick leave to make his salary payments during the period of his mid-October 1991 through November 27, 1991 absence, the Commissioner is in agreement with petitioner's contention and the ALJ's conclusion implicitly intimated, although not specifically stated in the initial decision, that the mandatory timelines established by *Veneret* are not dispositive in this matter. Rather, he notes that the State Board, in its 1995 decision in *Verneret*, recognizing that its holding represented a departure from previously understood interpretations of the timing of claims vis-à-vis the 90-day rule contained in *N.J.A.C.* 6:24-1.2(c) in this area, specifically directed that this decision be applied *on a prospective basis only*. (See *Verneret* at 135.) As such, the controlling legal authority applicable herein is that which existed prior to *Verneret*, established by *Steven B. Hern v. Board of Education of the City of Union City, Hudson County* (letter decision of May 8, 1991, affirmed by the State Board on August 7, 1991); *Joseph R. Mulford v. Board of Education of the Township of Hillside, Union County* (letter decision of May 29, 1990); *Angelo Bracoloni v. Board of Education of the Princeton Regional School District, Mercer County*, 1990 *S.L.D.* 447, and the precedents on which they rely,

including *Forgash v. Lower Camden County School*, 208 *N.J. Super.* 461 (App. Div. 1985), which were understood prior to *Verneret* to stand for the proposition that a determination from the Division of Workers' Compensation, establishing a nexus between a petitioner's injury and his employment, is an absolute prerequisite before any claim arising from *N.J.S.A.* 18A:30-2.1 may be filed with the Commissioner and requiring that any filing before the Commissioner prior to this determination be rejected as "premature."

Given the law as it existed prior to *Verneret* and in light of the specific facts existing in this matter, the Commissioner finds petitioner's contention that the 90-day limitation period specified by *N.J.A.C.* 6:24-1.2(c) began to run on August 14, 1996, the date on which he had a conversation with an employee of the Board, is untenable. Rather, he concurs with the ALJ that the running of this period began upon the entry of petitioner's workers' compensation Order for Judgment on April 4, 1996, and expired on July 5, 1996. Petitioner did not, however, file his petition until November 21, 1996, more than 4-1/2 months after the limitations period had expired, and, as such, his appeal is time barred. Moreover, it is noted that petitioner has presented no argument whosoever to explain or justify his failure to file during the applicable period, nor do the facts before the Commissioner present any exceptional circumstances that would warrant relaxation of the 90-day filing requirement pursuant to *N.J.A.C.* 6:24-1.15.

Accordingly, for the reasons expressed therein and expanded upon above, the Commissioner adopts the initial decision of the OAL finding the instant Petition of Appeal untimely, and orders that this petition be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 18, 1997
DATE OF MAILING SEPTEMBER 18, 1997

491-97

P.M., on behalf of daughter, P.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 18, 1997

OAL DKT. NO. EDU 9058-96
AGENCY DKT. NO. 194-5/96

P.M., on behalf of daughter, P.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 18, 1997
DATE OF MAILING SEPTEMBER 18, 1997

492-97

492-97

R.W.E., on behalf of minor son, R.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES BATHURST AND THE BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 18, 1997

OAL DKT. NO. EDU 4181-97
AGENCY DKT. NO. 147-5/97

R.W.E., on behalf of minor son, R.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES BATHURST AND THE BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 18, 1997
DATE OF MAILING SEPTEMBER 18, 1997

496-97

496-97

J.L.M., on behalf of minor child, H.A.M.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3171-97
AGENCY DKT. NO. 8-1/97

J.L.M. ON BEHALF OF MINOR CHILD H.A.M.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON,

Respondent.

No one appeared for or on behalf of petitioner

Anthony V. D'Elia, Esq., for respondent

Record Closed: August 5, 1997 Decided: August 5, 1997

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

Procedural History

This is an appeal brought on behalf of a student seeking enrollment in respondent's school district for a portion of the 1996-97 school year. Petitioner J.L.M. filed a verified petition with the Commissioner of Education ("Commissioner") on January 7, 1997. Subsequently, on March 3, 1997, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing as a contested case. On June 17, 1997, the OAL notified the parties that a hearing was to be held on August 5, 1997 at 185 Washington Street, Newark, New Jersey, 07102. At the hearing, J.L.M.'s

wife explained that her husband was in Santo Domingo. Thus, petitioner was unable to proceed with any proofs.

Findings of Fact

Based on the representations made at the hearing, I **FIND**:

1. The minor child, H.A.M.D., is presently in Santo Domingo, but will soon be going to Puerto Rico to live with his father.

2. H.A.M.D. will not return to Clifton High School for the 1997-98 school year and has abandoned any claim to domicile in the Clifton School District

3. In view of the foregoing, the Clifton Board of Education waives any claim for payment of tuition.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that petitioner failed to appear for the hearing without good cause and has abandoned his claim for relief.

Order

It is **ORDERED** that the petition is dismissed, with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 5, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

8/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 3171-97
AGENCY DKT. NO. 8-1/97

J.L.M., on behalf of minor child, H.A.M.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon a careful and independent review, the Commissioner concurs with the conclusion of the Administrative Law Judge that, as petitioner failed to appear for the scheduled hearing in this matter without good cause, he has abandoned his claim for relief.

Accordingly, the initial decision is hereby adopted for the reasons stated therein and, in that the within Board has waived its counterclaim for tuition, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1997
DATE OF MAILING SEPTEMBER 19, 1997

497-97

497-97

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT BENJAMIN,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF SOUTH BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent custodian for failure of a random drug test administered after he returned to work from a leave of absence for in-patient drug rehabilitation.

Having considered the record and the testimony of witnesses, the ALJ concluded that the collection and testing procedures used for respondent's test were more than consistent with reasonable medical office and laboratory practice. Citing *Caravello*, the ALJ noted that strict adherence to federal drug testing regulations is not required to validate drug tests which are not regulated by the federal government. ALJ concluded that the positive cocaine metabolite result on respondent's urine sample was valid. Thus, in light of his earlier agreement with the Board when he was granted a leave of absence to enter rehabilitation, the positive test for cocaine established the Board's tenure charges of unbecoming conduct and other just cause, warranting respondent's dismissal from his tenured position as custodian. ALJ ordered dismissal.

Upon review of the record, which included transcripts of the two days of hearing at OAL, the Commissioner concurred with the findings and determination of the ALJ and adopted them as his own. Commissioner ordered respondent dismissed from his tenured position as a custodian as of the date of this decision.

SEPTEMBER 19, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10696-95

AGENCY DKT. NO. 368-9/95

IN THE MATTER OF THE TENURE HEARING OF ROBERT BENJAMIN, BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY

John E. Collins, Esq., for Petitioner Board of Education (Carroll & Weiss, attorneys)

Stephen E. Klausner, Esq., for Respondent Robert Benjamin (Klausner & Hunter, attorneys)

Record Closed: January 27, 1997 Decided: August 6, 1997

BEFORE **BARBARA A. HARNED,** CALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter petitioner Board of Education filed tenure charges of unbecoming conduct against respondent Robert Benjamin based on his asserted failure of a random drug test administered after Mr. Benjamin returned to work from a leave of absence for in-patient drug rehabilitation. The Board certified and filed the charges with the Commisioner of Educaton on September 13, 1995. On November 6, 1995 respondent filed an Amended Answer to the charges. The matter was transmitted on November 20, 1995 by the Department of Education to the Office of Administrative Law (OAL)

for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on January 16, 1996, at which time the hearing was scheduled for June 17, 18, 19, 20 and 21, 1996. During a status conference held on May 15, 1996, it was agreed that the hearing would be adjourned until August 12, 13, 14, 15 and 16, 1996, subject to witness availability, due to problems the Board of Education had encountered in providing requested discovery to respondent. However, on May 17, 1996, counsel for the Board advised that its witnesses were unavailable during that week and the hearing was rescheduled for September 9, 10, 11, 12 and 13, 1996.

On September 5, 1996, counsel for respondent requested an adjournment of the hearing dates because his expert witness was not available during the week of September 9, 1996. A conference call was held on September 6, 1996, at which time it was agreed that the hearing would be adjourned until October 7, 8 and 9, 1996. The hearing commenced on October 7 and concluded on October 8, 1996. The final post-hearing submission was received on January 27, 1997, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS

It is undisputed that Robert Benjamin held a tenured position as a custodian with the South Brunswick Board of Education. At the hearing the parties stipulated to the following facts and I adopt them as **FINDINGS OF FACT.**

1 At a meeting on May 8, 1995, Mr. Benjamin advised Michael Lacey (Personnel Director) that he had a cocaine addiction and that his drug use was the cause of his absences and failures to call in when absent or tardy.

2. By a letter dated June 1, 1995, Mr. Lacey informed Mr. Benjamin that the school administration recommended to the Board of Education that it approve Mr. Benjamin's request for an unpaid leave of absence to attend a drug rehabilitation program at the Veterans Administration Hospital in Coatesville, Pennsylvania, for the period of May 31, 1995, to July 1, 1995. This recommendation was based on two

conditions: (1) that Mr. Benjamin provide periodic documentation of his actual commencement and continued attendance in the VA program, and (2) that Mr. Benjamin would be subject to random drug screening upon his return to work.

3. By a letter dated June 27, 1995, Mr. Benjamin was informed by Mr. Lacey that his leave of absence had been approved by the Board of Education.

4. Mr. Benjamin returned to his duties as school custodian on July 5, 1995.

5. On August 8, 1995, Mr. Benjamin consented to a random drug test; on that date he gave a urine sample to the Dayton Family Practice, 397 Monmouth Junction Road, Dayton, New Jersey 08810 (J-1).

This concludes the stipulated facts.

The urine sample referred to in the fifth stipulation was collected by Judith L. Davis, a medical assistant employed by Dayton Family Practice who testified on behalf of the Board. The relevant portions of Ms. Davis' testimony are uncontradicted by respondent. In addition, I found Ms. Davis to be a very credible witness. Accordingly, I adopt the following description of her testimony as **FINDINGS OF FACT.** Ms. Davis attended Memphis University for four years although she has not yet completed her degree. She has approximately four years experience as a medical assistant, the last two years with Dayton Family Practice. Dayton Family Practice is owned by Dr. James Boudwin who provided on the job training for Ms. Davis in the collection of urine samples for drug testing. She does five to twenty urine sample collections a day. In collecting the samples, Ms. Davis follows specific written procedures established by the testing laboratory and sent to Dayton Family Practice. In this instance, the testing laboratory was SmithKline Beecham (SB) Clinical Laboratories in Norristown, Pennsylvania and Ms. Davis accordingly followed the collection protocol established by SB in collecting the urine sample from Mr. Benjamin. That protocol was hanging on a wall. It contained 23 steps which she followed in collecting the sample.

Ms. Davis first obtained Mr. Benjamin's written consent to the obtaining of a urine sample for drug testing and reporting of those results to Board of Education (P-2). On this consent form, Mr. Benjamin indicated that he had taken three medications in the past two weeks: "Doxycycline, Menonidazole, [and] Zantac." (P-2). While Ms. Davis did not specifically recall asking Mr. Benjamin for his identification, it is the first step of the protocol which she follows on a regular and ongoing basis and there would have been no reason for her to deviate from that protocol.

Ms. Davis next filled out appropriate portions of a seven-page SB Chain of Custody and Control form, a blank example of which is entered into evidence as P-3. Copy 4 of this form for Mr. Benjamin's drug test is entered into evidence as P-5. At the top left hand corner of the form is a printed seven-digit number called the "Specimen Id. No. (P-3, P-5). The Specimen Id. No. for Mr. Benjamin's urine sample given on August 8, 1995 is "4235399" (P-5). Following the protocol, Ms. Davis then asked Mr. Benjamin to randomly select a drug testing kit from a bin kept under a counter. An unused example of such a kit is entered into evidence as P-4. The type of test used is called a "split specimen" and requires the use of two bottles. Ms. Davis instructed Mr. Benjamin to remove one of the bottles. The kit contains a "temperature strip" which Ms. Davis put on the bottle selected by Mr. Benjamin. The temperature strip is used to ensure that the urine sample returned in the bottle actually came from the individual being tested and at the time of testing since it should read between 90 and 100 degrees when returned to the collector.

Mr. Benjamin was then instructed to take the bottle into the bathroom and urinate into it and that he was not to flush the toilet. Donors are not instructed to wash their hands before giving a sample. Ms. Davis did not actually see Mr. Benjamin give the sample. However, the sink taps are closed and the toilet water is kept blue so the urine sample cannot be diluted. After urinating, Mr. Benjamin returned the bottle to Ms. Davis who verified that the specimen temperature was within the 90 to 100 degree range (P-5). Ms. Davis then "split" the specimen by pouring 15 milliliters into the second bottle in Mr. Benjamin's presence, leaving 30 milliliters in the first bottle. Mr. Benjamin did not act suspiciously or give Ms. Davis any problems. He listened to her directions and did not act "wired."

On the right hand side of the Custody and Control Form are two security strips (P-3). These strips contain the same pre-printed Specimen Id. No. as contained on the upper left hand portion of the Custody and Control Form (P-3). The strips also contain a line to enter the date and a line for the donor to initial (P-3). Mr. Benjamin initialed the security strips which Ms. Davis then placed across the top and sides of each bottle to prevent tampering. If the security strips indicate any tampering SB will not test the specimen but rather will inform the collector to obtain another specimen. The bottles were placed in a plastic bag along with the first three pages of the Custody and Control Form. On the first three sheets, the donor's name does not appear, only his or her social security number and the pre-printed Specimen Id. No. The three sheets are folded in half and placed in the bag with the sample bottles. The bag is then sealed and the donor is asked to initial the seal. Ms. Davis then arranged for distribution of copies 4 through 7 of the Custody and Control Form: copy 4 to the employer's Medical Review Officer; copy 5 to the donor; copy 6 to Dayton Family Practice as the collector and copy 7 to the employer (P-3). On copies 4, 5, 6 and 7, the donor is asked to write his phone number, date of birth, date of specimen collection and to print and sign his name (P-3). Mr. Benjamin provided this information (P-5). This information, however, is not included on the first three copies of the Custody and Control Form which are sent to the laboratory for testing.

The sealed bag with the "split sample" and the first three copies of the Custody and Control Form were placed in a special basket by Ms. Davis in the nurse's station. This basket is not locked and is accessible to the public but Ms. Davis was unaware of any unauthorized access to the specimens having occurred. A courier from SB picks up the specimens from Dayton Family Practice at noon and 6 p.m. Since Mr. Benjamin's specimen had been taken at 10:25 a.m. on August 8, 1995, his specimen was picked up by the SB courier at noon on that day. Ms. Davis signed the Custody and Control Form indicating that she had received Mr. Benjamin's urine specimen at Dayton Family Practice and that she released it to the SB courier on August 8, 1995 (P-5).

Susan P. Mills, Manager of SB's Forensic Toxicology Laboratory in Norristown, Pennsylvania, was qualified without objection as an expert in forensic toxicology and testified on behalf of the Board as to the testing procedure performed on Specimen No. Id. 4235399 at SB (2T 11-13 to 11-18, P10). While Ms. Mills' opinion on the reliability and accuracy of the test results reported on respondent's sample are challenged by respondent, her factual testimony is largely

uncontradicted by respondent. In addition, I found Ms. Mills to be a very credible witness. Accordingly, unless noted that the testimony is the opinion of Ms. Mills, I adopt the following testimony as **FINDINGS OF FACT.** Separate findings will be made as to Ms.Mills' opinion testimony. As Manager of the Forensic Toxicology Laboratory, Ms. Mills has total responsibility for forensic urine drug testing at the lab (2T 5-19). She identified and explained documents contained in the Test Documentation Package for respondent's specimen. Copy 2 of the Custody and Control Form for Specimen Id. No. 4235399 indicates that the specimen was reviewed at the SB Laboratory by Stephanie Jose (P-8), identified as a member of the accessioning staff at SB Labs (2T35-8 to 35-17).[1] The accessioning staff are processors who, *inter alia,* check the specimens after they arrive at the Lab for evidence of tampering (2T34-12 to 35-7). Ms. Jose did not testify. However, on Copy 2 of the Custody and Control Form she wrote that Specimen Id. No. 4235399 was reviewed by her on August 9, 1995 at 12:05 a.m. (P-8, P-11, page 5). She further indicated that the sealed bag was intact; the tamper resistant seals on the specimen bottles were intact and the identification number on the seals on the bottles matched the identification number on the Custody and Control Form, i.e. 4235399 (P-8, 2T 34-21 to 36-2). The process performed by Ms. Jose is known as the "pre-log" step. The pre-log function is performed on a batch of samples up to a maximum of 36 (2T39-20) and generates a Chain of Custody pre-log manifest (P-11, page 5). The pre-log manifest contains information such as client number, Specimen Id. No., date and time the sample was received and a sequence number assigned to each sample (P-11, page 5). The client number does not refer to the donor of the sample but rather to the client referring the sample for testing, in this case Dayton Family Practice (2T27-24). The pre-log manifest which included Specimen Id. No. 4235399 assigned sequence number 19 to that sample (P-11, Page 5). In the opinion of Ms. Mills, the particular sequence number assigned to a sample on the pre-log manifest has "absolutely n[o]" significance, other than the fact that once it reaches 36, no further samples will be added to that batch (2T39-17 to 39-22).

The next step in the process, called the "full log" requires scanning information from the Custody and Control Form into the computer (2T36-12). The bar coding on the top left-hand section of the form, including the client number and the Specimen Id. No., is scanned into the computer and the employee Social Security number, the reason for the test, the test code and the collection date and

[1] 2T refers to the transcript of October 8, 1996.

time are also entered into the computer (2T36-12 to 36-17). The computer then assigns a laboratory accession number to the specimen and generates bar coded labels which include the laboratory accession number, the client's identification number and the Specimen Id. No. Stephanie Berg, an accessioner who did not testify, performed the full log (2T43-5). The bar coded labels generated during the full log process are then applied to the specimen bottles and to the Custody and Control Form (2T36-17 to 36-20, 40-25 to 41-8). The laboratory accession number assigned to Specimen Id. No. 4235399 was 378047B (2T36-23). The bar coded labels with accession number 378047B were applied to the upper right-hand portion of Copy 1 of the Custody and Control Form for Specimen Id. No. 4235399 and to the specimen bottles (P-11, page 3, 2T41-16). The label includes the accession number of 378047B, the Specimen Id. No. of 4235399 and the client number of 10033325 (P-11, page 3). As noted above, the client number identifies the requester of the test, in this case Dayton Family Practice, and not the donor (2T27-23). Chris Pankey, an accesssioner who did not testify, performed the labeling function (2T43-10). Once the full log and labeling functions were completed the specimen was ready for the actual testing.

The SB laboratory is certified by the federal Department of Health and Human Services to perform federal drug testing (2T 12-4). As Specimen No. Id. 4235399 (accession number 378047B) was submitted as a federal drug test, the testing protocol followed by SB for this specimen was designed to meet the guidelines and requirements of the federal Department of Health and Human Services and the Department of Transportation (2T17-16 to 18-2).

Pursuant to the federal guidelines, SB utilized a two-tier testing process on Specimen Id. No. 4235399 (2T18-17). The first test performed is an enzyme immunoassay, or EIA test (2T18-18 to 18-25). This is a rapid screening test during which the specimen is tested for multiple analytes by taking absorbance readings on the specimen relative to specific cut-off levels. If the specimen is equal to or greater than the cut-off level that has been established, it is considered to be a presumptive positive and additional testing is performed (2T19-11 to 19-16). To perform the EIA test, a small portion of the urine sample is removed from the original bottle and placed into a small cup to be tested. This portion is called the aliquot (2T41-19 to 42-4). After the aliquot is removed from the bottle, the bottle is placed in temporary storage in a secured walk-in refrigerator in the lab (2T42-16

to 42-23). Bernard Nonan, another accessioner who did not testify, performed the aliquot function (2T43-16).

Alan Kochenberger, a technologist who did not testify, performed the EIA test on the 36 samples in the batch containing laboratory accession number 378047B (2T44-1 to 44-15). The work list for this load (load # 0809003) of tests includes the laboratory accession number, participant number (usually social security number), the type of test ordered, an instrument identification number and a sequence number for each sample to be tested in the load (P-11, page 9, 2T46-6 to 46-14). The sequence number assigned to laboratory accession number 378047B is 22 instead of the 19 assigned to it on the pre-log manifest (compare P-11, page 5 with P-11, page 10). Again, in Ms. Mills' opinion, the sequence number's significance is "[t]hat just shows that in this batch the sample was placed in sequence 22" (2T48-25 to 49-1). There are 40 sequence numbers included in the work list for the load, reflecting the 36 donor samples in the batch plus "control" samples that the lab adds to the batch in order to calibrate the testing instruments (2T49-9 to 49-18). The testing on laboratory accession number 378047B, sequence number 22, for load # 0809003 "showed that the sample screened presumptively positive for cocaine metabolite" (2T52-10, P-11, page 14). As a result it was necessary to run a confirmatory test on this sample to confirm the presence of the cocaine metabolite (2T55-11). Upon completion of the EIA test, Mr. Kochenberger discarded the aliquot (P-11, page 8).

The confirmatory test following the EIA test utilizes a methodology of gas chromatography mass spectrometry known as GC/MS (2T20-11). In the first part of this confirmatory test, a portion of the urine sample is injected into the gas chromatography equipment which results in analytes coming off at different times and into different ovens. The sample then goes through the mass spectrometer where it is bombarded with electrons and the fragments coming off are monitored. The mass spectrometer identifies a particular drug by "giv[ing] essentially what's called the fingerprint pattern for a drug" and can do a quantitative analysis (2T21-18 to 22-4). Under federal regulations, the GC/MS test is the only drug test confirmation method allowed (2T22-8).

Later on August 9, 1995 SB employee Darlene Devany, who did not testify, removed a number of samples from temporary storage in the locked refrigerator to set up the GC/MS

confirmatory test for samples that tested positive in the initial screening test (2T55-10 to 55-23, P-11, page 17). The sample with laboratory accession number 378047B was among these samples which were pulled to perform the cocaine metabolite confirmation test (P-11, page 18, 2T56-23). The reason for pulling the samples was to prepare aliquots for the confirmatory testing (2T57-13). There was a technical problem with the confirmatory test on that date and no results were reported for any of the samples (2T58-11 to 59-1). Accordingly, Ms. Devany repulled the same samples on August 10, 1995 and again prepared aliquots for each of the samples (2T58-3, P-11, page 17). The first step in preparing the aliquots is scanning by computer the bar coded labels on the sample bottles (2T125-2). The computer generates another bar coded label which includes, *inter alia*, the laboratory accession number of the sample bottle. The accessor compares the computer-generated label with that on the sample bottle and if they correspond, the new computer-generated label is attached to a glass test tube or vial by the accesssor (2T125-7, P-11, page 26). This comparison of labels results in the generation of the Specimen ID Verification Report (2T67-1 to -10, P-11, page 26). The accessor then pours a portion of the urine from the sample bottle into the labeled glass test vial for testing (2T124-2 to 124-24). The sample labeled laboratory accession number 378047B was included in the samples repulled for testing on August 10, 1995 (P-11, page 20). The Specimen ID Verification Report indicates that for accession number 378047B, the Specimen Id. No. (called Req.# on this report) was 4235399, the Specimen Id. No. assigned to respondent's sample, and the Donor Id. was respondent's social security number (P-11, page 26).

As the aliquots are prepared, the computer also creates a worklist for the testing and assigns a load number to identify the batch of samples to be tested (2T64-19 to 64-23, 125-17, P-11, pages 22 and 23). In this instance, the worklist is for "Txncoms," which is an acronym for testing for cocaine metabolites and the load number is 0810001 (2T55-12, P-11, page 22). In creating the worklist the computer will automatically place the samples to be tested into a sequence. "[B]asically it will accept up to 39 samples and just place them onto a work list to be extracted." (2T64-19 to -22). According to Ms. Mills, the sequencing does not always represent the order in which the aliquots will be injected into the GC/MS but rather "[i]t's really just to count to see how many samples are being placed into the batch to make sure the batch size does not exceed the . . . allowed number" (2T65-6 to -18). The aliquot with laboratory accession number 378047B was given sequence number 23 for load 0810001 on the August 10, 1995 Txncoms worklist (P-11, pages 24, 26). After scanning, labeling and

pouring, the aliquots are ready for testing and are placed in a test rack in the order in which they were prepared (2T125-17 to 126-7). The aliquots are then placed into a pass through area, which is a secured storage area (2T61-7, P-11, page 22). The chain of custody log for load 0810001 indicates that Ms. Devany placed the aliquots for that load in the pass through area on August 10, 1995 (P-11, page 22).

Before the actual testing of the donor samples the GC/MS instrument was tested for proper functioning on August 10, 1995 at 4:12 p.m. In Ms. Mills' opinion, the "Autotune Report" generated at that time indicated that the instrument was operating properly and was ready for operation (2T71-22 to 72-13, P-11, page 28). Respondent offered no conflicting expert opinion on the proper operation of the GC/MS instrument. Accordingly, **I FIND** that the GC/MS instrument was operating properly and ready for operation. Prior to the injection of donor samples into the GC/MS instrument, there are a number of calibration and control injections made to calibrate the instrument (2T62-25 to 63-3). For load 0810001 on August 10, 1995, the first injection (i.e. vial 1) was an "unextracted standard," a solution containing cocaine metabolite to check the chromatography and ensure that the instrument is acceptable for use (2T87-7 to 88-7, P-11, page 23, R-3). Vials 2, 3 and 4 were "calibrators" used to establish a calibration curve (2T73-13 to 79-5, P-11, pages 23, 30 to 35, R-3). It should be noted that on the worklist for the load to be tested, the calibrator vials were listed as sequence numbers 1, 2 and 3, (P-11, page 23), while on the data sheets from the actual GC/MS run they are listed as vials 2, 3 and 4 (P-11, pages 30 to 35). Ms. Mills explained that the "sequencing on the work list is not the same as the injection sequence on the instrument" (2T73-16). In this instance, the worklist did not include the "unextracted standard" described above and injected as vial 1 (P-11, page 23).

The fifth vial injected into the instrument on this load was a "negative" control (2T80-6 to 8, P-11, page 23). As with the calibrator vials, there is a difference in the sequence number for the negative control on the worklist (sequence number 4) and its vial number on the data sheets from the actual GC/MS run (vial number 5) as a result of vial number one being used for the "unextracted standard" (compare P-11, page 23 with P-11, page 37). Vials 6 and 7 were additional control injections to ensure the correct operation of the GC/MS instrument (2T83-5 to 85-7, R-3). Again, as with the previous vials, the sequence numbers of these control injections on the worklist (sequence

numbers 5 and 6) were one lower than their vial numbers as a result of the "unextracted standard" injected as vial number one and not included on the worklist (compare P-11, page 23 with P-11, pages 39 to 42).

In Ms. Mills' opinion the results obtained from injecting vials one through seven indicated that the instrument "was functionally acceptably" and ready for injection of donor samples (2T85-22 to 24). As respondent offered no conflicting expert testimony, **I FIND** that the GC/MS instrument was properly calibrated and functioning in an acceptable manner. Vial 8, with the accession number of 377944, was the first donor sample injected (R-2, R-3). As with the previous control and calibrator vials, the sequence number for the eighth vial on the worklist was one lower (seven) than its vial number as a result of the unextracted standard injected as vial number one which was not included on the worklist (compare R-2 with R-3). Vial 9, with the accession number of 3777939, was the second donor sample injected (R-2, R-3). Again, as with the previous vials, the sequence number for the ninth vial on the worklist was one lower (eight) than its vial number as a result of the first vial containing an unextracted standard (compare R-2 with R-3). Vial 10, with the accession number of 377641B, was the third donor sample injected (R-2, R-3). As with the previous vials, its sequence number on the worklist was one lower (nine) than its vial number (compare R-2 with R-3). According to the worklist, the next donor sample to be injected, sequence number ten, was another sample for accession number 377641B (R-2). That second sample, however, was not needed for testing and thus was not injected (R-3, 2T131-23 to 132-1). As a result, the next donor sample, accession number 376709B, which was listed as sequence number eleven on the worksheet, was injected as vial number eleven (compare R-2 with R-3).

The next ten donor samples, listed as sequence numbers twelve through twenty-one on the worksheet (R-2, P-11, page 24) were injected as vials twelve through twenty-one (R-3). The work sheet indicates that sequence number twenty-two was scheduled to be a "negative control" injection (P-11, page 24). A negative control contains a urine sample with no presence of cocaine metabolite (2T69-7). The negative control injection is made to check whether the instrument will report the test as negative. If the instrument renders a positive reading, it is an indication that "carry over" has occurred. "Carry over" means cocaine metabolite from previous donor samples has remained in the instrument. At SB, the policy is to inject a negative control every fifteen donor samples (2T69-17).

When the worksheet was compiled, the fifteenth donor sample to be injected was scheduled to be sequence number twenty-one and the negative control was thus to be injected as vial number twenty-two (P-11, page 24). However, because the duplicate sample for accession number 377641B was not injected as vial number ten, there had been only fourteen donor samples injected at this point. Accordingly, instead of injecting the negative sample as vial number twenty-two, the next donor sample was injected (2T131-22 to 132-8). The next donor sample, listed on the worksheet as sequence twenty-three, was respondent's sample (P-11, page 24). This sample, for accession number 378047B, was injected as vial number twenty-two (R-3). The negative control was then injected as vial number twenty-three (R-3).

In Ms. Mills' opinion, there is no significance to the fact that respondent's sample was listed as sequence number twenty-three on the worklist but was injected as vial twenty-two (2T73-16 to 74-12). Rather, proper identification of the donor samples is not based on the sequence in which they are injected into the instrument but on the bar code labeling placed on the vials containing, *inter alia*, the accession number of each sample. Moreover, there are two independent reviews by technologists during the process to verify identifying information (2T73-21 to 74-12).

Respondent's urine sample tested positive for benzoyl ecgonine, a cocaine metabolite (2T91-18, P-11, pages 43 and 44). The GC/MS result obtained for respondent's sample was 616 ng/ml, above the cut-off amount of 150 ng/ml (2T89-14). Following the testing, one of SB's Certifying Scientists, David Wallner, conducted a review of all the data and checked all quality controls in order to ensure that all data was interpreted correctly, that all chains of custody were completed properly and that appropriate protocols were followed in the testing process (2T62-1). Mr. Wallner then signed a worksheet certifying that respondent's specimen produced a result of 616 ng/ml of benzoylecgonine (a cocaine metabolite) (P-11, page 50). A laboratory report containing the results of the test was issued by Mr. Wallner (P-11, page 52) and sent to Dayton Family Practice for interpretation by the medical review officer for the Board of Education, Dr. James Boudwin (2T95-14, P-8). Mr. Wallner also completed Step 7 of the Custody and Control Form, certifying that the subject specimen tested positive for cocaine metabolites (P-11, page 53).

As noted above, SB received two bottles containing respondent's urine sample. The primary bottle was used for testing and the split bottle was retained at the laboratory for four months in the event that respondent requested a retest (2T96-6 to 98-4). After the four months the split bottle was discarded (2T98-4). There was some sample remaining in the primary bottle after testing which was kept in frozen storage by SB and was still available at the time of the hearing (2T98-5 to 98-12).

Dr. James Edward Boudwin operates the Dayton Family Practice where respondent's urine sample was taken and he is the Medical Review Officer for petitioner Board. Over the objection of respondent, Dr. Boudwin was qualified as an expert in Family Medicine and in the analysis of drug test results. As with Ms. Mills, while Dr. Boudwin's opinion on the accuracy and reliability of the report on respondent's urine sample was challenged by respondent, his factual testimony was essentially uncontradicted. In addition, based on his credibility as a witness, I adopt the following factual testimony as **FINDINGS OF FACT.** Separate findings will be made as to Dr. Boudwin's opinion testimony. A Medical Review Officer (MRO) reviews the results of employee drug tests for employers. For any positive result, the MRO reviews the donor's medical history to ascertain whether there is a legitimate medical reason for the presence of the drug. The concept of an MRO is based on federal regulations governing federal drug testing issued by the Department of Transportation. Dr. Boudwin, however, has not taken a federal MRO examination nor is he certified as an MRO. Rather he designated himself as an MRO. In New Jersey, neither certification nor examination is required. All that is required is that the individual be a medical doctor. Dr. Boudwin has practiced as an MRO in New Jersey for ten years.

In reviewing the results of a drug test that is not a federally regulated test, Dr. Boudwin reviews the consent form filled out by the donor which asks the donor to list all medications he is taking (P-2). He received the report from SB indicating that respondent had tested positive for cocaine metabolites (P-7). None of the medications reported by respondent could cause a false/positive result in testing for cocaine metabolites (P-2). Accordingly, Dr. Boudwin notified the Board that respondent had tested positive for cocaine (P-9). If respondent's drug test had been a federally regulated drug test, Dr. Boudwin would have been obligated to verify that the laboratory performed the test properly which usually involves a telephone call to the lab director or head toxicologist (1T77-24 to 78-3). In addition, if the test had been a federally regulated test, Dr.

Boudwin would have been obligated to call respondent and discuss the results with him (1T79-24 to 80-11). Dr. Boudwin did not call SB's lab director or chief toxicologist but rather relied on SB's federal approval from the National Institute of Drug Abuse (NIDA) and his past experience with SB since respondent's test was not a federally regulated drug test (1T91-1 to 91-23). He also did not call respondent but instead checked the consent form for medications respondent was taking because the test was not a federally regulated drug test and there are no state regulations requiring such actions (1T80-12 to 80-14, 88-3 to 4). To Dr. Boudwin's knowledge, although respondent's test was not a federally regulated drug test, SB nevertheless followed federal guidelines and regulations in performing the testing on respondent's sample (1T114-23 to 115-6).

On cross examination, Dr. Boudwin acknowledged that the money supply in the United States contains a significant amount of cocaine resin and that his practice does not require donors to wash their hands before giving their samples (1T108-13 to 108-16). However, in Dr. Boudwin's opinion, having cocaine resin on a donor's hands which could potentially end up in his urine sample would not effect the outcome of the drug test because the test looks for cocaine metabolites in the urine. The only way to have cocaine metabolites in a donor's urine is for the liver to have metabolized the cocaine, i.e., the cocaine had to have been ingested (1T109-16 to 109-25). Nor did Dr. Boudwin believe that drinking herbal tea would cause a false/positive result (1T110-1 to 110-5). Respondent presented no conflicting expert opinion that his positive result could have been caused by cocaine resin on his hands from the money supply or from drinking herbal teas and I found Dr. Boudwin's testimony on these issues convincing. Accordingly, **I FIND** that neither cocaine resin on his hands nor the drinking of herbal tea caused respondent's positive result. Dr. Boudwin did not physically examine respondent and thus did not observe any signs such as jitters or dilated pupils that would have indicated he was under the influence of cocaine when he gave his urine sample (1T112-13 to 112-23). Nor did Dr. Boudwin ask respondent if he had had any recent nose surgery or anesthesia (1T110-22 to 110-25).

Dr. Boudwin also acknowledged that respondent's urine sample was listed as sequence number 23 on the worksheet but was injected as vial number 22 and that vial number 23 had tested negative for cocaine (1T117 to 118). Dr. Boudwin characterized this as causing some "confusion" (1T128-14). However, "[t]here's still no question" in his mind that respondent's sample tested

positive for cocaine metabolites because the machine generated results clearly identified vial number 22 as respondent's (1T123-22 to 124-9, 1T128-16 to 129-7). In addition, in Dr. Boudwin's opinion, the injection of the negative control after respondent's sample rather than before as listed on the work sheet had no impact on the reliability of the test on respondent's sample (1T132-12 to 132-15). He reached this opinion because the negative control injected as number 23 tested as containing 4.2 nanograms per milliliter of cocaine metabolites (1T131-10 to 132-11). Such a low reading indicates that there was no problem with carry over, referred to as "wash out" by Dr. Boudwin, in the GC/MS instrument as a result of the positive samples tested prior to the injection of the negative contr. (1T132-2 to 132-11).

Karl Verebey, Ph.D. testified on behalf of respondent. Dr. Verebey was formerly the Director of Toxicology for the New York State Institute for Basic Research/CCL and the Chief Toxicologist for the City of New York (R-4). Since 1989 Dr. Verebey has performed laboratory inspections for the Substance Abuse and Mental Health Services Administration (SAMHSA) and its predecessor, NIDA (2T154-20 to 155-10). Laboratory inspectors go into labs and check their total operation against a lengthy check list (2T155-17). They inspect personnel, premises and the testing methods used by the laboratory (2T155-19). They also examine random records of testing for accuracy and chain of custody procedures and administrative errors (2T155-22 to 156-1). Laboratories are spot-checked twice a year (2T156-10). Federal approval of laboratories can be suspended if sufficient errors are found by inspectors (2T157-17). The Board stipulated that Dr. Verebey was qualified as an expert in toxicology and forensic toxicology (2T159-3 to 159-15).

Dr. Verebey submitted a written report in which he concluded that respondent's positive test result was "forensically flawed" and "the entire test of Mr. Benjamin is forensically negative" because the GC/MS

> confirmation work list identified Mr. Benjamin's sample as the 23rd sample to be injected into the gas chromatograph. The GC/MS technician made a mistake by mixing up sample # 22, the negative control, and sample #23, Mr. Benjamin's sample. Thus, Mr. Benjamin's sample was injected where the negative control should have been, in the position of sample #22. This mixup caused Mr. Benjamin's sample to follow 11 positive samples without blanks or negatives among them, thus having a clear possibility of carryover of cocaine from previous samples (R-5).

Dr. Verebey further opined that

> The most disturbing issue in this case is that a sample mixup occurred and it was not discovered by multiple review of the data. Furthermore, if such a mixup in the order of confirmation samples can occur, it is conceivable that someone else's sample was injected in place of that of the subject of the record. Since most samples in a confirmation run are positive for the particular drug tested (in this case, cocaine), in the absence of occasional negative controls or blank injections carryover is a clear possibility, especially for a relatively low reading of 616 ng/ml (R-5).

Dr. Verebey reiterated this conclusion during his testimony. In his opinion, the work list for a run "should identify the order in which the samples should be injected." (2T161-13). This is necessary to "avoid confusion" (2T161-4). His concern, particularly with a big lab like SB that performs up to 2500 tests a day, is that not following the work list sequence could result in a mix-up of donor samples (2T161-9 to 164-10). In fact, general instructions given to inspectors in November, 1992 advised that in recent months "there have been several incidents involving mistaken specimen identity" and that a vulnerable area included "procedures for the set up and injection of aliquots on auto injectors" (R-1). Inspectors were directed to "evaluate whether or not the procedures in the laboratory's Standard Operating Procedures provide adequate safeguards to maintain correct sample identity, and whether or not these safeguards are being followed in the laboratory" (R-1). In Dr. Verebey's opinion "in order to avoid confusion, most laboratories follow the work list as an order of injection made" (2T167-7). He further testified that "all the previous samples prior to Mr. Benjamin's sample were in order of that work list [and] it seems to me that that was the only variation" (2T167-9). This testimony conflicts with the information contained on R-3 which, as described above, indicates that other sequence numbers and vial injections numbers changed as a result of the injection of an unextracted standard as vial number 1 (R-3). Dr. Verebey was not provided R-3 prior to the hearing for him to review.

In addition to his concern with the work list sequence not being followed, Dr. Verebey testified that because the negative control was injected after respondent's sample and there had been eleven positive samples injected prior to respondent's sample "the possibility of carry over has to be considered" (2T162-11 to 162-13). In his opinion, the error in the sequence injection of respondent's sample should have been caught during SB's review process and the sample re-extracted and retested

(2T169-9). Dr. Verebey concluded that the errors he described caused the positive result to be invalid (2T173-7).

On cross examination, Dr. Verebey agreed that he was "not suggesting that someone else's sample was tested and the results given to Mr. Benjamin" (2T173-24 to 174-2). Because of the bar codes placed on the vials that go into the GC/Ms instrument, at this point of the testing it cannot happen that the results from somebody else's sample would be reported as the results of respondent's sample test (2T174-11 to 12). Dr. Verebey specifically stated that he "didn't see any result mix-up" (2T174-24) and that there was nothing technically that would make a sample different it if were injected in the twenty-second place instead of the twenty-third (2T176-12 to 176-21). In addition, while it is Dr. Verebey's experience that most large laboratories strictly follow their work list sequence in injecting samples, he was not aware of any federal regulations that require such strict adherence (2T180-1 to 180-14). He further testified that he knew of no federal guideline or requirement as to the frequency of injecting negative samples and he took no issue with SB's practice of injecting a negative control every 15 donor samples (2T174-25 to 175-16). Although Dr. Verebey had concerns about carry over resulting from the positive samples that were injected prior to respondent's sample, after reviewing handwritten notations of the level of cocaine metabolite reported for those samples (R-2), he testified that he saw no problem of carry over for the twenty-second vial injected, *i.e.*, respondent's vial (2T177-22, 2T179-3 to 5). However, Dr. Verebey could not attest as to the accuracy of the hand-written notations without the computer-generated results which were not provided to him (2T181-9 182-12).

On rebuttal, Ms. Mills testified as to how the handwritten notations were placed on the document reviewed by Dr. Verebey during his testimony (2T185-10). Based on her rebuttal testimony, which was not contradicted except for her concluding opinion, **I FIND** that the handwritten notations were entered by a technologist, Domenico Palumbo, who reviewed the computer generated results and marked on the work list whether the criteria was in or out, the quantitative level found in the sample and a P or an N to indicate a positive or negative result (2T186-17 to 187-8). The handwritten results were then reviewed by the certifying scientist, David Wallner, who re-reviewed the computer generated reports and the transcriptions. Based on her supervision, experience and expertise, it was Ms. Mills' opinion that the results handwritten on the work list were

the same results actually obtained from the GC/Ms test (2T187-18 to 187-24). Other than suggesting a human error could have been made in transcribing the results from the computer, respondent offered no evidence that such a mistake had been made. Based on Ms. Mills' testimony on the checking and rechecking done on these handwritten notations, **I FIND** that the handwritten notations of the level of cocaine metabolites found in each donor sample on R-2 are accurate.

As is evident from the above discussion there are no factual disputes as to the detailed procedure followed in obtaining and testing respondent's urine sample. What is disputed are the various expert opinions as to whether the positive test result can be considered valid. Respondent's expert, Dr. Verebey, opines that the change in injection sequence from the worklist invalidates the test. Dr. Verebey also initially at least testified that he had concerns of carry over because of the number of positive samples tested prior to respondent's. However, **I FIND** that no carry over occurred which would invalidate respondent's test. I base this conclusion on both Dr. Boudwin's testimony that the level of cocaine metabolite found in the negative control injected right after respondent's sample showed no problem with carry over and on Dr. Verebey's cross examination during which he was shown the handwritten notations on R-2, which I have found to be accurate, and agreed that the levels of cocaine metabolite found in the prior positive samples would not have caused a carry over problem.

The more difficult issue is whether the deviation from the worklist sequence invalidates the test result. Ms. Mills and Dr. Boudwin opine that the test result is valid regardless of the change in sequence while Dr. Verebey testified that the sequence change requires that respondent's sample be viewed as "forensically negative" rather than positive. Dr. Verebey may very well be correct in his testimony that more documentation of the reason for the change was needed and that such sequence changes are generally not done in laboratories. However, he clearly acknowledged on cross examination that there was no "result mix-up" in reporting the results of respondent's test as a result of the sequence change and that the computer bar codes placed on the test vials prevent "mix ups" in reporting test results. Based on that testimony, while the sequence change may not have been the best practice, it simply had no impact on the validity of the positive result reported for respondent's sample. Accordingly, **I CONCLUDE** that the positive test for the presence of cocaine metabolites in respondent's urine is not invalidated by the change in the injection sequence.

Respondent did not testify nor did he appear at the hearing.

LEGAL DISCUSSION

In addition to the sequence "change" and carry over issues, respondent also challenges the validity of his drug test based on asserted violations of the federal Department of Transportation Drug and Alcohol Testing Procedures, 49 *C.F.R.* Part 40. Federal procedures said to have been violated include: (1) failure to provide respondent with written instructions setting forth his responsibilities in violation of 49 *C.F.R.* section 40.23(c)(ii); (2) not requiring respondent to wash and dry his hands prior to providing the urine sample in violation of 49 *C.F.R.* section 40.25(f)(5); (3) failure to note any unusual behavior or appearance on the custody and control form in violation of 49 *C.F.R.* section 40.25(f)(8) and (4) using a collection container or specimen bottle that holds less than 60 milliliters of urine in violation of 49 *C.F.R.* section 40.25(b)(ii). The third so-called "failure" is a specious argument since it is uncontradicted that no unusual behavior or appearance of respondent was observed by Ms. Davis. While it is uncontradicted that "failure" numbers 1, 2 and 4 did occur, I am not persuaded that these deviations from the federal regulations invalidate respondent's drug test.

Respondent does not cite any authority which imposes federal workplace drug testing standards on the test performed on his urine. Moreover, while Dayton Family Practice, to a certain extent, and SB, to a greater extent, did follow federal guidelines, some deviation from those guidelines does not invalidate the test. *Matter of the Tenure Hearing of Harry Caravello,* 94 *N.J.A.R.* 2d (EDU) 163, aff'd St. Bd. of Ed., 94 *N.J.A.R. 2d* (EDU), aff'd App. Div., 95 *N.J.A.R.* 2d 160. As noted by the ALJ, the State Board of Education and the Appellate Division in *Caravello,* strict adherence to federal drug testing regulations is not required to validate drug tests which are not regulated by the federal government. Rather, the issue is whether the collection and testing procedures used were consistent with reasonable medical office and laboratory practice. As stated by the Appellate Division "there was sufficient credible evidence from which the ALJ could reasonably conclude that the positive cocaine test was sufficiently trustworthy to support appellant's dismissal." *Caravello, supra,* at 94 *N.J.A.R.* 2d (EDU) 160.

In this matter, I conclude that the collection and testing procedures used for respondent's test were more than consistent with reasonable medical office and laboratory practice. As shown by Ms. Davis' and Ms. Mills' testimony, a very detailed chain of custody procedure was followed by both

Dayton Family Practice and SB. In addition several checks and rechecks of the results were performed by SB staff. Moreover, the United States Supreme Court has recognized that the combination of a screening enzyme immunoassay test with a confirming GC/MS test, as performed herein, "is highly accurate, assuming proper storage, handling and measurement techniques." *National Treasury Employees Union v. Von Raab*, 489 *U.S.* 656, 103 *L. Ed. 2d* 685, 109 *S.Ct.* 1384, 1395 n. 2 (1989). Under these circumstances, failure to provide respondent with written instructions and use of a smaller container than that mandated by federal regulations do not suffice to establish that the positive cocaine result is untrustworthy. Similarly, that respondent was not told to wash and dry his hands had no appreciable effect on the outcome of the test because, as Dr. Boudwin testified, the laboratory test was for cocaine metabolites which can only appear in the urine if the cocaine was ingested and metabolized by the liver.

Respondent further contends that federal regulations were violated when Dr. Boudwin did not contact respondent to discuss his test result and/or advise respondent that he had the right to request a retest by an independent laboratory. As discussed above, the federal regulations are not requirements imposed on non federal employee drug tests. Respondent contends, however, that the failure to discuss his test result and notify him of his right for a retest, combined with the lack of written instructions, "substantially prejudiced" him by "prevent[ing] him from requesting a retest by an independent laboratory." In this regard, respondent is apparently relying on due process and fundamental fairness arguments. However, it is undisputed that respondent was advised of the test results (2T149-20 to -23). While the actual date of notification of the test results does not appear on this record, respondent certainly knew of the results no later than the filing of the tenure charges with the Commissioner of Education on September 14, 1995. Ms. Mills' testimony that respondent's split sample was not destroyed until December 4, 1995 was uncontradicted. Thus, respondent had between September 14, 1995 (at the latest) and December 4, 1995 to request a retest on the split sample and failed to do so. As respondent did not testify at the hearing, there is no explanation for his failure to request a retest. Moreover, Ms. Mills' testimony that a frozen portion of the original sample was still available at the laboratory as of the date of the hearing was uncontradicted. Respondent was represented by counsel at least since November 2, 1995 when counsel filed an answer to the tenure charges on his behalf. At no time during the pendency of this action, did respondent request a retest of the original sample. In *Caravello, supra*, the validity of a drug test was

upheld even though the urine sample was destroyed after 30 days. Respondent had a much longer time within which to request a retest. Under these circumstances, respondent was not prejudiced in any way.

Respondent further contends that destruction of his urine sample violated 49 *C.F.R.* section 40.29(h) which requires retention of frozen positive urine samples for at least one year. Firstly, as discussed above, deviation from the federal regulations does not invalidate a non-federally regulated drug test. More importantly, respondent ignores Ms. Mills uncontradicted testimony that a portion of his frozen urine sample was still available at the time of the hearing in October, 1996, well over a year after the test was done. Similarly, respondent's reliance on *Capua v. City of Plainfield,* 642 *F. Supp.* 1507 (D. N.J. 1980); *Burka v. New York City Transit Authority,* 747 *F. Supp.* 214 (S.D.N.Y. 1990) and *Egloff v. New Jersey Air National Guard,* 684 *F. Supp.* 1275 (D. N.J. 1988) is misplaced. In those three cases the employees were never given the opportunity for an independent retest of their urine samples. In this case, as discussed above, respondent had the opportunity to ask for a retest but failed to exercise that opportunity. Respondent also relies on *Franklin v. Office of Court Administration,* 2 *IER* 783 (Sup. Ct. 1987) to invalidate the result of his drug test. In *Franklin,* the court held that an employer had an obligation to advise an applicant for employment that he had the right to ask for an independent retest of his positive drug sample. Respondent herein was not told by the Board nor by Dr. Boudwin that he could ask for a retest and thus he asserts that the positive result should be rejected. However, I do not find *Franklin* to be applicable to the circumstances of this case. As discussed above, respondent has been represented by counsel since November, 1995. At that time both the split sample and the frozen portion of his original sample were still available for retesting and no such request was ever made.

Respondent also contends that SB's testing of his urine sample violated 49 *C.F.R.* sections 40.29(n)(4) and 40.31(d)(7). Subsection 40.29(n)(4) requires remedial actions to be taken when "systems are out of acceptable limits or errors are detected." Subsection 40.31(d)(7) requires the laboratory to notify the federal Department of Transportation "[s]hould a false positive error occur on a blind performance test specimen and the error is determined to be an administrative error (clerical, sample mixup, etc.). . . ." Firstly, as with the other regulations relied upon by respondent, failure to comply with the federal DOT regulations on drug testing does not invalidate a non-federal drug test

which in all other aspects was conducted in accordance, as here, with reasonable medical office and laboratory practice. Secondly, even if the federal regulations applied to this drug test, based on the factual findings set forth above, there simply were no errors or sample mixups for which SB would be required to take remedial action or report to the DOT.

Finally, respondent contends that any SB employee who actually performed any part of the testing should have been called as witnesses by the Board rather than the Director, Ms. Mills, and that the Board's failure to do so requires that an adverse inference be raised against the Board. The adverse inference which respondent contends should be raised is that the testimony of these employees "would have been that all testing procedures required by D.O.T. regulations and *Capua* and *Egloff* were not followed" (Respondent's Brief, page 37). Respondent's argument is this regard is not persuasive. In a large laboratory like SB where over 2,500 samples a day are tested, it is highly unlikely that any technician would have an independent recollection of one particular test performed over a year earlier. Rather, those employees would have had to rely on the same laboratory documentation testified to by Ms. Mills and which was admitted into evidence without objection from respondent. Ms. Mills, as Director, was clearly qualified and competent to interpret and explain the lab documentation of the test. In these circumstances, the failure to elicit the testimony of other SB employees does not make evident that the Board feared calling them as witnesses and therefore an adverse inference cannot be raised. *Caravello, supra,* 94 *N.J.A.R.* 2d (EDU) 163, 166.

Based on the foregoing, it is my conclusion that the positive cocaine metabolite result on respondent's urine sample is valid. As to the proper disciplinary action to be taken, *N.J.S.A.* 18A:6-10 provides that no person under tenure in the public school system "shall be dismissed or reduced in compensation . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause." Respondent's positive test for cocaine, particularly in light of his earlier agreement with the Board when he was granted a leave of absence to enter rehabilitation, establishes the Board's tenure charges of unbecoming conduct and other just cause, warranting respondent's dismissal from his tenured position as custodian.[2]

[2] In light of the prior agreement, respondent has not argued that the Board failed to provide him with a reasonable accommodation of his drug abuse handicap. *See, Caravello, supra; In the Matter of the Tenure Hearing of Alvin Davis, State Operated School District of the City of Paterson,* 95 *N.J.A.R.* 2d (EDU) 595, aff'd Commissioner, 95 *N.J.A.R.* 2d (EDU) 596.

ORDER

For the foregoing reasons, **IT IS ORDERED** that respondent be dismissed from his tenured position with the Board of Education of the Township of South Brunswick, Middlesex County.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/6/97
DATE

Barbara A Harned
BARBARA A. HARNED, CHIEF ALJ

Receipt Acknowledged:

8/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 11 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

DOCUMENTS IN EVIDENCE

Joint:

J-1 Stipulations

For Petitioner:

P-1 Four pages of instructions on obtaining drug test urine samples

P-2 Consent form signed by respondent on August 8, 1995

P-3 Sample Federal Drug Testing Custody and Control Form

P-4 Sample drug testing kit

P-5 Copy 4 of Federal Drug Testing Custody and Control Form for respondent's drug test

P-6 Resume of James E. Boudwin, MD

P-7 Report of drug test result for respondent from SB to Dayton Family Practice

P-8 Copy 2 of Federal Drug Testing Custody and Control Form for respondent's drug test

P-9 Controlled Substance Test Results prepared by James E. Boudwin, M.D.

P-10 Resume of Susan P. Mills

P-11 Test Documentation Package (53 pages)

For Respondent:

R-1 General Information for Instructions for Inspectors dated November 4, 1992 (3 pages)

R-2 Worklist for Txncoms testing for August 10, 1995 (3 pages)

R-3 Report on injected vials for Txncoms testing for August 10, 1995

R-4 Resume of Karl Verebey, Ph.D., DABFT

R-5 Report of Karl Verebey, Ph.D. dated September 3, 1996

WITNESSES

For Petitioner:

Judith L. Davis

James Edward Boudwin, M.D.

Susan P. Mills

For Respondent:

Karl Verebey, Ph.D., DABFT

OAL DKT. NO. EDU 10696-95
AGENCY DKT. NO. 368-9/95

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT BENJAMIN,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
TOWNSHIP OF SOUTH BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.[1]

Upon a careful and independent review of the record in this matter, which included transcripts from the two days of hearing at the OAL,[2] the Commissioner finds no cause to disturb the Administrative Law Judge's (ALJ) findings or conclusions. In this regard, he is not persuaded by petitioner's renewed contention that, "in essence," and by application of agency principles, the Board has adopted federal drug testing requirements and procedures as its own because the Board's physician testified that the drug testing he performed for the Board was

[1] Both the exceptions and the reply thereto reiterate arguments which were presented to the ALJ, and were fully and fairly considered by her, as well.
[2] October 7, 1996 and October 8, 1996.

pursuant to federal regulations. (Respondent's Exceptions at pp. 1, 2) Rather, as the ALJ aptly noted in citing *Carevello, supra,*

> Respondent does not cite any authority which imposes federal workplace drug testing standards on the test performed on his urine. Moreover, while Dayton Family Practice, to a certain extent, and [Smith Kline Beechum], to a greater extent, did follow federal guidelines, some deviation from those guidelines does not invalidate the test.*** (Initial Decision at p. 19)

The Commissioner further concurs that the Board has established that respondent is guilty of unbecoming conduct and other just cause, warranting his dismissal from his tenured position as a custodian, particularly in view of his earlier agreement with the Board upon his leave of absence to enter drug rehabilitation. In this regard, the Commissioner recognizes that

> ***Protection of the public is particularly vital in the school environment, where a custodian has ready access to impressionable young children who are not under the watchful eye of their parents. New Jersey has an expressed public policy of ridding the schools of the scourge of illegal drug use. The Legislature has recognized the special nature of the school setting by enacting stiffer penalties for drug offenses committed within the vicinity of school property. Such laws are intended "not only to protect school children by shielding them from direct drug sales," but also to immunize students from the indirect effects of drug dealings ***. (Citation omitted) *Larry Hall v. New Jersey State Department of Education*, 91 *N.J.A.R.* 2d (EDU) 46, 47.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Respondent is hereby dismissed from his tenured position as a custodian as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1997
DATE OF MAILING SEPTEMBER 19, 1997

498-97

IN THE MATTER OF THE TENURE	:	
HEARING OF RICHARD P. ADAMS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF OCEAN GATE,	:	
OCEAN COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct, insubordination and failing to perform duties against District superintendent. In consolidated matter, Board brought second set of tenure charges against respondent for unbecoming conduct.

ALJ dismissed the first set of tenure charges, finding that they did not constitute unbecoming conduct or insubordination, but, rather, as the charges were related to the Board's dissatisfaction with respondent's performance, as such, they amounted to inefficiency. In that the Board had not accorded respondent the 90 days to improve his performance as required by *N.J.S.A.* 18A:6-11, the ALJ dismissed the charges. ALJ dismissed the second set of tenure charges as having no legal or factual basis.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY DECISION

BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY,

Petitioner,

v.

RICHARD P. ADAMS,

Respondent,

and,

BOARD OF EDUCATION OF THE BOROUGH OF OCEAN GATE, OCEAN COUNTY,

Petitioner,

v.

RICHARD P. ADAMS,

Respondent.

OAL DKT. NO. EDU 8591-96

AGENCY DKT. NO. 413-9/96

OAL DKT. NO. EDU 4488-97

AGENCY DKT. NO. 169-5/97

(Consolidated)

Joseph L. Foster, Esq., for the Board of Education of the Borough of Ocean Gate, Ocean County, petitioner (McLaughlin, Bennett, Gelson & Cramer, attorneys)

Maria M. Lepore, Esq., for Richard P. Adams, respondent

Record Closed: July 24, 1997

Decided: August 7, 1997

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

In the first of these matters having OAL Dkt. No. EDU 8591-96, petitioner Board of Education brings charges against respondent, a School District Superintendent, alleging unbecoming conduct, insubordination and failing to perform duties. The matter was transmitted to the Office of Administrative Law (OAL) on October 4, 1996, for hearing as a contested case. A telephone prehearing conference was held on January 15,1997, and a prehearing order was entered on January 27, 1997, settling the procedures to be followed in this matter. As a result of the prehearing order, the matter was scheduled to be heard on June 12, 13, and 16, 1997. Because of scheduling conflicts, the matter was rescheduled for July 2, 10, and 11, 1997.

In the second of these matters having OAL Dkt. No. EDU 4488-97, petitioner Board of Education brought a second set of tenure charges against respondent for unbecoming conduct. The matter was transmitted to the OAL on June 2, 1997, for a hearing as a contested case. The matter was scheduled for a telephone prehearing hearing conference to be held on July 14, 1997.

The hearing scheduled for July 2, 1997, was adjourned and a settlement conference was scheduled for that date. During the settlement conference, certain understandings and agreement were entered into between the parties with respect to a number of procedural issues. The parties agreed to the consolidation of these two matters into a single proceeding and expressed the opinion that the matters could be resolved by way of motion. Accordingly, an Order for Consolidation was entered on August 6, 1997.

On July 14, 1997, the attorney for respondent submitted a motion for summary decision as to the two sets of tenure charges filed against respondent by petitioner. Attorney for petitioner verbally indicated that he agrees to the Joint Stipulation of Undisputed Facts, and that petitioner does not intend to submit a response to the motion or to the Certification of Paul Jablonsky in support of the motion.

FACTUAL DISCUSSION

The facts in this matter are contained in a Joint Stipulation of Undisputed Facts which is part of the motion for summary judgment (sic) submitted by respondent herein. The stipulated facts are set forth in 23 numbered paragraphs and are as follows:

1. Richard Adams at all times relevant hereto was the tenured Chief School Administrator for the Ocean Gate School District.
2. On September 4, 1996, the Board certified its first set of tenure charges against Mr. Adams to the Commissioner of Education under OAL Docket #EDUTH 08591-96S, and Agency Ref. #413-9/96.
3. Except for set forth herein, for purposes of this Motion for Summary Decision only, Respondent, Richard P. Adams, will accept the allegations as set forth in the first set of charges as certified to the Commissioner as true.
4. Prior to the filing of the within charges, Richard P. Adams filed a Petition with the Commissioner of Education alleging that the Board illegally reduced his compensation.
5. By order of the Honorable Joseph F. Martone, entered on March 10, 1997, the Board was ordered to restore Mr. Adams' compensation to its previous level.
6. The parties have a long-standing history of differences in ideas as to the management of the school district as well as the extent of the Board's involvement in the operation of the district.
7. Richard Adams recommending hiring of Lynn Adams after notifying her that she would be required to obtain a county emergency certificate to perform counseling services.
8. While Mr. Adams was not certified to counsel special education students upon her hiring, she was certified as a Learning Disabilities Teacher Consultant (LDTC) and, thus, qualified to perform all relevant services in the latter capacity.
9. Ms. Adams was the only individual who applied for the LDTC position for the 1995-96 school year, there was not other individual on staff qualified to perform LDTC services during the school year. For that reason, a situation was created requiring the immediate hiring of someone with LDTC certification.
10. Other members of the child study team were qualified to perform counseling services while Ms. Adams' emergency certificate was pending.

11. Notwithstanding the above, Mr. Adams decided to terminate Lynn Adams after review of *N.J.S.A.* 18A:28-14 with the Board attorney.
12. After notifying Ms. Adams that her services would be terminated, Mr. Adams placed the termination on the agenda. However, that item was removed from the Board's agenda.
13. With regard to charge number 10, though individual members of the Board directed Mr. Adams to provide a written report as to certain allegations raised by the parent, although there is no indication in the minutes of any meeting that the Board formally voted to so direct Mr. Adams.
14. The Board collectively, and through the directive of individual members, repeatedly informed Mr. Adams of the Board's desire for a bi-monthly newsletter, and Mr. Adams informed the members of the Board that he did not have the time or staff to prepare a bi-monthly newsletter.
15. Neither party attempted to meet to discuss a solution to their respective ideas regarding the bi-monthly newsletter.
16. As of the filing of the within motion, no bi-monthly newsletter has ever been prepared by any individual or by the Board since Mr. Adams was suspended from the district.
17. Notwithstanding the claim that the special education program was noncompliant, the program, as approved by the State Department of Education, was never found by the Department of Education to be out of compliance prior to the time of Mr. Adams' suspension.
18. During the 1994-95 and 1995-96 school years, the Board did not give Mr. Adams written notice of inefficiency or allow him 90 days to correct his performance pursuant to N.J.S.A. 18A:6-11. Mr. Adams received his only written notice of deficiencies in his performance when he received a copy of the first set of tenure charges.
19. On March 13, 1997, the Board filed its second set of tenure charges against Mr. Adams to the Commissioner of Education under OAL Docket #EDUTH 04488-97S, and Agency Ref.#169-5/97.
20. The allegations set forth in the second set of tenure charges all arise from the allegation that Respondent received income from a business owned by Paul Jablonsky.
21. The Certification of Mr. Paul Jablonsky, attached hereto as Respondent's Exhibit A, Mr. Adams never received any financial compensation or thing of value for any tasks he might have performed on occasional visit to Mr. Jablonsky's place of business.

22. The Board does not have any information available to it which documents the payment of a particular level of compensation by Mr. Jablonsky to Mr. Adams. Mr. Jablonsky's Certification indicates that, he never paid or promised financial compensation or any other thing of value to Mr. Adams for hiring his daughter Lynne by the Ocean Gate School District.
23. Mr. Adams did file and sign all financial disclosure statements referred to the Board in the second set of charges.

Additional facts are set forth in the Certification of Paul Jablonsky submitted by respondent in connection with this motion. Attorney for petitioner orally indicated that petitioner does not dispute the contents of the Certification and does not intend to respond thereto.

In his certification, Mr. Jablonsky indicated that he is the owner of Dino's Pizzeria located at 26 and Long Beach Boulevard, Ship Bottom, New Jersey. He indicated that he the sole owner of this establishment and that Richard P. Adams has no ownership interest of any kind. He also indicated that he is the father of Lynn Jablonsky.

Mr. Jablonsky certified that he has been a personal friend of Richard P. Adams for approximately 25 years and that on occasion Mr. Adams has assisted him in doing work in the establishment, particularly when the business has been exceptionally busy or if there has not been enough staff available. Mr. Adams has volunteered his time for this purpose and Mr. Jablonsky indicated that he has never paid Mr. Adams any financial compensation for his assistance or for any reason by or on behalf of the business. He has never discussed with Mr. Adams the hiring of his daughter Lynn by the Ocean Gate School District. He indicated that he did not offer or promise Mr. Adams any financial compensation or any other thing of value for hiring Lynn by the Ocean Gate School District. He indicated that Lynn does not work at Dino's and has no direct knowledge of any payments paid by Dino's to any individual or vendor and has no direct knowledge of the terms under which Richard Adams was present on the occasions mentioned.

LEGAL DISCUSSION AND ANALYSIS

N.J.A.C. 1:1-12.5(b) provides in relevant part that a motion for summary decision:

> . . . may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

Since the language of N.J.A.C. 1:1-12.5 is virtually identical to that found in the Court Rules governing summary judgment, court interpretations of the rule are helpful in understanding its requirements. Summary decision is a device for expeditiously reviewing the merits of a case to determine if the moving party is entitled to a favorable decision without the necessity of a hearing. *See, Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954); *Templeton v. Boro. of Glen Rock*, 11 *N.J.Super.* 1, 4 (App. Div. 1950). As the Supreme Court recently stated:

> . . . [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weight the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Brill v. Guardian Life Ins. Co. of America, 142 *N.J.* 520, 540 (1995) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In order to determine if a motion for summary decision should be granted or denied, the applicable law must be applied to the undisputed facts. Here, where there are no facts in dispute, and where the petitioner has not responded to the motion, it is clear that this matter should be resolved by way of summary decision.

In the first of these matters having OAL Dkt. No. EDU 8519-96, the charges allege that respondent Richard Adams was guilty of unbecoming conduct for: (1) allegedly falsely reporting to the Board on or about December 20, 1995, and February 28, 1996, that the District's special education program was in full compliance with applicable requirements when he knew or should have known that it may not have been (charges Nos. 1 and 2); and (2) recommending to the Board the hiring an individual, Lynn W. Adams, to fill a Learning Disabilities Teacher/Consultant and Guidance Counselor position, while knowingly and intentionally failing to report to the Board that she did not have the necessary certification for the Guidance Counselor position (charges Nos. 3, 4, 6 and 7). The charges further allege that respondent is guilty of insubordination by: (1) terminating the services of Lynn W. Adams without the approval of the Board when the Board complained that she did not have the proper emergency certification (charge no. 8); (2) failing to provide a written report as directed by individual members of the Board of Education (charge no. 10); and, (3) failing to prepare a bi-monthly newsletter for distribution in the school district even though he notified the Board that the school district did not have the staff or finances to perform this task (charge no. 11). Finally, these charges allege that respondent is guilty of "failing to perform his duties" in: (1) failing to determine if Lynn Adams obtained an emergency certification required by law to provide counseling services (charge 5).; (2) directing a sixth grade student be assigned to the Resource Room outside the student's age range (charge no. 9); and, (3) failing to act to bring the special education program into compliance (charge no 12).

Respondent argues that based upon the undisputed facts as well as the applicable law, all of the foregoing charges sound in inefficiency and thus, must be dismissed pending notice to Mr. Adams of his inefficiency, and the providing of 90 days to correct and overcome the inefficiency pursuant to *N.J.S.A.* 18A:6-11.

Inefficiency amounts to the teaching staff member failing to effectively perform his or her duties. *Rowley v. Manalapan-Englishtown Board of Education.*, 205 *N.J. Super.* 65,70 (App. Div. 1985). In sustaining charges of inefficiency, the Commissioner noted conduct must amount to "inefficiencies and inadequacies' in a respondent's performance of his duties. *In the Matter of the Tenure Hearing of Slovney*, 84 *S.L.D.* 1764, 1794. The charges which allege failure to perform duties are, by definition, another phrase for the term of "inefficiency." Accordingly,

Charges 5, 9, and 12 are viewed as charges of inefficiency. Clearly the allegations as pleaded attest to the Board's view that respondent did not perform effectively as a Chief School Administrator.

In a review of the other allegations set forth in the first set of charges number 1, 2, 3, 4, 6, and 7, it is clear that the Board is asserting that it is dissatisfied with respondent's performance of his duties. While it must be assumed for purposes of deciding this motion that the allegations as set forth in the charges are true, clearly, based upon the undisputed facts presented, I **FIND** that the allegations amount to the Board's complaint of the inadequacy in respondent's performance of his duties as chief school administrator.

Respondent argues that the charges of unbecoming conduct are unfounded based upon the allegations presented by the petitioner. It is clear from the extensive case law involving charges of unbecoming conduct that such charges are successful when the respondent has committed offenses that are illegal, immoral, or otherwise shocking and offensive. For example, in *The Tenure Hearing of Horowitz*, 93 *N.J.A.R.2d* (EDU) 232 (March 1, 1993), charges which amounted to unbecoming conduct against a superintendent of schools included yelling and shaking respondent's hand in the face of a senior citizen, disrupting a board meeting by loudly voicing negative comments about the Board, giving false testimony in a hearing before the Office of Administrative Law. For other examples of unbecoming conduct *see In re Tenure Hearing of Sammons*, 1972 *S.L.D.* 302 and *In re Tenure Hearing of McIntyre*, 96 *N.J.A.R.2d* (EDU) 718 (both holding that possession of a controlled dangerous substance by a teaching staff member constitutes unbecoming conduct even if possession occurs off of school grounds); *In re Tenure Hearing of Powers*, 96 *N.J.A.R.2d* (EDU) 508 (employee guilty of unbecoming conduct where employee performed duties as volunteer fireman while on leave due to an injury under Workers' Compensation); *Parsippany-Troy Hills Board of Educ. v. Molinaro*, 96 *N.J.A.R.2d* (EDU) 268 (employee dismissed due to unbecoming conduct where he was convicted of petty disorderly offense of making harassing phone calls off of school grounds where calls were harassing and contained graphic sexual references and implied threats); *In re Tenure Hearing of Gilbert*, 1982 *S.L.D.* 274 (unbecoming conduct found where teacher displayed constant negativity and insensitivity in dealing with students); *Johnston v. Newark*, 95 *N.J.A.R.2d* (EDU) 439 (physical and mental abuse of students constitutes unbecoming conduct).

There are no reported cases in which charges of unbecoming conduct were sustained when the conduct at issue amounted to a difference of opinion between the Board and an administrator over management decisions. However, the charges against respondent do, on their face, amount to a dissatisfaction on the part of the Board with the management decisions of the respondent as the chief school administrator. As such, even if these charges are true, they do not constitute unbecoming conduct, and I so **FIND**.

As to the charges of insubordination, upon review of the evidence presented by the Board, it is clear that they also amount to a difference of opinion as to the management decisions between the Board and the chief school administrator. For example, with regard to charge 8, the facts indicated that, upon review of the relevant law with the Board attorney, it was Mr. Adams' belief that Lynn Adams should be terminated immediately. He sent her notice of termination, and placed this action on the agenda to notify the Board at the next meeting. It is also undisputed that the Board was not notified of this action because the Business Administrator removed the item from the agenda. See Board's Exhibit F, attached to its first set of charges at p. 1774. This could not be considered insubordination as the Board never gave respondent any directive with regard to this matter. Further, he attempted to discuss this action with the Board at its next meeting only to have the Business Administrator remove the item from the agenda. Thus, it is clear that, while the Board was dissatisfied with the manner in which the termination of Lynn Adams was handled, the actions by respondent neither amounted to insubordination nor exceeded the authority of respondent. Thus, I **FIND** that this charge likewise sounds in inefficiency.

With regard to Charge 10, as is clear from the Board's own Exhibit R attached to its charges, the Board never voted to direct respondent to do anything with regard to the allegations which surfaced at the July 12, 1995 meeting. With regard to Charge 11, the Board's own exhibits indicate that on several occasions, respondent attempted to inform the Board that it would not be possible to do a bi-monthly newsletter, and that the principal's report should suffice. Respondent attempted to satisfy the Board's request through the preparation of a principal's report which was distributed at all Board meetings. Although respondent attempted to comply with the Board's directive, the Board was unhappy with the way in which respondent performed this duty. Therefore, since the record indicates that charges 10 and 11 amount to mere dissatisfaction by the

Board as to the manner in which respondent performed with regard to these two items, these two charges cannot amount to insubordination. As to charge 10, respondent received no directive with which he failed to comply. As to charge 11, respondent attempted to comply but the Board was not satisfied with the manner in which he performed this duty. Therefore, I **FIND** that charges 10 and 11 amount to inefficiency.

Assuming that these inefficiencies and inadequacies as set forth in the first set of charges are true, it is the Board's obligation, pursuant to *N.J.S.A.* 18A:6-11 to give respondent written notice of the inefficiency and allow him 90 days to correct the problem with his performance. As is clear from the record, there was no written notice of inefficiency until the Board provided respondent with a copy of the first set of tenure charges. Thereafter, respondent was not given the opportunity to correct his performance. Therefore, I **CONCLUDE** that the first set of charges should be dismissed, and respondent should be given 90 days to improve his performance pursuant to *N.J.S.A.* 18A:6-11.

In the second of these matters having OAL Dkt. No. EDU 4488-97, the tenure charges filed against respondent allege that respondent received compensation from a business owned by Paul Jablonsky and that respondent failed to report this income in his financial disclosure statements. Further, the Board charges that respondent had a conflict of interest in recommending the appointment of Lynn Jablonsky to a position in the district due to this financial involvement.

Based on the Certification of Mr. Jablonsky which has not been disputed by petitioner, respondent never received any financial compensation or other thing of value from Mr. Jablonsky. Since respondent has no source of income related to Mr. Jablonsky, all of the information provided in the financial disclosure statement is true and accurate. There is no other credible evidence which indicates that respondent had any financial dealings with Mr. Jablonsky.

Because the undisputed facts indicate that respondent received no compensation from Mr. Jablonsky, and because his financial disclosure statements are true and accurate, I **FIND** that respondent had no conflict of interest in recommending the appointment of Lynn Jablonsky to a

position in the district. Since there is no legal or factual basis for the second set of tenure charges, I **CONCLUDE** that they must be dismissed in their entirety.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the tenure charges against respondent in the matter having OAL Dkt. No. EDU 8519-96, amount to charges of inefficiency and, based upon petitioner's failure to comply with the requirements of *N.J.S.A.* 18A:6-11, shall be **DISMISSED**. It is further **ORDERED** that the tenure charges filed against respondent having OAL Dkt. No. EDU 4488-97 are hereby **DISMISSED** as having no legal or factual basis.

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

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

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

August 7, 1997
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

8/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 8 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF RICHARD P. ADAMS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
BOROUGH OF OCEAN GATE,	:	
OCEAN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. The record establishes that the first set of tenure charges herein, OAL Docket No. EDU 8519-96, are properly categorized as inefficiency and must, therefore, be dismissed for the Board's failure to comply with the requirements of *N.J.S.A.* 18A:6-11. Likewise, the Commissioner agrees that the Board's second set of tenure charges against respondent, OAL Docket No. 4488-97, must be dismissed as the record does not provide any legal or factual basis for such charges.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and the instant tenure charges against respondent are hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 19, 1997
DATE OF MAILING SEPTEMBER 19, 1997

499-97

BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought reversal of the determination of the Department of Education, Office of Compliance (Department), that the Board had transportation contract violations. The Board sought restoration of $53,777.79 in state aid entitlements.

Since the facts in this case were not in dispute, the ALJ found the matter ripe for summary judgment. ALJ concluded that the correct interpretation of *N.J.S.A.* 18 A:39-1.1 and 39-3 can only be that the transportation of pupils to and from school for *any purpose whatsoever* including, but not limited to, athletic and extracurricular activities requires a school district to obtain bids for contracts for that transportation. Moreover, *N.J.S.A.* 18A:18A-4 requires a school district to obtain bids for all contracts over $7,500. Thus, the ALJ concluded the Board was required to obtain bids for the contracts herein. ALJ also concluded that the doctrine of equitable estoppel did not apply herein as the reviews conducted in 1983 and 1989 of the Board's pupil transportation practices did not include practices for transportation of pupils to and from athletic and extracurricular activities and those reviews had been conducted by the County Superintendent, not the Department. The County Superintendent never requested the Department to conduct a review and the Department never conducted an audit of the transportation services of the two other school districts mentioned by the Board. Finally, the ALJ found that the Department is not restricted by the requirements of *N.J.A.C.* 6:21-19 *et seq.* when auditing a school district's transportation contracts and procedures; the Department may audit a school district's transportation records and accounts regardless of whether the County Superintendent requested an audit or provided a school district an opportunity to correct its transportation procedures. ALJ denied Board's motion for summary decision and granted Department's cross-motion for summary decision.

Commissioner adopted findings and determination in initial decision as his own. In light of statutory authorization and the Department's certification that it conducts audits of transportation contracts and records of school districts that are *not* requested pursuant to *N.J.A.C.* 6:21-19.5, the Commissioner concurred with the ALJ that the Board failed to demonstrate that the Department's actions were arbitrary and capricious or were otherwise contravened by State law. Petition was dismissed.

September 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION AND CROSS-MOTION
FOR SUMMARY DECISION
OAL DKT. NO. EDU 11005-96
AGENCY DKT. NO. 380-9/96

BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

Respondent.

Cheri L. Maxwell, Esq., for petitioner (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

John K. Worthington, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: June 23, 1997 Decided: August 6, 1997

BEFORE **MARIE P. SIMONELLI,** A.L.J.:

STATEMENT OF THE CASE

Petitioner, Board of Education of the Lakeland Regional High School District, Passaic County (the Board), seeks reversal of the decision of respondent, New Jersey State Department of Education, Office of Compliance (collectively referred to hereinafter as the Department), as

reflected in recommendations 4 and 7 of a Notice of Determination, dated October 12, 1994. The Board also seeks restoration of the sum of $53,777.79 in state aid entitlements.

PROCEDURAL HISTORY

On September 3, 1996, the Board filed a Petition of Appeal. On September 20, 1996, the Department filed an Answer to Verified Petition. On October 10, 1996, the Commissioner of the Department transmitted this matter to the Office of Administrative Law (the OAL) for a hearing as a contested case.

On February 24, 1997, the Board filed a motion for summary decision. On March 24, 1997, the Department filed a reply to the Board's motion and a cross-motion for summary decision. On April 7, 1997, the Board filed a response brief. On April 11, 1997, the Department filed a reply brief and an affidavit. On April 15, 1997, the Board filed a reply letter brief. On April 21, 1997, the Department filed a supplemental certification. On April 25, 1997, the Board filed an objection to the supplemental certification. On April 29, 1997, the Department filed a response to the Board's objection.

UNDISPUTED FACTS

The following facts are not in dispute. I, therefore, **FIND** them to be **FACTS** in this case:

The Board has two constituent school districts, Ringwood and Wanaque. The Board provided pupil transportation to and from school through contractual arrangements with private contractors and joint transportation agreements. During fiscal year 1993, the Board also provided transportation to one special education pupil by a private vehicle owned and operated by the pupil's parents. The Board also provided pupil transportation to and from athletic and extra-curricular activities through private contractors. The Board did not advertise for bids for pupil transportation to and from athletic and extra-curricular activities.

The Department conducted an audit of the Board's transportation operations for the periods July 1, 1991 to June 30, 1992, and July 1, 1992 to June 30, 1993. On October 12, 1994,

the Department submitted an examination report to the Board wherein it notified the Board that it had found several violations, including the following:

1. A transportation contract was not executed for a route to the Lakeview Learning Center during fiscal year 1992. The route was operated for 92 days at a total cost of $5,244.

2. A joint transportation agreement was not executed for Route S-20 during fiscal year 1993 with the host district, the Ringwood Board of Education.

3. A parental contract was not executed for the transportation of the special education pupil by a vehicle owned and operated by the pupil's parents. Neither a certificate of liability insurance in the amount of $1 million combined single limit coverage, nor evidence of an S-2 or handicapped vehicle registration was available for review.

4. The above were not in accordance with the provisions of *N.J.A.C.* 6:21-16.1(c) and (f), which requires the approval of the County Superintendent of Schools for all transportation contracts.

5. There was no documentation of solicited quotations for a to- and from-school transportation route to the Lakeview Learning Center with an annual cost of $5,244.

6. The Board failed to advertise for bids for pupil transportation to and from athletic and extra-curricular activities during fiscal years 1991-92 and 1992-93 in violation of *N.J.S.A.* 18A:39-1 *et seq.*, thus disallowing state aided portion of total costs in the sum of $25,866.16 for fiscal year 1991-92 and in the sum of $27,911.63 for fiscal year 1992-93 for total disallowed costs of $53,777.79.

As a result of its findings, the Department made the following recommendations:

1. the Board must adhere to the provisions of *N.J.A.C.* 6:21-16.1(f) which require the County Superintendent's approval of all transportation contracts;

2. the Board must execute transportation agreements and contracts for all awarded routes;

3. the Board must execute a contracts for transportation by the special education pupil's parent;

4. the Board must adhere to the requirements of *N.J.S.A.* 18A:39-1 *et seq.* regarding advertisement for bids and solicitation of quotes as applicable;

5. the Board must obtain invoices prior to payment and attach the purchase order;

6. the Board must take the necessary steps to recover the overpayment of $2,337.14 for the Lakeland Learning Center route;

7. the Board must refund to the Department the state aided portion of disallowed costs in the amount of $53,777.79; and

8. the Board must provide nonpublic transportation or pay aid-in-lieu-of transportation for pupils in the constituent as required by *N.J.S.A.* 18A:39-1.

On November 21, 1994, the Board submitted a corrective plan and an audit appeal. The Board appealed the finding that it had failed to advertise for bids for pupil transportation to and from athletic and extra-curricular activities in violation of *N.J.S.A.* 18A:39-1 *et seq.* resulting in state aided portion of disallowed costs of $53,777.79. The Board also appealed recommendations 4, 6 and 7 set forth above.

On October 26, 1995, the Department issued a Notice of Determinations for the audit appeal. The Department reversed the finding that the Board had failed to advertise for bids for pupil transportation to and from athletic and extra-curricular activities in violation of *N.J.S.A.* 18A:39-1 *et seq.* The Department upheld recommendations 4 and 7 and the disallowed costs set forth therein. In so doing, the Department determined that *N.J.S.A.* 18A:39-1 *et seq.* applies to

pupil transportation services to and from athletic and extra-curricular activities and that the Board had violated this statute by failing to advertise for bids for these transportation services.

On November 10, 1995, the Board filed a second audit appeal as to recommendations 4 and 7. The Department issued a Notice of Determination on June 6, 1997, again upholding recommendations 4 and 7. The Board then filed the present Petition of Appeal.

MOTION AND CROSS-MOTION FOR SUMMARY DECISION

The Board relies on a strict construction of *N.J.S.A.* 18A:39-1 *et seq.* It argues that it did not violate the bidding requirements of *N.J.S.A.* 18A:39-1 *et seq.* because that statute requires publicly advertised bids only for contracts for the transportation of pupils "to and from school." The transportation contracts in question do not involve the transportation of pupils "to and from school." Rather, they involve the transportation of pupils "to and from athletic and extra-curricular activities." In addition, the Board argues that a proposed amendment to the statute supports its strict construction because the amendment specifically includes the words "to and from extracurricular activities." The amendment, thus, expands the scope of the statute beyond the transportation of pupils "to and from school."

The Department argues that *N.J.S.A.* 18A:39-1 *et seq.* applies to contracts for the transportation of pupils to and from athletic and extra-curricular activities, not just to and from school. The Department claims that it always has interpreted this statute to include pupil transportation to and from athletic and extra curricular activities. It argues that this all-encompassing interpretation conforms with the plain language of the statute. The Department also argues that the proposed amendment to this statute to specifically include the words "to and from extracurricular activities" is merely to clarify, not expand, the scope of the statute. In response, the Board argues that if the plain language of the statute is clear and unambiguous, as the Department argues, then no clarifying amendment is needed.

The Department also argues that, regardless of whether or not *N.J.S.A.* 18A:39-1 *et seq.* applies to contracts for the transportation of pupils to and from athletic and extra-curricular activities, *N.J.S.A.* 18A:18A-4 requires public bidding for any contract over $7,500. This would

include contracts for the transportation of pupils both to and from school and to and from athletic and extra-curricular activities. In response, the Board argues that in the Notice of Determination, dated June 6, 1996, the Department specifically stated that the Board's transportation contracts are not governed by *N.J.S.A.* 18A:18A-4. In addition, the Board argues that even if this statute did apply, with the exception of two purchase orders, each of the transportation routes, which are the subject of this appeal, were under $7,500. The Board, thus, concludes that it did not violate *N.J.S.A.* 18A:18A-4.

The Board also argues that the Department is estopped from asserting that it violated *N.J.S.A.* 18A:39-1 *et seq.* because in two previous monitorings, the Department had approved the Board's transportation practices for athletic and extra-curricular activities. Due to these previous approvals, the Board believed that it was in complete and total compliance with the law. The Board also argues that it detrimentally relied on the previous approvals in continuing a practice for which it now is being penalized. The Board further argues that it complied with the requirements of *N.J.A.C.* 6:21-19 *et seq.* It submitted all of its transportation reports and contracts to the County Superintendent for review and the Department approved them through the monitoring process. Since the Department did not notify the Board of any deficiencies, the Board was unaware of any need to change its practices. In addition, contrary to statutory safeguards, the Department failed to inform the Board prior to the audit that its practices were not in compliance and it failed to provide a progressive review to the Board and an opportunity to comply prior to conducting a compliance audit.

In response, the Department argues that during the time of the two previous monitorings, State Categorical Transportation Aid was not provided for pupil transportation for athletic and extra-curricular activities. Rather, transportation for these services was funded with Unrestricted State Aid. Therefore, when the Department previously reviewed the Board's transportation costs and practices, it did not do so for athletic and extra-curricular activities because these transportation services were not part of the State aid category being reviewed.

Finally, the Board argues that the Department must be estopped from recovering the funds at issue because it acted arbitrarily and capriciously in failing to follow the requirements of *N.J.A.C.* 6:21-19 *et seq.* in conducting the audit at issue . The Board claims that the Department

only can conduct an audit if there is a referral from the County Superintendent. There was no such referral in this case. The Board further argues that the Department must be estopped because it acted arbitrarily and capriciously in allegedly not penalizing two other school districts that also had allegedly failed to bid for pupil transportation to and from athletic and extra-curricular activities.

The Department argues in response that it did not penalize the two other school districts because it never conducted any audit of these districts. With respect to its non-compliance with *N.J.A.C.* 6:21-19 *et seq.*, the Department argues that it is not restricted by this statute when auditing a school district's transportation contracts and procedures.

DISCUSSION AND CONCLUSION

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law."

Summary decision in administrative proceedings parallels summary judgment in the Superior Court. The traditional concept of summary judgment is:

> [T]o provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact requiring disposition at trial.
>
> [*Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954).]

Pursuant to *Judson*, in an administrative proceeding, as in the Superior Court, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact...." 17 *N.J.* at 75.

The New Jersey Supreme Court modified the *Judson* standard in *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520 (1995). In *Brill*, the Supreme Court adopted the summary judgment standard employed by the federal courts and held:

> [W[hen deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential material as required by *Rule* 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial. Under this new standard, s determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Liberty Lobby, supra,* 477 *U.S.* at 249, 106 *S. Ct.* at 2511, 91 *L.Ed. 2d* at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of *Rule* 4:46-2. *Liberty Lobby, supra,* 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed. 2d* at 213. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' *Liberty Lobby, supra,* 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed. 2d* at 214, the trial court should not hesitate to grant summary judgment.
>
> [142 *N.J.* at 539-540.]

Since the underlying facts in this case are not in dispute, this matter is ripe for summary decision concerning whether or not the Board must advertise for bids for contracts for the transportation of pupils to and from athletic and extra-curricular activities.

N.J.S.A. 18A:39-1.1 and *N.J.S.A.* 18A:39-3 clearly require the Board to obtain bids for contracts for the transportation of pupils "to and from school." The question is whether or not these statutes also requires the Board to obtain bids for contracts for the transportation of pupils "to and from athletic and extra-curricular activities."

The Board's attempt to limit the scope of these statues to include only pupil transportation to and from a student's home to school is illogical. A pupil cannot get to an athletic or extra-curricular activity from school and from the activity back to school except by transportation services provided by a school district. The correct interpretation of these statutes can only be that

transportation of pupils to and from school for *any purpose whatsoever* including, but not limited to, athletic and extra-curricular activities requires a school district to obtain bids for contracts for that transportation, and I so **CONCLUDE**.

In addition, *N.J.S.A.* 18A:18A-4 requires a school district to obtain bids for all contracts over $7,500. Since the contracts in question in this matter were over the sum of $7,500, this statute required the Board to obtain bids for those contracts, and I so **CONCLUDE**.

I further **CONCLUDE** that the doctrine of equitable estoppel does not apply in this case. Firstly, although the Board's pupil transportation practices were reviewed in 1983 and 1989, those reviews did not include the Board's practices for the transportation of pupils to and from athletic and extra-curricular activities. Those reviews also were done by the County Superintendent, not by the Department, and the County Superintendent never requested the Department to conduct a review. Secondly, the Department never conducted any audit of the transportation services of the two other school districts mentioned by the Board.

Finally, the Department is not restricted by the requirements of *N.J.A.C.* 6:21-19 *et seq.*, when auditing a school district's transportation contracts and procedures. *N.J.S.A.* 18A:4-35 permits the Commissioner to assign an assistant commissioner or director, to inspect and audit a school district's records and accounts for any reason. Thus, the Department may audit a school district's transportation records and accounts regardless of whether the County Superintendent requested an audit or provided a school district an opportunity to correct its transportation procedures.

ORDER

Based upon the foregoing, I hereby **ORDER** as follows:

1. The Board's motion for summary decision be and hereby is **DENIED**.

2. The Department's cross-motion for summary decision be and hereby is **GRANTED**. The Board's appeal be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the Judge and to the other parties.

August 6, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

8/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 11005-96
AGENCY DKT. NO. 380-9/96

BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and the Department's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the initial decision of the ALJ. In so doing, he notes that the Board's exception arguments essentially recast its position as argued before the ALJ, challenging, *inter alia*, that the ALJ "summarily" concluded that equitable estoppel was not appropriately applied in this matter. (Board's Exceptions at p. 3) In this regard, the Commissioner underscores the ALJ's discussion on page nine of the initial decision, and finds, contrary to the Board's assertions, that said decision adequately informs "*** the interested

parties and any reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra-legal considerations." *State Department of Health v. Tegnazian,* 194 *N.J. Super.* 435, 443 (App. Div. 1984), citing *Application of Howard Savings Institution of Newark*, 32 *N.J.* 29, 52 (1960). The Board points to no legal authority which compels the hearing tribunal to do more.

Moreover, even if the Board is correct in asserting that the Department, through the County Superintendent as its agent, "***repeatedly approved its practices relating to transportation to and from athletic and extra-curricular activities" in its prior audits (Board's Exceptions at p. 4) and the Board, was, therefore entitled to rely upon that review, as the Department notes, it

> may still properly enforce the law and recover the money at issue. Where a government agency realizes that it may have allowed its designee to act in contravention of applicable laws, it is not only permitted, but is compelled, to immediately rectify the fault. *Mathesius v. Mercer County Improvement Authority*, 177 *N.J. Super.* 626 (App. Div. 1981). (Department's Reply at p. 4)

Additionally, as to the "retroactive penalty" which the Board repeatedly refers to as being unjustly applied in this matter, as the Department argued below, it is not assessing a penalty but is attempting to recover State aid which the Board was not entitled to receive. (Board's Exceptions at p. 9) The Department adds,

> *N.J.S.A.* 18A:4-35 provides the authority to the Department [to] review and audit the books and records of local school districts. *N.J.A.C.* 6:5-1.28 gives the Commissioner the authority to withhold State aid from districts who fail to comply with school laws or State Board of Education regulations. In this case, the Department, as in all such cases, may withhold State aid to recover the amount due based on the audit at issue. Such withholding of

> aid is clearly within the authority provided by the above cited statutes and regulations. (Department's Reply at p. 9)

In view of this statutory authorization, and further noting the Department's certification that it conduct audits of transportation contracts and records of school districts that are *not* requested pursuant to *N.J.A.C.* 6:21-19.5,* the Commissioner concurs with the ALJ that the Board has failed to demonstrate that the Department's actions in this matter were arbitrary and capricious or were otherwise contravened by State law.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Affidavit of Tom King, Director, Office of Compliance, New Jersey State Department of Education, at p. 2.

4/99-97

EDU #11005-96
C # 499-97
SB # 88-97

BOARD OF EDUCATION OF THE LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 22, 1997

For the Petitioner-Appellant, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Cherie L. Maxwell, Esq., of Counsel)

For the Respondent-Respondent, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

The State Board of Education affirms the decision of the Commissioner of Education for the reasons expressed therein. In doing so, we reject appellant's claim that an audit of the Emerson school district, which appellant submitted in support of its appeal, shows that the Lakeland Regional High School District was treated in a discriminatory manner by the Department of Education. In this respect, we stress that while Lakeland's audit was a multi-year audit, Emerson's was a single-year audit.

March 4, 1998

Date of mailing MAR 06 1998

500-97

B.M., on behalf of minor child, M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent contested Board's determination that minor child, M.M. was not domiciled in the District. Petitioner sought to apply for special education benefits through the District.

ALJ found that although petitioner had residences in Florida and Cherry Hill and conducted business in Philadelphia, petitioner did establish through a preponderance of evidence and the operative law that he and M.M. were domiciled in Cherry Hill and, thus, lived within the District and any entitlements which flow from that fact, for which they were otherwise eligible, must be provided by the District.

Commissioner adopted findings and determination in initial decision as his own, concluding petitioner and M.D. were domiciled in the District and thus, M.D. was entitled to the benefits afforded by *N.J.S.A.* 18A:38-1a, so long as there is no change in petitioner's circumstances that would alter M.D.'s entitlement.

September 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2273-97

AGENCY DKT. NO. ---

B.M. ON BEHALF OF HIS DAUGHTER, M.M.,

Petitioner,

v.

CHERRY HILL BOARD OF EDUCATION,

Respondent.

Theodore A. Sussan, Esq., for petitioner (Sussan and Greenwald, attorneys)

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

Record Closed: June 23, 1997 Decided: August 7, 1997

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioner, B.M., on behalf of his daughter, M.M., seeks to establish domicile status in Cherry Hill, so that he may be eligible to apply for special education benefits through the

Individuals with Disability Education Act (IDEA) as administered by the Cherry Hill Board of Education.

Respondent Cherry Hill Board of Education contests the appeal, and seeks compensation for past schooling in the Cherry Hill School District.

Today's Initial Decision upholds petitioner B.M.'s claim of domicile in the Cherry Hill School District (the District).

PROCEDURAL HISTORY

This case was filed in Office of Administrative Law (OAL) by the agency head on March 18, 1997. Hearing convened on March 21, 1997, but closed as required by rule when respondent Board moved for recusal. An Order Denying Motion For Recusal issued that day, which respondent did not appeal.

Hearings then reconvened with substituted counsel representing petitioner on May 5, 1997, and May 28, 1997. Briefs were submitted, the last of which were filed in the OAL on June 23, 1997. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

Why this appeal was brought:

This appeal by petitioner, B.M, on behalf of his daughter M.M., arises from an earlier appeal by B.M. for special education compensation from the Board. M.M. was placed unilaterally in a school in Utah, and petitioner wants the Board to assume responsibility for the costs. The Board has declared that M.M., during the time at issue, was not, and now is not, domiciled in the Cherry Hill School District, and for that reason sought to have the special education matter

dismissed. Today's decision only recommends resolution of the dispute over domicile. The power to finally decide this question, it has been ruled earlier, reposes solely in the Commissioner of Education. Until this controversy is decided by the Commissioner, the pending placement appeal (OAL DKT. NO. EDS 0001-97) may not proceed.

The relevant history of petitioner B.M., and his family:

B.M. is a mechanical contractor who owns a business in Philadelphia. The business installs and services plumbing, heating and fire suppression equipment, and during the time in question it was located at 1514 Fairmount Avenue. In January 1997, the business was moved two blocks away, to 1719 Fairmount Avenue.

There are two residences which B.M. owns with his wife, P.Z.M. One is in Cherry Hill, New Jersey, at 402 Province Drive, which he claims as his domicile. The other, also owned with his wife, is in Boca Raton, Florida, at 5572 Fox Hollow Drive. The Board contests petitioner's assertion of domicile in Cherry Hill, and demands compensation for unlawful schooling of M.M. in the past, as well as dismissal of the pending special education appeal. Petitioner also owns some rental properties in Philadelphia.

The history of B.M.'s family life is relevant to the consideration of domicile:

In 1981, B.M. married his first wife, S.M., and in that same year, M.M. was born. In 1984, S.M. died. Eventually, petitioner, his daughter and his present wife, P.Z.M., as well as her two children from a previous marriage, M.T. and T.T., lived at 21 Woodbury Court, Cherry Hill, owned by P.Z.M., across the street from the District's Cooper Elementary School. From there, M.M., who was classified by the District as emotionally disturbed (ED) attended this school until she was ten. At that time, her father sent her to live with her maternal grandparents in Florida for the 1992-93 school year. M.M. was taken from the grandparents by her father after a month because of domestic turmoil, and placed with a Florida couple nearby. Despite the change, M.M. managed to complete the academic year in Florida at another, special school.

Meanwhile, petitioner, P.Z.M., and her two daughters continued living at 21 Woodbury Court in Cherry Hill. Petitioner did travel to Florida periodically to assess M.M.'s progress. Deciding at the end of the 1992-93 school year that M.M. had become too disruptive to remain in the south, B.M. brought his daughter back to the Cherry Hill Schools. He enrolled her in Kilmer School, where she stayed until June 1994.

At the end of the 1993-94 school year, B.M. testified, he decided to send P.Z.M. and all three children to Boca Raton, Florida, anticipating a sale of his business in Philadelphia (as it happened, in the end, the sale did not go through). The house at 21 Woodbury Court in Cherry Hill was sold, B.M. and P.Z.M. purchased the above-mentioned Boca Raton townhouse at 572 Fox Hollow Drive, and the entire family moved in. M.M. attended Boca Raton Middle School during that 1994-95 school year.

In March of 1995, B.M. and P.Z.M. were formally married. Neither he nor his wife adopted the respective children from their former marriages. B.M. himself stayed in Philadelphia at the 25 South 22d Street address during this time, living in a building he owned at 25 South 22d Street. Because she did not like the Florida school, P.Z.M.'s daughter T.T. stayed with petitioner, attending Cherry Hill High School for the 1994-95 school year, with B.M. paying out-of-state tuition. Petitioner recalled that he traveled to Florida every other weekend to be with his wife and the other two children.

Notwithstanding the Florida move, petitioner stated, he was forced to conclude by mid-May 1995 that escalating misbehavior by M.M. compelled him to bring her and P.Z.M. back to Philadelphia, where he could personally exercise control. The other two girls, who both were much older than M.M. and out of high school, remained behind in Florida. Just prior to the beginning of September 1995, B.M. testified, he and his wife purchased the property at 402 Province Drive, in Cherry Hill, and with M.M., went to live there. M.M. began eighth grade in the District's Beck School that month, attending for the entire 1995-96 school year.

The summer of 1996 was not a good one for M.M., petitioner testified, and after failed trials at JCC camp, the Hyde School in Massachusetts, and Red Cliff Ascent in Utah, he placed M.M. unilaterally in Cross Creek Manor, also in Utah, for the 1996-97 school year. She remains there pending resolution of these appeals. B.M. maintains that during the 1996-97 school year and even now, he has continued to be domiciled at 402 Province Drive.

The indices of domicile:

Petitioner's evidentiary case:

Recounting her personal arrangements after they moved to Province Drive in September 1995, **P.Z.M.** recalled that, from late fall through early spring during every year since, she has returned to the Florida townhouse in Boca Raton. She explained that this was because the cold weather in New Jersey adversely affects her perforated left ear. P.Z.M. stated that, because she is responsible for the payment of all personal bills, they are sent to the Florida address during this time.

Sorting out the various taxes in three states, New Jersey, Florida, and Pennsylvania, **B.M.** testified that this variety of locations was due to his Pennsylvania business, as well as the bi-location of his wife because of her ear injury and the domicile of her two daughters. He himself remained at the true domicile of himself and his wife, B.M. stated, which is Cherry Hill. He was certain that he stayed there some 340 days per year. He was absent from the State only during intermittent weekend and holiday trips to be with his family. This testimony was supplemented by that of **Linda Schneide**r, a semi-retired next-door neighbor on Province Drive, who saw him at least once a week year-round, and heard his car entering the adjoining garage four-to-five times per week.

Petitioner explained that his voting registration in Florida was by unthinking happenstance, and has been changed to New Jersey on legal advice. His driver's license was obtained in Pennsylvania (he no longer had one in Florida) for business reasons, and in particular to obtain a gun permit to carry a weapon during rent collections from the apartment houses he owns in

Philadelphia. The differing leases in the vehicles he owns reflected the business/home dichotomy between Pennsylvania and New Jersey. This was true as well for the various post office boxes he maintained over three states.

Petitioner pointed out that his banking was carried out in the nearby Commerce Bank on Route 70, in New Jersey, and **Maria Loughlin**, the bank employee handling his accounts there for the past ten years confirmed his regular appearance at least three times per week and more, over that time. Ms. Loughlin added that, like her B.M., her husband, P.Z.M. conducted banking business there too, using their Commerce Bank personal and business accounts. Ms. Loughlin saw P.Z.M. in the summer months, and was aware that she resided in Florida during the winter. She recalled that the couple used the New Jersey Post Office Box address, 3870. The bank had recorded their home address as 402 Province Drive, Cherry Hill.

The Board's countering testimony:

The Board offered the investigation results of its **Director of Security, Michael Nuzzo**, as proof that petitioner was not domiciled in the District. Mr. Nuzzo, a retired police lieutenant with twenty-seven years' law enforcement experience, noted that he had personally conducted the Board's review at the request of the Director of Special Education programs, made in February 1997, which was unusual, in his experience.

Mr. Nuzzo found that the property record card for 402 Province Drive in the Centura development of Cherry Hill listed both B.M. and P.Z.M. as owners. However, on his two visits to this guard-gated community, on February 27 and March 20, 1997, petitioner was not at home. His message asking for a return call, left on petitioner's answering machine, went unanswered. On one day, an unidentified female, not the guard, but apparently part of Centura management, disclosed to Mr. Nuzzo that B.M. lived there. According to Mr. Nuzzo, she also thought that the couple resided in Florida during the summer months.

Beyond this, Mr. Nuzzo observed, petitioner had no voter registration in Cherry Hill, and there were no New Jersey driver's licenses or registrations in the name of husband or wife. Mr. Nuzzo acknowledged that the DMV record revealed a leased vehicle registered with B.M.'s business, having the Cherry Hill P.O. Box 3870 as the address. As to voting, B.M. was registered in Palm County, Florida, and also was licensed to drive in that state, Mr. Nuzzo disclosed. Although he had never entered the development or talked to neighbors, the sum of this information convinced Mr. Nuzzo that the couple lived in Florida.

Gloria Quigley, a social worker with whom the District had contracted for a report to be used in the pending special education appeal, recalled that she had difficulty arranging a meeting with B.M. and P.Z.M., because repeated calls to the Province Drive answering machine were not immediately returned. However, she recalled that each time petitioner had replied, he was on a car phone, and said he was returning from the business in Pennsylvania to his home at 402 Province Drive. Because of the difficulties in reaching him, Ms. Quigley stated, B.M. apologized, blaming the long hours and constant movement he experienced in running his business.

Eventually, on March 9, 1997, she was received by both B.M. and P.Z.M. in the gated-community home at 402 Province Drive. The hour-and-a-half interview was pleasant; the house itself was furnished, and had a lived-in appearance, Ms. Quigley recalled from her observation at that time.

Finally, the Board presented the testimony of **Antoinette Rath**, Supervisor of Special Education Student Services, who recalled that a letter addressed to 402 Province Drive had been returned as undeliverable. She did not know why, did not know what was in the letter, and conceded this was the only postal problem the Board had experienced which raised a residency question.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact:

To resolve disputes over material facts, I make, or adopt from the record, the following **FINDINGS:**

1. In accordance with the requirements of *N.J.S.A.* 18A:38-1, it is the longstanding policy of the Cherry Hill Public School District that no student who is not domiciled within Cherry Hill Township is entitled to a free public education in the township's schools (R-1 to R-5).

2. Petitioner, B.M., is the parent of the minor child M.M.

3. At some time subsequent to June 1996, B.M. unilaterally placed M.M. in a residential facility in Utah.

4. In September 1996, B.M. filed a due process petition seeking relief upon issues surrounding M.M.'s IEP, program and placement, and requiring the school district to assume financial responsibility for the Utah placement.

5. Around the end of February 1997, during the course of discovery in the due process matter, the question arose as to the validity of the M.'s domicile in Cherry Hill, and the eligibility of M.M. for a free public education in the Cherry Hill School District.

6. B.M. and P.Z.M. were married on February 13, 1995.

7. M.M., date of birth December 9, 1981, is B.M.'s daughter from a previous marriage. He has had no children with P.Z.M., and P.Z.M. has not adopted M.M.

8. Mrs. M. has two children from a prior marriage, which B.M. has not adopted. P.Z.M.'s children are M.T., now twenty-two years old, and T.T., now nineteen years old. Both M.T. and T.T. reside in Florida.

9. B.M is self-employed as is the president of American Sprinkler and Alarm, a mechanical contractor and fire suppression firm since 1981, with its principal place of business in Philadelphia since 1983.

10. B.M. and P.Z.M. own rental properties and a town home-villa at 5572 Fox Hollow Drive, Boca Raton, Florida, which they purchased in February 1995. B.M. has a mortgage on the property in Boca Raton and uses a post office box in Boca Raton for that property.

11. In August 1995, B.M. and P.Z.M. purchased a townhouse at 402 Province Drive in Cherry Hill, New Jersey. For the mortgage obtained in New Jersey, B.M. used a Florida address.

12. B.M. travels to be with P.Z.M. on some weekends, and various holidays, during the winter months when she is in Florida.

13. Although B.M. does not own any automobiles registered in New Jersey, there are approximately seven to ten vehicles which are all leased through American Sprinkler and registered here. These vehicles are used by project managers, employees in the field and B.M. He currently drives a 1997 Yukon, registered through P.O.

Box 3870, Cherry Hill. No personal vehicles are insured by B.M. in New Jersey.

14. B.M. and P.Z.M. have four cars in Florida: a Mustang, an Acura, a Lexus and a Nissan. B.M. is responsible for the payments on the Acura. It is registered in Florida and has Florida tags and Florida insurance.

15. B.M. has only one driver's license, issued by the State of Pennsylvania.

16. B.M. produced a United States Individual Tax Return (1040) (P-5) and a New Jersey Tax Return (1040), both for 1996 (P-6).

17. B.M. and P.Z.M. bank at Commerce Bank, Cherry Hill, New Jersey. They have personal and business accounts there. The personal account is held jointly. Their transactions utilize P.O. Box 3870 in Cherry Hill. Nothing is ever sent directly to their home. All statements are sent to P.O. Box 3870.

Conclusions of Law:

Burden of persuasion:

Petitioner concedes that, as the applicant for a benefit (the costs of placement for M.M., potentially) he must demonstrate that he is domiciled in the Cherry Hill School District. He must prove his case by a preponderance of the credible evidence, which is the standard in administrative proceedings, *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Preponderance may also be described as the greater weight of credible evidence in

the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, *State v. Lewis*, 67 *N.J.* 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, *Spagnuolo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954).

These are the standards which, when applied to the record, informed the **FINDINGS** made above.

Applying the law to the facts:

The law:

Residence is where you hang your hat. Domicile is where your heart is.

This venerable legal cliché has been recast consistently in standard juristic phraseology, without destroying the pith of its meaning. *E.g.*, it has been held that, generally speaking, domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante, et al. v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd.*, 58 *N.J.* 112 (1971). Further, a person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile, *Ibid.* Finally, the question of domicile is one of fact, and must be determined on a case-by-case basis. *Lea v. Lea*, 18 *N.J.* 1, 7 (1955).

The facts:

The intent which must be determined case-by-case can only be divined, as here, by evaluating the words and demeanor of the person claiming domicile, and then matching his or

her assertions with the artifacts of record which, when evaluated holistically, leave a persuasive impression of true domicile.

In these times, this impression is not easily obtained. It cannot be reasonably gainsaid that in our society people live, work, and travel over a broad geography. For that reason, domestic presence may be identified through a variety of symbols, and in assorted locales: a license in one state, voter registration in another, properties (rental or owned; personal and real) often found throughout the length of their travels. Repeat marriages and the diverse children of these unions are not uncommon, and neither will all the families necessarily be found living together.

Such is the case here.

The record is unrefuted that B.M. has conducted his business in Philadelphia since at least 1981. He continues to do so. For most of the time since then, M.M. has been schooled in the District. M.M. left New Jersey during one school year at age ten because of disruption at home (it must be remembered that M.M. is classified as emotionally disturbed). Notwithstanding, she came back to Cherry Hill and continued in the District for two more years. When B.M. anticipated a sale of his business, the entire family moved south, and for one year, 1994-95, M.M. attended a Florida school. When the business did not sell, she once again returned to the District to complete eighth grade.

As the preponderating evidence reveals, B.M. returned to Cherry Hill to continue to manage his business. It is uncontroverted that, as a consequence of his return, B.M. and P.Z.M. have owned 402 Province Drive in the township since August 1995. For the 1995-96 academic year, M.M. was placed in the District, at Beck School, and she attended from this Province Drive address. The testimony of B.M., P.Z.M., Linda Schneider, Maria Loughlin, and the Board's own witness, Gloria Quigley, are most credible, and corroborate B.M.'s contention that he lives primarily at the Province Drive locale approximately 340 days of every year, and that this address is *intended* to be, and is, his "home base."

B.M.'s domicile:

There is confusion caused by the various indices of geographical connection: P.Z.M.'s obviously greater involvement in Florida, from where she pays their personal bills; B.M.'s business vehicle leases, diverse post office boxes, and his driver's license to obtain a gun permit, his personal car ownership, voting registration (B.M. now legally votes in New Jersey), and his variously located properties. This confusion is superficial. It is clear that the family survival depends on B.M., and the evidence preponderates that he tends to this duty by commuting throughout the year from the couple's home in Cherry Hill to conduct his business in Philadelphia. The collective circumstances of B.M. are consistent with his intent, and they confer domicile.

M.M.'s domicile:

If then B.M. is domiciled in the District, what impact do P.Z.M.'s extensive stays in Florida have on the domicile of M.M.? The answer is: none. P.Z.M. is not M.M.'s mother. The child was not adopted by P.Z.M. The evidence strongly implies that the relationship is not totally harmonious. The direct attachment of M.M. is to her father, B.M. He continues to assume responsibility for her care. Under school law, the domicile of a child for school purposes is that of the natural father. *Bd. of Ed., Little Egg Harbor v. Bds. of Ed., etc.*, 145 *N.J. Super.* 1, 12 (App. Div. 1975) (Morgan, J.A.D., dissenting), *rev'd. per curiam, based on dissent below*, 71 *N.J.* 537 (1976) (citing *Mansfield Tp. Bd. of Ed. v. State Bd. of Ed.*, 101 *N.J.L.* 474 (Sup. Ct. 1925)); *V.R. on Behalf of A.R. v. Hamburg Bd. of Ed.*, 2 *N.J.A.R.* 283, 286 (Educ. 1980), *aff'd.*, State Bd., 1981 *S.L.D.* 1553, *rev'd sub nom. on other grounds, Rabinowitz v. N.J. State Bd. of Ed.*, 550 *F. Supp. 481* (D. N.J. 1982). Consequently, M.M. is domiciled in the District.

Conclusion:

Petitioner, B.M., has established through preponderating evidence and the operative law that he and his daughter, M.M., are domiciled in Cherry Hill, New Jersey, and thus live within the District. Any entitlements which flow from that fact, for which they are otherwise eligible, must therefore be provided by respondent Cherry Hill Board of Education.

ORDER

I ORDER therefore that the Cherry Hill Board of Education record the domicile of B.M. and M.M. as being at 402 Province Drive, Cherry Hill, New Jersey.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 7, 1997
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

8/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 12 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS

For petitioner:

P-1	Deed, dated August 31, 1995
P-2	Closed End Motor Vehicle Lease Agreement
P-3(a)	Insurance identification card
P-3(b)	Leased vehicle registration
P-4(a)	Real estate enclosure sheet from Title American Agency Corp., dated January 8, 1995
P-4(b)	Title insurance policy no. 87R 08554 from Penn Title Insurance Company
P-5	1040 U.S. Individual Income Tax Return for 1996
P-6	NJ-1040 State of New Jersey Income Tax - Resident Return for 1996
P-7	Copies of Bell Atlantic telephone bills
P-8	Copies of PSE&G bills
P-9	Copies of Garden State Cable TV bills
P-10	Notice of Property Tax Assessment for 1997
P-11	Delaware River Port Authority Police Bureau, Miscellaneous Incident Report, dated April 27, 1996
P-13	Copies of Bell Atlantic telephone bills
P-14	Copies of Garden State Cable TV bills
P-15	Monthly Mortgage Statement from Fleet Mortgage Group, dated February 21, 1997
P-17	Photocopies of State of New Jersey Insurance Identification Card (Expiration Date May 21, 1997) and Leased Vehicle Registration

For respondent:

R-1	Cherry Hill Board of Education Policy #157, Non-Resident Students
R-2	Cherry Hill Board of Education Policy #158, Tuition
R-3	Proof of Residency for New Entrants
R-4	Nonresident Student Policy and its Implementation
R-5	Administrative Guide, Student Residency (Part One)
R-6	Residency Investigation Monthly Summary, dated February 1997
R-7	Camden County, New Jersey, PRC Realty Systems
R-8	Photocopy of envelope addressed to parents of M.M.
R-9	Handwritten notes
R-10	Application for Non-Resident Student Policy E-7

WITNESS LIST

For petitioner:

Linda Schneider
B.M., petitioner
P.Z.M.
Maria Loughlin

For respondent:

Michael Nuzzo
Gloria Quigley
Antoinette Rath

OAL DKT. NO. EDU 2273-97
AGENCY DKT. NO. 82-3/97

B.M., on behalf of minor child, M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm, with clarification as herein stated, the well-reasoned findings and conclusions offered by the Administrative Law Judge (ALJ) in a matter which presents a rather unique set of circumstances requiring a finding of domicile for a petitioner whose family has multiple geographic connections. The Commissioner appreciates that such an analysis is sensitive, and further recognizes that "[c]oncepts of domicile *** are not immutably fixed and the term 'may have different content and shades of meaning depending upon the context in which it is used.'" *Clifton Bd. of Education v. Sauro,* 96 *N.J.A.R. 2d (EDU)* 497, 500,

citing *In re Estate of Gilmore,* 101 *N.J. Super.* 77, 86-87 (App. Div. 1968). Thus, the Commissioner concurs with the ALJ that intent, the touchstone of a domicile analysis, must be determined "***by evaluating the words and demeanor of the person claiming domicile, and then matching his or her assertions with the artifacts of record which, when evaluated holistically, leave a persuasive impression of true domicile." (Initial Decision at pp. 11, 12)

In so doing, the Commissioner notes that the Board raises extensive exceptions with respect to the factual findings of the ALJ based on the testimony of the witnesses and the credence and weight ascribed to such testimony. However, in that the record before the Commissioner did not include transcripts from the two days of hearing conducted in this matter, challenges to the factual findings predicated upon credibility determinations made by an administrative law judge require the party asserting such exceptions to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). The ALJ's findings cannot be properly rejected, as the Board so urges, without appraisal of the portions of the transcribed record which are relevant to the Board's exceptions. (*Id.* at 159) Thus, without such pertinent transcript citations from which to draw his own conclusions, the Commissioner defers to those credibility determinations reached by the ALJ who was in a position to hear and adjudge the credibility of witnesses. See *Parker v. Dornbierer*, 140 *N.J. Super.* 185, 188 (App. Div. 1976). Further, the Commissioner finds that such factual findings and conclusions are sufficiently grounded in the record before him, and such record does not provide any cause to challenge the weight ascribed to evidence, nor to credibility assessments rendered by the ALJ. That is, there are sufficient objective indicia, or "artifacts," of domicile in the record to support petitioner's claim.

In response to the Board's concern, as raised in its exception arguments, that the ALJ improperly commingled evidence relating to M.D.'s special education proceeding which has been bifurcated from this matter, the Commissioner clarifies that his conclusion herein is reached without consideration of any such facts or conclusions, as may have been offered by the ALJ, in that they are irrelevant to a domicile analysis. (Board's Exceptions at p. 8)

Finally, the Commissioner observes that, although the ALJ rightfully notes that the domicile of a child traditionally follows that of her natural father (Initial Decision at p. 13), the more obliging, and still legally correct, rule for a changing society is that an unemancipated child's domicile is equated with the domicile of the parent or guardian "having legal control of the child." *Sauro, supra*, citing *Mansfield Twp. v. State Bd. of Educ.*, 101 *N.J.L.* 474, 479 (Sup. Ct. 1925). In any event, that person is petitioner.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. Having established through a preponderance of credible evidence that petitioner and M.D. are domiciled in the District, M.D. is thus entitled to the benefits afforded by *N.J.S.A.* 18A:38-1a, so as long as there is no change in petitioner's circumstances that would alter M.D.'s entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

September 22, 1997
Date of Mailing, September 22, 1997

501-97

C #501-97L
SB # 83-97

RICHARD CHAMBERS, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, September 22, 1997

For the Petitioner-Appellant, Richard Chambers, pro se

For the Respondent-Respondent, James L. Jackson, Esq.

The decision of the Commissioner of Education declining to entertain the instant request for declaratory judgment is affirmed for the reasons expressed therein. Our review of the record confirms the Commissioner's finding that the educational issues raised by petitioner in his request for declaratory judgment also form the basis for a petition of appeal which he filed with the Commissioner on August 14, 1997. That petition is currently pending in the Office of Administrative Law. We note, in addition, that an appeal filed by petitioner from a decision of the Commissioner denying his request for emergent relief is currently pending before the State Board.

Petitioner's request for oral argument is denied as not necessary for a fair determination of this matter. N.J.A.C. 6:2-3.2.

March 4, 1998

Date of mailing MAR 06 1998

503-97

503-97

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
M.M.,	:	
RESPONDENT.	:	
	:	

SEPTEMBER 25, 1997

AGENCY DKT. NO. 255-7/97

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
M.M.,	:	
RESPONDENT.	:	

For the Board, Gloria L. Buxbaum, Esq.

This matter having been opened before the Commissioner of Education by way of Petition of Appeal filed on July 14, 1997, seeking tuition reimbursement pursuant to *N.J.S.A.* 18A:38-3; and

The Commissioner having directed respondent by notices dated July 14, 1997, August 6, 1997 and August 19, 1997* to file an Answer to the charges against them; and

As of this date, neither respondent, nor any attorney on her behalf, having filed an Answer to the charges against her, and each count of the charges against respondent having been deemed to be admitted; now therefore

IT IS ORDERED on this 25th day of September 1997 that summary judgment shall be granted to the Board of Education and that respondent shall pay tuition in the amount of $13,190 due the Board for the 1995-96 and 1996-97 school years when respondent's daughter

* Return card number Z754567865 evidences receipt on August 21, 1997.

attended free public school in Livingston as a nonresident pupil. There being no provision for the grant of attorney's fees or costs within the Commissioner's authority, said fees and costs are not herein granted. *Pascack Valley Regional High School District v. Kwon*, 93 *N.J.A.R.* 2d (EDU) 897, 898, citing *Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434 (1990).

COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1997
DATE OF MAILING SEPTEMBER 25, 1997

504-97

504-97

R.H., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 25, 1997

AGENCY DKT. NO. 101-3/97

R.H., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For petitioner, R.H., *pro se*

This matter having been opened before the Commissioner of Education on April 3, 1997[1] through the filing of a Petition of Appeal challenging the Board's refusal to admit petitioner's minor children into its District on the basis of nonresidency, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*; and

Petitioner, a resident of Hamilton Township, having filed proofs of residency along with her Petition of Appeal; and

The Commissioner having directed respondent by two notices[2] and by two letters dated July 10, 1997 and August 19, 1997, sent via regular and certified mail,[3] to file an Answer to the charges against it; and

[1] While a letter of intent to appeal the Board's decision was filed by petitioner on March 24, 1997, it did not constitute a perfected Petition of Appeal.
[2] April 4, 1997 and May 8, 1997.
[3] District received notices on July 14, 1997 and August 21, 1997, as evidenced by return receipts.

As of this date, neither respondent nor any attorney on respondent's behalf having filed an Answer to the Petition of Appeal; now therefore

IT IS ORDERED this 25th day of September 1997 that summary judgment shall be granted to petitioner, thus entitling her children to attend school within respondent's District free of charge, in accordance with *N.J.S.A.* 18A:38-1 *et seq.*

COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1997
DATE OF MAILING SEPTEMBER 25, 1997

509-97

509-97 E

K.B., on behalf of minor child, H.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

SEPTEMBER 25, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 6974-97
AGENCY DKT. NO. 314-9/97

K.B., ON BEHALF OF MINOR
CHILD H.B.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE RANCOCAS VALLEY
REGIONAL HIGH SCHOOL
DISTRICT, BURLINGTON COUNTY,
Respondent.

K.B., petitioner, *pro se*

Steven J. Mushinski, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner, a resident within respondent's regional high school district in Burlington County, contests the refusal of respondent to provide transportation for H.B.'s attendance at the Gloucester County Institute of Technology Academy of Performing Arts.

Respondent has refused to provide this transportation and petitioner filed the within petition together with a petition requesting emergent relief with the Commissioner of the Department of Education on September 4, 1997. Thereafter, the matter was transmitted to the Office of Administrative Law (OAL) on September 9, 1997, for consideration of the emergent relief application. A hearing on the application for emergent relief was scheduled for September 16, 1997. On that date oral argument was considered and the undersigned administrative law judge (ALJ) reserved decision pending receipt of additional information. When this additional information was provided on September 17, 1997, the proceedings regarding the application for emergent relief were concluded.

FACTUAL DISCUSSION

With certain significant exceptions which are identified herein, the facts in this matter are not disputed.

Petitioner, K.B., mother of H.B., resides in Rancocas, New Jersey and is a resident of the Rancocas Valley Regional High School District. Petitioner is a single parent with two children. In her petition for emergent relief, petitioner indicates that she has always known that her daughter, H.B., has creative ability, and two years ago they moved into the Westhampton Township School District where her talents were recognized and developed. Through a teacher therein, H.B. and petitioner became aware that a high school for the performing arts was opening in Gloucester County, New Jersey for the 1997-98 school year.

K.B. attended a meeting for parents of potential students for the high school of the performing arts and the parents were assured that transportation would be provided by the sending districts. H.B. applied and auditioned for acceptance at the high school even though only 25 students would be accepted for drama. In April 1997, H.B. received her letter of acceptance.

K.B. was under the impression that the Gloucester County Institute of Technology would be arranging with the local school district for transportation. It was subsequently determined that this transportation would not be provided by respondent whereupon K.B. made formal application to respondent herein for such transportation in mid-August 1997. This request was denied

despite the decision of the Commissioner of Education in a matter entitled *M.R., etc., et al, v. Board of Education of the Borough of Pompton Lakes, Passaic County*, Agency Dkt. No. 386-97 (decided July 29, 1997).

Following respondent's denial of petitioner's request for transportation, the Gloucester County Institute of Technology Academy for the Performing Arts agreed to provide such transportation to H.B. on a temporary basis until the determination in the present matter.

During the emergent relief oral argument on September 16, 1997, petitioner was asked whether the transportation temporarily being provided by the Gloucester County Institute of Technology would continue until the hearing and final decision in this administrative proceeding, or whether it would only continue until such time as the application for emergency relief was heard and decided. Petitioner did not know the answer to that question and petitioner was given additional time to obtain information concerning this issue. It was explained to petitioner that this question could have an impact on the hardship issue being claimed in this matter.

On the afternoon of September 17, 1997, Victor Morrella, Superintendent of the Gloucester County Vocational and Technical School contacted the undersigned ALJ and left a message that the Gloucester County Vocational and Technical School will continue to transport K.B., but will be charging the Rancocas Valley Regional High School District for transportation and tuition.

K.B.'s employment requires that she work from 10:30 p.m. to 7:00 a.m. As a result, she is unable to provide transportation to H.B. It was represented that it would take approximately 45 minutes, one way to transport H.B. from her home to the Academy. It was also represented that if transportation is not made available, H.B. will not be able to continue at the academy and will be required to enroll in the local school district, and that this is the irreparable harm that would be suffered by petitioner by the refusal of this application for emergent relief. Petitioner also indicated that H.B. will be devastated if she is not given this opportunity to continue at the Academy of Performing Arts.

K.B. also argued the unique nature of the program at the Academy which includes specialized training in the area of drama, speech, dance and the performing arts leading to advance preparation for either employment or college level courses.

In response to this, the respondent school district takes the position that it has no obligation or responsibility to provide transportation to H.B. to attend the Gloucester County Institute of Technology Academy of Performing Arts. Respondent admits that it has refused to provide transportation to H.B. but denies that this refusal as in violation of the decision of the Commissioner of Education in *M.R. v. Pompton Lakes*. Respondent takes the position that it provides a drama program within the school district which is available to all students, including first year students. Respondent employs a full-time drama teacher and courses include theater preparation, speech and communication and performance of the arts. Thus, respondent argues that there is a clear factual dispute as to whether the Gloucester County program and the program of respondent are comparable, and that this issue can only be decided as a result of a full hearing.

In addition, attorney for respondent argues that there is some question whether an academy for the performing arts is a vocational school program requiring a local school district to provide transportation for a student's attendance.

In addition, respondent argues that if the Gloucester County School has agreed to provide transportation to petitioner during the pendency of the hearing, there is no hardship shown which would entitle petitioner to emergent relief, and that the application should be denied.

LEGAL DISCUSSION AND ANALYSIS

The standard for granting or denying emergency relief is set forth at *N.J.A.C.* 1:1-12.6(e) and (f). This provides that where circumstances require some immediate action to preserve the subject matter of the application pending a hearing, an order granting temporary relief may be issued. It further provides that it shall include a finding that immediate and irreparable harm will probably result before adequate notice can be given, that the relief must be based on the likelihood that the moving party will prevail when the application is fully argued by all parties, and must be as limited in scope and as temporary as is possible.

The standards applicable to a request for emergency relief in administrative proceedings are analogous to those applied in New Jersey Courts.

The most recent court decision dealing with the grant or denial of emergent relief is set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In that case, the Supreme Court set forth the various factors to be considered in determining whether to grant or deny emergent relief. These may be summarized as follows:

1. The relief should not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy. In certain circumstances, severe personal inconvenience may constitute irreparable harm.
2. The relief should not be granted when the legal right underlying the applicant's claim is unsettled.
3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits, but mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo.
4. The relative hardship to the parties in granting or denying relief must be considered.

In the present matter, the irreparable harm being claimed in this matter is the inability of H.B. to remain at the Gloucester County Academy if transportation is not provided. Petitioner is a single parent and does not have the means to provide transportation unilaterally. This is not a situation where she would be able to pay for the cost of transportation and seek reimbursement from respondent in the event it is subsequently determined that respondent is responsible for providing such transportation. In addition, petitioner would lose the ability to remain at the academy for the school year if she were not provided with this transportation. I **FIND** that K.B. will not be able to provide the transportation on her own because of her work schedule. I also **FIND** that when weighed one against the other, the relative hardship to the parties is such that it weighs more heavily on petitioner. While the expense of providing transportation to H.B. would be significant, the overall burden and hardship on respondent would be much less than that on petitioner. However, in view of the apparent fact that the Gloucester County Vocational

Technical School will continue to provide transportation pending the disposition of this matter, I **FIND** that the relief requested by petitioner is not necessary to prevent irreparable harm

Another difficulty I have with petitioner's application is with respect to whether respondent has the legal obligation to provide transportation and whether petitioner has a reasonable probability of ultimately succeeding on the merits. Respondent asserts that it has a comparable program of performing arts within the high school district and that H.B. is able to attend this comparable program without the necessity of proving transportation and the tuition cost associated with the Gloucester County Institute of Technology Academy. Even though the petitioner read into the record from the curriculum for the new program at the Gloucester County Academy, there is simply insufficient information on the record upon which I am able to make a determination whether or not there is a comparable program within the local school district. Accordingly, I **FIND** that I am unable to determine whether petitioner has a reasonable probability of ultimately succeeding on the merits with respect to the criteria and requirements which are set forth in *M.R. v. Board of Education of the Borough of Pompton Lakes.* Accordingly, I **CONCLUDE** that I must deny petitioner's application for emergent relief.

Following the guidance given by the Commissioner of Education in the M.R. case, I **FIND** that the issues raised in this matter are appropriately decided through an expedited hearing and decision on the merits. Because, I am unable to make this determination based on the existing record, I **FIND** and **CONCLUDE** that a plenary hearing with respect to these issues should be scheduled on an expedited basis.

This order on application for emergency relief may be adopted, modified or rejected by **Commissioner of Education** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

September 17, 1997
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

lam

OAL DKT. NO. EDU 6974-97
AGENCY DKT. NO. 314-9/97

K.B., on behalf of minor child, H.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, including the audiotape of proceedings before the Administrative Law Judge (ALJ), and the Order on Motion for Emergent Relief of the Office of Administrative Law have been reviewed.

Upon careful and independent review, the Commissioner affirms the ALJ's denial of emergent relief herein, pursuant to *Crowe v. DeGioia*, *supra,* in that, because the Gloucester County Vocational Technical School will continue to provide transportation to H.B., pending the disposition of this matter on its merits, he agrees that the relief requested by petitioner is not necessary to prevent irreparable harm.

It is noted that this matter is scheduled for plenary hearing on October 22, 1997, to resolve the issue of whether the drama program offered by the Rancocas Valley Regional High School District is a comparable program to that available at Gloucester County Institute of

Technology Academy of the Performing Arts. Although the record additionally indicates that the Board raises a question as to whether the Performing Arts Program offered by the Gloucester County Institute falls within the scope of vocational education as contemplated by *N.J.S.A.* 18A:54-1, the Commissioner takes judicial notice of the program's inclusion in the Department of Education's Directory of Verified Occupational Education Programs (DOE Publication PTM No. 1123.00, Revised 1995), reflecting its status as a DOE approved trade and industrial program.* As such, it is clearly within the purview of the cited statutory provisions and, therefore, there is no necessity for resolution of this question at the plenary hearing. Additionally, in reviewing the Directory, the Commissioner notes that the program at issue herein is the only approved vocational program in Dance and Performing Arts in southern New Jersey (Atlantic, Burlington, Camden, Cape May, Cumberland, and Gloucester Counties).

Accordingly, the recommended Order of the ALJ denying petitioner's Motion for Emergent Relief is adopted for the reasons expressed therein, and this matter shall proceed to its scheduled October 22, 1997 plenary hearing on the sole issue of whether the respondent school district offers a program in Dance and Performing Arts comparable to the type offered by the Gloucester County Institute.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

* CIP (Classification of Instructional Programs) No. 500301.

505-97

505-97

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEPTEMBER 25, 1997

OAL DKT. NO. EDU 11477-96
AGENCY DKT. NO. 362-8/96

THOMAS FEDOR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1997
DATE OF MAILING SEPTEMBER 25, 1997

506-97

ANGELA DE CESARE, BONNI ERHARDT, CATHERINE FOLLIS, NINA FORREST, BONNIE FROHLICH, CAROL A. HANLEY, NORMA GRANT-KATZ, JOHN W. KENNY, SUE PARK, FLORENCE PARIS, ANGELA RODIN, MARY KATHERINE SMETHIE, BARBARA STAFFA, IVAN SUSS AND CAROL TAYLOR,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HAWORTH, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SEPTEMBER 25, 1997

OAL DKT. NO. EDU 7950-96
AGENCY DKT. NO. 301-7/96

ANGELA DE CESARE, BONNI ERHARDT, CATHERINE FOLLIS, NINA FORREST, BONNIE FROHLICH, CAROL A. HANLEY, NORMA GRANT-KATZ, JOHN W. KENNY, SUE PARK, FLORENCE PARIS, ANGELA RODIN, MARY KATHERINE SMETHIE, BARBARA STAFFA, IVAN SUSS AND CAROL TAYLOR,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWORTH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1997
DATE OF MAILING SEPTEMBER 25, 1997

507-97

507-97

MARIE C. ABBEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 25, 1997

OAL DKT. NO. EDU 1331-97
AGENCY DKT. NO. 591-12/96

MARIE C. ABBEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER 25, 1997
DATE OF MAILING SEPTEMBER 25, 1997

508-97

508-97

PAUL SCHMIDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 25, 1997

OAL DKT. NO. EDU 3976-97
AGENCY DKT. NO. 108-3/97

PAUL SCHMIDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

SEPTEMBER25,1997
DATE OF MAILING SEPTEMBER 25, 1997

509-97

509-97 E
660-97

K.B., on behalf of minor child, H.B.,	:	
PETITIONER,	:	
AND	:	
GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,	:	
INTERVENOR,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent contested the refusal of her district of residence Board (Rancocas Valley) to provide transportation for her child, H.B., to attend an Academy of Performing Arts in another district. Rancocas Valley alleged it provided a comparable program.

ALJ found that the Rancocas Valley's program consisted of a first year performing arts course followed by subsequent years of independent study. ALJ found that there is no approved vocational program of performing arts or dance at Rancocas Valley and that Rancocas Valley does not have a dance program. Thus, the ALJ found that Rancocas Valley does not offer a program in dance and the performing arts comparable to that offered by the Gloucester County Institute of Technology (GCIT), Academy of the Performing Arts. ALJ concluded petitioner and intervenor were entitled to relief requested, respondent Rancocas Valley was to provide transportation to H.B. for attendance at GCIT.

Commissioner adopted findings and determination in initial decision as his own and directed respondent Rancocas Valley to provide transportation to H.B. for attendance at GCIT. Commissioner reminded respondent that notwithstanding that petitioner only sought transportation costs, respondent was likewise responsible for payment of H.B.'s tuition and, to the extent permitted by law, any imposed nonresident fee.

DECEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6974-97

AGENCY DKT. NO. 314-9/97

K.B., ON BEHALF OF MINOR
CHILD H.B.,

Petitioner,

and,

GLOUCESTER COUNTY INSTITUTE
OF TECHNOLOGY,

Intervenor,

v.

BOARD OF EDUCATION OF
THE RANCOCAS VALLEY
REGIONAL HIGH SCHOOL
DISTRICT, BURLINGTON COUNTY,

Respondent.

K.B., petitioner, *pro se*

Joseph F. Betley, Esq., for intervenor Capehart & Scatchard, attorneys)

Frank P. Cavallo, Jr., Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: October 31, 1997 Decided: November 12, 1997

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner, a resident within respondent's regional high school district in Burlington County, contests the refusal of respondent to provide transportation for H.B.'s attendance at the Gloucester County Institute of Technology (GCIT) Academy of the Performing Arts. Petitioner filed the within petition together with a petition requesting emergent relief with the Commissioner of the Department of Education on September 4, 1997. Thereafter, the matter was transmitted to the Office of Administrative Law (OAL) on September 9, 1997, for hearing as a contested case. A hearing on the application for emergent relief was held on September 16, 1997. By an Order entered on September 17, 1997, emergent relief was denied. The matter was then scheduled for an expedited hearing on October 22, 1997.

At the hearing scheduled for October 22, 1997, the petitioner was not prepared to proceed and requested that the matter be adjourned. This request was granted and the hearing was rescheduled for October 31, 1997, with the understanding that the parties would be fully prepared to proceed on the rescheduled hearing date.

On October 30, 1997, attorney for intervenor filed a motion seeking leave to intervene on behalf of the GCIT. Oral argument on this application was heard on October 31, 1997, and the application was granted with the understanding that the intervenor would not seek any relief in addition to that requested by petitioner herein and that the intervention would not delay this proceeding.

A hearing was held and concluded and the record closed on October 31, 1997.

FACTUAL DISCUSSION

With certain significant exceptions which are identified herein, the facts in this matter are not disputed.

It was established at the hearing on the application for emergent relief that petitioner, K.B., mother of H.B., resides in Rancocas, New Jersey and is a resident of the Rancocas Valley

Regional High School District. Petitioner is a single parent with two children. In her petition for emergent relief, petitioner indicated that she has always known that her daughter, H.B., has creative ability, and two years ago they moved into the Westhampton Township School District where her talents were recognized and developed. Through a teacher therein, H.B. and petitioner became aware that a school for the performing arts was opening in Gloucester County, New Jersey for the 1997-98 school year.

K.B. attended a meeting for parents of potential students for the school of the performing arts and the parents were assured that transportation would be provided by the sending districts. H.B. applied and auditioned for acceptance at the school even though only 25 students would be accepted for drama. In April 1997, H.B. received her letter of acceptance.

K.B. was under the impression that the GCIT would be arranging with the local school district for transportation. It was subsequently determined that this transportation would not be provided by respondent whereupon K.B. made formal application to respondent herein for this transportation in mid-August 1997. This request was denied despite the decision of the Commissioner of Education in a matter entitled *M.R., etc., et al, v. Board of Education of the Borough of Pompton Lakes, Passaic County*, Agency Dkt. No. 386-97 (decided July 29, 1997).

Following respondent's denial of petitioner's request for transportation, the GCIT Academy for the Performing Arts agreed to provide transportation to H.B. on a temporary basis until the determination in the present matter, but will be charging the respondent herein for transportation and tuition.

K.B.'s employment requires that she work from 10:30 p.m. to 7:00 a.m. As a result, she is unable to provide transportation to H.B. It takes approximately 45 minutes, one way, to transport H.B. from her home to the Academy. If transportation is not made available, H.B. will not be able to continue at the Academy and will be required to enroll in the local school district. Petitioner also indicated that H.B. will be devastated if she is not given this opportunity to continue at the GCIT Academy of the Performing Arts.

K.B. also testified to the unique nature of the program at the Academy which includes specialized training in the area of drama, speech, dance and the performing arts leading to advance preparation for either employment or college level courses.

In response to this, the respondent school district took the position at the emergent hearing that it has no obligation or responsibility to provide transportation to H.B. to attend the GCIT Academy of the Performing Arts. Respondent admitted that it has refused to provide transportation to H.B. but denied that this refusal violates of the decision of the Commissioner of Education in *M.R. v. Pompton Lakes*. Respondent takes the position that it provides a drama program within the school district which is available to all students, including first year students. Respondent employs a full-time drama teacher and courses include Theater Preparation, Speech and Communication and The Performing Arts. In addition, attorney for respondent argued that there is some question whether an academy for the performing arts is a vocational school program requiring a local school district to provide transportation for a student's attendance.

At the plenary hearing held in this matter on October 31, 1997, Meredith Flynn, Assistant Superintendent at GCIT, testified that she has been employed at GCIT for 23 years. In her present position she performs institutional research and development and applies for grants for funding of programs at GCIT. She has been involved with program development for the past six years. She was involved in the development of The Southern New Jersey Academy of the Performing Arts at GCIT and she identified a Program of Studies for School Year 1997-1998 (I-1).

Ms. Flynn testified that eight years ago the GCIT started to develop this program. The program is designed as a secondary course of study for high school students who are seriously considering careers in dance, drama and radio and television production.

Ms. Flynn testified that the approval process for the Academy took 18 months and fully complies with the requirements of the regulations.[1] The GCIT was required to study the labor market needs and to prove that it will prepare individuals for future employment and occupations

[1] Identified by attorney for intervenors as *N.J.A.C.* 6:43-3.1 to 3.9.

in the performing arts. The substance of the program is required to prove that it is preparing students for entering into the career fields of dance, drama and radio and television production. Approval for the Academy was received approximately three years ago.

Ms. Flynn described and highlighted the present elements of the Program, the details of which are set forth in the Program of Studies booklet (I-1). It is a full-time career academy and it is a school within a school. It teaches students who are focused in a particular area. The academy consists of 55 students out of a total of 1,100 attending the GCIT. Two and half to three hours each day are spent by students in dance and drama courses. The academic programs are focused on and geared towards the performing arts and are integrated into the performing arts. All of the students' classmates are other performing arts students. The academic courses consist of English, foreign languages, science, humanities and mathematics. Ms. Flynn explained that the academic courses are applied to various aspects of the performing arts. For example, sciences such as chemistry and physics address aspects of the performing arts, and in mathematics, subjects such as geometry are applied to sets and blocking.

One-hundred, fifty-seven credits are required for graduation from the Academy as compared to the State requirement of 110 credits for graduation from high school. Sixty credit hours of courses of study in the performing arts are required for graduation. There is a separate diploma issued by the Academy.

Ms. Flynn described the application process for admission to the Academy. Students are invited to apply and there is an audition before a panel of performing artists. In addition, early warning test scores are considered. Most recently there were 120 applicants for positions at the Academy and 58 were accepted.

The Academy has an ongoing relationship with professional groups and performers. In fact the impetus for the Academy came from a group of performing artists. This group recommended an Academy which would teach college preparatory courses in the performing arts.

Ms. Flynn indicated that it is not a requirement, but the students are able to attain membership in either Actors' Equity or in the Screen Actors' Guild. The achievement of Actors

Equity membership requires 50 weeks of performances in Actors' Equity productions. She explained that there are Actors' Equity-sponsored productions and this means that such productions involve producers, directors and artists who are Actors' Equity members.

Ms. Flynn described the facilities at GCIT used by the Academy. They include a theater in which the scenery is able to be raised and lowered onto the stage from above rather than being moved to the side or back. In addition there is a full dance studio and rehearsal rooms and other facilities. All of the teachers at the Academy are fully vocational certified. This requires seven years of work in a particular career field. In addition, the Academy brings in guest professional artists to teach in specialized areas. Seventy-five to ninety days a year are scheduled for visiting performing artists. She also indicated that the Academy has an advisory committee made up of professional performing artists, talent agents, college faculty members and representatives of actors' unions. The advisory committee recommends changes in the curriculum and methods of improving the work of the Academy. The Academy also employees a paid consultant, Abraham Beller, who has extensive experience in the performing arts.

Ms. Flynn testified as to the recruiting efforts which are made by the Academy. She indicated that the Program of Studies booklet is one of the efforts. Representatives of the Academy travel to various schools seeking talented students for enrollment in the Academy.

The Academy provides both career and personal counseling (I-1, page 7). It is also involved in dialogues with colleges and universities whereby students will obtain advance credit standing in colleges.

Ms. Flynn indicated that students are expected to give three dance performances and three drama performances per year as part of the program of study.

On cross-examination, Ms. Flynn identified the core curriculum required of all students (I-1, page 12). These total 157 credits required for graduation. The electives are any GCIT courses. She indicated that there are three drama productions each year, including one in January, one in March and one in late May. She also indicated that the Academy is not focused towards music because it did not want to duplicate existing programs. It is also exploring an affiliation or

involvement with a professional production company in Wilmington, Delaware. She indicated that the Academy theater at GCIT does not have fixed seating but it was intended to be a smaller theater where there were would be more interaction between performing artists and the audience.

Ms. Flynn also indicated that she has reviewed the Rancocas Valley course profile, R-3, and she finds it to be comparable to one part of the GCIT Academy curriculum in the freshman year. She identified this as the dance or drama portion of the freshmen year program (I-1, page 31).

Peggylou Welch testified on behalf of respondent. She has been employed by Rancocas Valley since 1976. She teachers theater, speech and communications and performing arts. She also teaches English courses. She teaches three classes and she also directs plays, participates in the Arts Fest and is involved in local and instrumental music. She testified as to her educational background and experience and indicated that she is a graduate of High Point University with a degree in theater and speech. She holds certifications in English, grades 9-12, theater K-12 and speech and communication K-12. She teaches the Theater Preparation program. The students study four different full-length plays in this program.

Ms. Welch identified the Fine and Performing Arts Program of Studies found in the Program of Studies for Rancocas Valley for School Year 1997-1998 (R-1, pages 6 and 7). She testified that the theater preparation class has as its goal to make its students feel more comfortable, to raise students' self-esteem and self-confidence, and to establish and show that students must work together for successful performances. Students are also involved in pantomime, soap operas and they are also able to use and be involved with a television broadcasting studio.

Ms. Welch identified the Course Profile for Theater Preparation (R-2). She also indicated that the Course Profile for the Performing Arts course (R-3) is an advanced class for students interested in the performing arts. Students are auditioned and cast in a show scheduled for January of each year. They are also involved in one acts, character studies, creation of sets, lighting and make-up. They work with a guest artists from McCarter Theater in Princeton, New Jersey, and they are also involved in various specialized types of instruction such as performing

artists who teach theater in combat. She indicated that students are able to take the Performing Arts courses all four years, although the Course Profile (R-3) indicates that it is for grades 10, 11 and 12. She indicated that freshmen year students who have knowledge and experience in the performing arts are able to take it their freshmen year. The course consist of 84 minutes each day, five days a week. After a student takes and completes the first year course, she creates the curriculum and it is an independent study course for students taking it in subsequent years.

Ms. Welch described the facilities at Rancocas Valley. There is a classroom facility and they also have a small theater which seats 100. They are in the process of converting it into a "black box" theater.

Ms. Welch also identified the Course Profile for the Speech and Communication course (R-4). This is part of the Fine Arts curriculum. She indicated that this is a five credit course and she indicated that as part of it she set up a court trial from history.

Ms. Welch also testified that extracurricular actives are also available at Rancocas Valley. These include the Art Fest, a children's show, and an Arts Honor Society. Rancocas Valley also has a concert choir, a show choir, a men's chorus and a women's chorus. Rancocas Valley does not have a dance program but it has "Movements Unlimited" which is an extracurricular activity involving dance. There are five public performances and the chorus and show dance does six performances. Students are also involved in competitions such as the Rider College competition and the Surflight Theater, two or three times each year. Students are encouraged to participate in local community theaters.

Ms. Welch also testified that she has participated in the Geraldine R. Dodge Foundation which works with different teachers in the State of New Jersey. There are workshops in which she has participated and these have resulted in a tremendous network of teachers she is able to contact to assist students in the furtherance of their careers in the area of the performing arts.

Ms. Welch testified that the Fine Arts classes are always full, and there is always a waiting list. There is a Thespian Society. In addition, for the most recent play there were 150 people who auditioned for ten parts. She also indicated that there are students at the high school who are

on track to take all 45 credits available in the performing arts. The auditorium seats 600 and is a prosthenum theater with a fixed seating arrangement. The television studio is also able to record scenes and students are able to participate in music programs.

On cross-examination Ms. Welch indicated that the Performing Arts course changes curriculum each semester for students taking advanced courses. Each student is able to take Performing Arts for a total of four years. There have been three or four exceptions permitting freshmen to take the Performing Arts course in their freshmen year. In order to do so, that individual student must go through an audition. She also indicated that people having no interest in a career in the performing arts are able to take courses. She admitted that there is no approved vocational program of performing arts or dance at Rancocas Valley.

Ms. Welch testified that she has been involved as an actor in community theaters. However, she does not have an Actors' Equity card or Screen Actors' Guild membership.

Ms. Welch indicated that of the 25 students who took the Performing Arts course in the first semester, three have taken it in the second semester. In order for a student to take a total of 45 credits it must be their choice. No one else teaches classes in the performing arts other than her. Students also take other general academic courses in addition to the fine arts courses. There is no interrelationship between the performing arts courses and other academic courses. She indicated that the musical plays are broadcast and some other activities are broadcast on the local television station. Rancocas Valley does not have a dance program. She has personally encouraged students to continue to take courses but there is no school policy which encourages this. The only services to assist students in pursuing future jobs or careers in the performing arts is the assistance provided by her and by the guidance counselors. She indicated that the fine arts courses are both academically-oriented and career-oriented. There has been one professional actor or consultant providing teaching to students since September 1997, although another is scheduled for this year. Last year one professional actor or consultant came in.

LEGAL DISCUSSION AND ANALYSIS

Before discussing the statutory provisions and controlling decision of the Commissioner of Education, it is necessary to determine the issue or issues which must be decided in this matter.

Following the entry of the Order Denying Emergency Relief dated September 17, 1997, the Commissioner of Education conducted an independent review of the record of the emergent application. In his Decision On Motion dated September 25, 1997, the Commissioner affirmed the denial of emergent relief. The Commissioner stated therein:

> Although the record additionally indicates that the Board raises a question as to whether the Performing Arts Program offered by the Gloucester County Institute falls within the scope of vocational education as contemplated by *N.J.S.A.* 18A:54-1, the Commissioner takes judicial notice[2] of the program's inclusion in the Department of Education's Directory of Verified Occupational Educational Programs (DOE Publication PTM No. 1123.00, Revised 1995), reflecting its status as a DOE approved trade and instructional program. As such, it is clearly with the purview of the cited statutory provisions and, therefore, there is no necessity for resolution of this question at the plenary hearing. Additionally, in reviewing the Directory, the Commissioner notes that the program at issue herein is the only approved vocational program in Dance and Performing Arts in southern New Jersey (Atlantic, Burlington, Camden, Cape May, Cumberland and Gloucester Counties).

The Commissioner then goes onto to state that the plenary hearing should proceed "on the sole issue of whether the respondent school district offers a program in Dance and Performing Arts comparable to the type offered by the Gloucester County Institute." Thus, this is the sole issue before me.

The entitlement of New Jersey students to attend county vocational schools is initially established by *N.J.S.A.* 18A:54-20.1. This entitlement is further elaborated through a State Board of Education regulation found at *N.J.A.C.* 6:43-3.11, which provides as follows:

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[2] Pursuant to *N.J.A.C.* 1:1-15.2, official notice may be taken of judicially noticeable facts as explained in *Rule* 9 (now *Rule* 201) of the *New Jersey Rules of Evidence.*

> (a) Pupils shall be admitted to enroll in programs of vocational instruction offered by district boards of education other than their residential district so long as the resident district board of education does not offer a comparable type of program and space is available for additional enrollees in the programs offered by the receiving district board of education.
>
> (b) To the extent that space is available, each type of program of vocational instruction offered by the State Board [pursuant to *N.J.A.C.* 6:43-2.1(a), the State Plan for Vocational Education] shall be made available to all pupils residing in the State, and each program of instruction offered by a district board of education shall be made available to all pupils residing in the district or community served by the district board of education offering such instruction.
>
> (c) Pupils shall be admitted for enrollment in classes and provided instruction on the basis of their potential for achieving the occupational or other objective of such instruction.

As was stated by the Commissioner in his decision in a matter entitled *M.R. v. Board of Education of the Borough of Pompton Lakes, Passaic County*, (decided July 29, 1997), these enactments clearly establish a statewide delivery system for vocational education that ensures pupil access to such education through a tiered structure that first directs pupils to the local or regional district, then to the county district if the local district does not offer a comparable type of program, and then to schools statewide, to the extent that facilities and students qualify, if a comparable type of program is unavailable within the county district. The Commissioner indicated that the terms of both the statute and rule are plain in their directive that county districts *shall* admit nonresident students to the extent space is available and students qualify, and that they *shall* be entitled to collect tuition from the sending districts in which their pupils reside, together with a nonresident fee to the extent permitted by law. The Commissioner concluded that there could be no question that students are entitled to attend, without cost to the student or parent, vocational schools outside their district and county of residence when comparable types of programs are not available within the county. In this decision, the Commissioner goes onto indicate that such right of access of necessity entails a concomitant right to transportation.

As previously indicated, the Commissioner's decision on motion of September 25, 1997, concluded that the performing arts program offered by GCIT falls within the scope of vocational education as contemplated by *N.J.S.A.* 18A:54-1. I will now address the sole issue before me which is whether respondent school district offers a program in dance and performing arts comparable to the type offered by GCIT.

K.B. testified in layman's terms about the unique nature of the program at the Academy which includes specialized training in the area of drama, speech, dance and the performing arts leading to advance preparation for either employment or college level courses.

The GCIT developed a program designed as a secondary course of study for high school students who are serious about careers in dance, drama and radio and television production. The impetus for the Academy came from a group of performing artists which recommended an Academy which would teach college preparatory courses in the performing arts. The approval process for the Academy required that it prove that it will prepare individuals for future employment and occupations in the performing arts and that there is a need in the labor market for such employment. The program prepares students for entry into the career fields of dance, drama and radio and television production. The Academy was approved as being in compliance with the requirements of the regulations.

The details of the Academy's program are set forth in the Program of Studies booklet (I-1). It is a full-time career academy and it is a school within a school. It teaches students who are focused in a particular area. There is extensive training of students in dance and drama courses, and the traditional academic courses are focused on and geared towards the performing arts, are integrated into the performing arts and are applied to various aspects of the performing arts.

One hundred fifty seven credits are required for graduation from the Academy as compared to the State requirement of 110 credits for graduation from high school. Sixty credit hours of courses of study in the performing arts are required for graduation.

Students are invited to apply and there is an audition before a panel of performing artists and early warning test scores are considered. All of the students are other performing arts

students. Students are able to attain membership in either Actors' Equity or in the Screen Actors' Guild if they comply with the other requirements for membership.

The facilities at the Academy include a prosthenium theater, a full dance studio and rehearsal rooms and other facilities. All of the teachers are fully vocational certified which requires seven years of work in a particular career field. In addition, visiting professional artists are brought in on a regular basis to teach in specialized areas. The Academy has a paid consultant, with extensive experience in the performing arts, and an advisory committee made up of professional performing artists, talent agents, college faculty members and representatives of actors' unions to recommend improvements in the curriculum of the Academy.

The Academy provides both career and personal counseling (I-1, page 7). It is also involved in dialogues with colleges and universities whereby students will obtain advance credit standing in colleges.

On the other hand, respondent Rancocas Valley has one teacher who teaches theater, speech and communications and performing arts. She also teaches English courses. She teaches three classes and she also directs plays, participates in the Arts Fest and is involved in vocal and instrumental music. She has participated in the Geraldine R. Dodge Foundation and has participated in workshops which have resulted in her having a tremendous network of teachers she is able to contact to assist students in the furtherance of their careers in the area of the performing arts.

The Fine and Performing Arts Program of Studies is found in the Program of Studies for Rancocas Valley for School Year 1997-1998 (R-1, pages 6 and 7). The theater preparation class has as its goal to make its students feel more comfortable, to raise students' self-esteem and self-confidence, and to establish and show that students must work together for performances. Students are also involved in pantomime, soap operas and are able to use and be involved with a television broadcasting studio.

The Performing Arts course (R-3) is an advanced course for students interested in the performing arts. Students are auditioned and cast in a show, and they are also involved in one

acts, character studies, creation of sets, lighting and make-up. They work with guest artists from McCarter Theater in Princeton, New Jersey, and are also given various specialized types of instruction by performing artists. However, there has been only one professional actor or consultant providing teaching to students since September 1997, although another is scheduled for this year. for the 1996-97 school year, one professional actor or consultant came in. Students are able to take the Performing Arts courses all four years, although the Course Profile (R-3) indicates that it is for grades 10, 11 and 12. There have been three or four exceptions permitting freshmen to take the Performing Arts course in their freshmen year. In order to do so, applying students must go through an audition and must show that they have knowledge and experience in the performing arts. The course consist of 84 minutes each day, five days a week. After a student takes and completes the first year course, the curriculum for subsequent years becomes an independent study course designed by the teacher.

The Speech and Communication course (R-4) is part of the Fine Arts curriculum, and is a five credit course.

Extracurricular actives are also available at Rancocas Valley including the Art Fest, a children's show, and an Arts Honor Society, a concert choir, a show choir, a men's chorus and a women's chorus. There is also a Thespian Society. Rancocas Valley does not have a dance program but it has an extracurricular activity involving dance. Students are also involved in competitions such as the Rider College competition and the Surflight Theater, two or three times each year and are encouraged to participate in local community theaters.

There are students at the high school who are on track to take all 45 credits available in the performing arts. People having no interest in a career in the performing arts are able to take courses. There is no approved vocational program of performing arts or dance at Rancocas Valley.

Rancocas Valley has a classroom facility and a small theater which seats 100 and which is in the process of being converted into a "black box" theater. The auditorium seats 600 and is a prosthenum theater with a fixed seating arrangement. The television studio is also able to record scenes and students are able to participate in music programs.

Students also take other general academic courses in addition to the fine arts courses, but there is no interrelationship between the performing arts courses and other academic courses. Rancocas Valley does not have a dance program. The only services to assist students in pursuing future jobs or careers in the performing arts is the assistance provided by the teacher and the guidance counselors.

I **FIND** that the respondent school district does not offer a program in dance and performing arts comparable to the type offered by GCIT. This finding may be made on the sole basis that respondent does not provide any program in dance other than as an extracurricular activity.

Aside from the deficiency of respondent's program with regard to dance, I **FIND** that the GCIT Academy of the Performing Arts offers a completely integrated program of specialized training in the area of drama, speech, dance and the performing arts leading to advance preparation for either employment or college level courses. I **FIND** that GCIT is a full-time career academy and it is a school within a school which teaches students who are focused in a particular area of the performing arts. There is extensive training in dance and drama courses and the traditional academic courses are integrated into, focused on and applied towards various aspects of the performing arts. I **FIND** that this program of studies prepares individuals for future employment and occupations in the performing arts, and specifically prepares students for entering into the career fields of dance, drama and radio and television production. Of the 157 credits required for graduation from the Academy (as compared to the State requirement of 110 credits for graduation from high school) 60 credits of courses in the performing arts are required for graduation. All of the teachers are fully vocational certified which requires seven years of work in a particular career field, visiting professional artists are brought in on a regular basis to teach in specialized areas, and the Academy has a paid consultant, with extensive experience in the performing arts, and an advisory committee made up of professionals in the field of the performing arts. I **FIND** that the Academy provides both career and personal counseling.

I **FIND** that respondent Rancocas Valley has only one teacher who teaches courses in theater preparation, speech and communications, and performing arts. I **FIND** that the Fine and Performing Arts Program of Studies consists of a Theater Preparation course, a Performing Arts course and a Speech and Communication course. The Performing Arts course is an advanced course for students interested in the performing arts, and students are cast in a show, are also involved in one acts, character studies, creation of sets, lighting and make-up., work with guest artists and are given various specialized types of instruction by performing artists. However, after a student takes and completes the first year course, the curriculum for subsequent years becomes an independent study course designed by the teacher. I **FIND** that this course is comparable to the dance or drama portion of the freshmen year program of the GCIT Academy curriculum in the freshman year (I-1, page 31).

I **FIND** that there is no interrelationship between the performing arts courses and other academic courses at Rancocas Valley. I **FIND** that there is no approved vocational program of performing arts or dance at Rancocas Valley, and that Rancocas Valley does not have a dance program. I **FIND** that the only services which are available to assist students in pursuing future jobs or careers in the performing arts is the assistance provided by the single teacher and the guidance counselors.

In summary, I **FIND** that the respondent school district does not offer a program in dance and performing arts comparable to that offered by the GCIT Academy of the Performing Arts. Therefore, I **CONCLUDE** that petitioner and the intervenor are entitled to the relief they are seeking.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that respondent Rancocas Valley Regional High School District shall provide transportation to H.B., a resident within the school district, for attendance at the Southern New Jersey Academy of the Performing Arts at Gloucester County Institute of Technology. It is further **ORDERED** that the relief requested by petitioner and intervenors is hereby **GRANTED**.

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

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

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

November 12, 1997
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

11/14/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lam

APPENDIX

LIST OF WITNESSES

For petitioner:

K.B.

For intervenor:

Meredith Flynn

For respondent:

Peggylou Welch

LIST OF EXHIBITS

I-1 Program of Studies 1997-98, the Southern New Jersey Academy of the Performing Arts at the Gloucester County Institute of Technology

R-1 Rancocas Valley Regional High School Program of Studies 1997-98

R-2 Course Profile-Theater Preparation

R-3 Course Profile-Performing Arts

R-4 Course Profile-Speech and Communication

OAL DKT. NO. EDU 6974-97
AGENCY DKT. NO. 314-9/97

K.B., on behalf of minor child, H.B.,	:	
PETITIONER,	:	
AND	:	
GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,	:	
INTERVENOR,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board filed exceptions which, essentially, recast and reiterated its arguments presented before the Administrative Law Judge (ALJ).

Upon his careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the ALJ that the respondent District does not offer a program in dance and performing arts comparable to that offered by the Gloucester County Institute of

Technology (GCIT), Academy of the Performing Arts, and, therefore, petitioner is entitled to provision of transportation to H.B. by the District for the child's attendance at this school.*

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein. Rancocas Valley Regional High School District is hereby directed to provide transportation to H.B. for attendance at the Southern New Jersey Academy of the Performing Arts at GCIT.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Respondent is reminded that, notwithstanding the fact that the within Petition of Appeal only seeks transportation for H.B.'s attendance at GCIT, Academy of the Performing Arts, pursuant to *N.J.S.A.* 18A:54-20.1c, the District is likewise responsible for payment of H.B.'s tuition and, to the extent permitted by law, any imposed nonresident fee.

DECEMBER 29, 1997
DATE OF MAILING DECEMBER 29, 1997

509-97

EDU #6974-97
C # 509-97E
C # 660-97
SB # 87-97 and #10-98 (consolidated)

K.B., on behalf of minor child, H.B.,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT-APPELLANT,

AND

K.B., on behalf of minor child, H.B.,

PETITIONER-RESPONDENT,

AND

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,

INTERVENOR-RESPONDENT,

V.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decision on motion by the Commissioner of Education, September 25, 1997

Decided by the Commissioner of Education, December 29, 1997

MAR. 1, 2000

For the Petitioner-Respondent, K.B., pro se

For the Respondent-Appellant, Parker, McCay & Criscuolo (Stephen J. Mushinski, Esq., of Counsel and Frank P. Cavallo, Esq., of Counsel)

For the Intervenor-Respondent, Capehart & Scatchard (Joseph F. Betley, Esq., of Counsel)

K.B. (hereinafter "petitioner"), who resided within the Rancocas Valley Regional High School District in Burlington County, filed a petition of appeal with the Commissioner of Education, along with an application for emergent relief, alleging that the Board of Education of the Rancocas Valley Regional High School District (hereinafter "Board") had improperly refused to provide transportation for her daughter, H.B., who attended the Gloucester County Institute of Technology Academy of Performing Arts ("GCIT" or "Gloucester County Institute"). The Board countered that it had no obligation to provide transportation for H.B., contending that it offered a performing arts program that was comparable to the program provided by the Gloucester County Institute. See N.J.A.C. 6:43-3.11. The Board also questioned whether an academy for the performing arts was a vocational program within the intendment of N.J.S.A. 18A:54-1 et seq. so as to require a school district to provide transportation for a student's attendance.

On September 17, 1997, an administrative law judge ("ALJ") recommended denying the petitioner's application for emergent relief. The ALJ found that although the relative hardship to the parties weighed more heavily on the petitioner, the relief requested was not necessary to prevent irreparable harm since the Gloucester County Institute had agreed to provide transportation during the pendency of this case. In

addition, the ALJ found that there was insufficient information in the record to determine whether the petitioner had a reasonable probability of prevailing on the merits of her claim. The ALJ therefore concluded that a plenary hearing should be scheduled on an expedited basis.

On September 25, 1997, the Commissioner affirmed the ALJ's decision to deny the petitioner's application for emergency relief, agreeing that the relief requested by the petitioner was not necessary to prevent irreparable harm. The Commissioner added:

> Although the record additionally indicates that the Board raises a question as to whether the Performing Arts Program offered by the Gloucester County Institute falls within the scope of vocational education as contemplated by N.J.S.A. 18A:54-1, the Commissioner takes judicial notice of the program's inclusion in the Department of Education's Directory of Verified Occupational Educational Programs (DOE Publication PTM No. 1123.00, Revised 1995), reflecting its status as a DOE approved trade and instructional program. As such, it is clearly within the purview of the cited statutory provisions and, therefore, there is no necessity for resolution of this question at the plenary hearing. Additionally, in reviewing the Directory, the Commissioner notes that the program at issue herein is the only approved vocational program in Dance and Performing Arts in southern New Jersey (Atlantic, Burlington, Camden, Cape May, Cumberland and Gloucester Counties).

Commissioner's Decision, slip op. at 9.

The Commissioner therefore denied petitioner's motion for emergent relief and directed that this matter proceed to a plenary hearing limited to the issue of whether the Rancocas Valley Regional High School District offered a performing arts program comparable to the program offered by the Gloucester County Institute.

The Board filed the instant appeal to the State Board, arguing that nothing in N.J.S.A. 18A:54-1 et seq. or its legislative history suggested that the Legislature had

intended the definition of vocational education to include the type of program at issue herein.

On November 12, 1997, following a hearing, the ALJ concluded that the Board did not offer a program in the performing arts that was comparable to the program offered by the Gloucester County Institute. Consequently, he recommended that the Board be directed to provide transportation for H.B. to the Gloucester County Institute. On December 29, 1997, the Commissioner adopted the findings and conclusions of the ALJ and directed the Board to provide such transportation. The Commissioner added in a footnote:

> Respondent is reminded that, notwithstanding the fact that the within Petition of Appeal only seeks transportation for H.B.'s attendance at GCIT, Academy of the Performing Arts, pursuant to N.J.S.A. 18A:54-20.1c, the District is likewise responsible for payment of H.B.'s tuition and, to the extent permitted by law, any imposed nonresident fee.

Commissioner's Decision, slip op. at 21.

The Board filed an appeal to the State Board from that decision, contending that the Commissioner erred in determining that its performing arts program was not comparable to the program offered by the Gloucester County Institute. In addition, the Board argued that the Commissioner had gone beyond the scope of the petition in determining that the Board was also responsible for H.B.'s tuition.

Since they arise from the same claim, we have consolidated the two appeals filed by the Board.

After a careful review of the record, we reverse the Commissioner's decision and remand this matter for further proceedings in accordance with our determination herein.

We reject the Commissioner's assertion in his decision of September 25, 1997 that inclusion of the GCIT performing arts program in the Department of Education's Directory of Verified Occupational Education Programs ("Directory") conclusively establishes that such program is "clearly within the purview of the cited statutory provisions and, therefore, [that] there is no necessity for resolution of this question at the plenary hearing." Initially in that regard, we find that the Commissioner failed to follow the proper procedure for taking official notice of the Directory. N.J.A.C. 1:1-15.2, which permits an agency to take official notice of "judicially noticeable facts" and "generally recognized technical or scientific facts within the specialized knowledge of the agency," requires that

> (c) Parties must be notified of any material of which the judge intends to take official notice, including preliminary reports, staff memoranda or other noticeable data. The judge shall disclose the basis for taking official notice and give the parties a reasonable opportunity to contest the material so noticed.

In this instance, we can find no indication in the record certified to us by the Commissioner that he notified the parties of his intent to take official notice of the Department's Directory of Verified Occupational Education Programs or provided them with the opportunity to contest such material. Nor is there any indication that he informed the parties that he intended to rely upon a staff memorandum dated September 24, 1997 from the Director of the Department's Office of School-to-Work Initiatives to the Director of the Bureau of Controversies and Disputes to conclude that

the GCIT program was the only approved program in these occupational fields in southern New Jersey.[1]

We stress in this regard that it is well established that the Commissioner cannot consider materials outside the record without divulging their substance and providing the parties with the opportunity to address them. See Edison Township Education Association v. Board of Education of the Township of Edison, decided by the State Board of Education, September 7, 1994, aff'd, Docket #A-895-94T1 (App. Div. 1996). In Elizabeth Federal S. & L. Assn. v. Howell, 24 N.J. 488, 506-507 (1957), the State Supreme Court emphasized that:

> The determination of the Commissioner cannot be made to rest upon information outside the record in the case before him which the parties have not had the opportunity to meet. This principle of exclusiveness of the record was discussed in Mazza v. Cavicchia, 15 N.J. 498 (1954) and was held there to be established law in this state. We said in that case, 15 N.J., at page 514:
>
> "In any proceeding that is judicial in nature, whether in a court or in an administrative agency, the process of decision must be governed by the basic principle of the exclusiveness of the record. 'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' Benjamin, Administrative Adjudication in New York, 207 (1942). Unless this principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision? Or

[1] The memorandum was in response to a request for information regarding the performing arts program at the Gloucester County Institute. Along with his memorandum, the Director of School-to-Work Initiatives provided the "pertinent pages" of the Directory of Verified Occupational Education Programs—the title page and page 17, which included the GCIT program at issue. He indicated in his memorandum that "[t]he program at Gloucester County Vocational School is the only approved program in these occupational fields in southern New Jersey (Atlantic, Burlington, Camden, Cape May, Cumberland, and Gloucester Counties)."

> consult another's findings of fact, or conclusions of law, or recommendations, or even hold conferences with him?"
>
> Beyond question the use of expert knowledge gained by the Department is a desirable attribute of the administrative process, but it need not be applied in a manner which is unfair. By taking appropriate official notice of such material and making such facts part of the record and giving the parties fair opportunity to meet, explain or refute it, the Commissioner can satisfy the requirements of fairness and adequately protect the interests of all concerned.

In Edison Township Education Association, supra, slip op. at 7, the State Board observed that:

> "It is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." Mazza, supra, at 516....
>
> Moreover, the Administrative Procedure Act, while authorizing the agency to take notice of generally recognized technical facts within the specialized knowledge of the agency, requires that the parties "shall be notified either before or during the hearing or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed." N.J.S.A. 52:14B-10(b).

As previously stated, there is no indication in the record of the instant matter that the Commissioner notified the parties that he intended to rely upon the memorandum from the Director of School-to-Work Initiatives or that he intended to take official notice of the Directory of Verified Occupational Education Programs. Consequently, the parties were not afforded the opportunity to contest those materials.

Moreover, as previously indicated, the record before us contains only two pages from the Directory—the title page and page 17, which includes the GCIT performing arts

program along with a partial list of the approved vocational programs in Gloucester County. The limited information contained on those two pages does not permit the conclusion that the GCIT performing arts program is the only approved program of its type in southern New Jersey. Such an approach does not "satisfy the requirements of fairness and adequately protect the interests of all concerned," Elizabeth Federal S. & L. Assn., supra, at 507, particularly in light of the fact that the parties were not notified of the memorandum submitted to the Commissioner by the Director of School-to-Work Initiatives, which was the sole authority upon which this conclusion rests.

We conclude, in addition, that even if the Commissioner had followed the required procedure for taking official notice of the fact that the GCIT program was listed in the Department's Directory of Verified Occupational Education Programs, it was not proper for him to construe such inclusion as providing conclusive proof that the program satisfied the requirements of N.J.S.A. 18A:54-1 et seq. The record before us is devoid of any information regarding the procedure for inclusion of a program in the Directory during the period relevant to this matter. Nor is there any indication of the basis for the determination to include the GCIT performing arts program or the standard applied in determining to include that program. The title page of the Directory, which is included in the record, indicates only that it was "revised for 1995" and was "[p]repared under the direction of New Jersey Occupational Competencies Project, Northeast Curriculum Coordination Center."

Under these circumstances, in which we are unable to review either the legal or factual basis for the inclusion of the GCIT program in the Directory, we would be abdicating our quasi-judicial responsibilities if we were to affirm the Commissioner's

determination to foreclose review of that program without any factfinding or legal analysis concerning whether the program was vocational within the intendment of the statute. See In re Masiello, 25 N.J. 590, 606 (1958).

Therefore, for the reasons expressed herein, we reverse the Commissioner's decision that the Board was responsible for H.B.'s transportation to the Gloucester County Institute and remand this matter to him with the directive that he transmit it to the Office of Administrative Law for such proceedings as are necessary to determine whether the GCIT performing arts program was vocational within the intendment of N.J.S.A. 18A:54-1 et seq. during the period relevant to this matter and for a resultant determination on the merits of the petitioner's claim for transportation. Since the petitioner did not make a claim against the Board for the payment of H.B.'s tuition and the parties, therefore, did not litigate the Board's obligation to pay tuition, we also set aside the Commissioner's determination in a footnote that the Board was responsible for H.B.'s tuition at the Gloucester County Institute. Hence, the Commissioner's determination on remand, in the absence of proceedings to resolve the tuition issue, must necessarily be limited to the petitioner's request for transportation.

We retain jurisdiction.

Samuel J. Podietz recused himself.

March 1, 2000

Date of mailing MAR 03 2000

515-97

515-97

RICO PAGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning clerical worker challenged Board's withholding of his increment for the 1996-97 school year for alleged insubordination and unsatisfactory performance. Petitioner contended the Board's actions were procedurally defective pursuant to *N.J.S.A.* 18A:29-14.

ALJ found that the procedural deficiencies alleged by petitioner were either not proven or *de minimus* in nature given the facts in this matter. ALJ granted the Board's motion for summary decision dismissing the petition and denied petitioner's cross-motion for summary decision restoring his increment.

Commissioner affirmed the ultimate conclusion of the ALJ dismissing the petition, but for reasons other than those expressed by the ALJ. Commissioner noted that since petitioner was a "reproduction clerk," not a teaching staff member, the requirements of *N.J.S.A.* 18A:29-14 were not applicable herein. Thus, in that petitioner had made no showing of entitlement to a salary increment, alleged no violation of procedures set forth in contract or Board policy, and did not contend that the Board lacked a reasonable basis for withholding his increment, petitioner advanced no cognizable cause of action before the Commissioner. Petition was dismissed.

SEPTEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8984-96

AGENCY DKT. NO. 438-9/96

RICO PAGE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Karen A. Murray, Esq., and **Yvonne D. Catley,** Esq., for respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: June 30, 1997 Decided: August 13, 1997

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on September 23, 1996, when Rico Page (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order determining that the action of the Board of Education of the City of Camden (hereinafter respondent) withholding

his salary increment for the year 1996-97 was arbitrary, capricious and ultra vires and in violation of N.J.S.A. 18A:29-14. An answer on behalf of respondent was filed on October 15, 1996 and on October 30, 1996, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was scheduled for January 13, 1997. That date was adjourned, however, at the request of petitioner's attorney because of an anticipated settlement agreement. Apparently, settlement efforts did not result in a settlement agreement because on April 15, 1997, respondent's attorney filed a motion for summary decision, together with supporting papers. Petitioner's attorney replied by letter dated May 1, 1997, wherein petitioner also cross-moved for summary decision. On May 19, 1997, respondent filed a letter memorandum in opposition to petitioner's cross-motion for summary decision, together with the affidavit of Leon Freeman, executed May 15, 1997, and the affidavit of Cecelia Brown-Cannon, executed May 15, 1997. Oral argument on the cross-motions took place by telephone conference call on June 24, 1997. Thereafter, pursuant to the request of the undersigned, respondent's attorney provided a copy of the Non-Official Report of the Superintendent of Schools for June 24, 1996 and a full copy of the official meeting minutes of the Camden City Board of Education, June 24, 1996. These exhibits were received on June 30, 1997, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of the within matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner is employed by respondent as a reproduction clerk. In that capacity his duties include reproducing materials mandated by the State, such as the Safe and Drug-Free Schools Student Handbook and the Parent Handbook to be distributed to schools in the district. On May 14, 1996, Cecelia Brown-Cannon, the Director of State and Federal Funding for respondent who is petitioner's direct supervisor, submitted a recommendation to respondent that petitioner's

salary increment of the 1996-97 school year be withheld. Ms. Brown-Cannon listed the following reasons for her recommendation:

INSUBORDINATION:

Mr. Page has failed to obey district and department procedures by:

- leaving the worksite without permission
- not submitting log sheets or completed work orders on a daily basis
- duplicating materials during working hours that are not job-related
- not calling in each time he is absent or late
- refusal to do assigned tasks

INADEQUATE PERFORMANCE

- failure to complete assigned tasks

OTHER

- to date Mr. Page has clocked in late 11 times
- to date Mr. Page has 35 1/2 occasional absences

The impact of his actions has caused a back log of material to be duplicated

In support of her recommendation, Ms. Brown-Cannon provided to respondent numerous memoranda which had been sent to petitioner regarding his insubordinate behavior, his absences, and his failure to follow department and district policies and procedures. The memoranda record numerous occasions when petitioner failed to submit log sheets and work orders on a daily basis, failed to call in each time he was late or absent, refused to perform assigned copying tasks and repeatedly left his work site without permission. On his Clerical Appraisal Form dated January 29, 1996, he received an unsatisfactory evaluation. On January 26, 1996, Ms. Brown-Cannon met with petitioner regarding his attendance and inadequate performance. An Individual

Improvement Plan was developed to assist petitioner in the improvement of his deficiencies. In March 1996, petitioner received another unsatisfactory evaluation, however. On March 26, 1996, another conference was held with petitioner to discuss his continued failure to complete assignments and his attendance. Present at that meeting were Roy J. Dawson, Jr., Ed.D., Superintendent of Schools; Ms. Brown-Cannon, petitioner, and Ms. Antionette Cummings, CEA representative. At the conclusion of that meeting, Dr. Dawson issued the following directives to petitioner:

What Dr. Dawson said Mr. Page is to Do

1. Give Mrs. Jason and Dr. Dawson a copy of the log sheet on a daily basis.
2. Complete the Parent Handbook by the end of April.
3. Dr. 2,000 additional copies of the Drug Free School Policy.
4. Be at his post as required.

At the time Ms. Brown-Cannon issued her recommendation for increment withholding on May 14, 1996, petitioner had used all of his contractual leave time for the 1995-96 school year (thirteen sick days and two personal days). Petitioner had also been absent approximately nineteen days without pay; he was late twenty-nine days and left early without pay five days. By June 30, 1996, petitioner was absent without pay approximately twenty-six days; he was late thirty-three times and had left early without pay nineteen times.

By letter dated June 3, 1996, respondent advised petitioner that the Board of Education would be considering the withholding of his increment for the 1996-97 school year at the June 24, 1996 Board meeting. The letter also advised petitioner of his option to waive his right to privacy and request a public discussion of this action. On June 3, 1996, petitioner and a union representative reviewed petitioner's personnel file and received copies of the documents related to evaluations and increment withholding. Petitioner did not request that respondent's discussion concerning his increment withholding take place in public, and on June 24, 1996 respondent voted

by a recorded roll call majority vote (9-0) to adopt the report of the superintendent of schools which, inter alia, recommended the withholding of petitioner's 1996-97 salary increment.* On September 23, 1996, petitioner filed the within petition of appeal contesting the Board's June 24, 1996 action.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), was recently modified in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under R. 4:37-2(b) and for determining motions for judgment under R. 4:40-1 and R. 4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or

* The report of the roll call vote in the official minutes of the June 24, 1996 meeting is somewhat confusing, in that the minutes recite that the motion was made and seconded to adopt the report of the superintendent of schools, but after each name recites "(Exc. pg. 10 H-1)"; the report of the superintendent which is incorporated in the minutes of the June 24, 1996 meeting, lists "Withholding of Increments" as item H. It is clear, however, from a review of the documents submitted and from the uncontested affidavit of Leon Freeman, Business Administrator/Board Secretary for respondent, that the reference to section H-1 was to the unofficial report submitted by the superintendent of schools prior to the meeting. That report did contain a Section H-1 entitled "H. Appointment-(late item) 1. Purchasing Agent." Mr. Freeman explains that since H-1 was voted down, it was not made a part of the official report and the Withholding - of - Increment section which had appeared in the unofficial report under the letter "I" had been redesignated by the letter "H" in the official report. It is clear therefore that there was a recorded roll call majority vote of the entire Board on the increment withholding where all nine board members voted in favor.

> herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.". . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, . . ., the trial court should not hesitate to grant summary judgment. (citations omitted) Id. at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, petitioner's responding papers have not challenged the accuracy of any of the underlying substantive facts. Respondent's submission of the May 15, 1997 affidavits addresses any concerns petitioner might otherwise have had that facts relied upon were not of record. The essence of petitioner's challenge is that respondent's actions are procedurally defective, and there are no facts in dispute concerning the procedural history. Accordingly, the within matter is ripe for summary decision.

N.J.S.A. 18A:29-14, the statute relevant to a determination in this matter, provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board

> of education to pay any such denied increment in any future year as an adjustment increment.

The standard for review of a local board's action pursuant to the statute is set forth in Kopera v. West Orange Board of Ed., 60 N.J. Super. 288 (App. Div. 1960) wherein the court said that "the scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Id. at 296. Petitioner does not question whether the underlying facts were as those who made the evaluations claimed or whether it was unreasonable for the Board to conclude as it did based upon those facts. Rather, relying on Schwab v. Board of Ed. of Borough of Manasquan, 1982 S.L.D. 1310, petitioner claims that by merely adopting the report of the superintendent of schools, respondent failed to withhold his increment by a recorded roll call majority vote of the full membership of the Board. In Schwab, supra, the Board voted on the superintendent's recommendation of a contract salary list for the 1981-82 school year which included Schwab's salary. Id. at 1317, 1321. The salary list did not mention increment withholding and did not state any reason for the withholding. Id. The Commissioner concluded that the Board had failed to comply with the statutory requirements of N.J.S.A. 18A:29-14. In the present matter, unlike in Schwab, the superintendent's recommendation was not merely a salary list, but was a specific recommendation to withhold the salary increments of specific individuals. The names of the individuals and the reasons for the recommendations together with supporting documentation were supplied to respondent prior to the June 24, 1996 meeting. When each Board member voted to adopt the superintendent's recommendations, he or she voted to withhold petitioner's salary increment and that vote was done by roll call and was recorded. Accordingly, the within matter is clearly distinguishable from Schwab.

Although it is true, as petitioner states, that the minutes of the June 24, 1996 meeting are devoid of any evidence that the Board members engaged in any individualized consideration of the reasons set forth in the superintendent's recommendations to withhold petitioner's increment, the requirement for minutes to so reflect pertains only to decisions to certify tenure charges pursuant to N.J.S.A. 18A:6-11, not to decisions to withhold increments pursuant to N.J.S.A. 18A:29-14. Stephenson v. Greenbrook Board of Ed., Borough of Somerset County, 1980 S.L.D. 713, aff'd

State Board, 1981 S.L.D. 1501. Furthermore, the affidavit of Leon Freeman and the supplemental exhibits provided by respondent's counsel upon request of the undersigned clarify that the withholding of petitioner's increment was not contained in the section of the report of the superintendent of schools which was not adopted by respondent (Section H-1 on p. 10). Finally, petitioner's contention that respondent's motion should be denied because it failed to provide him with written notice of its June 24, 1996 action within ten days thereafter together with reasons for the action as required by N.J.S.A. 18A:29-14 must also be rejected. When this issue has been considered on other occasions, the Commissioner has ruled that such technical procedural errors will not void the action of the Board where there was a rational basis for the action and the petitioner knew or should have known the reason for the increment withholding. In Marshall v. Southern Ocean County Regional High School District, 1978 S.L.D. 593, the Commissioner noted that "[t]he intent of the notification requirement . . . is to give the affected employee opportunity to appeal the action to the Commissioner." In the within matter, petitioner filed a timely petition of appeal challenging respondent's action withholding his increment. Petitioner had been provided with copies of all of the letters and memoranda recording the facts which provided the basis for Ms. Brown-Cannon's recommendation to the superintendent. In fact, respondent's records reveal that on June 3, 1996, the date petitioner was given notice of the superintendent's recommendation to the Board to withhold his increment, he reviewed his personnel file together with a union representative and received copies of memos related to evaluation and withholding of increment. Petitioner must acknowledge that he suffered no prejudice from respondent's failure to comply with the ten-day written notification requirement of N.J.S.A. 18A:29-14. This is not to say that respondent should cavalierly ignore this requirement in the future, but under the circumstances, it is an inconsequential omission and should not provide a basis for denying summary decision where the undisputed facts support respondent's determination.

For all the foregoing reasons, respondent's motion for summary decision dismissing the within petition of appeal is hereby **GRANTED**. Petitioner's cross-motion for summary decision restoring his increment is **DENIED**. Accordingly, it is hereby **ORDERED** that the petition of appeal is **DISMISSED WITH PREJUDICE** and these proceedings are hereby concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. BOX 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 13, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

8/13/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1997
DATE

Barbara A. Howard
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 8984
AGENCY DKT. NO. 438-9/96

RICO PAGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon an independent review of the record in this matter, although the Commissioner determines to affirm the ultimate conclusion of the Administrative Law Judge (ALJ), *i.e.*, dismissal of the within Petition of Appeal, he does so for the reasons which follow, rather than those expressed in the initial decision.

Initially, the Commissioner observes that all issues and arguments of the parties, and the discussion of the ALJ, are framed in terms of procedures dictated by *N.J.S.A.* 18A:29-14, a statutory provision which is specifically applicable only to *teaching staff members.* As the record here indicates that the within petitioner is a "reproduction clerk," the requirements of that statute are not applicable to these proceedings.

As such, given that petitioner has made no showing of entitlement to an increment, either by contract* or through Board policy; has not claimed any violation of procedures set forth in any such contract or policy; nor does he contend that the Board did not have a reasonable basis for withholding his increment, he has advanced no cognizable cause of action before the Commissioner.

Accordingly, the initial decision of the OAL dismissing the within Petition of Appeal is adopted as the final decision in this matter for the reasons articulated herein, and such petition is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* It is noted that a claim of a contractual entitlement would place this matter outside the jurisdictional purview of the Commissioner of Education.

516-97

EDITH R. MOORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WOODBURY HEIGHTS, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2212-96

AGENCY DKT. NO. 64-2/96

EDITH R. MOORE,

Petitioner,

v.

BOARD OF EDUCATION OF WOODBURY HEIGHTS, GLOUCESTER COUNTY,

Respondent.

Michael R. Hannisian, Esq., for petitioner

Russell E. Paul, Esq., for respondent

Record Closed: August 7, 1997 Decided: August 11, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 18, 1996, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a release indicating the terms thereof, which is attached and fully incorporated herein.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this release agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

July 11, 1997
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

8/13/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RELEASE

COPY

This Release, dated 1996 AUG 7 A 11:45, 1996, is given

BY the Releasor(s) EDITH MOORE
123 S. Glassboro Rd.
Woodbury Heights, N.J. 08097 referred to as "I",

TO WOODBURY HEIGHTS BOARD OF EDUCATION
100 Academy Avenue
Woodbury Heights, NJ 08097 referred to as "You",

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

> **Edith Moore releases any claims that she might have against the Woodbury Heights Board of Education relating to medical coverage in the past or in the future, and the consideration for this Release is that the Board of Education agrees to provide medical coverage to Edith Moore and also to pay $1,000.00 for prior medical coverage expenses.**

2. Payment. I have been paid a total of **$1,000.00**, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witness or Attested by: Michael K. Lamison

By: Edith R. Moore (Seal)
EDITH MOORE

Prepared By

Russell E. Paul, Esq.

OAL DKT. NO. EDU 2212-96
AGENCY DKT. NO. 64-2/96

EDITH R. MOORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WOODBURY HEIGHTS, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1997
DATE OF MAILING SEPTEMBER 29 ,1997

517-97

517-97

ANN T. STELLA-RISTAINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SEPTEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1745-96

AGENCY DKT. NO. 431-10/95

ANN T. STELLA-RISTAINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT,

Respondent.

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

Alexander W. Booth, Jr., Esq., for respondent
(Brownstein, Booth & Barry, attorneys)

Record Closed: July 22, 1997 Decided: August 6, 1997

BEFORE **DIANA C. SUKOVICH**, ALJ:

Petitioner filed a verified petition with the State Department of Education (DOE), seeking relief from respondent. Respondent filed an answer on January 29, 1996. The DOE transmitted the matter to the Office of Administrative Law on February 20, 1996.

A telephone conference was conducted on May 23, 1996. A hearing scheduled for October 10, 1996 was adjourned at the parties' requests because of a pending settlement. Subsequent to continued communications with the parties, an executed Memorandum of Agreement was filed on July 22, 1997, on which date the record was closed. Attached herewith is a copy of the Memorandum of Agreement.

I have reviewed the record and the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

August 6, 1997
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

8/13/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 14 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

njf

RECEIVED
STATE OF NEW JERSEY
JUL 22 1 38 PM '97

MEMORANDUM OF AGREEMENT

This Agreement, made this 14th day of July, 1997, by and between Ann T. Stella-Ristaino (hereinafter referred to as "Stella-Ristaino"), residing at 25 Meadow Avenue, #36, Monmouth Beach, New Jersey 07750,

AND

The Board of Education of the Hudson Area Vocational-Technical School (hereinafter referred to as the "Board"), with offices located at 8511 Tonnelle Avenue, North Bergen, New Jersey 07407.

WITNESSETH:

WHEREAS, Stella-Ristaino has initiated a Petition to the Commissioner of Education alleging that the Board improperly terminate her employment and violated her tenure rights;

WHEREAS, the Board has denied the allegations against it as set forth in the Petition, and,

WHEREAS, the parties have indicated their desire to enter into an agreement stipulating the terms of an amicable resolution of these matters;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The Board shall reemploy Stella-Ristaino as a secretary at a salary determined by the applicable negotiated salary guide in the district.

2. In the event that there is any need to establish or determine Stella-Ristaino's seniority status or years of service, as such rights may be established in the applicable collective negotiations agreement, her seniority status or years of service shall include all of her employment service in the district.

3. It is understood that Stella-Ristaino shall receive all other benefits or emoluments of employment specified in Board policy, practice, by law, or through the collective negotiations agreement to which she may be entitled.

4. Upon approval of this Agreement by the Commissioner of Education, the Petition filed by Stella-Ristaino in this matter shall be deemed dismissed with prejudice.

5. The parties acknowledge that they have entered into this Agreement freely, willingly, and voluntarily without duress or coercion and with the opportunity to consult with counsel or other advisor at her or its option.

6. The parties will execute appropriate releases limited to the issues raised in the underlying actions.

7. The parties agree that their respective covenants and entry into this Agreement does not constitute any admissions of wrongdoing or guilt on the part of any party.

8. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms.

9. The parties acknowledge that they fully understand the terms of this Agreement and the duties and obligations enumerated herein.

10. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

11. This Agreement and the provisions it contains shall not serve to establish any precedent or practice as between an employee of the Board and the Board, and the Board reserves its right to exercise its discretion on a case-by-case basis.

12. This Agreement shall be subject to the laws of the State of New Jersey.

Witness

Ann T. Stella-Ristaino

Dated: 5/1/97

Board President

Dated:

Board Secretary

Dated: 7/14/97

OAL DKT. NO. EDU 1745-96
AGENCY DKT. NO. 431-10/95

ANN T. STELLA-RISTAINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

SEPTEMBER 29, 1997
DATE OF MAILING SEPEMBER 29, 1997

518-97

MICHAEL P. RUSSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher, who allegedly suffered a work-related injury, sought restoration of sick leave and personal leave pursuant to *N.J.S.A.* 18A:30-2.1.

ALJ determined that as petitioner voluntarily chose not to pursue his Workers' Compensation claim, his claim under the sick leave statute must be dismissed.

Commissioner adopted findings and determination in initial decision as his own.

SEPTEMBER 29, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6470-96S

AGENCY DKT. NO. 231-6/96

MICHAEL P. RUSSO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,

Respondent.

Barbara E. Riefberg, Esq., for Petitioner (Baron & Riefberg, attoneys)

Cynthia A. Satter, Esq., for Respondent (Stephen E. Gertler, attorneys)

Record Closed: July 8, 1997 Decided: August 8, 1997

BEFORE **BARBARA A. HARNED** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 23, 1996, this matter was transmitted to the Office of Administrative Law (OAL) by the Department of Education for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Pursuant to *N.J.S.A.* 18A:30-2.1 petitioner is seeking his full salary for

one year and restoration of accumulated sick leave and personal leave. He contends that his illness or injury and resulting disability was caused by a work related accident or illness.

On November 4, 1996, this matter was placed on the inactive list at the OAL at the request of both parties pursuant to the State Board of Education decision in *Jacques Verneret v. Board of Education of the City of Elizabeth, Union County,* 95 *N.J.A.R.* 2d (EDU) 134 (1991). The matter was to remain on the inactive list at the OAL until such time as a workers' compensation judge renders a decision on the issue of whether petitioner's injury arose out of and in the course of his employment. On May 6, 1997, a second order of inactivity, continuing the case on the inactive list was issued.

By letter dated May 15, 1997 counsel for respondent notified the OAL that the worker's compensation petition was dismissed on April 17, 1997 for lack of prosecution. A telephone conference call was held on June 16, 1997 at which time both parties agreed that this matter should be removed from the inactive list and that respondent would file a motion to dismiss the case within thirty days. An order removing the case from the inactive list was entered on June 18, 1997. On July 8, 1997, respondent Board filed a motion to dismiss. No opposing papers were filed by petitioner.

FACTUAL DISCUSSION AND FINDINGS

In the absence of any opposing papers, the following facts are undisputed and are adopted as **FINDINGS OF FACT.** Petitioner filed a claim for workers' compensation, alleging that his illness or injury and resulting disability was caused by a work related accident or illness. However, that claim was dismissed on April 17, 1997 for lack of prosecution because petitioner had not answered interrogatories nor appeared for required medical examinations.

LEGAL DISCUSSION

N.J.S.A. 18A:30-2.1 provides as follows:

> [w]henever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in

> the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or in the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

In *Jacques Vernert, supra,* the State Board of Education held that the "[t]he question of whether an injury 'arose out of and in the course of employment' within the meaning of *N.J.S.A.* 18A:30-2.1 is controlled by the standards established under the Workers' Compensation Act. 95 *N.J.A.R.* 2d (EDU) at 134. In such cases, the "State Board has held that the Commissioner of Education should refrain from exercising his jurisdiction pending a determination of that issue by the Division of Workers' Compensation." *Id.* at 135. While the Commissioner may decide to refrain from acting until a determination by the Division of Workers' Compensation, a petitioner is nevertheless required to file his petition under the school law with the Commissioner of Education within the 90 day filing period provided for by *N.J.A.C.* 6:24-1.2. Accordingly, the State Board concluded in *Verneret* that "the proper course for the Commissioner to follow when he confronts [such] a case . . . is to hold the matter in abeyance, rather than to dismiss the petition, while awaiting the determination by the Division of Workers' Compensation." *Ibid.*

Both the statutory provisions and the decision in *Verneret* envision that a petitioner seeking an award pursuant to *N.J.S.A.* 18A:30-2.1 will in fact present a Workers' Compensation claim and prosecute same. Petitioner cannot be awarded any damages under 18A:30-2.1 until the compensation claim has been determined because under the statute the Board is entitled to a reduction for the Workers' Compensation award made for temporary disability and because under *Vernet* the question of whether the injury arose out of and in the course of his employment is to be determined by a proceeding in the Division of Workers' Compensation. As petitioner has voluntarily chosen not to pursue his Workers' Compensation claim, his claim under the school law sick leave statute will be dismissed with prejudice.

ORDER

For the foregoing reasons, **IT IS ORDERED** that the petition in this matter **BE DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/5/97
DATE

Barbara A. Harned
BARBARA A. HARNED, CHIEF ALJ

Receipt Acknowledged:

8/13/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

OAL DKT. NO. EDU 6470-96S
AGENCY DKT. NO. 231-6/96

MICHAEL P. RUSSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that, as petitioner has elected not to pursue his Workers' Compensation claim, his within claim under the school law sick leave statute, *N.J.S.A.* 18A:30-2.1, must be dismissed.*

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly stated therein, and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The Commissioner clarifies the ALJ's discussion at page 3 of the initial decision by noting that awards under *N.J.S.A.* 18A:30-2.1 are not *necessarily* conditioned upon presentation of a Workers' Compensation claim, as, for example, when the duration of the absence is insufficiently long to be eligible for such presentation. See *Steven B. Hern v. Board of Education of the City of Union City, Hudson County*, decided by the Commissioner May 8, 1991, aff'd State Board of Education August 7, 1991, rev'd and remanded Appellate Division, A-339-91T3, October 23, 1992, remanded State Board of Education March 3, 1993.

SEPTEMBER 29, 1997
DATE OF MAILING SEPTEMBER 29, 1997

520-97

520-97 DHP

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF R.N.W.	:	DECISION
_____	:	

SEPTEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9489-96
AGENCY DKT. NO. DHP#51-96

RODERICK N. WALKER,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent

Roderick N. Walker, petitioner, *pro se*

Appearance without personal representation for respondent, pursuant to *N.J.A.C.*1:1-5.6

Record Closed: August 5, 1997 Decided: August 12, 1997

BEFORE **ARNOLD SAMUELS**, ALJ:

This is an appeal by the petitioner, Roderick N. Walker, from a determination by the respondent, disqualifying him from employment as a custodial/maintenance worker for the Passaic County Elks Cerebral Palsy Center, following receipt of a record of criminal conviction, pursuant to *N.J.S.A.* 18A:6-7.1.

PROCEDURAL HISTORY

In April 1996 the Passaic County Cerebral Palsy Center (Center), a facility under the supervision of the New Jersey State Department of Education requested a criminal history background check on the petitioner, an applicant for employment as a custodial/maintenance worker. Petitioner was accepted and had begun working.

The Office of Criminal History Review returned advice to the Center and to the petitioner indicating that a fingerprint search through the New Jersey State Police and the Federal Bureau of Investigation revealed a criminal record that would disqualify the petitioner, pursuant to *N.J.S.A.* 18A:6-7.1, from continued employment in the position for any school or other institution under the supervision of the Department of Education.

The petitioner was advised that he had 30 days from the date of the written notice sent to him (April 16, 1996) to appeal the decision by filing a petition with the Commissioner of Education in accordance with the statute.

The petitioner filed a timely appeal, and on September 17, 1996 the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination pursuant to *N.J.S.A.* 52:14F-1 to 13.

A hearing was held in the OAL in Newark, New Jersey on August 5, 1997. The petitioner appeared and testified in his own behalf. The respondent appeared, without personal representation, but relied on the documents included in the transmittal, in addition to copies of the criminal record inquiries and answers returned to the parties. These documents included the petitioner's two page letter of appeal and letter recommendations on behalf of the petitioner from various persons and agencies.

ISSUE

The issue is: Whether the petitioner should be disqualified from employment in accordance with *N.J.S.A.* 18A:6-7.1, because his criminal history record check revealed a record of conviction under subsection (b) of the statute, relating to crimes or offenses involving controlled dangerous substances; or should such disqualification be vacated or not imposed pursuant to the rehabilitative factors set forth in *N.J.S.A.* 18A:6-7.1(e). The petitioner requested a stay of the disqualification determination issued by the respondent.

TESTIMONY AND EVIDENCE

The petitioner, Roderick N. Walker, was the only witness who testified at the hearing. None of the facts stated by him or elicited from him in his testimony were contested by the respondent, who presented no witnesses or argument in opposition. Similarly, the respondent did not contest the contents of the documentary exhibits that had been presented by the petitioner and which were included in the transmittal to the OAL.

Because neither the testimony or the contents of the exhibits were contested, all of the same are accepted as **FACTS**, which can be summarized as follows:

FINDINGS OF FACT

1. The petitioner is 30 years of age and resides in Paterson, New Jersey.

The petitioner was accepted by and commenced employment at the Passaic County Elks Cerebral Palsy Treatment Center in Clifton, New Jersey, as a custodial/maintenance worker.

2. The petitioner's criminal history record is as follows:

> June 1985: conviction for possession of marijuana; thirty day suspended sentence.
>
> August 1987: conviction for possession of a controlled dangerous substance; possession with intent to distribute, within 1,000 ft of a school; five year mandatory sentence with mandatory three years to serve before parole eligibility.

3. The petitioner served three years of the sentence, beginning in October 1988. He was paroled and released in 1991.

4. The petitioner has no other arrest or criminal history record.

5. The petitioner was 18 years old at the time of his first offense, which involved being apprehended while he was smoking marijuana. He pleaded guilty to that offense.

6. The petitioner acknowledges that the second offense was more serious, committed when he was twenty years old. The petitioner admits that it occurred at a time in his life when he thought he wanted to live fast and take shortcuts, like others living around him. After serving the mandatory three years, he was released for good behavior.

7. The petitioner has not committed any offenses or been arrested since his release, six years ago.

8. Petitioner then realized that his life had become disorganized, painful and self-defeating. He decided to seek help and rehabilitate himself. His attitude in that respect has been consistent and unwavering. He realizes that he needed to face his past in order to create a productive future. He also understands that he needed to prove his value to himself, his family and his community.

9. Looking back, the petitioner realizes that he was caught up in unsavory neighborhood activities, and he became involved primarily because of peer pressure. He has since moved away from that neighborhood.

10. Petitioner asserts that he never harmed anyone but himself.

11. In May 1996 Lawrence Horyd, a vocational rehab. counselor in the New Jersey State Department of Labor, Division of Vocational Rehabilitation Services, wrote an affirmative letter of recommendation to the manager of the New Jersey State Department of Education, Office of Criminal History Review. This letter stated that the petitioner is a former participant in the Division of Vocational Rehabilitation Program and that his case was closed, in Rehabilitated Status, in February 1995. Mr. Horyd also stated that the petitioner received supportive counseling and vocational training at Bergen County Technical Schools. Finally, the counselor stated his opinion that Mr. Walker has been drug free, has demonstrated a positive attitude and truly wants to be a productive member of society.

12. Washington Griffin, who has known the petitioner for at least fifteen years, also wrote a letter of commendation. This letter referred to the petitioner's previous difficulties, but stated that he is older, more mature and deserves a second chance.

13. On June 10, 1996, Jean Godfey, a teacher in the Paterson Board of Education, wrote a letter to the Office of Criminal History Review stating that she has known Mr. Walker for his entire life and is aware of his past problems. She indicated that he has worked hard to get his life on the right track again and clean himself up, with great integrity. She stated that the petitioner worked diligently and conscientiously to mainstream himself properly in society. Ms. Godfey writes that she believes Mr. Walker has learned the value of a safe and drug free life through counseling and is better able to cope with his problems. She states that he is a hard worker and will be an asset to any job.

14. The petitioner's mother, Selina Walker, in a letter dated June 1, 1996, stated her knowledge of the rehabilitation efforts pursued by her son. These included a voluntary admission into a five day detoxification program in the Beth Israel Hospital of Passaic and two long term care programs in Florida and Virginia, where he attended Narcotics Anonymous meetings and participated in a Work Release Program. He also attended a Beth Israel Hospital Outpatient Program called "Hope," which included attendance at meetings and individual counseling sessions. Ms. Walker also stated that her son has completed an Air Conditioning and Refrigeration training program and currently holds down two jobs. She feels that he has learned many lessons from his former destructive past. The petitioner's mother stated that petitioner has her love and support.

15. The petitioner has continued attending Narcotics Anonymous (NA), on a regular basis, three or four times a week.

16. The petitioner also belongs to a panel that travels to various hospitals and their rehabilitation and detoxification sections. He speaks of his experiences and attempts to assist the patients in those facilities.

17. The petitioner is anxious to be able to resume and retain his job at the Passaic County Elks Cerebral Palsy Center . He states that he enjoys the work, receives adequate pay and feels that it is a beneficial atmosphere.

LEGAL DISCUSSION

N.J.S.A. 18A:6-7.1 requires a disqualification from employment in facilities supervised by the Department of Education if an individual's criminal record check reveals a record of conviction for a diverse series of crimes and offenses, including the sale, possession or habitual use of controlled dangerous substances.

Subsection (e) of the statute provides as follows:

> Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered.
>
> (1) The nature and responsibility of the position which the convicted individual would hold;
>
> (2) The nature and seriousness of the offense;
>
> (3) The circumstances under which the offense occurred;
> (4) The date of the offense;
>
> (5) The age of the individual when the offense was committed;
>
> (6) Whether the offense was an isolated or repeated incident;
>
> (7) Any social conditions which may have contributed to the offense;
>
> (8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work release programs, or the recommendation of persons who have had the individual under their supervision.

A review of the foregoing factors, in this petitioner's case, leads to the following findings:

(1) The nature and responsibility of the position the petitioner would hold, custodial and maintenance services, needs no explanation.

(2) The nature and seriousness of the offenses of which the petitioner was convicted involved what is known as the "drug scene." Of course, this was serious,

because it has the capacity to damage society as well as the individual. However, petitioner must be commended for his successful efforts in eliminating this illness from his life.

(3) the offenses occurred under circumstances that involved the petitioner's personal use of drugs, as part of a community that subjected him to such pressures.

(4) The offenses were committed twelve and ten years ago.

(5) The petitioner was eighteen years of age at the time of the first offense and twenty years old the second time.

(6) The two offenses, occurring two years apart, were not preceding by any prior arrest, nor have they been repeated since.

(7) The social conditions in which the petitioner lived at the time definitely contributed to the offenses. He resided in a neighborhood populated by many young people involved with drugs, and he was caught up by the peer pressure.

(8) The petitioner's record since his release shows constant evidence of rehabilitation. He conduct in prison was good, and he has been a benefit to his community since. He participated in counseling and drug treatment programs and acquired vocational schooling. He also participated successfully in a correctional work release program, and he belongs to a panel in which he uses his experience to assist others in their rehabilitation efforts. Additionally, the petitioner frequently attends regular meetings of NA. Lastly, the petitioner has submitted impressive recommendations of persons who have known him and attest to his rehabilitation.

CONCLUSIONS

Having considered all of the foregoing, including the testimony, exhibits, applicable law and particularly the rehabilitative factors set forth in *N.J.S.A.* 18A:6-7.1e, it is **CONCLUDED** that the petitioner has affirmatively demonstrated, by clear and convincing evidence, that he has undoubtedly been rehabilitated from any adverse factors that might have followed from his convictions. His trustworthiness and demonstration of good moral character and reliability has been demonstrated, also by clear and convincing evidence. No adverse factors have been noted in the petitioner's character or standing in the community since he began his rehabilitative efforts.

ORDER

It is therefore **ORDERED** that the petitioner should not be disqualified from his employment at the facility supervised by the Department of Education; and the disqualification required by *N.J.S.A.* 18A:6-7.1 should not be applied to him.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 12, 1997
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

Roderick N. Walker, petitioner

Exhibits:

All documents attached to the transmittal dated September 17, 1996 from the Department of Education to the Office of Administrative Law are Exhibits.

OAL DKT. NO. EDU 9489-96
AGENCY DKT. NO. DHP 51-96

IN THE MATTER OF THE	:	
DISQUALIFICATION FROM SCHOOL	:	COMMISSIONER OF EDUCATION
EMPLOYMENT OF R.N.W.	:	DECISION
	:	

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

Upon a careful and independent review of the record, the Commissioner adopts the findings and conclusions of the Administrative Law Judge (ALJ) arising from petitioner's appeal from disqualification from school employment. Consequently, the Commissioner concurs that petitioner has demonstrated rehabilitation in accordance with *N.J.S.A.* 18A:6-7.1 and is, therefore, qualified for school employment within the intent of the criminal history record check laws.

It is observed in reaching this decision, that the Commissioner had no cause to question the ALJ's assessment of petitioner's credibility as such assessment is not belied by the record. Moreover, it was the ALJ who had the opportunity to hear petitioner's sworn testimony and to observe his demeanor, so that he was in the optimum position to make such determination.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision as the final decision in this matter and petitioner is deemed qualified for school employment as a custodial/maintenance worker.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEM BER 29, 1997
DECISION SEPTEMBER 29, 1997

521-97

521-97

ARTHUR JORDAN, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 1, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11544-96

AGENCY DKT. NO. 481-10/96

ARTHUR JORDAN, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,

Respondent.

David C. Dixon, Esq., for petitioner (Scangarella & Feeney, attorneys)

Vito A. Gagliardi, Jr., Esq., for respondent (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, attorneys)

Record Closed: July 30, 1997 Decided: August 19, 1997

BEFORE **EDITH KLINGER**, ALJ:

On October 17, 1996, petitioner, Arthur Jordan, Inc. (Jordan), filed a petition with the Commissioner of Education seeking to set aside the contract awarded to a competitor to provide pupil transportation in the respondent school district during the

1996-97 school year. Petitioner also seeks damages, attorney's fees and costs. On November 1, 1996, the Board of Education of the Township of West Milford (Board) filed its answer and on November 20, 1996, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone conference was held with the parties on February 4, 1997, and the matter was set down for hearing on September 9, 1997. On June 30, 1997, the Board moved for summary decision to dismiss Jordan's petition on the grounds that it is now moot because the performance of the contract has been completed and the Commissioner of Education cannot award damages and attorney's fees to petitioner. The record closed on July 30, 1997, when the final submission was received from the parties.

UNDISPUTED MATERIAL FACTS

In July or August 1996, the Board advertised for bids to provide pupil transportation services for the 1996-97 school year. The bids were to be in accord with the specifications entitled "PUBLIC/NONPUBLIC AND IN/OUT-OF-DISTRICT HANDICAPPED STUDENT TRANSPORTATION, 1996-97 School Year," further identified as "BID CODE #96-13 . . . TRANSPORTATION ROUTE TO CHILDREN'S CENTER AND ALLEGRO SCHOOLS IN AIR CONDITIONED LIFT VEH. WITH AIDE." The bid opening date was August 26, 1996.

The contract was awarded to Laidlaw Transit, Inc., and Jordan objected, claiming to be the lowest responsible bidder. On October 17, 1996, Jordan filed its petition with the Commissioner of Education contesting the award and seeking related relief. Petitioner did not apply to the Commissioner, pursuant to *N.J.A.C.* 1:1-12.6, for emergent relief, so the matter was scheduled at the Office of Administrative Law as early as possible consistent with the availability of parties and hearing dates.

POSITIONS OF THE PARTIES

On June 30, 1997, the Board moved for summary decision on the grounds that Laidlaw has already completed performance of the contract in question and petitioner is entitled to no relief which would allow it to provide the transportation. Under the relevant statutes and case law, it argues, the Commissioner of Education cannot award compensatory damages for loss of profits nor attorney's fees nor costs of appeal, so there is no relief which may be granted to petitioner.

Petitioner concedes that its claim for certain forms of relief, that is, setting aside the contract, awarding it to Jordan, or rejecting all bids and/or rebidding the contract, are now moot, but still presses its request for damages, attorney's fees and costs. It further claims that its petition is not moot because it is entitled to represent the public's interest in the integrity of the bidding process through the present appeal.

N.J.S.A. 18A:18A-46 provides that no damages may be recovered against any board of education or any of its officers because of any action taken by virtue of Title 18A, Chapter 18A, which governs public schools contracts. Jordan argues that, since *N.J.S.A.* 18A:18A-49.1 excludes pupil transportation contracts from the provisions of Chapter 18A, it also excludes them from the effect of *N.J.S.A.* 18A:18A-46. Pupil transportation contracts are governed by Title 18A, Chapter 39, which does not specifically prohibit the award of damages. From this, Jordan infers that damages and attorney's fees are available under Chapter 39 and that the Commissioner of Education can award them.

DISCUSSION OF LAW AND CONCLUSIONS

Although Title 18A, Chapter 39, contains no provision equivalent to *N.J.S.A.* 18A:18A-46, it does not thereby follow that Jordan is entitled to recover damages from the Board.

In general, the prohibition of damages is based upon public policy considerations which apply to all contracts with public bodies.

> It is true that, as the contractor-plaintiffs point out, a bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him. But such standing was granted simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust. It was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder.
>
> [*M. A. Stephen Constr. Co. v. Borough of Rumson*, 125 *N.J. Super.* 67, 74 (App. Div. 1973) (citation omitted); *Delta Chemical v. Ocean Co. Util.*, 250 *N.J. Super.* 395, 400 (App. Div. 1991).]

These rights are conferred on the bidder "to the end that the public will obtain all that is due it in the procurement process, rather than for [the bidder's] individual aggrandizement." *Morie Energy Management v. Badame*, 241 *N.J. Super.* 572, 576 (App. Div. 1990), quoting *Trap Rock Indus. v. Kohl*, 59 *N.J.* 471, 480 (1971). A bidder would not have the incentive to notify the contracting agency promptly of an illegal contract if it were aware that it could subsequently recover damages for its losses. *Id.* at 577-78. The *M. A. Stephen* court wrote:

> Nor should it be overlooked that, to allow the lowest responsible bidder to recover damages not only would violate and run counter to sound and long established principles of law, but also would invert the very policy and reasons which gave rise to the obligation of the public official to accept the bid proposal which best serves the public interest. Thus, where a public authority improperly rejects the lowest bid and awards the contract to the next lowest bidder, who performs the contract work before the ultimate resolution of the legal propriety of the rejection, to

> permit the low bidder to recover damages would simply twice penalize the public. A "disobedience of the provisions of the statute will make the [public authority] pay the difference between the lowest bid and the bid for which the contract is made, and also the profit that the lowest responsible bidder would have made if the statute had not been violated."
>
> [125 *N.J. Super.* at 75-76 (citation omitted).]

Given the strong underlying public policy involved, I **CONCLUDE** that, by enacting *N.J.S.A.* 18A:18A-49.1, the Legislature did not intend to make pupil transportation contracts the only public school contracts for which damages are available. I **CONCLUDE** that, if the Legislature intended to make such a radical change in public policy, it could have stated its intention to do so in the form of a statute specifically authorizing the recovery of damages by bidders solely in the case of pupil transportation contracts.

I **CONCLUDE** that this statute simply recognizes that pupil transportation contracts have unique features which call for bidding requirements different from those of other public school contracts. Consequently, *N.J.S.A.* 18A:18A-49.1 notwithstanding, I **CONCLUDE** that *N.J.S.A.* 18A:18A-46 must be read to apply to pupil transportation contracts also.

Based upon the above, I **CONCLUDE** that Jordan is not entitled to recover damages for the award of the pupil transportation contract to Laidlaw. The only relief which was available to petitioner was to apply to the Commissioner of Education in a timely manner for emergent relief to set aside the award and prevent performance.

Further, it is settled law that the Commissioner of Education has no authority to award counsel fees, or any other legal expenses, including costs, without express authorization by statute, rule or contract. This power is not included among the incidental powers which are implied in order to permit the Commissioner to fulfill his

statutory function. *Balsley v. North Hunterdon Regional High Sch.*, 225 *N.J. Super.* 221, 225 (App. Div. 1988). I, therefore, **CONCLUDE** that petitioner is not entitled to recover legal fees or costs with respect to this appeal.

In summary, petitioner's only hope of achieving financial redress was to seek emergent relief from the Commissioner before the disputed contract could be performed. Since this was not done, I **CONCLUDE** that Jordan is entitled to no relief in this matter.

Petitioner correctly argues that it served the public interest in bringing this appeal. This is in accord with the public policy expressed in *M. A. Stephen*, *supra*, 125 *N.J. Super.* at 74.

> But such standing was granted simply and solely in order that the public interest might be served by compelling the lax or erring public official to properly perform his public trust.

By denying damages, public policy compels the bidder to act promptly against the contracting agency to prevent performance of an illegal contract in order to fulfill the purpose for which standing is granted: protection of the public. This purpose is lost if the bidder sits back and waits to collect damages while the public is forced to pay more than necessary for services. *Morie Energy Management, supra*, 241 *N.J. Super.* at 577. Once the contract is performed, *N.J.A.C.* 6:21, subchapter 19, provides for the review and evaluation of pupil transportation contracts and the imposition of sanctions for non-compliance; further intervention by a bidder serves no purpose. The bidder has, in effect, lost its standing to continue its appeal.

As a result, I **CONCLUDE** that Jordan's appeal is moot, not only because the contract has been performed, but also because, if the public interest remains to be vindicated, petitioner is no longer the proper party to pursue it.

Pursuant to *N.J.A.C.* 1:1-12.5(b), summary decision is appropriate if there is no genuine issue of any material fact challenged and the moving party is entitled to prevail as a matter of law. I **FIND** that there is no genuine issue of material fact in the present matter and I **CONCLUDE** that respondent is entitled to summary decision as a matter of law.

It is, therefore, **ORDERED** that the petition of Arthur Jordan, Inc., is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 19, 1997
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

8/22/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 26 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

OAL DKT. NO. EDU 11544-96
AGENCY DKT. NO. 481-10/96

ARTHUR JORDAN, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter is properly dismissed as moot. Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 1, 1997
DATE OF MAILING OCTOBER 1, 1997

522-97

522-97

BARRY YOUNG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 1, 1997

OAL DKT. NO. EDU 11526-95
AGENCY DKT. NO. 355-9/95

BARRY YOUNG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law withdrawing and closing this matter at the request of petitioner have been reviewed. Upon his review, the Commissioner approves the withdrawal and, consequently, the matter is no longer deemed to be a contested case before the Commissioner and is, accordingly, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 1, 1997
DATE OF MAILING OCTOBER 1, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL/WITHDRAWAL
OAL DKT. NO. EDU 11526-95

BARRY YOUNG,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett, attorneys)

Victor E.D. King, Esq., for respondent
(King, King & Goldsack, attorneys)

Record Closed: July 7, 1997 Decided: August 14, 1997

BEFORE **ARNOLD SAMUELS**, ALJ:

On September 5, 1995 the petitioner, Barry Young, filed a Verified Petition with the Commissioner of Education seeking payment of continued salary from the respondent, pursuant to *N.J.S.A.* 18A:30-2.1, after having been injured in the course of his employment. The petitioner, being temporarily disabled, remained out of work. It

was undisputed that petitioner was covered by Worker's Compensation. The respondent filed an answer on October 10, 1995, asserting various affirmative defenses, particularly relating to the pending matter in Worker's Compensation Court and the timeliness of the petition.

On October 13, 1995 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13. The transmittal by the Commissioner asked the ALJ to consider the timeliness of the petition and whether or not the particular facts underlying the claim are such that the Commissioner should refrain from considering the matter until a determination has been made by the Division of Worker's Compensation, as threshold issues. See *Jacques Verneret v. Board of Education of the City of Elizabeth, (State Bd.* of Ed. Jan. 4, 1995)

A hearing was scheduled for July 11, 1996, but the matter was placed on the inactive list until January, 1997, at the request of the parties, in order to await a determination from the Division of Worker's Compensation. At the same time, the matter was consolidated with another similar case that had also been transmitted to the OAL by the Commissioner of Education, with the same instructions, *Tanya Wilson v. Board of Education of the City of Plainfield, Union County*, OAL DKT. EDU 11527-95.

Counsel thereafter advised that the instant matter had been concluded in the Division of Worker's Compensation, in a manner that would result in a withdrawal of the petition. On July 7, 1997 written advice was received from petitioner's attorney requesting that the petition be withdrawn and the matter closed. A copy of such advice is attached hereto. (Since the Tanya Wilson case has yet to be determined in the Division of Worker's Compensation and will remain pending for at least another ninety days, it is severed from this matter and is retained at the OAL.)

It is **CONCLUDED** that good cause has been shown for withdrawal and dismissal of this matter, based upon petitioner's request.

It is therefore **ORDERED** that withdrawal and dismissal of this contested case, with prejudice, be approved, subject to approval by the Commissioner of Education.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 15, 1997
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 21 1997
DATE

Barbara A. Harnett
OFFICE OF ADMINISTRATIVE LAW

sej

523-97

HENRY AKIN-MARTINS, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, provisional teaching staff member, alleged his termination was arbitrary and capricious. Petitioner sought reinstatement as a provisional teaching staff member, subject to Alternative Route Program (ARP) certification; restoration of all benefits and salary; and reimbursement of tuition and costs to maintain his enrollment in College in order to obtain required educational certification.

ALJ concluded that the District's action terminating petitioner, based upon reports of the use of unjustified and inappropriate methods of physical intervention with students, was not improper. Moreover, ALJ concluded that equitable estoppel and laches should not be applied against respondent. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1503-96

AGENCY DKT. NO. 482-12/95

HENRY AKIN-MARTINS,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Ifeoma A. Olejeme, Esq., for petitioner
(Banks, Erlanger, attorneys)

Louis R. Franzese, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 3, 1997 Decided: August 18, 1997

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

In November 1995, Henry Akin-Martins (petitioner or Akin-Martins), filed a petition with the State Department of Education (DOE), seeking certain relief from the State-Operated School District of the City of Newark (respondent or District). The petition was not properly served, and counsel subsequently retained by petitioner filed

a letter on December 26, 1995 with the DOE, advising that proper service had been effected and again filing the petition. Respondent filed an answer on or about January 19, 1996. The DOE transmitted the matter to the Office of Administrative Law on February 2, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Telephone conferences were conducted throughout the proceedings. Hearings were conducted on January 29 and 30, 1997. The deadlines for the filing of initial and reply post-hearing briefs were extended at the requests of the parties. Akin-Martins and the District filed initial and reply briefs in April 1997. Additional communications thereafter occurred among this judge and counsel for the parties, including a request by me that petitioner provide a copy of a certain case referenced in his initial brief, which document was filed on April 17, 1997.

Petitioner's initial brief contained, in part, references to four documents which had not been moved into evidence during the hearings; copies of those documents were transmitted with the brief. Petitioner requested that they be deemed moved into evidence. Respondent objected to consideration of and moving the documents into evidence in its reply brief. The District's objections were deemed by this judge to constitute a motion to strike, and the parties were permitted to file final positions regarding the issue. On July 3, 1997, I issued an order that the documents in question, which were deemed to be marked for identification as Exhibits P-6 through P-9, not be admitted into evidence. The record was closed on July 3, 1997.

NATURE OF THE CASE

Petitioner was initially employed, as a substitute teacher with the District, during the 1991/92 school year. He held a provisional certification issued by the DOE as an elementary school teacher and a teacher of Bilingual/Bicultural Education. During the time he was employed by respondent, Akin-Martins was a participant in the State Alternative Route Program (ARP) for teacher certification and a student at Saint Peter's

College (College), in New Jersey. In September 1995, petitioner was advised, by letter from Dr. Beverly L. Hall (Hall), the then Acting State District Superintendent, that his employment was terminated effective October 21, 1995.

Petitioner argues that the District's action terminating his employment was arbitrary and capricious. Petitioner seeks reinstatement, as a provisional teaching staff member, subject to ARP certification; restoration of all benefits and salary; and reimbursement of tuition and costs to maintain his enrollment in the College in order to obtain required educational certification.

Respondent argues that the termination action was not arbitrary nor unreasonable, that petitioner's employment was terminated in accordance with his employment contract, that pertinent statutes were not violated, and that the Commissioner of the DOE (Commissioner) is not empowered to award tuition and costs to allow petitioner to obtain a teaching certificate. The issues, broadly, are whether petitioner is entitled to relief, and, if so, the type of relief.

FINDINGS OF FACT

Based upon a review of the entire record, including credibility assessments, I **FIND** the following to be facts.

Akin-Martins was employed by the then Board of Education (Board) of the City of Newark in approximately January 1992 as a substitute teacher at the Avon Avenue School (Avon). On January 23, 1992, the Institutional Abuse Investigation Unit (Unit) located within the Division of Youth and Family Services (DYFS), State Department of Human Services, received an allegation of physical abuse pertinent to petitioner. Subsequent to an investigation by DYFS, an investigator with the Unit advised petitioner of the results by letter dated May 22, 1992. The allegation of physical abuse was not substantiated, "with concerns." The Unit concluded that Akin-Martins had used "an inappropriate method of physical intervention placing the students at risk of harm."

(Exh. R-3). The letter noted that the Board had been notified of the results of the investigation and concluded by advising petitioner of his right to appeal the findings.

The Unit subsequently received allegations of physical abuse by petitioner at the Elliot Street School (Elliot) on March 12, 1992. Petitioner was assigned as a substitute teacher at Elliot as of that date. Akin-Martins allegedly had struck a student on the thigh with a yard stick. The Unit found that the allegation of physical abuse at Elliot was substantiated. At some point, petitioner and the Board were notified of the Unit's determination. Akin-Martins was also notified that he could appeal such determination. Petitioner was removed from the roster of substitute teachers at Elliot.

Petitioner commenced substitute teaching at the McKinley School (McKinley). Several days later, the Unit received a third allegation of physical abuse pertinent to petitioner. It was alleged that petitioner had slapped a student on the face. Subsequent to an investigation, the Unit determined that that allegation of physical abuse was not substantiated "with serious concerns related to your actions" (Exh. R-2). The Board and petitioner were notified by the Unit of its determination, and petitioner was again notified of his right to appeal. Petitioner was thereafter removed from the roster of substitute teachers at McKinley.

Petitioner subsequently was able to obtain employment as a substitute teacher at the Miller Street School (Miller). The Unit received a fourth allegation of abuse by petitioner, at Miller, on May 22, 1995. Apparently, the administration at Miller agreed not to use Henry Akins' services as a substitute teacher, pending the outcome of an investigation by the Unit. The Unit found that "[P]hysical abuse was unsubstantiated with concerns regarding your actions . . . " (Exh. P-4). The Board was advised of the results of the Unit's investigation. Akin-Martin was also advised of the results by letter dated August 17, 1995. The Unit informed petitioner of his rights of appeal.

In approximately July 1995, the DOE assumed operation of the Newark School District. Petitioner continued to teach as a substitute teacher, employed by respondent.

In 1993, petitioner had taken, and passed, the National Teacher's Exam, which made him eligible for employment as a regular teacher pursuant to the ARP in New Jersey. Petitioner made efforts, between 1993 and 1995, to obtain such employment with respondent, generally communicating with Lynn Antonacci (Antonacci), an employee in the District Department of Human Resources. Antonacci interviewed petitioner on approximately March 14, 1994 and February 22, 1995 for a regular teaching position. On or about June 30, 1995, petitioner sent a letter to a Ms. Copinegro, then Director of Human Resources with the District, expressing his frustration at not being hired as a regular teacher.

By letter dated August 17, 1995, the Unit advised Dr. John P. Duggan (Duggan), Director of School Operations with respondent, of its conclusions regarding its investigation pertinent to the May 22, 1995 allegation. The Unit advised that "[P]hysical abuse was unsubstantiated with concerns regarding the actions of Substitute Teacher Henry Martins . . . " (Exh. R-5, p. 1). The letter noted that the student in question, A., had swung his coat and accidentally struck another student on the eye. Noting that A. did not constitute a continued danger to himself, nor others, the Unit concluded that petitioner did not attempt "[V]erbal intervention" and that:

> The method of intervention was inappropriate. Mr. Martins walked over to A. and slapped him on the face, near the eye, once with an open hand using a partial arm swing as retaliatory disciplinary action and forced A. to apologize for hitting the student with his coat. [*Ibid.*]

The Unit found that petitioner's actions constituted "a dangerous technique" and " . . . placed A. at an unnecessary and undue risk of harm. . . . Mr. Martins has an established pattern of the use of unjustified and inappropriate methods of physical intervention with students." *Id.* The letter noted in the latter respect the prior investigations by the Unit, indicating that petitioner had been "administratively counseled" regarding the January 1992 investigation. (*Ibid.*)

The Unit concluded, in part, that:

> It should be noted that following the investigation of 3/16/95 Mr. Henry Martins was terminated as a substitute teacher with the Newark Public Schools on March 26, 1992. Mr. Martins reapplied and entered the Newark Public School System as a substitute teacher using the name Henry Akin-Martins. It is recommended that the Newark Public Schools terminate Mr. Henry Akin-Martins' employment as a substitute teacher based upon his actions in this matter and his pattern of the use of unjustified and/or inappropriate methods of physical intervention. [*Ibid.*]

In approximately August 1995, the District conducted a "Job Fair," attended by prospective employees. (Tr., 1/29/97, p. 49). Petitioner attended and was interviewed by several individuals. Files relevant to the Job Fair interviews were thereafter sent to the Assistant Superintendent's Office. Any principal of a school with a vacancy had an opportunity to review the files and select individuals based on such review. Those individuals were offered employment.

Petitioner applied for a position as a bilingual teacher. He subsequently spoke to Iris Martinez-Arroyo, Director of the Bilingual and Bicultural Department, who advised him that his application had not been sent to her as a "qualified candidate." (*Id.* at pp. 55-52).

In August 1990, petitioner was subsequently informed, "by someone in the personnel office," that his personnel files had been "canceled," that is, that a notation to the effect "do not renew for any position" had been written on the pertinent files. (*Id.* at p. 39). Apparently, a Ms. Burgess, a secretary involved with processing renewals of substitute teachers' employment, provided this information to petitioner.

August 25, 1995, petitioner met, at his initiative, with Patricia Lucas (Lucas), Acting State District Superintendent, Human Resources Services. After reviewing personnel files pertinent to Akin-Martins, and speaking with Antonacci, Lucas told petitioner that he would be immediately employed as a substitute teacher and that he

would also be considered for a vacant position as a regular bilingual teacher. Lucas then had a letter prepared, summarizing the situation, and gave it to petitioner. The letter, which was dated August 25, 1995, read as follows:

> Per our conversation during our meeting today, please be advised that you are immediately reinstated as a substitute teacher for the 1995-96 year.
>
> Also be advised that your candidacy is being considered for vacancies in the Bilingual Department; however, this is in no way to be construed as a guarantee of permanent employment. [*Ibid.*]

Lucas was one of a number of individuals temporarily assigned by the DOE to the District during a transition period. Lucas' assignment ended in late August or early September 1995.

By letter dated August 31, 1995, Lucas advised petitioner that he was being employed at the Vailsburg Middle School as an elementary/bilingual teacher, commencing September 5, 1995 (Exh. R-8).

On August 31, 1995, petitioner and an employee of the District executed an employment contract, pertinent to the position of elementary/bilingual teacher. The contract stated, in pertinent part, that:

> The appointment and employment hereunder may be terminated by either party, at any time, upon thirty (30) days' written notice prior to attainment of tenure. This notice provision shall not be interpreted to require the Board of Education to give individual notice to the employee prior to implementing personnel actions other than termination. [Exh. P-1, p. 1.]

Petitioner understood, when he executed the contract, that he could be terminated upon thirty-days' notice for any reasons. He commenced teaching in the elementary/bilingual position on September 5, 1995.

Petitioner was not an education major in college. Petitioner understood that he had to enroll in such a program to become a certified teacher in New Jersey.

Subsequent to August 31, 1995, petitioner enrolled in a one-year program at the College, which, he hoped, would result in his obtaining teacher certification, pursuant to the ARP.

Hall, the then Acting State District Superintendent, sent petitioner a notice of termination, dated September 21, 1995. Hall stated that, based upon recommendations of the Acting State District Assistant Superintendent for Human Resource Services, Akin-Martins' employment was terminated, effective October 21, 1995. Hall characterized the action as being taken pursuant to the thirty-days' notice provision of the August 31, 1995 employment contract. Petitioner was also advised that he was immediately suspended with pay from his duties as an elementary/bilingual teacher, until the date of his termination. Hall summarized prior investigatory conclusions of the Unit, noting that petitioner had been deemed to have exhibited a pattern of "unjustified and inappropriate methods of physical intervention" and advised that the decision to terminate petitioner's services was based upon the Unit's recommendation. (Exh. P-3, p. 1).

Petitioner thereafter applied for State unemployment benefits, which application was approved. The State Department of Labor (DOL) issued a notice of determination, advising petitioner that he was eligible for unemployment benefits commencing October 22, 1995. The notice stated the DOL's conclusions, based upon information submitted, that "ALLEGED INCIDENT OF UNJUSTIFIABLE AND INAPPROPRIATE METHODS OF PHYSICAL INTERVENTION DURING THE PERFORMANCE OF YOUR WORK," were not substantiated; "THERE IS NO EVIDENCE OF WILLFUL OR DELIBERATE BEHAVIOR IN CONNECTION WITH YOUR DISCHARGE. NO DISQUALIFICATION ARISES" (Exh. P-7).

At some point, petitioner sent a letter to the Commissioner stating his belief that he had been terminated because of retaliatory action, that is, because he had complained of nepotism in hiring practices of the District. By letter dated October 20, 1995, the Commissioner advised petitioner that:

> Your termination appears to have been implemented within the terms of your contract. Since the underlying basis for your claim appears to be retaliation for bringing charges of wrong doing against superiors, you may choose to file in Superior Court under the Conscientious Employee Protection Act (N.J.S.A. 34:19-1 *et seq.*). [Exhibit R-4.)

Duggan has been employed a total of 28 years in the Newark district. His most recent title is that of Director of Student Information Services. He also functions as the "point of contact" with DYFS pertinent to instances of institutional abuse allegations pertinent to the District. (Tr. 1/30/97, p.4). He has served in the latter position since 1989. Subsequent to receiving any reports from DYFS, Duggan's practice is to discuss the situation with the pertinent Assistant Superintendent regarding whether or not recommendations of DYFS should be acted upon. In any case in which there is a concern with the behavior of an employee, action is recommended pertinent to the employee's employment status.

In 1992, after receipt of the pertinent DYFS report, petitioner was removed from the list of eligible substitutes because the District deemed his actions and behaviors to have put students at risk of harm. The intent was that Akin-Martins would not be rehired again. Petitioner was subsequently rehired. Duggan did not know why nor how petitioner was rehired. Petitioner was again terminated subsequent to March 26, 1992.

Petitioner "was known" to the District in 1992 as "Mr. Henry Martins." (*Id.* at p.15). To Duggan's knowledge, petitioner apparently reapplied for substitute teacher employment, utilizing the name "Mr. Henry Akin-Martins," a change not "caught." (*Ibid.*) Petitioner was apparently deemed to be a new employee, and any prior records pertinent to previous employment were not reviewed.

Upon receipt of the August 1995 report from DYFS, Duggan recognized petitioner's name and requested that respondent's Department of Human Services review the matter to determine if it were the same individual who had been terminated

in 1992. Upon learning that it was, Duggan notified Antonacci and the pertinent Assistant Superintendent of the situation.

The Unit's recommendation that petitioner's employment be terminated was "taken very seriously" by District personnel, because ". . . one of the first issues that educators must address in public education is making sure that we can ensure the safety of our students and that students will come to no harm as part of their educational experience." (*Id.* at p.16). The incidents which had occurred in 1992 and 1995, however, would have supported a termination action even if the Unit did not so recommend. It is Duggan's practice to report to DYFS regarding any actions taken subsequent to receipt of reports from the Unit. The District has in the past terminated employees based upon one substantiation of child abuse. It is a common practice in the District to terminate employees in situations where DYFS finds unsubstantiated allegations of abuse but articulates concerns.

Petitioner received all the pertinent Unit letters advising of the results of the investigations. He did not appeal any of the conclusions.

Antonacci currently holds the title of Personnel Administrator, a position which she has held since July 1996. She previously worked with the District in a similar capacity under a different title. She has been employed in the Newark district for a total of nine years. As of August 1995, her responsibilities included recruitment, selection, and placement of all instructional personnel.

Antonacci was not aware of all interviews with applicants for regular teaching positions. However, Akin-Martins was interviewed on several occasions for the position of elementary school teacher. He was deemed to be an "unsuccessful" applicant as a result of those interviews, *i.e.*, the interviewers, who are administrators in the pertinent instructional areas, apparently concluded that he did not have the potential to be a successful teacher. (*Id.* at p.41). To Antonacci's knowledge, petitioner was deemed to be "successful to some degree" as a result of the Job Fair interviews but not in subsequently scheduled ones. (*Id.* at p.42).

Antonacci did not have access to any of the pertinent files. She had no input into whether or not Akin-Martins would be hired subsequent to the Job Fair. In addition, Antonacci had no knowledge of any ratings given to petitioner. Lucas never accused Antonacci of "holding back" petitioner's Job Fair file. (*Id.* at p.45). Lucas was Antonacci's superior at the time. Antonacci was not involved in the 1995 action terminating petitioner's employment. Antonacci was also not involved in prior decisions to terminate petitioner's employment as a substitute teacher.

Antonacci's office schedules job interviews; she personally has no involvement in such scheduling. She is usually not involved in interviewing employees. She is also not personally involved in the employment of substitute teachers, although such is handled by her office. The District's practice is not to conduct interviews with individuals seeking employment as substitute teachers. Antonacci did not know, as of 1992, that petitioner's employment had been terminated. Antonacci had no knowledge of any of the allegations pertinent to petitioner communicated by DYFS prior to the issuance of the 1995 termination notice. Documents pertinent to DYFS investigations are not included in employee's personnel files. They are maintained separately by Duggan.

Antonacci's office's involvement in the termination process consists of receipt of a termination letter, or generation of such upon request, removal of the individual from the payroll system, and ensuring that the individual's file is taken off inactive status.

It is the practice of Human Resources Department personnel to make notations on certain personnel files that individuals should not be rehired, although it is not a regular practice. Individuals other than Antonacci have authority to make such notations on personnel files.

Petitioner sometimes uses the name Henry Martins, "and other times, Henry Akin-Martins." (*Id.* at p.87). His college degree, which is from Kean College in New Jersey, was issued to "Henry Akin-Martins." (*Id.* at p.89). His Social Security card

states his name to be "Henry Akin-Martins." (*Id.* at p.88). Petitioner's name is listed as Henry Akin-Martins on his driver's license. (*Id.* at p.94).

Petitioner was not interviewed when he applied for a position as a substitute teacher. He did provide access to his Social Security card and his driver's license. Each year when he was employed as a substitute teacher, he "just registered for another school year. . ." (*Id.* at p.93), showing his Social Security card and driver's license. Consistent with the district's practices, petitioner was required to apply for a substitute teacher position each year. Petitioner never executed an employment contract during the years he was employed as a substitute teacher. He was employed as such on a per diem basis, called to work daily, as needed.

DISCUSSION

The Commissioner has jurisdiction generally to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9.

On or before May 15 of each year, a nontenured teaching staff member continuously employed by a local board of education since the preceding September 30 shall either receive a written offer of a contract of employment for the next succeeding year or a written notice that such employment will not be offered. *Id.* at §27-10 (Supp. 1997). *N.J.S.A.* 18A:27-10. This provision is not applicable in the current matter because petitioner was not continuously employed since September 30, 1994.

If the employment of a teaching staff member is terminated on notice, pursuant to a contract entered into with a local board of education, it is optional with the board whether or not the staff member shall continue to perform his/her duties during the period between the giving of the notice and the date of termination. *N.J.S.A.* 18A:27-9.

The pertinent contract provided that petitioner's employment could be terminated, for any reason, upon 30 days' notice. There is no question that Akin-

Martins was given 30 days' notice prior to his termination in 1995. Teaching contracts containing a termination provision 'may be terminated in accordance with their terms, without the need to demonstrate "good" or "just" cause.' *Siegel v. Garfield Bd. of Ed.*, 93 *N.J.A.R.* 2d (EDU) 766, 767.

A nontenured teacher does not have a right to have an employment contract renewed, nor is he/she ordinarily entitled to a statement of reasons for a nonrenewal, nor to a hearing prior to such action. A local board of education has "extremely broad" discretion in such matters. *Winston v. Bd. of Ed. So. Plainfield*, 125 *N.J. Super.* 131, 143 (App. Div. 1973) (citation omitted) (*Winston*). However, the discretion of a board of education regarding matters such as the appointment, dismissal, and nonrenewal of teachers ". . . is conditioned upon Fourteenth Amendment limitations." (*Ibid.*) (citations omitted). It has been specifically recognized, for example, that nonrenewal of a nontenured public school teacher's one-year contract may not be based on his/her exercise of First and Fourth Amendment rights. *Id.* at p.144. However, " . . . the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions." (*Ibid.*)(citation omitted).

Respondent's action terminating petitioner, based upon the reports from the Unit, were reasonable, even if not all the allegations were found to be substantiated. The Unit, on each occasion in question, viewed the allegations with concern and ultimately communicated its recommendation to the District that Akin-Martins' employment be terminated because of a disturbing pattern of inappropriate conduct with students. As respondent argues, ensuring the safety of students is of paramount concern. In addition, respondent's actions pertinent to petitioner were consistent with its general policies and practices. The determination by the DOL is not determinative of the issues presented in the current matter.

It is not entirely clear from the record why petitioner was reemployed subsequent to the 1992 termination. However, such is not determinative of the question of whether the termination action in 1995 was reasonable. Duggan acted reasonably, and consistent with respondent's practices regarding DYFS recommendations and reports,

in initiating action against petitioner subsequent to receipt of the August 1995 letter from the Unit.

Petitioner's argument that he was not terminated because of recommendations from DYFS, but because of animus by employees of the District, including Antonacci, are not supported in the record. Akin-Martins' testimony was ambiguous and nonspecific in this respect. In addition, Antonacci's testimony that she had no involvement in any decisions to terminate petitioner, and had no knowledge of prior investigations by DYFS, until subsequent to issuance of the 1995 termination notice, was credible. In addition, petitioner was advised by the Commissioner that any action for retaliatory termination should be initiated in another forum. There is no evidence in the record addressing the question of whether or not petitioner subsequently did so.

Arguments on behalf of petitioner that laches and equitable estoppel should be applied against respondent are also not persuasive. Equitable estoppel reflects the doctrine that one should not be allowed to repudiate an act or position when such would work an injustice to another who, having the right to do so, has detrimentally relied thereon. *Anske v. Bor. of Palisades Park*, 139 *N.J. Super.* 342 (App. Div. 1976). The claiming party must demonstrate that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. The conduct must be relied on, and the relying party must act so as to change his/her position to his/her detriment. *Miller v. Miller*, 97 *N.J.* 154 (1984).

Estoppel against a governmental entity may be detrimental to the public interest and could interfere with central governmental functions. *O'Malley v. Dept. of Energy*, 109 *N.J.* 309 (1987) (*O'Malley*). An element of intentional misrepresentation, or demonstration that a public official knew or should have known of material facts but acted as if he/she did not have such knowledge, causing a misrepresentation, must be demonstrated. (*O'Malley, supra.*) The burden of proving intent is on the party seeking the benefit of estoppel. *Newark v. Natural Resource Counsel, Dept. of Environ. Prot.*, 82 *N.J.* 530 (1980) (*Natural Resource*).

Laches, similar to estoppel, does not apply to governmental entities to the same extent as against private parties. *Natural Resource , supra*. Laches applies when there is an unexplained and inexcusable delay in enforcing a known right and prejudice results to the other party because of such delay. *Matter of Adoption of a Child of Indian Heritage*, 111 *N.J.* 155 (1988). Time alone is not determinative. *Pavlicka v. Pavlicka*, 84 *N.J. Super.* 357 (App. Div. 1964). The application of laches is particularly dependent upon considerations of equity. *Auchiello v. Stauffer*, 58 *N.J. Super.* 522 (App. Div. 1959).

Petitioner has not demonstrated any intentional misrepresentation by employees, nor agents, of respondent pertinent to Akin-Martins' enrollment in the ARP at the College. In fact, he has not demonstrated any conduct nor representation made intentionally or under any circumstances inducing action on his part. Akin-Martins has not, in addition, demonstrated any inexcusable delay in enforcing any right of petitioner, nor any prejudice as a result thereof. Finally, I note that the application of equitable doctrines against respondent in this case would likely interfere with an essential function of the District, that of ensuring the safety of its students. I am therefore persuaded that equitable estoppel and laches should not be applied against respondent. I am also persuaded, for the reasons articulated in respondent's reply brief, that petitioner's reliance on *Sheets v. Teddy's Frosted Foods*, 179 Conn. 471 (1980) is misplaced.

CONCLUSIONS

I **CONCLUDE** that petitioner has not demonstrated, by a preponderance of the credible evidence, that respondent's action of September 21, 1995, terminating his employment with the District, effective October 21, 1995, was arbitrary nor unreasonable. To the contrary, I **CONCLUDE** that the action in question was reasonable. I also **CONCLUDE** that laches and equitable estoppel should not be applied against respondent and that Akin-Martins' petition should be dismissed. In light of these determinations, it is not necessary to reach issues raised by the parties regarding any relief to be awarded to Akin-Martins.

ORDER

It is hereby **ORDERED** that Akin-Martins' petition, filed with the DOE on December 26, 1995, be and is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 15 1997
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

8/22/97
DATE

DNT
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 26 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

APPENDIX

Witnesses:

For Petitioner:

Akin-Martins

For Respondent:

John Duggan
Lynn Antonacci

Exhibits in Evidence:

P-3 Notice of Termination
P-4 Letter dated August 17, 1995
P-6 Letter dated August 25, 1995
P-7 Notice of determination
P-8 Letter dated August 31, 1995
P-10 Application dated September 1, 1993

R-1 Employment Contrat
R-2 Undated letter
R-3 Letter dated May 29, 1992
R-4 Letter dated October 20, 1995
R-5 Letter dated August 17, 1995

OAL DKT. NO. EDU 1503-96
AGENCY DKT. NO. 482-12/95

HENRY AKIN-MARTINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, which included transcripts from the two days of hearing at the OAL, the Commissioner concurs with the Adminsitrative Law Judge (ALJ) that petitioner has failed to establish by a preponderance of credible evidence that the District's decision to terminate his employment contract was in any manner contrary to law. The Commissioner further concurs that petitioner's claims that the District's actions should be barred in equity are not persuasive.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein.* The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* The Commissioner herein clarifies, however, that, contrary to the ALJ's statement on page 13 of the initial decision, any teaching staff member receiving notice that a teaching contract for the succeeding year school year will not be offered by the local board, may, within 15 days thereafter, request in writing a statement of reasons for such nonemployment which shall be given to the teaching staff member within 30 days after receipt of such request. N.J.S.A. 18A:27-3.2 An informal appearance before the board may also be requested pursuant to *N.J.S.A.* 18A:27-4.1 and *N.J.A.C.* 6:3-4.2.

OCTOBER 1, 1997
DATE OF MAILING OCTOBER 1, 1997

524-97

524-97

WRIGHTSTOWN BOROUGH COUNCIL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Council alleged the Board improperly adopted a resolution that placed on the ballot a question to determine whether the membership of the Board should be reduced from nine to seven. Council alleged the resolution was barred by *N.J.S.A.* 18A:8-31. In prior proceeding, the Commissioner denied Council's motion to enjoin placement of the question on the ballot at the 1997 annual school election.

ALJ concluded that the Board acted within the compass of authority the Legislature granted it when, pursuant to *N.J.S.A.* 18A:12-12, it determined that it was in the best interest of the District that the membership of the Board be reduced and it put that question to the public. ALJ noted that even if the interpretation is less than liberal, the structure of Chapter 271 of the Laws of 1967 makes clear the legislative intent that any type II school district may increase or reduce its membership provided it follows the statutory prescription at *N.J.S.A.* 18A:12-12. (Consolidated school districts have all the powers and duties and are subject to the same restrictions as a board of education in a type II school district. *N.J.S.A.* 18A:8-28.) Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own, clarifying that New Hanover is a consolidated school district.

OCTOBER 2, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2811-97

AGENCY DKT. NO. 78-3/97

WRIGHTSTOWN BOROUGH COUNCIL,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER,

Respondent.

John T. Barber, Esq., for petitioner

Denis C. Germano, Esq., for respondent (Hulse & Germano, attorneys)

Record Closed: July 25, 1997 Decided: August 20, 1997

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

The Wrightstown Borough Council claimed the New Hanover Township Board of Education improperly adopted a resolution that placed on the ballot a question to determine whether the membership of the Board should be reduced from nine to seven. Wrightstown alleged the resolution is barred by *N.J.S.A.* 18A:8-31 and that the Board's adoption of the

resolution violated the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 through -21, or *N.J.A.C.* 6:3-1.2 or both.

The Board denied the claims and said it was not a consolidated school district, nor did it violate the OPMA or provisions of the New Jersey Administrative Code, Title 6.

The Borough opened the matter before the Commissioner of Education on March 5, 1997 by request for emergent relief in which it asked the Commissioner to enjoin placement of the question on the ballot at the 1997 annual school election. On April 9, 1997, the Commissioner denied the motion.

The matter was then transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to -13. After notice, telephone conferences were held. Counsel tried to resolve the matter amicably, but those attempts failed. The matter now proceeds on cross-motions for summary decision, all facts being stipulated. The OPMA issue is no longer argued.

ARGUMENTS

The Petitioner

Although the New Hanover Board of Education now acknowledges that it is, in fact, a consolidated school district, a question remains. It must be determined what legal effect this determination has on the reduction of members of the Board from nine to seven.

Boards of education are creatures of the Legislature, are controlled by statute and may exercise only those powers expressly delegated to them by statute. *N.J.S.A.* 18A:8-25 through -41 generally apply to consolidated districts. The Borough asserts that these statutory provisions govern the outcome of the present case. *N.J.S.A.* 18A:8-31 provides that a consolidated board shall consist of nine members and that the members shall serve for terms of three years and that vacancies for unexpired terms shall be filled in the same manner as in other type II districts. The

Board, on the other hand, points to *N.J.S.A.* 18A:12-10 through -15 which apply to type II boards in general and at *N.J.S.A.* 18A:12-14 provides for reduction in the membership of a board.

The Borough urges that the Board has presented no authority in support of the legal interpretations it urges this tribunal to adopt. There may be no specific decisions that provide an interpretation of certain statutes implicated here. However, there is plenty of guidance in the field of statutory interpretation.

The Board contends that the rules of statutory construction favor an interpretation that *N.J.S.A.* 18A:12-12 and -14, contained within general provisions for type II school districts, should override the particular statutory direction in *N.J.S.A.* 18A:8-31, specific to consolidated school districts. This interpretation is in conflict with the specific and express provisions of *N.J.S.A.* 18A:8-31, which provides

> The board shall consist of nine members and the members shall serve for terms of three years and vacancies for the unexpired terms shall be filled in the same manner as in other type II school districts. The board shall provide annually for election of members from the former constituent districts to succeed the members selected therefrom as their terms expire.

When the Legislature uses the word "shall" within a statute, there is a presumption that what is thus commanded must be done. *N.J.S.A.* 1:1-1, General Rules of Construction, provides

> In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed in their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.

N.J.S.A. 18A:8-31 is drafted in the imperative. This creates the clear understanding that the Legislature intended boards of consolidated school districts to be governed by nine members, and nine members only. In *Diodato v. Camden County Park Comm'n*, 136 *N.J. Super.* 324 (App. Div. 1975), the court held, "whenever the word 'shall' appears in a statute, it creates a

presumption that what is thus commanded must be done." Clearly, the Legislature chose to use the word shall when commanding the number of board members for a consolidated school district.

It is a settled principle of statutory construction that when there is a conflict between a specific statutory provision and a general enactment, the specific provision controls. Where, as in the present case, a conflict arises between a general statute and a specific statute on the same subject, the specific provision controls. The New Jersey Supreme Court has addressed the issue many times. *See, e.g., State v. Hotel Bar Foods*, 18 *N.J.* 115 (1955), citing *Hackensack Water Co. v. Division of Tax Appeals*, 2 *N.J.* 157 (1949), which held

> [T]he general rule of statutory construction [is] that "where there is any conflict between a general and specific statute covering the same subject in a more minute and definite way the latter will prevail over the former and will be considered an exception to the general statute."

The same reasoning and holding are expressed in scores of cases. With these well-established rules in mind, the Borough offers the proper interpretation of the statutes concerning board membership for consolidated school districts. Application of the *in pari materia* doctrine is inappropriate under the present circumstances. The Board argues that the doctrine justifies applying the statutory provisions generally established for all type II school districts in a way that supersedes the specific provisions that were enacted for consolidated school districts. But such an application has been held to be inappropriate in circumstances of the present type. *International Broth. of Elec. Workers v. Gillen*, 174 *N.J. Super.* 326 (App. Div. 1980) held that

> The rule that statutes *in pari materia* are to be construed together is one which may be helpful in resolving doubts and uncertainties and in ascertaining the legislative intent. But it is merely an aid to the interpretation of doubtful or ambiguous statutes, and where, as here, "an act is plain and unambiguous in its terms, the rules is fundamental that there is no room for judicial construction, since the language employed is presumed to evince the legislative intent." The doctrine is not invoked to engraft the terms of one statute onto another merely because the general subject matters of the two enactments are similar.

The statutory enactments here are quite clear. *N.J.S.A.* 18A:8-25 through -41 were enacted specifically to establish and maintain the procedural and operational structure for consolidated school districts. *N.J.S.A.* 18A:8-31 specifically mandates that the board of education of a consolidated school district shall consist of nine members. By resorting to the general provisions for type II school districts to argue that the number of board members for a consolidated school district may be submitted to the voters, the Board is attempting to "engraft terms of one statute onto another merely because the general subject matters of the two enactments are similar." This is improper and the tribunal should so rule.

In addition, if two statutory provisions are enacted by the same Legislature, and the former designates certain operational provisions while, on the same subject, the latter is silent, the inference is created that the distinction was a purposeful one. In short, the Legislature is presumed to be cognizant of its prior acts each time it enacts a new statute. This being so, it can be inferred that the Legislature intended the distinction between the statutes that the Borough posits.

The legislative histories of these two statutory sections is extensive. *N.J.S.A.* 18A:8-31 traces its history through R.S. 18:5-17.7 and -17.9 in the Laws of 1947, chapter 86 revision from the Laws of 1903 (2nd Sp. Sess.) chapter 1, §105. *N.J.S.A.* 18A:12-12 traces its history through R.S. 18:7-4 and -5 to the Laws of 1919, chapter 192, §1 and from that point through the Laws of 1904, chapter 28, §1 and back to the Laws of 1903 (2nd Sp. Sess.) chapter 1, §78. The statutes have been amended from time to time, but both are substantially rooted in the comprehensive education laws created by the Second Special Session of the Legislature in 1903.

The Borough believes it is clear that the Legislature enacted and intended to continue separate provisions mandating that consolidated school boards shall consist of nine members. Other type II districts, which normally are comprised of only one municipality, may determine to vary the membership number. This direction stems from a desire to provide for the balancing of the potentially diverse interests of the various constituent municipalities in a consolidated district. If the Board's position were accepted, a given municipality in a consolidated school district might be represented by only one member, which could prove insufficient even to obtain the necessary second to have a motion placed upon the floor for discussion.

Both series of statutory provisions establish the organizational structure for type II school districts. *N.J.S.A.* 18A:12-10 through -15 apply generally to all type II school districts. However, *N.J.S.A.* 18A:8-25 through -41 apply specifically to consolidated school districts. The more specific enactments pertaining to consolidated school districts expressly set the number of board members at nine and remain silent as to altering the statutorily set number. The more general provisions of *N.J.S.A.* 18A:12-10 through -15, on the other hand, provide for changing the number of board members generally, as for other type II school districts. This distinction can be viewed only as a purposeful distinction, created by the Legislature and meant to distinguish the membership of boards of education of consolidated school districts from the membership of boards of education of other type II school districts.

The statutory construction and interpretation offered by the respondent would render *N.J.S.A.* 18A:8-31 inoperative, superfluous and meaningless. A construction that will render any part of a statute inoperative, superfluous or meaningless is to be avoided. *State v. Reynolds*, 124 *N.J.* 599 (1991).

And the Appellate Division has stated that it is required to enforce the legislative intent as written and not according to some supposed unexpressed intention. *Gillen,* above, 174 *N.J. Super.* at 329.

N.J.S.A. 18A:8-31 specifically provides that there are to be nine board members for consolidated school districts. Nowhere in Article 5, *N.J.S.A.* 18A:8-25 through -41, has the Legislature provided for changing the number of board members in a consolidated district. Because the Legislature provided no mechanism for changing the number of board members in a consolidated district, it may be inferred that the Legislature specifically intended that nine school board members are to govern the boards of consolidated school districts.

Similarly, nothing in the statutes that provides for the creation of a new school district requires any other interpretation. In *N.J.S.A.* 18A:12-11.1, the language states, "Whenever a new school district, except a regional school district, or a consolidated school district . . . is created, there shall be placed upon the official ballot to be voted upon, at the first annual school election,

the question of whether the board shall consist of three, five, seven or nine members." The Legislature could not have been more clear. It expressly adopted the statement, "except a regional school district, or a consolidated school district."

The Borough's interpretation is supported and illustrated. The Legislature has been quite clear. Where it intends to include consolidated boards in a provision, it so states. Where it intends not to include consolidated boards, it also makes this apparent.

The Superior Court has determined that a statute should not be broadened or enlarged, if that would be contrary or detrimental to the legislative intent. In *Mulcahy v. Bergen County Board of Elections*, 156 *N.J. Super.* 430 (Law Div. 1979), the court stated

> Even where the legislative intent might warrant liberal construction it should be done only where the facts warrant and violence will not be done to the legislative scheme by such construction. [At 435, n. 2.]

This tribunal should decline to use the statutory construction urged by the Board to render unnecessary the statutory provisions of *N.J.S.A.* 18A:8-25 through -41.

The Respondent

The Board concedes at the outset that a review of legislative history and certain historical acts of the New Hanover Township Board of Education demonstrates that the Board is, indeed, a consolidated board of education. Having conceded that the district is a consolidated school district, the Board argues nevertheless that voters of consolidated school districts may be given the choice to reduce membership on their boards of education from nine to a lesser number.

Reading various sections of the statutes together, the Board urges that districts such as New Hanover are type II school districts and all of the provisions of *N.J.S.A.* 18A:12-10 through -15 apply. One of those provisions, *N.J.S.A.* 18A:12-12, clearly states that the board of any type II school district may call for a referendum to reduce, or increase, the number of seats on the board.

The Borough maintains that *N.J.S.A.* 18A:8-31 mandates nine-member boards for consolidated districts:

> The board shall consist of nine members and the members shall serve for terms of three years and vacancies for the unexpired terms shall be filled in the same manner as in other type II school districts.

The Borough asks the tribunal to read the final phrase, "in the same manner as in other type II school districts," as relating only to unexpired terms. In other words, the only thing that consolidated school districts do in the same manner as other type II school districts is fill vacancies. But, board members for consolidated districts serve for terms of three years, and this is no different from other type II school districts. The Board's precise argument on this point is as follows:

> The petitioner asks the court to read the final phrase, "in the same manner as in other type II school districts," as relating only to unexpired terms. In other words, [it] asserts that the only thing that consolidated school districts do like other type II districts is fill vacancies. But note, board members for consolidated districts "serve for terms of 3 years" no different than "other type II school districts." So too, aren't nine (9) member boards authorized for type II school districts? As the undersigned argued in our brief in opposition to the petitioner's request for emergent relief, while this section can be read as the petitioner does, can't it just as easily be read to mean that consolidated districts have nine (9) member boards, whose members are elected for 3 year terms, and whose vacancies are filled, <u>all</u> as in other type II school districts? [Respondent's brief at 3.]

The Board concedes that the petitioner's reading of *N.J.S.A.* 18A:8-31 is reasonable standing alone. However, the Board's reading of the statute is buttressed by and consistent with many other sections of the title. First, *N.J.S.A.* 18A:9-3(a)(4) provides that four different kinds of local school districts, including consolidated school districts, are type II districts and, in the final section of the statute, says that such districts "shall be subject to the provisions of this title relating to type II districts except as otherwise so provided in the case of regional districts."

Consolidated school districts then, in the Board's view, are governed by those parts of Title 18A that relate to type II school districts. *N.J.S.A.* 18A:12-10 through -15 deal specifically with type II school districts having elected board members. New Hanover is such a district. The first statute, *N.J.S.A.* 18A:12-10 provides that the statutes are to apply to all type II school districts except as otherwise provided in this title for regional districts and except those districts in which the members of the boards of education are appointed. The statute clearly does not carve out consolidated districts. The provisions of subarticle B of Article 4, Chapter 12 apply to all type II school districts. All of those provisions apply to consolidated school districts. One of the provisions, *N.J.S.A.* 18A:12-12 provides

> If the board of any district shall determine by resolution that it is for the best interest of the schools that the membership of the board shall be increased from whatever number than composes it to five, seven or nine members, or reduced from said number to seven, five or three members, the question of such increase or reduction shall be submitted to the voters of the district at the next annual school election and the question shall be stated in the notice of the election.

The Board asserts that further support for its position is found at *N.J.S.A.* 18A:12-11.1. The first paragraph of that section reads

> Whenever a new school district, except a regional school district, or a consolidated school district or a new district created under the terms of article 4 of chapter 8 of this title is created, there shall be placed upon the official ballot to be voted upon, at the first annual school election, the question whether the board shall consist of three, five, seven or nine members.

According to the Board, the tribunal would have to find that when the Legislature enacted *N.J.S.A.* 18A:12-11.1, it was aware that all provisions of subarticle B of Article 4 applied to all type II school districts and then immediately forgot that fact when it enacted *N.J.S.A.* 18A:12-12 if the tribunal is to sustain the Borough's position. And, *N.J.S.A.* 18A:9-3 provides that four different kinds of local school districts and all regional school districts are type II districts. The statute concludes with the words, "[each] such district shall be subject to the provisions of this

title relating to type II districts except as otherwise so provided in the case of regional districts." When the Legislature failed to include consolidated districts within the exception language, the Legislature signaled its intent to make all general rules applicable to type II school districts applicable to consolidated school districts. The tribunal should find that nine-member consolidated boards of education are mandated only by *N.J.S.A.* 18A:12-11.1, which refers to newly-created consolidated districts and their boards of education and that the reference in *N.J.S.A.* 18A:8-31 to consolidated school districts having nine-member boards is merely a reflection of the fact that these boards, unlike other local school districts, must begin as nine-member boards.

DETERMINATION

Counsel carefully researched the Board of Education's history. The school district was established as a consolidated school district in 1918, pursuant to laws that emanated from the Second Special Session of the Legislature in 1903. Since 1918, new legislation has been established and older legislation has been modified or supplanted. In 1967, the Legislature passed and the Governor signed into effect chapter 271 of the Laws of 1967. This act is codified, in part, at *N.J.S.A.* 18A:8-25 through -41. This is also referred to as Article 5 of Chapter 8, Title 18A.

N.J.S.A. 18A:8-27 provides for the adoption of a different name for consolidated boards previously created. This requires only a majority vote of the local board and approval of the State board. Once approved, this is certified to the Secretary of State, and the new title becomes the corporate title of the district.

N.J.S.A. 18A:8-28 provides that a consolidated school district shall have all the powers and duties and be subject to the same restrictions as a board of education in a type II school district unless an exception shall appear in Chapter 8.

N.J.S.A. 18A:8-29 through -38 address apportionment of board membership, organization of the board, custodial of school monies, supervision of consolidated districts, elections, collection and payment of appropriations and certifications to county boards of taxation. *N.J.S.A.* 18A:8-31 expressly states, "The board shall consist of nine members and the members shall serve

for terms of three years and vacancies for the unexpired terms shall be filled in the same manner as in other type II districts." The statute goes on to say, "The board shall provide annually for election of members from the former constituent districts to succeed the members selected therefrom as their terms expire." Given its place in Article 5, it is certain that *N.J.S.A.* 18A:8-31 speaks to the period in which a consolidated board is created. That a slightly different procedure existed in Title 18 and was employed when this district was formed in 1918 is not unimportant, but neither is it controlling. The Legislature has carefully preserved the fiscal and corporate integrity of boards created prior to January 11, 1968. Note, for instance, *N.J.S.A.* 18A:8-39 and -40. These statutes expressly provide that R.S. 18:5-18 and -19 are saved from repeal. Certain school districts earlier consolidated continued to exist; debt incurred by those districts was protected. In short, the article rewrote the manner in which consolidated districts are formed, thus replacing the procedure this school district used in 1918, but protected the corporate and fiscal integrity of existing consolidated districts.

It must be noted that, when this package of statutes was enacted, the Legislature offered incentives to school districts to create consolidated districts and regional districts, both all purpose and limited purpose. It may reasonably be inferred that the Legislature sought to do nothing that would act as a disincentive to regionalization or consolidation.

Subarticle B, *N.J.S.A.* 18A:12-10 through -15, was part of chapter 271, Laws of 1967. The legislation must be treated as a whole. The Legislature was, simultaneously, encouraging regionalization and consolidation and being careful not to impair the integrity of existing districts. In addition to new material, the Legislature reenacted much existing statute.

It is beyond argument that the Legislature intended consolidated school districts to be type II school districts, in all respects. The language in Article 5, *N.J.S.A.* 18A:8-25 through -41 is addressed to consolidated school districts. At *N.J.S.A.* 18A:8-25, it provides that the chapter shall be applicable to all consolidated local school districts already in existence. It provides at *N.J.S.A.* 18A:8-28 that each consolidated school district shall have all the powers and duties and be subject to the same restrictions as a board of education in a type II school district. It provides at *N.J.S.A.* 18A:8-29, -30 and -31 for the apportionment of membership of the board. At *N.J.S.A.* 18A:8-32, it provides that consolidated boards shall organize annually in the manner prescribed

for other type II districts. The word other is significant. *N.J.S.A.* 18A:12-10, applicable to choice of members, requires that provisions of the subarticle in which it is contained shall apply to all type II school districts except regional districts and those districts in which the members of the boards of education are appointed pursuant to *N.J.S.A.* 18A:12-16 through -19.

N.J.S.A. 18A:9-3 provides that type II school districts shall include every consolidated school district. If, as the Borough suggests, there were any ambiguity in the many statutes applicable here, *N.J.S.A.* 18A:9-3 dramatically eliminates it. The parties agree that the New Hanover School District is a consolidated school district. Every consolidated school district is a type II school district. Upon formation, each consolidated school district shall have a board consisting of nine members. Similarly, if a type I school district using the procedures prescribed at *N.J.S.A.* 18A:9-4, -5 and -8, should be reclassified as a type II school district, *N.J.S.A.* 18A:9-10 requires that the first board in any such district shall consist of nine members. Yet, both a consolidated district and a district that has reclassified from type I to type II may, under the clear provisions of *N.J.S.A.* 18A:12-12 increase or reduce its membership. *N.J.S.A.* 18A:12-12 was enacted as were nearly all the statutes discussed as part of chapter 271, Laws of 1967, effective January 11, 1968. The Legislature was cognizant of what it was doing. Notwithstanding that certain boards had to begin corporate life with nine members, the Legislature also said

> If the board of any district shall determine by resolution that it is for the best interest of the schools that the membership of the board shall be increased from whatever number of members than composes it to five, seven or nine members or reduced from said number to seven, five or three members, the question of such increase or reduction shall be submitted to the voters of the district at the next annual school election and the question shall be stated in the notice of election.

Thus, the whole structure of chapter 271, Laws of 1967 is internally consistent. School districts are classified as either type I or type II, where formerly, under Title 18, they were referred to as Chapter 6 or Chapter 7 districts. All consolidated districts were designated type II districts. New consolidated districts and type I districts reclassifying as type II districts must initially have nine-member boards. Thereafter, if the board of any district determines that it is in the best interest of

the schools that the membership of the board be adjusted, then that question shall be put to the voters at the next annual school election. If the voters approve, the board, with the guidance of the county superintendent of schools, shall so resolve and shall put the change into effect.

In consideration of the foregoing, I **FIND** and **CONCLUDE** that the New Hanover Township Board of Education acted within the compass of authority the Legislature has granted it when, pursuant to *N.J.S.A.* 18A:12-12, it determined that it was in the best interest of the district that the membership of the Board be reduced and it put that question to the public. The readings of the statutes that the Borough urges are simply too strained. The legislation discussed is hardly penal. Therefore, it should be interpreted liberally. Even if the interpretation is less than liberal, the structure of chapter 271 of the Laws of 1967 makes clear the legislative intent that any type II school district may increase or reduce its membership provided it follows the statutory prescription at *N.J.S.A.* 18A:12-12.

Therefore, I **CONCLUDE** that the petitioner Borough of Wrightstown has not carried the burden of persuasion and that the petition of appeal must be **DISMISSED**. It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

20 AUGUST 1997
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

8/22/97
DATE

Receipt Acknowledged:
DNA
DEPARTMENT OF EDUCATION

AUG 25 1997
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

ml

OAL DKT. NO. EDU 2811-97
AGENCY DKT. NO. 78-3/97

WRIGHTSTOWN BOROUGH COUNCIL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were filed by the Board and replies thereto were timely filed by the Council in accordance with *N.J.A.C.* 1:1-18.4.

The Board takes exception only to the Administrative Law Judge's (ALJ) failure to include a finding as to whether or not New Hanover is a consolidated school district as provided by *N.J.S.A.* 18A:8-4.

Council recasts and reiterates arguments raised before the ALJ contending that Article 5 (of Chapter 8, Title 18A) does not authorize a change in the statutorily mandated number of board members in a consolidated school district.

Upon a careful and independent review, the Commissioner determines to uphold the determination of the ALJ finding the reasoning contained therein to be consistent with

applicable statutory provisions. In so ruling, the Commissioner is satisfied that the ALJ carefully considered Council's arguments and provided a basis for their rejection.

Further, the Commissioner recognizes that the ALJ did not render a declaration as to the status of the New Hanover School District. In that the parties stipulated that the District was consolidated for purposes of the within proceeding, the Commissioner concurs with the parties' assessment, and herein declares New Hanover to be a consolidated school district.

Accordingly, the Commissioner affirms the initial decision of the OAL, as clarified, and dismisses the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 2, 1997
DATE OF MAILING OCTOBER 2, 1997

525-97

525-97

SAMUEL SCHOONOVER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, ATLANTIC COUNTY AND THE TEACHERS' PENSION AND ANNUITY FUND,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, spouse of a deceased school employee, contended the Board improperly categorized his wife as resigned rather than on leave of absence, thereby depriving him of benefits at her death.

ALJ concluded that since petitioner's cause of action arose, at the very latest, at the time of his discussion with the Board's secretary in the spring of 1995, his petition filed in April 1996 was time barred under the 90-day provisions of *N.J.A.C.* 6:24-1.2(c).

Commissioner adopted the initial decision as his own. Petition was dismissed as untimely filed.

OCTOBER 2, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6474-96

AGENCY REF. NO. 139-4/96

SAMUEL SCHOONOVER,

Petitioner,

v.

BOARD OF EDUCATION OF ATLANTIC COUNTY, VOCATIONAL-TECHNICAL SCHOOL DISTRICT, ATLANTIC COUNTY & TEACHERS PENSION AND ANNUITY FUND,

Respondent.

Allen H. Vernon, Esq., for petitioner

James Ferguson, Esq., for respondent, Board of Education

Celestine Ross, Deputy Attorney General, for respondent, Division of Pension and Benefits, (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: August 1, 1997 Decided: August 15, 1997

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Samuel Schoonover, alleged that the Board of Education improperly accepted his wife's resignation at a School Board meeting held on August 21, 1989, which affected certain pension rights of his wife, now deceased, and ultimately of the petitioner. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case, pursuant to the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -15, the act creating the OAL, *N.J.S.A.* 52:14F-1 to -13.

FACTS NOT IN DISPUTE

The within matter comes before the Office of Administrative Law as a contested matter as a result of a Petition filed by petitioner, Samuel Schoonover against the Board of Education of the Atlantic County Vocational Technical School (Voc-Tech) which in effect alleges that the Board acted improperly in accepting the petitioner's decedent's resignation at a School Board meeting held on August 21, 1989 and that said decision has affected certain pension rights of the petitioner and petitioner's decedent. The facts are not in dispute.

Petitioner is the husband of the decedent, Patricia Schoonover, who was employed as a LPN instructor at Voc-Tech commencing March 29, 1989 through approximately July 12, 1989, when petitioner's decedent sustained injury in the course of her employment. As a result of the injury sustained in the accident as well as a subsequent illness, petitioner's decedent did not return to work. On or about August 21, 1989, the Voc-Tech Board voted to accept the resignation of petitioner's decedent effective September 1, 1989. Petitioner alleges in his Petition at paragraph 7, that said action of the Board was without written notice to him. Petitioner's decedent died on August 20, 1991, two years later, following a lengthy illness. During that two years, petitioner's wife never challenged the Board's decision nor did anyone on her behalf nor is there any allegation she ever applied for a benefit. Petitioner takes the position that at all times his wife, the decedent, was on a medical leave of absence and that it was her intention at all times to return to work following recovery from her illness. This claim is being made despite that fact that the

petitioner's decedent was a non-tenured employee and due to her limited length of service was not eligible for medical leave of absence pursuant to contract.

At some unspecified date subsequent to the death of petitioner's decedent the petitioner contacted the school business office to inquire about benefits and claims and he was initially told that no benefits were available. He later alleges that in the Spring of 1995, he received a letter from the Atlantic County Vocational School indicating that unclaimed benefits were available.

At about the same time the petitioner contacted Paul Trivellini, the Board secretary and was informed that the school had accepted his wife's resignation on August 21, 1989, effective September 1, 1989.

Notwithstanding the receipt of this information in the spring of 1995, the petitioner waited until December 1995 before he requested the Board to reconsider its decision from August 1989. At the meeting held on January 16, 1996, the petitioner submitted his certification and the Board rejected petitioner's request.

The respondent maintains that the Board's action of August 21, 1989, is the conduct or Board decision which is at issue and not the Board's subsequent denial of petitioner's request at the January 16, 1996, meeting. Although the petitioner alleges that neither he nor his wife was ever notified of the Board's August 21, 1989, decision at any time in close proximity to the decision, nevertheless the petitioner's certification and the Petition filed in this matter readily concede that he certainly was aware of the Board's decision in the Spring of 1995 as a result of his conversations with Mr. Trivellini. That being the case, the respondent, Voc-Tech maintains that the Petition filed in this matter is untimely pursuant to *N.J.A.C.* 6:24-1.2 and seeks a dismissal of the Petition with Prejudice. Schoonover has not replied to the Board's motion or otherwise contested the facts stated therein. He does not explain why he thought his wife was on a leave of absence during the two years prior to her death.

LAW AND ARGUMENT

The respondent, Voc-Tech seeks a dismissal of the Petition pursuant to *N.J.A.C.* 6:24-1.2(c) which states as follows:

> The petitioner shall file a Petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the District Board, individual party, or agency, which is the subject of the requested contested case hearing.

The matter at issue in the instant Petition is the Board's action of August 21, 1989. Although the petitioner alleges that neither he nor his wife received written notice of that decision, the instant Petition, as well as the petitioner's earlier certification clearly establish that he had notification of the Board's earlier decision through his conversation with Mr. Trivellini in the Spring of 1995. The respondent Board takes the position that the ninety day time frame accrues from that time (Spring of 1995) and not as of the Board's rejection of petitioner's request for reconsideration in January 1996. The subject regulation has been interpreted in a number of administrative and court cases. The leading case is *Kaprow v. Board of Education of Berkeley Township,* 131 *N.J.* 572 (1993). *In Kaprow,* the Court upheld the authority of the Commissioner of Education and the State Board's authority to adopt the subject regulation which in effect imposes a period of limitation and repose. Secondly, the Court found that the imposition of the limitations period did not violate the petitioner's due process rights and finally, the court found that the ninety day time limitation period was triggered by unofficial, informal communications from the Board's secretary.

In that case the petitioner, who was an assistant superintendent, was terminated pursuant to *N.J.S.A.* 18A:28-9. At the time of his termination he was the only tenured assistant superintendent in the school district. The termination was as a result of a reduction in force (RIF). The local Board failed to notify the petitioner of his post RIF rights to other positions in school district. Having received no notice from the local school Board the petitioner requested from the local Board a list of eligible positions in February 1988. On February 23rd the petitioner received a note from the Board secretary informing him that certain positions to which he held

tenure rights had already been filled. After various exchanges of correspondence the petitioner on August 1, 1988, filed a verified Petition with the Commissioner. One of the issues that the Court was called upon to decide was whether petitioner received adequate notice under *N.J.A.C.* 6:24-1.2. The Court in determining that the "unofficial and informal notice" by the Board secretary was sufficient to trigger the ninety day limitation stated as follows:

> The local Board was clearly required to give Kaprow official notice of that action. Kaprow, however, did not receive any notice of the Board's action until February 23, 1988, when he learned from the secretary of the local Board that it had created and filled two positions in which he claimed tenure rights. That notice, *although it was unofficial and informal, was sufficient to trigger the ninety day limitations period.* It is clear that Kaprow learned that the local Board had in fact taken final and formal action. Kaprow obviously believed that his tenured status entitled him to one or both of those positions under *N.J.S.A.* 18A:28-12 and the notice he had received was adequate to enable him to pursue his claim. In the future, it would be better if such information and notice is officially authorized and communicated by the local Board. Nonetheless, Kaprow's February 28th letter to the secretary of the local Board demonstrates that he had sufficient knowledge of the relevant facts to bring a RIF claim . . . Kaprow's attempt to resolve his claim through negotiations with the local Board is *irrelevant.* It does not negate the fact that he received adequate notice on February 23, nor does it toll the running of the limitations period. ...
>
> Kaprow received adequate notice under *N.J.A.C.* 6:24-1.2(c) on February 23, 1988, to trigger the ninety day limitations period. On that date he learned from the local Board the existence of that state of facts that would enable him to file a timely claim. To insist under these circumstances that there be additional or more specific notice will not further the objectives of the regulatory scheme, and would only defeat the considerations of repose and interfere with the efficient administration of the school laws. Because Kaprow received adequate notice on February 23, he was obligated to file his petition within the ninety day period. Kaprow, however, did not file his Petition until August 1, more than two months after the limitations period had expired. We, therefore, find that his claims are time barred by *N.J.A.C.* 6:24-1.2(c). 131 *N.J.* at 588-589.

The Court also went on to find that the Board action taken subsequent to petitioner's dismissal was not sufficient to allow petitioner to invoke the Doctrine of Equitable Estoppel. *See*, 131 *N.J.* at 588-591.

The facts in the *Kaprow* matter are not unlike those in the instant matter since in *Kaprow* the initial actions taken by the Board occurred back in 1981 and he did not receive notification of positions being filled until February 1988 even though those positions had been filled approximately a year and a half to two years earlier. The facts in *Kaprow* also indicate that the notice of the Board's prior action was informal and unofficial not unlike the notification which the petitioner admits he received in this action from the Board's secretary in the Spring of 1995. Certainly petitioner was aware from oral communications with the Board secretary that the Board had taken action which effected a claimed right and there is no plausible explanation for petitioner waiting for almost nine months to come before the Board and then several more months or until April 12, 1996, before filing a Petition. *See, also Nissman v. Board of Education of the Township of Long Beach Island, Ocean County*, 272 *N.J. Super.* 373 (App. Div. 1994) cert. denied 137 *N.J.* 315 (1994), wherein the court upheld the limitations provisions of *N.J.A.C.* 6:24-1.2 and determined that the subsequent petition was time barred. In that case the Court determined that the ninety day time frame runs from the time that the petitioner first became aware of the Board's action and not from the date that the consequences of the action are directly felt by the employee. 272 *N.J. Super.* at 381-382. *See, also Hoffman v. Township of Hillsborough*, OAL Dkt. No. EDU 678-96, Agency Docket No. 22-1/96 in which the Commissioner noted that the petitioner's Petition was deemed to have been filed out of time under the ninety day rule where it was found that she was given notice that her request for a salary adjustment was denied by the Board and the ninety day limitations provisions would not be relaxed, notwithstanding that the parties were negotiating the issue.

CONCLUSION

Based upon the factual allegations contained in the filed Petition, as well as the facts recited in the earlier certification, the accrual of the petitioner's cause of action, occurred at the very latest upon petitioner's conversation with the Board's secretary in the Spring of 1995 and the filing of the instant Petition approximately a year later is time barred under the ninety day provisions of *N.J.A.C.* 6:24-1.2(c).

ORDER

Accordingly, it is hereby **ORDERED** that the Petition of Samuel Schoonover is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/15/97
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

August 20, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 22 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

NONE

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 PETITION OF SCHOONOVER

P-2 CERTIFICATION OF SCHOONOVER

FOR RESPONDENT:

NONE

OAL DKT. NO. EDU 6474-96
AGENCY DKT. NO. 139-4/96

SAMUEL SCHOONOVER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, ATLANTIC COUNTY AND THE TEACHERS' PENSION AND ANNUITY FUND,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon his review, the Commissioner agrees with the conclusion of the Administrative Law Judge that the within petitioner's cause of action in this matter arose, at the very latest, at the time of his discussion with the Board's secretary in the spring of 1995 and, as such, his Petition of Appeal in the instant matter, filed in April 1996, is time barred under the 90-day provisions of *N.J.A.C.* 6:24-1.2(c).

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 2, 1997
DATE OF MAILING OCTOBER 2, 1997

526-97

RICHARD MANFRIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former Director of Buildings and Grounds, contended the Board wrongfully refused to accept withdrawal of his retirement notice but, rather, subsequent to receipt of such notice, acted to eliminate his position.

Initially, the ALJ concluded that petitioner failed to show good cause to compel the taking of depositions and, therefore, the motion to compel depositions was denied. ALJ found that petitioner's claim that his acquisition of knowledge regarding his workers' compensation benefits or his learning that the Board had not accepted his withdrawal did not trigger the 90-day limitations period. Rather, the Board's action of June 27, 1995 accepting his resignation for retirement started the clock. Thus, the ALJ concluded that as a matter of law petition filed in October 1996 was time barred. ALJ concluded that even if this action were not time barred, petitioner cannot now unilaterally rescind or renegotiate his retirement package as it was duly accepted by the Board. The Board's motion for summary judgment was granted. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own with modification. Commissioner concurred with the denial of motion for deposition as petitioner failed to establish "good cause" pursuant to *N.J.A.C.* 1:1-10.2(c)i. Commissioner further agreed with the ALJ that the law was clear that petitioner could not unilaterally rescind his planned retirement that had been duly accepted by the Board. Therefore, Commissioner granted Board's motion for summary decision. The Commissioner determined given that the result in this case on its merits was clear, that it was unnecessary to consider the procedural issue with respect to the exact point in time petitioner's within cause of action arose in that it would contribute nothing to the ultimate outcome of this matter. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10519-96
AGENCY DKT. NO. 465-10/96

RICHARD MANFRIA,
Petitioner,
v.
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, UNION COUNTY,
Respondents.

Robert C. Shea, Esq., for petitioner
(Shea & Novy, attorneys)

Julienne S. Duncan, Esq., for respondents
(Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, attorneys)

Record Closed: Decided: August 14, 1997

BEFORE **IRENE JONES**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On or about October 16, 1996 petitioner, Richard Manfria, filed a petition for Emergent Relief with the Department of Education. The petition sought an Order from

the Commissioner declaring that the respondent, the Union County Vocational-Technical Schools (Board), acted illegally when it terminated the petitioner; the Board's refusal to accept a withdrawal of the petitioner's resignation; reinstatement, back pay and benefits retroactive to June 30, 1996; and temporary reinstatement pending the outcome of the instant controversy.

On October 15. 1996 the Commissioner directed that the petition for emergent relief be perfected within ten days. The petitioner timely perfected the pleadings and on November 8, 1996 the Board filed its answer in opposition to the petition. By Order dated November 15, 1996, the Commissioner **DENIED** the motion for emergent relief and transmitted the matter to the Office of Administrative Law for hearing as a contested case.

On February 19, 1997, petitioner filed a motion to compel the depositions of the Superintendent of the School District and the School Business Administrator. On March 3, 1997, respondent filed a brief in opposition to the motion and a cross-motion for summary judgment which seeks to dismiss this matter with prejudice. This matter is scheduled for plenary hearings on October 27 and 28, 1997.

This initial decision concerns the motions filed by the parties.

STATEMENT OF THE FACTS

Richard Manfria, (Manfria) was employed by the respondent as its Director of Buildings and Grounds for approximately thirteen years and thus, was a tenured employee. In February 1993, Manfria, while on the job slipped and fell and sustained injuries to his back. He filed a worker's compensation claim and was out of work for ten months. In February 1994, Manfria returned to work. However, he continued to suffer from his injury and found that the pain made it impossible for him to carry out his job duties. (Affidavit of Richard Manfria (Manfria Affidavit), paragraph 5). Manfria spoke with the Superintendent of the School District, Dr. Thomas Bistocchi (Bistocchi) about

his salary and his desire to retire (Bistocchi Certification, Paragraph 6). Manfria and Bistocchi agreed that the salary issue could be resolved as a part of the petitioner's retirement package. On May 5, 1995, Bistocchi sent a letter to Manfria memorializing their prior discussion and setting forth a settlement of the salary dispute. (Bistocchi's Certification, Exhibit A). The letter further advised that the Board was accepting the proposed settlement pending receipt of his retirement letter tentatively scheduled to be effective April 1, 1996 but no later than June 30, 1996. Since the payment of salary differential was scheduled for the May 18, 1995 Board of Education meeting, Manfria was directed to sign and date the agreement and return it to Bistocchi's office no later than May 12, 1995. Manfria returned the executed agreement consistent with directives set forth therein.

Thereafter, Bistocchi submitted the resignation to the Board and at its June 26, 1995 meeting, a resolution was adopted accepting the resignation. On June 27, 1995, the Board notified Manfria of its action. (Bistocchi Certification, Exhibit C). Further, the Board acknowledged that it would pay the disputed salary pursuant to the signed agreement.

On January 24, 1996 Manfria sent a letter to the school Business Administrator, John Paredes, advising that he was "voiding out" his letter of retirement. Further, that he would be submitting a new retirement letter after he had back surgery. The Board did not respond to this letter. On October 16, 1996, Manfria moved for emergent relief.

DISCUSSION, FINDINGS AND CONCLUSION

Petitioner moves for an order compelling the respondent's to submit to deposition. Respondent cross moves for summary judgment. The motion to compel depositions will be addressed first.

Initially, it must be emphasized that the Uniform Administrative Procedure Rules (UAPR), *N.J.A.C.* 1:1-1.1 *et seq.*, are construed so as to achieve just results,

procedural simplicity, fairness in administration, and the elimination of unjustifiable expense and delay. *N.J.A.C.* 1:1-1.3(a). Pursuant to *N.J.A.C.* 1:1-10.1(a), the purpose of discovery is to facilitate the disposition of cases and, to this end, give litigants access to facts which may support or undermine their position or that of their adversary. In considering a discovery motion, the ALJ is to weigh the specific need for the information, the extent to which the information is in the control of the party, and matters of expense, privilege, trade secret and oppressiveness. *N.J.A.C.* 1:1-10.1(c).

The UAPR provides for the taking of depositions only upon a motion for good cause. *N.J.A.C.* 1:1-10.2(c).i

> Depositions upon oral examination or written questions and physical and mental examinations are available only on motion for good cause. In deciding any such motion, the judge shall consider the policy governing discovery as stated in *N.J.A.C.* 1:1-10.1 and shall weigh the specific need for the deposition or examination; the extent to which the information sought cannot be obtained in other ways; the requested location and time for the deposition or examination; undue hardship; and matters of expense, privilege, trade secret or oppressiveness. An order granting a deposition or an examination shall specify a reasonable time during which the deposition or examination shall be concluded.

Div. of Consumer Affairs v. Acme Markets, 3 *N.J.A.R.* 210 (1981). Good cause generally cannot be shown unless other discovery methods have proved inadequate. Indeed, the parties are obligated to exhaust all less formal opportunities to obtain discoverable material before invoking provisions for discovery practice. *Acme Markets*, *supra* at 213.

I **FIND** that the parties have not engaged in any of the less formal discovery methods. No interrogatories have been propounded, no requests for production of documents were made, and no requests for admissions have been sought. *N.J.A.C.* 1:1-10.2(a). Petitioner asserts that the fact-sensitive nature of this case and the need

to elicit information from Dr. Bistocchi and Mr. Paredes as to their conversations regarding petitioner's retirement render traditional discovery methods inadequate. Moreover, petitioner contends that interrogatories would be difficult to fashion and would lead to only general answers. Even assuming this to be true, good cause cannot be shown until other discovery methods prove ineffective. Petitioner is obligated to exhaust all less formal discovery options before moving to compel depositions. *Acme Markets, supra* at 213. Here, the record reflects and petitioner concedes that no discovery has taken place. Instead, petitioner merely asserts that fashioning written interrogatories to obtain the information would be "difficult if not impossible." Difficulty in fashioning written interrogatories is not a factor to be weighed pursuant to *N.J.A.C.* 1:1-10.2(c)i.

I **CONCLUDE** that petitioner has failed to show good cause to compel the taking of depositions and therefore the motion is hereby **DENIED**.

Respondent moves for summary judgment on the basis that the material facts herein are undisputed and it is entitled to prevail as a matter of law. *N.J.*A.C. 1:1-12.5; *Brill v. Guardian Life Insurance Company of America*, 142 *N.J.* 520, 529 (1995). First, the petition is time bared under *N.J.A.C.* 6:24-1(c) and thus it should be dismissed. Further, the petitioner cannot unilaterally rescind his resignation. Since the Board had accepted the petitioner's resignation, it had no obligation to re-hire or retain the petitioner after the effective date of the resignation. Moreover, it is clear that the petitioner does not seek to rescind his resignation but is seeking to renegotiate its terms.

Petitioner contends that there are genuine disputed facts. Specifically, it is contended that the petitioner was mislead by the respondent. Indeed, it was the respondent's misrepresentations that induced the petitioner to resign. Petitioner further asserts that since discovery has not taken place, summary judgment is inappropriate.

Moreover, petitioner disputes that the petition is time barred. The ninety day time limitation for the filing of the instant matter commenced on July 15, 1996 and expired on October 13, 1996. The petition was filed on October 11, 1996 within the ninety day time limitation.

In an administrative proceeding, an ALJ may grant summary decision if the papers and discovery show that no genuine issue exists as to any disputed material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b) provides as follows:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The administrative regulation is essentially the same as the court rule, *R.* 4:46-2, which governs summary judgment in civil actions. Thus, summary judgment principles and precedent are sufficiently analogous to apply to proceedings at the OAL.

Summary judgment has long been recognized as a valid procedure under which a legal issue may be quickly and inexpensively disposed of where the pleadings, affidavits, and other papers filed clearly show that no genuine issue of material fact requiring disposition at a hearing exists. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). The moving party bears the burden of proof and the court must draw all inferences of doubt against the movant. *Judson v. Peoples Bank & Trust Co.*, 17 *N.J.* 67, 70, 74-75 (1954).

I **FIND** that there are no genuine issues of material fact that would require a hearing in this matter. The issue herein are legal and not factual.

The first issue is whether this action is time barred by the ninety-day rule. If so, the matter will not be permitted to proceed. The second issue is whether the petitioner resigned from his position and is simply attempting to re-negotiate the terms of his retirement.

As an employee of the Union County Vocational-Technical Schools, petitioner's action arises under the school laws. *N.J.A.C.* 6:24-1.2(c) governs the filing of actions arising under the school laws and establishes the ninety day rule.

It provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Thus, the ninety day rule requires that a petition be filed within ninety days of the receipt of notice of a final order, ruling or other Board action. *N.J.A.C.* 6:24-1.2(c). The ninety days begin to run on the date of some identifiable action taken by the board. Here, the ninety days began to run when the petitioner received notice that the Board had accepted his resignation at their regular board meeting on June 26, 1995. The Board sent petitioner a letter to that effect on June 27, 1995. The ninety days began to run as of June 27, 1995.

The validity of the N.J.A.C. 6:24-1.2(c) was discussed in *Kaprow v. Board of Ed. of Berkeley*, 131 *N.J.* 572 (1993), wherein the Supreme Court upheld the authority of the Commissioner and the State Board to establish a time limitation for the resolution of disputes arising under the school laws. The Court reasoned that:

> The limitation period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. ... The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.
>
> [*Id.* at 582.]

CF: Nissman v. Board of Ed., 272 *N.J. Super* 373, 380 (App. Div. 1994), *certif. denied*, 137 *N.J.* 315 (1994).

Petitioner contends that he did not know until January 24, 1996 that his worker's compensation claim would provide for his treatment and thus enable him to return to work. Thus, petitioner wrote to the Board at that time, indicating that he wished to submit a new retirement letter. The Board did not respond to this letter. There was no communication between the Board and petitioner until May 1996 when the Board sent a letter to petitioner regarding pension and benefits matters. It was at this time that he learned that the Board had not accepted his withdrawal of his resignation. Assuming the facts most favorable to the petitioner, the ninety days would have run by August 1996. However, petitioner did not file the petition until October 1996. Thus, it must be concluded that even if that May, 1996 action by the Board started the limitations clock, petitioner still filed his claim out of time.

Petitioner further asserts that he learned he had a cause of action in July 1996, when his attorney received a letter from the Board's attorney which indicated that the Board considered petitioner retired.

In *Willson v. Toms River Regional School Dist.*, 96 *N.J.A.R.2d* (EDU) 872 a similar argument was made and rejected. There a food services instructor retired after twenty-five years of service, during the last of which the school accommodated

petitioner by extending the food services program so that petitioner could receive full retirement benefits. Pursuant to their arrangement, petitioner tendered his letter of resignation in January 1994 for retirement effective July 1995 and the Board accepted his resignation at a meeting in August 1994. In June 1995, after not being able to secure other employment, petitioner requested that his resignation be withdrawn. *Id.* It was concluded therein that the petitioner's action was time-barred, because the only date which could reasonably be construed as beginning the limitations period was the date on which the Board notified the petitioner that it had accepted his resignation, that is, August 1994. *Id.* at 874. The ALJ explicitly rejected the notion that the rescission letter constituted continuing negotiations with the Board. *Id.*

Here, the petitioner seeks to enlarge the period of time within which he had to file a petition based on what he know and when he had knowledge. However, the ninety-day rule specifically requires board action to trigger the running of the ninety days, not action or knowledge on the part of a claimant. As the court stated in *Nissman*, "the 90 days begin on the date on which the final action of the local Board took place,...not the date on which petitioner claims that a substantive right accrued." *Nissman , supra* at 381. Under the public policy rationale expressed in Kaprow, supra, if cases could be brought based on when knowledge accrued to a petitioner, the Board would never know when or if a claim was going to be pursued. Clearly, this violates the mandate of *N.J.A.C.* 6:24-1.2(c) which is designed to offer both repose and security that claims can only be instituted within a given period of time. *Kaprow v. Board of Ed.*, 131 *N.J.* 572, 582 (1993) Some objective event must occur to trigger the limitations period. *Id.* at 587.

Therefore, I **FIND** that the petitioner's claim that his acquisition of knowledge regarding his worker's compensation benefits or his learning that the Board had not accepted his withdrawal did not trigger the ninety day limitations period. Rather, only board action pursuant to *N.J.A.C.* 6:24-1.2(c) can start the clock. I further **FIND** that the Board took its action on June 27, 1995, when it notified the petitioner that it had accepted his resignation for retirement. Therefore, I **CONCLUDE** that as a matter of law, the petitioner's action is time-barred.

I further **CONCLUDE** that even if this action were not time barred, petitioner cannot now rescind or re-negotiate his retirement package. It is well settled law in New Jersey that a resignation or retirement may not be unilaterally rescinded once it is accepted by the local school board.[1] Once retirement/resignation is accepted, the employment relationship is terminated and withdrawal of the resignation is ineffectual. *See Andrews v. Lamb*, 136 *N.J.L.* 548 (Sup. Ct. 1948); *Cutro v. Hazlet Township Bd. of Ed.*, 94 *N.J.A.R.2d* (EDU) 402; *Fisher v. East Orange Bd. of Ed.*, 1988 *S.L.D.* 8; *Hanley v. East Brunswick Bd. of Ed.*, 1988 *S.L.D.* 157; *Sathan v. North Brunswick Bd. of Ed.*, 1989 *S.L.D.* 87. However, a resignation may be withdrawn before it is accepted, *Kozack v. Waterford Bd. of Ed.*, 1976 *S.L.D.* 633, and can be rescinded if the local board consents to the rescission. *See Mancuso v. No. Arlington Boro.*, 203 *N.J. Super.* 427 (App. Div. 1985).

Here, petitioner's retirement was clearly accepted by the Board at its June 1995 meeting. In addition, no claim can be made that the school board consented to a rescission. More importantly, however, is the fact that the petitioner's letter does not express that he wishes to rescind his resignation. Rather, the January 26, 1996 letter express an intent to re-negotiate the retirement package. Specifically, the letter provides: "I will be submitting a new retirement letter when I am released from the Doctor...." Petitioner makes no claim in this letter that he wants his position back or that he has any intent of returning to work. Rather, the letter reflects his intent to re-negotiate the terms of his retirement to correct an alleged pension problem with his pay and a dispute over vacation, sick and personal time. It is only in the instant brief before this tribunal that the petitioner asserts that he wants his job back. The Board did not respond to this letter and was under no obligation to do so, the matter of petitioner's retirement having been concluded seven months earlier.

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[1] Note that under an analogous regulation of the Civil Service code, a permanent employee in the career service may resign in good standing by giving at least 14 days notice. *N.J.A.C.* 4A:2-6.1(a). A resignation is considered accepted by the appointing authority upon receipt of the notice of resignation. *N.J.A.C.* 4A:2-6.1(b). A request to rescind a resignation prior to its effective date may be consented to by the appointing authority. *N.J.A.C.* 4A:2-6.1(c).

Petitioner further asserts that he was misled by respondent regarding his Worker's Compensation benefits and medical treatment and that such information induced his retirement. However, a resignation can only be voided or rescinded upon a showing of duress or coercion in the procurement of the resignation. Coercion and duress exist only where there are threats made and one's will is controlled. In *Gobac v. Davis*, 62 *N.J. Super.* 148 (Law Div. 1960), a tenured employee with the Division of Alcoholic Beverage Control was told he must either resign or he would be terminated immediately without a hearing. Plaintiff signed a prepared letter of resignation and later claimed duress. In finding that plaintiff was coerced into resigning, the court looked to the threats made and the extent to which those threats controlled the will of the threatened person. *Id.* at 157.

Conversely, in *McBride v. Atlantic City*, 146 *N.J. Super.* 498 (Law Div. 1974), *aff'd* 72 *N.J.* 201 (1976), a police officer was told he must resign or he would be criminally charged. The police officer was a mature person and experienced policeman who was well aware of his legal rights and right to a hearing before discharge. *Id.* at 506. The court concluded that the officer was not coerced because he had participated in several meetings with the commissioner and deputy commissioner regarding his options and had time to consider the consequences of his decision. *Id.* In *Manzo v. Jersey City Div. of Health*, 92 *N.J.A.R.2d* 117 (CSV), petitioner resigned because his circumstances made him saddened, upset and possibly depressed. The Appellate Division, upholding the ALJs decision and reversing the Merit System Board, determined that "distressful circumstances" do not rise to the level of duress or coercion. Instead, evidence of unlawful threats and the will of the person being overcome must be present. *I/M/O/ Manzo*, A-2872-91 and A-1326-92 (unreported) (App. Div., Nov. 1, 1993) *Evaul v. Camden Bd. of Ed.*, 35 *N.J.* 244 (1961).

In the instant case, petitioner claims only that he was misled. Even if he was misled, which is doubtful since petitioner was represented at all times by a worker's compensation attorney, this clearly does not rise to the level of threats sufficient to overcome his will. Misinformation simply cannot be likened to duress and coercion.

Therefore, whatever information petitioner later learned regarding his worker's compensation benefits and/or insurance coverage cannot be used now as a basis for rescinding his resignation. I **FIND** and **CONCLUDE** that the petitioner's resignation was voluntarily entered into, was submitted to the Board at his behest, and the Board acted in accordance with the terms of his retirement.

It is therefore **ORDERED** that the petitioner's motion to compel the taking of the respondent's deposition is hereby **DENIED** and it is further **ORDERED** that the respondent's motion for summary judgment is hereby **GRANTED** and this matter is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/14/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 21 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

RICHARD MANFRIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his review, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that, as the within petitioner has failed to establish "good cause," pursuant to *N.J.A.C.* 1:1-10.2(c)i, to justify depositions being compelled from the District's Superintendent and School Business Administrator, his motion in this regard must be denied. The Commissioner further agrees with the ALJ that the law is clear that petitioner in this matter, having proffered notice of his planned retirement, which was duly accepted by the Board in June 1995, cannot, subsequently, unilaterally rescind such retirement, (*see Andrews, Cutro, Fisher, Hanley, Sathan, supra*) and, as such, the Board's motion for summary decision must be granted.*

* In that the result in this case on its merits is clear, *i.e.*, the Board is entitled to summary decision as a matter of law, the Commissioner resolves that an arduous consideration of the parties' respective arguments and the discussion of the ALJ on the *procedural issue* with respect to the exact point in time petitioner's within cause of action arose is unnecessary in that it would contribute nothing to the ultimate outcome of this matter. As such, the Commissioner declines to reach this procedural issue.

Accordingly, the initial decision, as modified herein, is adopted. Summary decision is hereby granted to the Board, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 2, 1997
DATE OF MAILING OCTOBER 2, 1997

527-97

527-97

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 269,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 2, 1997

OAL DKT. NO. EDU 6075-96
AGENCY DKT. NO. 88-3/96

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 269,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 2, 1997
DATE OF MAILING OCTOBER 2, 1997

531-97

531-97

BOARD OF EDUCATION OF THE TOWNSHIP OF DOWNE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOSEPH WEBB,	:	DECISION
RESPONDENT.	:	

OCTOBER 3, 1997

OAL DKT. NO. EDU 33-97
AGENCY DKT. NO. 578-12/96

BOARD OF EDUCATION OF THE TOWNSHIP OF DOWNE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOSEPH WEBB,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 3, 1997
DATE OF MAILING OCTOBER 3, 1997

532-97

532-97

JANET BECKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH HANOVER, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 3, 1997

OAL DKT. NO. EDU 8440-96
AGENCY DKT. NO. 316-7/96

JANET BECKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH HANOVER, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 3, 1997
DATE OF MAILING OCTOBER 3, 1997

533-97

533-97

ANTHONY ANDRIOLA *ET AL.* AND CAROL GOLDSTEIN, ON BEHALF OF THE TEANECK EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

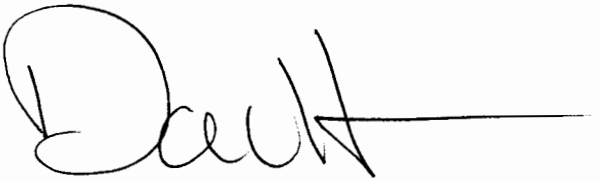
OCTOBER 3, 1997

OAL DKT. NO. EDU 11978-94
AGENCY DKT. NO. 427-10/94

ANTHONY ANDRIOLA *ET AL.* AND CAROL GOLDSTEIN, ON BEHALF OF THE TEANECK EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.



ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 3, 1997
date of mailing october 3, 1997

534-97

SHEILAH ROBINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 3, 1997

OAL DKT. NO. EDU 11543-96
AGENCY DKT. NO. 463-10/96

SHEILAH ROBINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 3, 1997
DATE OF MAILING OCTOBER 3, 1997

535-97

535-97

A.D., on behalf of minor child, G.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 3, 1997

OAL DKT. NO. EDU 5470-97
AGENCY DKT. NO. 118-4/97

A.D., on behalf of minor child, G.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 3, 1997
DATE OF MAILING OCTOBER 3, 1997

538-97

538-97

IN THE MATTER OF THE	:	
TENURE HEARING OF	:	
DEBORAH SUITT-GREEN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY.	:	
	:	

SYNOPSIS

State-operated School District certified tenure charges of unbecoming conduct, corporal punishment and insubordination against respondent teacher.

Initially, the ALJ denied respondent's motion to dismiss certain charges based on alleged incidents that occurred between 1989 and 1993 due to application of *res judicata*, collateral estoppel or *N.J.S.A.* 18A:6-13. ALJ found that the charges were not litigated in 1993; the Board did not render a decision on the merits; and the District was not barred from subsequent refiling of the charges. Next, in light of overwhelming testimony and documentary evidence, the ALJ found that the District did prove incidents documenting respondent's propensity to become upset, yell, scream, use offensive and abusive language, engage in irrational behavior and lose self-control among students and her colleagues. ALJ also found that the District gave her numerous reprimands and negative memoranda. Thus, the ALJ concluded that respondent had given the District just cause for dismissing her. Considering the seriousness of the offenses, the number of offenses and the length of time over which these offenses were committed, from 1989 to 1996, the penalty of dismissal was not excessive or unreasonable. (*Redcay*) ALJ ordered respondent dismissed from her tenured teaching staff position.

Commissioner adopted findings and determination in initial decision as his own and directed respondent be dismissed from her position as of the date of this decision. Matter was referred to the State Board of Examiners for action as it deems appropriate.

OCTOBER 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7071-96
AGENCY DKT. NO. 178-5/96

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

DEBORAH SUITT-GREEN,

Respondent.

Gregory G. Johnson, Esq., for petitioner

Eugene G. Liss, Esq., for respondent

Record Closed: July 28, 1997 Decided: August 25, 1997

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves tenure charges filed by the petitioner, the State Operated School District of the City of Newark, Essex County, against respondent, a tenured teaching staff member, for dismissal or reduction in compensation pursuant to *N.J.S.A.* 18A:6-10 to -29.

PROCEDURAL HISTORY

The petitioner, the State Operated School District of the City of Newark, Essex County (District), certified and filed tenure charges with the Commissioner of Education against the respondent, Deborah Suitt-Green, on April 4, 1996. The Statement of Charges alleges that the respondent is guilty of corporal punishment, unbecoming conduct and insubordination, which, if true, would warrant dismissal or reduction salary. An answer, denying the charges and asserting affirmative defenses, was filed by the respondent on June 12, 1996.

On June 24, 1996, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held on September 16, 1996, resulting in the entry of a prehearing order, dated September 26, 1996, fixing hearing dates, providing for discovery, and regulating other procedural matters connected to the forthcoming hearing. The hearing was scheduled to be held at the OAL in Newark, New Jersey, from May 5 through May 9, 1997.

On April 16, 1997, the respondent filed a motion to dismiss many of the charges based on the alleged incidents that occurred between April 7, 1989, and June 24, 1993, because those charges had been considered by the Newark Board of Education (Board) in 1993, at which time the Board decided not to certify them to the Commissioner. The petitioner filed papers in opposition. (The Board was the District's predecessor.)

The motion to dismiss, which was the equivalent of a motion for partial summary decision, was not decided because of late filing, approximately two weeks before the hearing was to begin. Instead, the application was deferred, to be dealt with at the end of the entire case.

The hearing was held on May 5, 6, 7 and 9, 1997. Twelve witnesses testified for the petitioner and four witnesses, including the respondent, testified for Ms. Suitt-Green. More than forty documentary exhibits were marked in evidence by the parties, an itemized list of which is contained in the Appendix attached hereto. Posthearing briefs were filed by both parties, and the record closed on July 28, 1997, when the last submission was filed.

ISSUES

The issues, as set forth in the prehearing order, are:

a) Did the acts of the respondent, as alleged in the charges, constitute unbecoming conduct or other just cause for dismissal pursuant to *N.J.S.A.* 18A:6-10 *et seq.*?

b) If the charges or any of them are proved, is the penalty of dismissal justified?

c) Are some of the charges barred because they were prior charges that were not acted on or were dismissed?

STATEMENT OF CHARGES

Charge One: Corporal Punishment

1. The respondent committed numerous acts of corporal punishment with the intent to discipline, harm, punish, intimidate or otherwise embarrass the pupils under her charge:

a. On or about June 16, 1993, while assigned to Vailsburg Middle School, the respondent visited the home of [C.J.], parent of [D.C.], sixth grader, and

pushed [D.C.] and physically threatened him and his family.

b. On or about April 4, 1995, while assigned to Mount Vernon School, the respondent refused to permit pupil [M.G.] to obtain his coat from the classroom. After the school administration assisted in obtaining [M.G.'s] coat, the respondent called [M.G.] "a thief, a criminal, drug dealer," and "poor white trash" in the presence of staff and pupils.

Charge Two: Conduct Unbecoming a Teacher

2. The charge of conduct unbecoming a teacher is based upon the same specifications as those set forth above in Charge One. Those specifications are hereby incorporated by reference.

Charge Three: Conduct Unbecoming a Teacher

3. During the respondent's period of employment, she has referred to District employees and pupils in a demeaning, disrespectful manner by threatening physical harm, using profanity, racial epithets and other derogatory language:

a. On March 7, 1996, while assigned to Mount Vernon School, during a conference with her supervisors and union representative, the respondent stated she was not "a house nigger like others around here." "I do not have a slave mentality. I do not go running to the white man when there is a small problem."

b. On or about October 10, 1995, while assigned to Mount Vernon School, in the presence of students and Charles Best, teacher, the respondent stated, "I am sick of this shit and this man's mouth."

c. On or about April 4, 1995, while assigned to Mount Vernon School, the respondent called pupil [M.G.] "a thief, a criminal, a drug dealer," and "poor white trash" in the presence of staff and pupils.

d. On or about June 19, 1995, while assigned to Mount Vernon School, the respondent threatened teacher Charles Best and called him a "faggot, a beast, and scum of the earth" in the presence of staff and pupils.

e. On or about April 7, 1989, while assigned to Peshine Avenue School, the respondent threatened teacher Sharon Hall and stated, "I am going to beat your ass." "Don't you fuck with my kids, I will get you at your car."

f. On or about April 7, 1989, while assigned to Peshine Avenue School, the respondent threatened teacher Robert Wright and stated, "Get the fuck out you little punk."

g. On or about April 7, 1989, while assigned to Peshine Avenue School, the respondent threatened teacher Antoinette Odoms and stated, "Go cover my motherfucking class, I am going to whip some ass."

h. On or about April 7, 1989, while assigned to Peshine Avenue School, the respondent stated to pupil [K.J.] "Get the fuck out of my class." "You didn't have to bring your bodyguard [referring to teacher Robert Wright] with you." [This charge was withdrawn by the District and dismissed on the third hearing day, May 7, 1997.]

i. On or about March 26, 1993, the respondent confronted teacher Robert Wright while he was preventing a student fight at Vailsburg Middle School and stated "Get the fuck out of my face, this is my student." "Don't you tell her what to do motherfucker." [This charge was withdrawn by the District and dismissed on the third hearing day, May 7, 1997.]

j. On or about March 8, 1995, while assigned to Mount Vernon School, the respondent yelled at Acting Principal Carol Schwartz, called her a "racist" and threatened that "You'll be sorry you ever met me."

k. On or about March 28, 1995, while assigned to Mount Vernon School, the respondent threatened

pupil [T.B.] about reporting the use of profanity by the respondent. The respondent stated, "You know your [sic] gonna pay for this." [This charge was withdrawn by the District and dismissed on the third hearing day, May 7, 1997.]

l. On numerous dates over the years, the respondent has threatened staff members Denise Hampton, and Charles Best.

The respondent threatened and profaned students and staff on other dates not specifically delineated above.

Charge Four: Conduct Unbecoming a Teacher

4. The respondent threatened several staff members with physical harm and assaulted one staff member:

a. On or about March 26, 1993, while assigned to Vailsburg Middle School, the respondent struck teacher Robert Wright in his left eye and kicked him on his leg.

[This charge (all of Charge Four) was withdrawn by the District and dismissed on the third hearing day, May 7, 1997.]

Charge Five: Pattern of Insubordination

5. During the 1993-94 through to the present school year, the respondent committed numerous acts of insubordination, defiance and gross insubordination by refusing to comply with the directives, instructions and assigned duties by her supervisors. The respondent refused to quiet her class, enroll students in her class, submit reports or attendance figures upon request.

TESTIMONY FOR THE DISTRICT

The petitioner's first witness was Mark Davis, an executive assistant, facilities management, who worked as a substitute teacher at the Mount Vernon School in 1994-

95. He testified about an incident that occurred on April 3, 1995, involving a student, M.G., who wanted to retrieve his coat from Ms. Suitt-Green's classroom. According to Mr. Davis, the respondent refused his request to allow the boy to get his coat, because she did not have time and was leaving the building.

Mr. Davis said that he then escorted M.G. to a vice principal, who gave Mr. Davis the key to respondent's classroom with instructions to escort the student into the room, retrieve the coat, lock the door and return to the vice principal's office. Mr. Davis indicated that upon leaving the classroom, he and the student were confronted by Ms. Suitt-Green and accosted for entering the classroom. Ms. Suitt-Green made various loud accusations against the student, saying that he was a thief, a criminal, a drug dealer, a motherfucker and "he ain't shit."

Mr. Davis testified that the vice principal and several other teachers overheard the confrontation, and that when the vice principal tried to find out what the problem was Ms. Suitt-Green continued the verbal assault, calling M.G. "poor white trash." Mr. Davis stated that he felt insulted by the unprofessional language used, and that M.G. was reduced to tears. The next day Mr. Davis submitted a written report of the incident to the acting principal, Carol Schwartz (Exhibit P-4).

Antoinette Odoms was a substitute special education teacher at the Peshine Avenue School during the 1988-89 school year. She testified about an incident that occurred in April 1989 when she was in the auditorium preparing for a PTA fashion show. According to Ms. Odoms, the respondent, who seemed to be angry and upset, asked her to cover her class because she was going to "whip someone's ass." Ms. Odoms was concerned by this remark and reported it to Vice Principal William May.

William May, who was a vice principal at the Peshine Avenue School in 1988-89, testified about a different incident in which he was personally involved, on April 7, 1989. Mr. May had been speaking to a class about proper behavior, and he told the students that he expected the same standards of behavior from them as from his own son, who was in private school. According to Mr. May, when the respondent saw him in

the hall the next day she charged out of her room and shouted "I don't give a flying hyena about your son in private school." Confirming a written statement about the incident, Mr. May said that Ms. Suitt-Green was ranting and raving in a very high-pitched voice, the veins in her neck were bulging and her eyes were glassy and watery. Mr. May said that he remained calm and left the area after telling Ms. Suitt-Green that he thought it would be best for her to leave for the day, which she did. *See* Exhibit P-2 at 1 and 4.

Daniel Antonacci, Sr., vice principal at the Vailsburg Middle School in the 1993-94 school year, testified that at a meeting in May 1993 the respondent made several remarks about other staff members that he considered to be unprofessional. He also indicated that, as a group of staff members walked down the stairs with a student, Ms. Suitt-Green accused another staff member, Ms. Felder, of being a drug addict, a cocaine addict and someone who "nods off" at her desk. Mr. Antonacci stated that he told her to contact the authorities if she had evidence of illegal activities. However, he believed her remarks to be without foundation. *See* Exhibit P-6.

Deborah Yvonne Irvin, an eighth-grade teacher in the Mount Vernon School, testified in support of an incident report she addressed to Dr. Charles Mitchel, her principal, about an occurrence she witnessed in June 1995. After hearing a commotion in the hallway involving two eighth-grade students, Ms. Irvin found another teacher nearby, Mr. Best, and she asked him to explain what had happened. As Mr. Best was telling Ms. Irvin about the incident, the respondent came down the hall hollering and screaming at Mr. Best. Ms. Irvin said that Ms. Suitt-Green "jumped in [Mr. Best's] face," pointing her finger at him, while yelling and conducting herself in a very unprofessional manner. The respondent attacked Mr. Best's manhood and called him many disrespectful names. According to Ms. Irvin, the more she attempted to calm the respondent down, the louder the respondent became, continuing to shout at Mr. Best, face to face with him. While she had no independent recollection of the respondent's specific accusations, her report states that the respondent told Mr. Best that he was worse than the scum of the earth, and he needed to find out who he was. Finally, the respondent left the scene and walked toward her classroom, still screaming. Ms. Irvin

said that Mr. Best did not respond to Ms. Suitt-Green's attack, and he conducted himself in a very professional manner. *See* Exhibit P-11.

Ray Dandridge, assistant principal at the Mount Vernon School from 1994 through 1996 and the respondent's immediate supervisor, testified that a meeting had been called on March 7, 1996, to give the respondent an opportunity to respond to a complaint made against her by a community aide, Ms. Pettys. Present at the meeting were the respondent, the principal, Mr. Dandridge, and Ms. Key, another staff member. According to Mr. Dandridge, after he had informed Ms. Suitt-Green of the purpose of the meeting, she used unprofessional and inappropriate language in reference to her colleagues at the school. In the course of the meeting, she stated, about another staff member, "you are not a 'house nigger' like others around here. You do not go running to the 'Caucasian master.' They (your colleagues) did it with Dr. D'Agostino (a former principal) and now they are doing it with you." Exhibit P-8.

In a memorandum to Ms. Suitt-Green dated March 12, 1996, Mr. Dandridge wrote, in reference to Ms. Suitt-Green's remarks at the March 7 meeting, "This kind of racially derogatory language is both unprofessional and a totally inappropriate manner [in which] to refer to fellow employees in a school setting. You are cautioned never to use this kind, or any other kind of unprofessional language at Mount Vernon School again." Exhibit P-8. The respondent received the memo, but refused to sign the receipt for it.

Mr. Dandridge testified about another occurrence on March 13, 1996, when he escorted two of the respondent's students back to her class and reminded them that they had been instructed to line up with the group before proceeding to the next class. He said that the respondent defended them in a loud, boisterous voice, indicating that her students were role models and that the problem students belonged to other teachers who needed to be spoken to. When Mr. Dandridge asked Ms. Suitt-Green to lower her voice because she was speaking inappropriately and not setting a good example for the students, the respondent disregarded that instruction and persisted, stating that she would see him in court. According to Mr. Dandridge, the respondent

continued to speak very loudly, and he thought it best to remove himself from the scene. The next day he sent a memorandum to Ms. Suitt-Green about this incident, in which he called her behavior unbecoming of a professional (Exhibit P-7).

The last incident testified to by Mr. Dandridge involved a student, M.G., who had been administratively assigned to the respondent's class on March 2, 1995. Mr. Dandridge said he had escorted M.G. to respondent's classroom and informed Ms. Suitt-Green that the boy was being transferred to her class. He testified that she refused to accept M.G. When Ms. Suitt-Green attempted to explain her reason, Mr. Dandridge suggested that the conversation be continued at another time because the student was becoming upset by her tone of voice and adverse comments about him. In addition, the conversation took place inside the classroom, with other students present. Mr. Dandridge then escorted the student away from the scene. This event was documented by Mr. Dandridge in a memo to the respondent dated March 2, 1995 (Exhibit P-14).

Shirley Key was a fifth-grade teacher at the Mount Vernon School from 1994 through 1996. She was also a union representative and grade-level chairperson. Ms. Key testified that she was present at the meeting on March 7, 1996, that was called by the principal. Ms. Key stated that she heard the respondent refer to Ms. Pettys as a "house nigger." In addition, Ms. Key said that the respondent was classifying other staff members as either "house niggers" or "field niggers." Ms. Key did not recall which teachers were placed in which category. She said that she immediately tried to get Ms. Suitt-Green to be quiet, and that the principal was speechless. At that point, the principal ended the meeting. *See* Exhibit P-8.

Thomas J. Ward, supervisor of security services, was a public school investigator for the City of Newark in 1988-89. At that time, he investigated reported misconduct by the respondent at the Peshine Avenue School. After speaking to several staff members, including the respondent, Mr. Ward filed his report with the senior investigator of the Division of Security Services. In his testimony, Mr. Ward referred specifically to page four of his report, wherein Ms. Suitt-Green confirmed her

confrontation with William May on April 7, 1989, during which she said, "I don't give a flying hyena about your son in private school." The respondent denied, however, that she had used any foul or abusive language with the vice principal.

In addition, Mr. Ward pointed to page five of his report, which contains teacher Robert Wright's statement that the respondent said to him, "Get the fuck out you little punk," and Ms. Odoms's statement that the respondent was threatening to beat someone up and had said to her, "Cover my motherfucking class, I am going to whip some ass." The report also contains Ms. Odoms's statement that the respondent had jumped her, after which she informed supervisors that Ms. Suitt-Green was cursing in the hallway. (There are some details in the report that did not come out in the testimony of Ms. Odoms.) When asked on cross-examination about the manner in which he compiled his report, Mr. Ward stated that he wrote only what he was told by the people he interviewed, without embellishment. *See* Exhibit P-2, which contains statements made to Mr. Ward by the people he interviewed.

D.C., presently a tenth-grade student at Barringer High School, testified about an incident that took place in June 1993 when the respondent was his teacher in the Vailsburg Middle School. According to D.C., he became involved in a violent confrontation with another student after the respondent left the classroom; he hit the other student, and that student started to cry. When the respondent returned to the classroom and heard about the incident she instructed the other student to hit D.C. back. That student tried to follow her instructions, but D.C. resisted, and Ms. Suitt-Green pushed D.C.

D.C. further testified that the respondent drove to and stopped in front of his home that day after school, yelling and cursing at him out of the car window. He said that she threatened him while he stood on his front steps, but she did not leave her car. D.C. stated that Ms. Suitt-Green remained there for about fifteen or twenty minutes, and then drove away. No one else was at home at the time, but when his mother returned he reported the incident to her, and she reported it to school authorities.

C.J., D.C.'s mother, testified that she went to the school on the following day to speak to the principal, but he was not in his office. Instead, she went to the respondent's classroom, but she could not get in because the door had been locked. C.J. then reported the incident to Vice Principal Antonacci. Mr. Antonacci accompanied her back to the respondent's classroom, at which time Ms. Suitt-Green unlocked the door and came out into the hallway. According to C.J., her other son, G., asked the respondent why she had hit his brother. C.J. said that, in response, the respondent took out a container of mace and sprayed G. with it. Charges were then filed against Ms. Suitt-Green, but C.J. did not show up for the hearing. No further testimony was elicited about the mace incident.

Charles Mitchel, currently administration chairman at Seton Hall University, was principal of the Mount Vernon School in Newark during many of the years that respondent was employed there. He testified about several incidents involving Ms. Suitt-Green. The first incident reported to him took place on the morning of April 7, 1989, at the Peshine Avenue School. *See* Exhibit P-1. As assistant executive superintendent, Dr. Mitchel was responsible for that school at the time.

In his testimony, Dr. Mitchel reviewed Exhibit P-2, the seven-page document written by investigator Thomas Ward containing statements by various staff members concerning Ms. Suitt-Green's behavior on the morning of April 7, 1989. Mr. Ward's report primarily dealt with abusive and profane language used by the respondent toward others, beginning early that morning. For example:

> Sharon Hall stated that the respondent came to her door and said, "I am going to fuck you up," and "I am going to beat your ass." "Don't you fuck with my kids, I will get you at your car." Exhibit P-2 at 1.

> Ms. Odoms informed Mr. May that the respondent was "ranting and raving and threatening to beat someone's m-----f------ ass." Exhibit P-2 at 2.

Teacher Robert Wright stated that the respondent intervened when he attempted to speak to another teacher. Mr. Wright reported that the respondent said "you don't scare me, you fucking punk." After being told that there was a female ranting in an upstairs hallway, Vice Principal Vivian Brown called security, who in turn advised her to call the superintendent's office. She was instructed to first speak with the respondent to calm her down and tell her that she would have to leave for the rest of the day. She was further told to call Board security to put Ms. Suitt-Green out if she would not leave. However, Ms. Brown reported that security personnel arrived and informed her that the Newark Police Department would have to remove Ms. Suitt-Green because she was an employee in the Newark Board of Education. Exhibit P-2 at 2-3.

When summoned to a conference about these incidents on April 7 and told that she was endangering the students in her present state and had to leave the building, the respondent refused to do so. Exhibit P-2 at 3.

The last three pages of Exhibit P-2 contain short statements taken from various staff members who were affected by the respondent's behavior.

Dr. Mitchel also produced a memorandum written to the respondent on April 28, 1989, detailing some of the documentation he received about her conduct (Exhibit P-3). He met with her and others at the central Board office and concluded thereafter that the documentation of unprofessional conduct was overwhelming. Exhibit P-3 was given to Ms. Suitt-Green and a copy was placed in her personnel file. It is considered to be a strong warning.

Dr. Mitchel then referred to Exhibit P-10, a letter submitted to him by eighth-grade teacher Charles Best in which Mr. Best documented allegations of rudeness toward him by the respondent in the presence of others. June 1995 written statements from three other teachers (Exhibits P-11, P-12, and P-13) corroborate Mr. Best's account. According to Dr. Mitchel, the respondent claimed that Mr. Best had agitated

the situation, contrary to the written statements of the other teachers. In October 1995, Mr. Best wrote another report relating to additional offensive conduct toward him by the respondent. He indicated that when he told one of Ms. Suitt-Green's students to stop acting up outside of the classroom, the respondent came out of the room and said "I'm sick of this shit and this man's mouth" and she slammed her door. Mr. Best said that he had a problem with her use of foul language in front of the students. Dr. Mitchel met with Ms. Suitt-Green again, and he testified that she interpreted the incident with Mr. Best differently and said that it had been instigated by Mr. Best. *See* Exhibit P-9.

Dr. Mitchel further testified about the events of March 7, 1996, which caused him to write a memorandum to the respondent relating to her "house nigger" comments (Exhibit P-8). Dr. Mitchel stated that he heard the remarks that she made during the meeting, and he considered them to be exceedingly unprofessional, regardless of the fact that she was angry because her colleagues had complained about her. Dr. Mitchel stated that he did not know the respondent to be a racist, but he considered her use of racially derogatory language to be unprofessional and totally inappropriate.

Dr. Mitchel also reviewed a letter sent to him by another teacher, Denise Hampton, on March 18, 1996, wherein Ms. Hampton identified several incidents of verbal attacks and threats against her by the respondent (Exhibit P-22). Ms. Hampton wrote, "I have been subjected to her rage constantly. I have endured her harassment up to this point. But now I am exhausted, and am no longer willing to work under such a stressful environment." She was concerned that the respondent's verbal attacks toward her would escalate into violence, and that continued conduct like this by the respondent would be detrimental to the Newark Board of Education and the Mount Vernon School. Ms. Hampton wrote that if the Board did not deal with the harassment swiftly, she would have her attorney contact the Board.

Dr. Mitchel testified that, after reviewing all of the incident documentation (some of which is recited above) and the results of meetings and consultations with other administrators, he decided to proceed with tenure charges, which were subsequently filed.

On cross-examination about the meeting that was held on March 7, 1996, regarding the allegations against the respondent by Ms. Pettys, Dr. Mitchel said that he had concluded that the information he received in total did not support Ms. Pettys's allegations. His reprimand to the respondent (Exhibit P-8) dealt with her conduct and language at the meeting. He interpreted her racially derogatory language to be her way of criticizing those who chose to complain to higher authorities. He did not find fault with such complaints.

Charles Best, a fifth-grade teacher in the Mount Vernon School, testified about the incident that occurred on June 19, 1995, and was recorded in detail by him (Exhibit P-10). He saw two students having an argument in the hall, which escalated into a fight. One of the students was in the respondent's class, and the respondent pulled that student into her classroom after Mr. Best had instructed both of the students to go to the vice principal's office. He said that the respondent refused to send her student to the office and she began to yell and scream at Mr. Best, telling him to "get out of [her] face." Then she told him that she would send the student out after she washed her face, and Mr. Best agreed. Mr. Best said that as he was walking away, the respondent shouted at him in front of the students and teachers, calling him a "faggot" and saying that he was a beast and the lowest scum of the earth. In his report, Mr. Best wrote, "No matter the reason, I as a professional should not be subjected to this kind of cruelty and madness. I don't know how I kept my cool, but I did." He identified the other teachers who witnessed this incident.

Mr. Best then testified about an incident that took place on October 10, 1995, when a student was acting up near the respondent's classroom and he told the student to stop. At that point, the respondent came out of her classroom and said, "I'm sick of this shit and this man's mouth," and she slammed the door. In a memo about this incident, Mr. Best wrote, "I don't have a problem with Ms. Green shutting the door, I have a problem with her using foul language in front of the students." Exhibit P-9.

Written statements by three other teachers corroborated Mr. Best's testimony and report about the June 1995 incident. Deborah Irvin wrote that she witnessed the respondent screaming at Mr. Best and calling him many disrespectful names. Ms. Irvin stated that Ms. Suitt-Green became louder each time she tried to walk her away, and she was still shouting at Mr. Best when she left. Exhibit P-11. Ms. Hampton wrote that she saw Ms. Irvin trying to get the respondent to calm down, without success. Ms. Hampton remained at the scene long enough to get the students out of the hallway and to watch the respondent finally walk back to her classroom. Exhibit P-12. Ms. Hannibal confirmed that the respondent questioned Mr. Best's manhood and made other unprofessional and embarrassing remarks during the verbal attack in front of students and staff members. Ms. Hannibal also noted that the respondent became more agitated as Ms. Irvin attempted to quiet her down. Exhibit P-13.

All three statements referred to above clearly state that Mr. Best did not respond to the respondent's yelling and finger pointing in any way, and he kept his composure throughout the verbal bashing. The statements indicate that Mr. Best is to be commended for conducting himself in a very professional manner, despite extreme provocation.

Carol Schwartz, a vice principal at Mount Vernon School who supervises instruction and instructional staff, also testified about the incident that occurred in early March 1995. Ms. Schwartz directed Mr. Dandridge to take a student, M.G., to the respondent's class and enroll him there as an administrative assignment. Mr. Dandridge reported to Ms. Schwartz that Ms. Suitt-Green had refused to accept the student. *See* Exhibit P-14. Mr. Dandridge further reported that when the respondent attempted to explain to Mr. Dandridge why she did not want the student to be in her class, he recommended to her that the discussion be continued another time, because M.G. was hurt by Ms. Suitt-Green's derogatory remarks about him.

According to Ms. Schwartz, for five days following that incident M.G. was not enrolled in any class and just wandered the school or was absent. On March 6, 1995, the respondent sent a memo to Ms. Schwartz, Exhibit R-2, explaining why she, along

with other seventh-grade teachers, would not accept M.G. She referred to the student as a drug abuser and trafficker. She also stated that M.G. had a gun in his possession and was therefore a danger to students and staff.

Ms. Schwartz asked to be supplied with specific documentation of these allegations about M.G., which she referred to as serious and in need of substantiation. Exhibit P-16. Ms. Schwartz testified that she then met with the respondent, who became "agitated and out of control" and accused her of being a racist, along with another vice principal. According to Ms. Schwartz, the respondent said to her, "You'll be sorry you ever met me." In a later memo to the respondent, Ms. Schwartz stated that she felt threatened and intimidated by these comments and by Ms. Suitt-Green's uncontrolled anger (Exhibit P-18). She testified that Ms. Suitt-Green was trembling during this conversation. After consulting with a teachers' union representative, Ms. Schwartz wrote a directive to the respondent, Exhibit P-15, giving her a direct order to enroll M.G. in her class. This directive also stated that the respondent's allegations about the student were investigated and proved to be unfounded.

On cross-examination of Ms. Schwartz, counsel attempted to show that M.G. was dangerous and incorrigible to the point where a teacher was justified in refusing to accept him. However, Ms. Schwartz stated that the refusal took place in front of the student, who later said that he knew he was not wanted. Ms. Schwartz indicated that she would have been willing to discuss the matter, but strongly objected to the manner in which the respondent went about the refusal, in front of M.G. She also stated that the respondent never obtained any information in support of the allegations she made about the student.

TESTIMONY FOR THE RESPONDENT

Testifying in her own behalf, the respondent, Deborah Suitt-Green, discussed the M.G. enrollment-refusal matter. She said that this young man was taller and older than the average student in her class; that the other pupils were afraid of him; and that

she was afraid that he would destroy the atmosphere in the class. The respondent said that M.G. had previously beaten up other students, had absenteeism and drug problems and was known to be difficult in class. She also stated that some teachers had told her that he took things and could not be controlled because he floated all over the school. In addition, the respondent testified that a crossing guard had told her that she saw M.G. with a gun, passing drugs and allowing adults into the building.

Ms. Suitt-Green stated that she did not know ahead of time that M.G. would be assigned to her class, and when she was instructed to take him she wanted to negotiate the situation and delay it. She denied refusing to admit the student, saying that the incident did not occur as described. Ms. Suitt-Green testified that M.G. was standing there, and that Mr. Dandridge wanted to discuss M.G.'s admittance to her class at another time. He then took the boy back with him.

Respondent stated that M.G. ultimately was admitted to her class, after her written warning to the administrative staff on March 6, 1995. *See* Exhibits R-2 and P-17, which appear to have been written simultaneously. The respondent stated that M.G. destroyed property in her classroom, much of it her own. She described specific incidents involving M.G. in order to show how difficult this student was. *See* Exhibits R-3, R-4 and R-6.

The respondent identified a March 9, 1995 letter from the school crossing guard, Anixa M. Williams, to the Newark Board of Education (Exhibit R-5) as her source for the allegation that M.G. was involved in drugs and possessed a gun. In the letter, Ms. Williams referred to a group of youths, but she did not mention any names. The respondent admitted that she never saw M.G. with drugs, never saw him dealing drugs and never saw him with a gun in his possession. She said that she just believed that the information given to her by the school crossing guard was true.

Referring to Charges 1b and 3c, which relate to the April 4, 1995 incident involving M.G., the respondent stated that she did not know why he appeared in her room to get a coat, and she did not know if it was his coat. In addition, she was worried

about her own property in the classroom. Ms. Suitt-Green said that M.G. was upset, called her names and swore at her. She denied calling him derogatory names, such as "poor white trash," as testified to by Mark Davis and reported in his account of the incident (Exhibit P-4).

The respondent then discussed the incident of March 8, 1995, testified to by Acting Principal Carol Schwartz. Ms. Suitt-Green denied that she shouted or called Ms. Schwartz a racist. She denied threatening Ms. Schwartz by saying "You'll be sorry you ever met me" (Charge 3j). The respondent admitted that prior to this incident, she had taken offense at being called a "gal" by Ms. Schwartz. She said that African-American women are offended by that term, which is considered to be degrading and possibly racist. Ms. Suitt-Green indicated that her grandfather used to call his mule "gal," and that the term has become derogatory and is used to show disrespect. She said that the same interpretation is given to the term "girl."

Ms. Suitt-Green wrote a memorandum to Ms. Schwartz (Exhibit R-7) on March 15, 1995, after she received a memo of understanding from Ms. Schwartz (Exhibit P-18). The respondent wrote that she could not say if she had called Ms. Schwartz or anyone else a racist, but that she considered some of the actions taken against her and other staff members and students as racist in nature. She chastised Ms. Schwartz for using the term "gals," which she said is the same as calling an African-American man a "boy" or a "nigger." She concluded her memo by differentiating between interpretation and opinion.

On cross-examination, the respondent denied having called Ms. Schwartz a racist, and reiterated that she interpreted "gal" as racist terminology.

The respondent's version of the June 19, 1995 incident involving Charles Best (Charge 3d) was completely different than that of Mr. Best and others. Ms. Suitt-Green said that the two students fighting in the hall ended up in front of her door, and that she went out and stopped them. According to the respondent, no other teachers were in the hall at the time. She said that Mr. Best came out and yelled at her and called her a

bitch, incompetent, unprofessional and interfering. She said that he told her to mind her own business, and then he went away.

Ms. Suitt-Green documented her version of the incident (Exhibit R-8). She wrote that she went out into the hallway and found an eighth-grade student crying, cursing, yelling, etc. It appeared that another student was "coming after her." Ms. Suitt-Green told the student to come into her room, calm down and wash her face. She said that when she stepped back out into the hallway to see if any eighth-grade students were there she was verbally assaulted by Mr. Best, who called her names, said that she was interfering, told her to stay out of his business and said that the children should not speak to her. Ms. Suitt-Green wrote that, if necessary, she would contact the American Civil Liberties Union (ACLU) and have an ACLU representative explain to Mr. Best that he could not dictate to whom students or teachers could speak. She concluded her written statement with the criticism that the talent shows produced by Mr. Best always have sexual overtones.

The respondent then testified about Daniel Antonacci's testimony and his report of May 24, 1993, relating to unprofessional conduct by the respondent (Exhibit P-6). Referring to the portion of the report about her charge that Ms. Felder was a drug addict and that she "nods off" at her desk, the respondent admitted that she said Ms. Felder "nods off" and that she is suspected of being a drug addict. The respondent testified that she could see powder in Ms. Felder's nose.

Ms. Suitt-Green admitted that during the March 7, 1996 conference with Dr. Mitchel she stated that she was not a "house nigger" like others and that she does not go running to the "Caucasian master" (Charge 3a). She said that she was frustrated with her inability to get to Dr. Mitchel and see to it that the complaint against her by Ms. Pettys would be left alone. She further explained that she used the words to inform Dr. Mitchel about the meaning of those words as she understood it.

On cross-examination, the respondent was confronted with her own affidavit, wherein she said that she never used the terms "house nigger" or "Caucasian master."

She explained that the denial was her way of trying to respond to the memo sent to her by Dr. Mitchel, Exhibit P-8, which she regarded as misleading. Ms. Suitt-Green said that she did use the words, but "not in that context." The respondent equivocated when asked if these terms were racist, unlike her certainty about the word "gal."

Testifying about the June 1993 incident involving D.C., Ms. Suitt-Green acknowledged that she did go to the student's house, but not because she wanted to confront him or shout at him. She did not find anyone at home, so she left. She said that she had wanted to speak to D.C.'s mother, who had previously asked Ms. Suitt-Green to let her know about any problems with her son, and that she had to go to the house because the family had no telephone. She had noticed that D.C. had been asking to go to bathroom at about the same time every day, and she found out that D.C. had been smoking in the bathroom with a group of other students each afternoon. The respondent said that she did not actually see the smoking, but smelled smoke outside of the bathroom.

Ms. Suitt-Green said that one week later, D.C.'s mother and other family members came to her classroom, acting belligerently and demanding to know why she had assaulted D.C. She told them she did not know what they were talking about, and she sent two of her students to inform security that she felt threatened. Ms. Suitt-Green also said that D.C.'s brother threatened to beat her up, and she sprayed mace in his direction when he lunged toward her.

In her testimony relating to Charge 5 (pattern of insubordination), the respondent denied having raised her voice to Mr. Dandridge, and she denied having commented that she would see him in court.

Teacher Denise Hampton had charged, in a letter to Dr. Mitchel in March 1996 (Exhibit P-22), that Ms. Suitt-Green had discussed Ms. Hampton's finances with several of her colleagues and made false statements about Ms. Hampton's private life and her relationship with her husband. She also complained of other incidents of alleged harassment. The respondent denied these accusations by Ms. Hampton, and she

indicated that she had filed a complaint with the ACLU naming Denise Hampton. Ms. Suitt-Green likewise denied or could not recall the alleged incidents of disruptive behavior, verbal assault and threats of physical harm by her against others described in an incident report (Exhibit P-1) filed by Vice Principal Vivian Brown on April 10, 1989 (Charges 3e, f & g).

The respondent submitted five evaluation reports for the school years preceding 1994-95. Her overall performance rating was satisfactory in each of these evaluations.

Anixa Williams, the school crossing guard who wrote a report on unauthorized persons within school boundaries, testified on respondent's behalf about her impression of M.G., the student whom the respondent initially refused to accept into her class. Ms. Williams said that she had seen M.G. smoking marijuana, drinking alcohol and fighting on the street during school hours. Ms. Williams indicated that M.G. was part of a larger group whom she wrote about generally in her report. However, she stated that she never saw him with a gun.

Ruth DiChiara, a retired teacher, testified that she was on the Supervisory Committee of the Newark Board of Education Teachers' Credit Union along with the respondent. Ms. DiChiara stated that she never received any complaints about a breach of confidentiality by Ms. Suitt-Green.

RESPONDENT'S MOTION TO DISMISS CERTAIN CHARGES

As set forth in the procedural history above, respondent filed a prehearing motion to dismiss certain charges of unbecoming conduct and "other just cause" based on alleged incidents that occurred between April 7, 1989, and June 24, 1993. These prior tenure charges were filed with and considered by the Newark Board of Education on October 26, 1993. The respondent and her attorney appeared at a closed session of the Newark Board of Education at that time to answer the charges and the statement of evidence presented. The Board did not find probable cause to certify the charges to the Commissioner of Education, and respondent was returned to employment.

The current tenure charges against respondent, dated April 4, 1996, generally allege corporal punishment, conduct unbecoming a teacher and a pattern of insubordination. These charges are based upon the incidents previously considered by the Newark Board of Education in 1993, as well as incidents which have occurred since then and up to March 18, 1996.

The respondent has characterized the Board's 1993 decision not to certify the tenure charges as a final determination on the merits and claims that new litigation of those charges must be barred in accordance with the doctrines of *res judicata* and collateral estoppel. The respondent also claims that the earlier tenure charges filed against respondent are barred by *N.J.S.A.* 18A:6-13. The motion was not decided prior to hearing because of late filing, but is considered and decided now.

The respondent's argument for dismissal because of the application of *res judicata* or collateral estoppel is incorrect. The tenure charges were not litigated in 1993 by the Newark Board of Education, and the Board did not render a decision on the merits. The proceeding before the Board included the filing of tenure charges, consideration of those charges by the Board and the Board's subsequent determination that the charges would not be certified to the Commissioner of Education, based on lack of probable cause.

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

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership

> whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination . . . . In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to *N.J.S.* 18A:6-16.[1]

This statute imposes no requirement on a local board of education to adjudicate the tenure charges filed against an employee, nor to render a final decision on the merits of those charges. Instead, the board is required to consider the submitted written statement of evidence and the employee's written statement of position and to "determine by a majority vote . . . whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction of salary." *N.J.A.C.* 6:24-5.1(b)(4). As indicated by *N.J.S.A.* 18A:6-11, where charges are certified to the Commissioner, any required hearing is conducted by the Commissioner.

Therefore, a board's consideration of tenure charges and a decision not to certify the charges to the Commissioner is not tantamount to plenary litigation and final determination in a prior cause of action, as contemplated by the doctrines of *res judicata* and collateral estoppel, both of which are applicable to administrative proceedings, *City of Hackensack v. Winner*, 82 *N.J.* 1, 29 (1980), and are related but separate doctrines of preclusion. To avoid the confusion which has resulted over the years from the interchangeable use of these two terms, the courts have refined the nomenclature used in the preclusion doctrine.

The term "claim preclusion" has been applied to *res judicata*, and "issue preclusion" has been applied to collateral estoppel. *Wade v. City of Pittsburgh*, 765 *F.*2d 405, 408 (3rd Cir. 1985); *Gregory v. Chehi*, 843 *F.*2d 111, 116 (3rd Cir. 1988); *see*

[1] These procedures are reiterated in the statute's implementing regulation, *N.J.A.C.* 6:24-5.1, but with more specific time frames.

also Migra v. Warren City Sch. Dist. Bd. of Educ., 465 *U.S.* 75, 104 *S. Ct.* 892, 79 *L. Ed.* 2d 56 (1984).

Res judicata, or claim preclusion, refers broadly to the common-law doctrine barring relitigating claims that have already been adjudicated. In essence, the doctrine of *res judicata* "provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." *Velasquez v. Franz*, 123 *N.J.* 498, 505 (1991). Both New Jersey law and federal law require three basic elements for application of the *res judicata* doctrine: (1) The judgment in the prior action must be valid, final and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; (3) the claims in the second action must derive from the same transaction or occurrence as the claims in the first one. *Federated Dep't Stores, Inc. v. Moitie*, 452 *U.S.* 394, 398, 101 *S. Ct.* 2424, 2428, 69 *L. Ed.* 2d 103, 108 (1981); *In re Energy Cooperative, Inc.*, 814 *F.*2d 1226, 1230 (7th Cir. 1987); *Watkins v. Resorts Int'l Hotel and Casino*, 124 *N.J.* 398, 412 (1991); *Velasquez, supra*, 123 *N.J.* at 505-06; *Culver v. Insurance Co. of North America*, 115 *N.J.* 451, 460 (1989); *Roberts v. Goldner*, 79 *N.J.* 82, 85 (1979).

To determine whether two claims or causes of action are the same for *res judicata* purposes, a court must consider: (1) whether the acts complained of and the demand for relief are the same; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same; and (4) whether the material facts alleged are the same. *Culver, supra*, 115 *N.J.* at 461-62, quoting *United States v. Athlone Indus., Inc.*, 746 *F.*2d 977, 984 (3d Cir. 1984).

Collateral estoppel, as a separate but related concept, has been defined as "that branch of the broader law of *res judicata* which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." *State v. Gonzales*, 75 *N.J.* 181, 186 (1977). Collateral estoppel will be applied where:

> (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question.
>
> [*Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 *F.*2d 495, 505 (3d Cir. 1992).]

For either doctrine to apply, there must be a prior adjudication and a final judgment on the merits. These elements are absent in the present circumstances. As discussed above, there was no adjudication or subsequent final decision on the merits by the Newark Board of Education in 1993. Therefore, neither claim preclusion (*res judicata*) nor issue preclusion (collateral estoppel) is applicable to the instant matter, and the respondent's motion for dismissal of the earlier charges based on these doctrines must be **DENIED**.

An alternative argument presented by respondent is that the tenure charges based on incidents considered and not certified by the petitioner in 1993 should be dismissed because they are barred by *N.J.S.A.* 18A:6-13. That statute provides:

> If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

The respondent asserts that, while this section "speaks to a board's inaction and the consequences of dismissal and no further proceeding or action shall be taken thereon, it can't be argued that once a determination is made not to certify charges after a hearing, a board can, thereafter, bring the same charges." Respondent's Motion to Dismiss at 12.

The respondent's argument is incorrect. The "such a determination" referred to in *N.J.S.A.* 18A:6-13 is the requirement established by *N.J.S.A.* 18A:6-11. That statute provides that when any tenure charge is filed against an employee of a board of education,

> [a]fter consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. . . . In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to *N.J.S.* 18A:6-16, together with a certificate of such determination.

The petitioner complied with the statute and made a timely determination, on October 26, 1993, that there was no probable cause to certify the tenure charges to the Commissioner. As such, the section of *N.J.S.A.* 18A:6-13 which requires that where a timely determination is not made the "charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon" was never applicable to the instant matter. *See Montville Bd. of Educ. v. Pinto*, 94 *N.J.A.R.*2d (EDU) 507, 514, where the Commissioner, in noting that the parties had agreed to extend the period for the board to reach its determination on whether to certify tenure charges, indicated in footnote 2 that pursuant to *N.J.S.A.* 18A:6-13, tenure charges are deemed dismissed if the district board does not make a determination on whether to certify such charges to the Commissioner within 45 days after receipt of the written charges.

The respondent does not actually argue that the petitioner failed to render a timely determination. Rather, she has somehow drawn from *N.J.S.A.* 18A:6-13 the insupportable position that "it can't be argued that once a determination is made not to certify charges after a hearing, a board can, thereafter, bring the same charges." The respondent then repeats the argument made in support of her attempt to invoke the

doctrines of *res judicata* and collateral estoppel, that the determination in 1993 was a full and final adjudication on the merits.

The respondent's reliance on *N.J.S.A.* 18A:6-13 is misplaced. First, the petitioner satisfied the necessary requirements in 1993, and the section which would have required dismissal of the charges was never triggered. Second, the respondent's arguments regarding a full adjudication on the merits are irrelevant and further indicate a misinterpretation of the statute. Accordingly, there is no support for the respondent's contention that the statute bars any of the currently filed tenure charges. The purpose of the statute is to ensure that boards of education promptly determine whether filed tenure charges against an employee should be certified to the Commissioner for a hearing. The statute does not state, nor can it be reasonably implied, that where such charges are not certified, subsequent refiling and reconsideration of the same charges, which may result in certification to the Commissioner, is barred.

Therefore, the respondent's claim that the prior tenure charges are barred by *N.J.S.A* 18A:6-13 must also be **DENIED**.

FINDINGS OF FACT

Having heard the testimony, observed the witnesses, reviewed the exhibits, and considered the arguments of counsel, I **FIND** the following **FACTS**, by a preponderance of the credible evidence:

1. The respondent, Deborah Suitt-Green, is a tenured teaching staff member, since 1986, in the State Operated School District of the City of Newark. The District replaced the Board of Education of the City of Newark in July 1995.

2. In April 1989, while in the school auditorium, the respondent angrily asked Antoinette Odoms to cover her class because she was going to "whip someone's ass."

They are considered to be business records. As such, the facts related in them are also found to be evidential, without the need for repetition herein.

15. Numerous reprimands and negative memoranda were issued to the respondent by her superiors and administrators in the Newark School District. *See* Exhibits P-3, P-7, P-8, P-14, P-15, P-16 and P-18. The factual matter described in these memoranda to the respondent is found as fact.

LEGAL DISCUSSION AND CONCLUSIONS

In any case involving tenure charges, a board of education has the burden of proving the truth of the charges by a preponderance of the competent and credible evidence. *In re Tenure Hearing of Dusel, Sayreville Sch. Dist.*, 1978 *S.L.D.* 526; *In re Tenure Hearing of Ribacka, Sussex-Wantage Reg. Sch. Dist.*, 1978 *S.L.D.* 929; *In re Tenure Hearing of Brown, Bayonne Sch. Dist.*, 1970 *S.L.D.* 239.

A variety of charges, general and specific, were filed by the District against the respondent. The general charges are characterized as corporal punishment, conduct unbecoming a teacher and a pattern of insubordination. The specific charges, encompassed within the general charges, are itemized above. Several of the charges were withdrawn by the petitioner or dismissed during the hearing. These are identified as Charges 3h, 3i, and 3k, and Charge 4 (which includes 4a). Some of the charges were inartfully drawn or inaccurate in some respect, but the conclusions to be reached here will be based on the credible evidence presented at the hearing, both testimonial and documentary.

N.J.S.A. 18A:28-5, dealing with the tenure of teaching staff members, provides:

> The services of all teaching staff members . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation

> except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause
>
> [*See also N.J.S.A.* 18A:6-10 to -29.]

The charges involved in this matter, if true, can constitute conduct unbecoming a teaching staff member or other just cause under the statute. There was no allegation that the respondent was not capable of the teaching duties that were assigned to her or that she was inefficient, and no complaints were registered about the respondent's performance of her duties on an academic level.

If it is determined that the charges, or any of them, are true, it then becomes necessary to address the question of the appropriate penalty to be imposed. *N.J.S.A.* 18A:28-5 speaks of dismissal or reduction in compensation. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior reoccurring. *In re Tenure Hearing of Ostergren, Franklin Sch. Dist.*, 1966 *S.L.D.* 185, 187; *In re Tenure Hearing of Kittell, Little Silver Sch. Dist.*, 1972 *S.L.D.* 535, 541; *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967).

Also, in determining the respondent's fitness to continue in the position, the pronouncement in *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L* 326 (E. & A. 1944), serves as a concise guideline:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.

The charges in the instant matter relate to numerous alleged incidents of conduct by this teacher which was described as unprofessional, profane, threatening, intimidating, insubordinate, harassing, demeaning, abusive and disrespectful to

ORDER

It is therefore **ORDERED** that the respondent be **DISMISSED** from her position as a tenured teaching staff member employed by the State Operated School District of the City of Newark, Essex County.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 River View Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

August 27, 1997

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 28 1997

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

R-9 March 14, 1996 letter of student V.R. to Dr. Mitchell

R-10 June 29, 1995 letter from Edward J. Magram to Deborah Suitt-Green

R-11 April 19, 1996 letter from Newark Municipal Court to Deborah Suitt-Green

R-12 March 6, 1995 letter from Carol Schwartz to Deborah Suitt-Green

R-13 June 1988 Teacher Annual Evaluation Report of Deborah Suitt-Green

R-14 June 1991 Teacher Annual Evaluation Report of Deborah Suitt-Green

R-15 June 1992 Teacher annual Evaluation Report of Deborah Suitt-Green

R-16 June 1993 Teacher Annual Evaluation Report of Deborah Suitt-Green

R-17 June 1994 Teacher Annual Evaluation Report of Deborah Suitt-Green

R-18 November 11, 1993 letter from John L. Schettino, Esq., to Newark Board of Education

OAL DKT. NO. EDU 7071-96
AGENCY DKT. NO. 178-5/96

IN THE MATTER OF THE	:	
TENURE HEARING OF	:	
DEBORAH SUITT-GREEN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY.	:	
	:	

The record of this matter and the initial decision rendered by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein.

Having conducted his own careful and independent review of the entire record in this matter, which includes transcripts of the four days of hearing conducted at the OAL[1], and the exceptions filed by respondent, the Commissioner determines to affirm the findings and conclusion of the Administrative Law Judge (ALJ) for the reasons well expressed therein.

Initially, the Commissioner affirms the ALJ's denial of respondent's motion to dismiss certain of the within charges based on alleged incidents which occurred between April 7, 1989 and June 24, 1993. Notwithstanding respondent's exceptions, which continue to

[1] The record reflects that the hearing was held on May 5, 6, 7, and 9, 1997.

advance the arguments with respect to these charges presented below[2], the Commissioner is in full accord with the ALJ's consideration and resolution of this motion detailed on pages 22-28 of the initial decision.[3]

Next, the Commissioner accepts the ALJ's factual findings (Initial Decision at pp. 28-31), finding these to be amply supported by the record before him. Despite respondent's exception assertions to the contrary, he finds no basis either in the transcripts or in the record as a whole to challenge the ALJ's credibility determinations, being fully satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that he carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit in reaching such findings of fact. In this regard, the Commissioner is unpersuaded by respondent's attempts to discredit certain of the District's witnesses by advancing unsubstantiated allegations aimed at impugning their general character and, in some cases, undocumented accusations of their involvement in criminal conduct.[4]

In making his determination herein, the Commissioner duly recognizes, as was pointed out in respondent's exceptions, that the within charges were filed despite "satisfactory" ratings in respondent's formal evaluations completed during the period covered by such charges.

---

[2] Respondent again asserts that because these charges were previously considered by the Board on October 26, 1993, and a decision was made at that time that there was not sufficient probable cause to certify them to the Commissioner, such determination was a "final adjudication" with respect to these charges, requiring their dismissal here. Respondent also renews her alternative argument that, as these charges are based on incidents which were considered and not certified by the Board in 1993, they are now barred by *N.J.S.A.* 18A:6-13, which places a 45 day time limitation on the period in which a board must certify charges.

[3] It is additionally noted that the initial decision establishes that the majority of these "contested charges" were either withdrawn by the District during the course of the hearing or found by the ALJ not to have been proven by the District. (Charges 1a, 3e, 3f, 3h, 3i and 3k, and all of 4.)

[4] Particularly troublesome was a declaration, raised for the first time in respondent's exceptions, that one of the District's witnesses had been charged with a serious criminal violation. Respondent also enclosed a newspaper article which, it is assumed, was intended to lend credence to her charge. The Commissioner admonishes respondent for this unwarranted and improper submission and stresses that this material was neither reviewed nor considered in the within determination.

Specifically, respondent maintains that such ratings in two specific categories, "Functions as a member of the total school program" and "Meets accepted standards of professional behavior" included on her evaluation forms, undermine the legitimacy of the charges in that they indicate "that the incidents collectively amassed were individually of minor consequence and of such insignificance that no warnings via the evaluative process" were necessary, (Respondent's Exceptions at p. 5) The Commissioner categorically rejects such a contention. Nor can he reasonably conclude, as argued by respondent, that she had no reason to believe that her conduct during this period was unprofessional, as her evaluations specifically indicated the contrary. *(Id.)* Rather, the Commissioner opines that "[t]he absence of comment in evaluations of respondent's performance regarding the incidents now forming the tenure charges does not render these charges invalid." *Morris School District Board of Education v. Christine Brady*, 92 *N.J.A.R.* 2d (EDU) 410, 419. Rather, he observes that it is oftentimes customary that individuals who routinely perform these evaluations are specifically directed to record observations which they actually witness in the classroom setting and prepare their evaluations only upon that basis. (See *Brady, supra.*) That no mention of any of these incidents was made in any observation or evaluation is explicable by the fact that none of the conduct at issue herein was observed while in a formal observation setting. Indeed, the Commissioner concludes that the witnesses in this case who wrote detailed incident reports contiguously with the specific events provide a more trustworthy version of respondent's performance in these areas than customary performance evaluations conducted in the regular course of business. Moreover, given the numerous reprimands and negative memoranda issued to respondent by her superiors and administrators in the District during this period (see Exhibits P-3, P-7, P-8, P-14, P-15, P-16, and P-18), the

Commissioner finds disingenuous her assertion that she had no knowledge that her conduct was viewed as unbecoming or that she was in any way prejudiced by the absence of comment to this effect on her evaluation forms.

The Commissioner is in full agreement with the ALJ that the evidence advanced by the District, both in terms of testimony and documentary evidence elicited from a wide range of staff members and administrators, is "overwhelming." (Initial Decision at p. 37) The incidents proven herein document respondent's propensity to become upset, yell, scream, use offensive and abusive language, engage in irrational behavior and lose self-control. Particularly disquieting is respondent's categorical denial of the details of each of these incidents and her failure to adequately explain the facts in the testimony of the large number of District witnesses. As such, the Commissioner cannot infer, based on this record, that respondent's conduct was an aberration, nor can it be reasonably predicted, based on her failure to accept responsibility for any of her actions herein, that it is more likely than not that such conduct would not be repeated in the future.

Finally, as to the appropriate penalty in this matter, the Commissioner was particularly cognizant that it has long been recognized that, by virtue of the unique position they occupy, educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321

> ***[Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.****
> (Emphasis added)

Likewise, he is mindful that "[u]nfitness for a position under the school system is best evidenced by a series of incidents." *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), aff'd 131 *N.J.L.* 326 (*E. & A.* 1944). While considering respondent's apparently sound teaching record and the length of her employment within the District, the Commissioner is nonetheless satisfied that the charges and proofs established herein are not "trivial" but rather reflect a pattern of professionally unacceptable conduct which cannot be tolerated in a school setting, and comprise the "series of incidents" envisioned by the Court in *Redcay*, warranting respondent's loss of her tenured position.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. Respondent is dismissed from her tenured teaching position with the State-operated School District of the City of Newark as of the date of this decision. This matter is further referred to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 14, 1997
DATE OF MAILING OCTOBER 14, 1997

538-97

EDU #7071-96
C # 538-97
SB # 86-97

IN THE MATTER OF THE TENURE :
HEARING OF DEBORAH SUITT-GREEN, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, October 14, 1997

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

For the Respondent-Appellant, Eugene G. Liss, Esq.

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

February 4, 1998

Date of mailing FEB 06 1998

539-97

539-97

DONNA GOLDSMITH, WILLIAM SMITH, DEBRA MC GUIRE, DEBORAH COOKE AND RUTH ULLMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7692-96

DONNA GOLDSMITH,

WILLIAM SMITH, DEBRA McGUIRE,

DEBORAH COOKE AND RUTH ULLMAN,

Petitioners,

v.

RIVER VALE BOARD OF EDUCATION,

Respondent.

Alfred F. Maurice, Esq., for petitioners

(Springstead & Maurice, attorneys)

Richard H. Bauch, Esq., for respondent

(DeMaria, Ellis, Hunt & Friedman, attorneys)

Record Closed: August 8, 1997 Decided: August 22, 1997

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on July 31, 1996. Prehearing conferences scheduled for October 3, 1996 and December 12, 1996 were adjourned when counsel represented that the matter either would be settled or withdrawn. Subsequently, as a result of discussions between counsel and their respective clients I was advised that a settlement had been reached.

A Stipulation of Settlement containing the terms and conditions of the agreement reached between the parties has now been submitted to me for review and recommendation to the Commissioner for approval. I have reviewed the terms of the Stipulation and **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures on the Stipulation.

2. The settlement fully disposes of all the issues in controversy and is consistent with law.

I **CONCLUDE** the agreement meets the requirements of *N.J.A.C.* 1:1-19.1. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED.**

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

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

August 22, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

August 27, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 28 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

DeMARIA ELLIS
744 Broad Street, Suite 1400
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Attorneys for Respondent
River Vale Board of Education

AUG 8 2 23 PM '97

DONNA GOLDSMITH, WILLIAM SMITH, DEBRA McGUIRE, DEBORAH COOKE AND RUTH ULLMAN,
Petitioners,

v.

RIVER VALE BOARD OF EDUCATION,
Respondent.

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDUOR 07692-96 N
Agency Ref. No. 201-5/96

STIPULATION OF SETTLEMENT AND DISMISSAL

The Petitioner, River Vale Board of Education (the "Board"), with principal offices at 613 Westwood Avenue, River Vale, New Jersey 07675, and Petitioners, Donna Goldsmith, residing at 312 Demarest Avenue, Closter, New Jersey 07624, William Smith, residing at 12 Haring Street, Bergenfield, New Jersey 07621, Debra McGuire, residing at 774 Rolling Drive, River Vale, New Jersey 07675, Deborah Cooke, residing at 50 Crescent Street, Closter, New Jersey 07624, and Ruth Ullman residing at 6 Sturms Place, Park Ridge, New Jersey 07656, (collectively the "Petitioners"), and the River Vale Education Association ("RVEA"), desiring to settle this matter in an amicable way and so avoid the time, expense, and uncertainty of continued litigation, hereby set forth their full and complete agreement, as follows:

1. The Board agrees to abide by all Complaint Procedures set forth in its officially adopted policies and regulations and in the collective negotiations agreement between the Board and the RVEA concerning complaints against employees of the River Vale Board of Education.

2. The Board will advise the parents of all children attending the River Vale Public Schools, in writing, concerning the complaint procedures that are to be followed pursuant to Board policy, should a parent wish to make a complaint against an employee of the River Vale Board of Education.

3. In agreeing to this Stipulation of Settlement and Dismissal, the Parties acknowledge that the Board expressly denies wrongdoing of any kind regarding this matter.

4. The Petitioners agree to withdraw their Verified Petition of Appeal, bearing OAL Docket No. EDUOR 07692-96N and Agency Ref. No. 201-5/96, with prejudice, forthwith, but in no event later than within seven (7) calendar days, following the complete execution of this Stipulation of Settlement and Dismissal.

5. The Petitioners and RVEA agree to withdraw, with prejudice, all grievances, claims, disputes and/or complaints they have or may have filed with the Board, the Board's Administrators, the RVEA, or any other person, entity or organization, arising out of or related to the allegations contained in the Verified Petition of Appeal bearing OAL Docket No. EDUOR 07692-96 N and Agency Ref. No. 201-5/96, forthwith, but in no event later than seven (7) calendar days following the complete execution of this Stipulation of Settlement and Dismissal.

6. The Petitioners and the RVEA agree that this Stipulation of Settlement and Dismissal sets forth a complete and full resolution of this matter and resolves fully any and all claims and causes of action they might have against the Board, its officials, officers, employees, agents and attorneys, relating to any action(s) taken or not taken with respect to this matter, whether arising under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., the School Laws under Title 18A of N.J.S.A., or any other State or Federal law, statute, rule or regulation.

7. This Stipulation shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of any of the

parties to this Stipulation, and shall not be referred to in any subsequent proceeding by any such party other than to enforce the express terms of this Stipulation of Settlement and Dismissal. In the event that this Stipulation is not fully executed and approved by all parties hereto, this Stipulation shall become null and void and shall neither constitute an admission of any such party nor be referred to by any such party in any subsequent legal proceeding for any purpose whatsoever.

8. Petitioners acknowledge that they have been represented by and consulted with legal counsel throughout the negotiations of this Stipulation of Settlement and Dismissal and that they have reviewed said Stipulation in detail with their counsel and that they fully understand its requirements and limitations. Petitioners further expressly state that they are fully satisfied with the representation provided by their legal counsel.

9. Petitioners hereby state that they are signing this Stipulation of Settlement and Dismissal voluntarily of their own free will and not under duress or coercion of any kind.

10. This Stipulation of Settlement and Dismissal shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

11. This Stipulation of Settlement and Dismissal constitutes the full and complete agreement of all parties hereto with respect to its subject matter, and it supersedes any prior or contemporaneous representations, whether oral or written, and may not be modified or amended except by written instrument signed by all the parties hereto.

IN WITNESS HEREOF, THE PARTIES HERETO SET THEIR HANDS THIS 6th DAY OF ~~MARCH,~~ JUNE 1997.

Donna Goldsmith
DONNA GOLDSMITH, Petitioner

W. Smith 6/6/97
WILLIAM SMITH, Petitioner

Debra McGuire
DEBRA McGUIRE, Petitioner

Deborah E Cooke
DEBORAH COOKE, Petitioner

Ruth Ullman
RUTH ULLMAN, Petitioner

STATE OF NEW JERSEY :
BERGEN: ss:
COUNTY OF ~~ESSEX~~ :

I CERTIFY that on June 6, 1997, Donna Goldsmith, William Smith, Debra McGuire, Deborah Cooke and Ruth Ullman personally came before me and acknowledged under oath, to my satisfaction, that these persons:

(a) are named in and personally signed this document; and
(b) signed, sealed and delivered this document as their act and deed.

Sworn and subscribed to me on
this 6th day of ~~March~~ June, 1997.

Notary Public
Alfred F. Maurice Atty. at Law of N.J.

RIVER VALE EDUCATION ASSOCIATION

BY: John Noone

STATE OF NEW JERSEY :
: ss:
COUNTY OF ESSEX :

I CERTIFY that on June 6, 1997, John Noone personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) personally signed this document on behalf of the River Vale Education Association; and
(b) signed, sealed and delivered this document as his/her act and deed.

Sworn and subscribed to me on
this 6th day of ~~March~~ June, 1997.

Notary Public
Alfred F. Maurice, Atty at Law of N.J.

RIVER VALE BOARD OF EDUCATION

By: _____
KAREN MELIN, President

STATE OF NEW JERSEY :
: ss:
COUNTY OF ESSEX :

I CERTIFY that on June __, 1997, Anthony J. Mistretta personally came before me and acknowledged under oath, to my satisfaction, that:

(a) he is the Secretary of the River Vale Board of Education;

(b) he is the attesting witness to the signing of this document by the proper officer of the River Vale Board of Education who is Karen Melin, the President of the River Vale Board of Education;

(c) this document was signed and delivered by the River Vale Board of Education as its voluntary act, duly authorized by a proper resolution; and

(d) he signed this proof to attest to the truth of these facts.

Sworn and subscribed to me on
this __ day of June, 1997

_____
Notary Public
GLORIA I. JULIANA
NOTARY PUBLIC, State of New Jersey
My Commission Expires [illegible]

_____
Anthony J. Mistretta, Board Secretary

THE BELOW SIGNED COUNSEL OF RECORD HEREBY STIPULATE AND AGREE TO THE DISMISSAL AND SETTLEMENT OF THE ABOVE MATTER, WITHOUT ATTORNEYS' FEES OR COSTS.

SPRINGSTEAD & MAURICE
Attorneys for Petitioners, Donna Goldsmith, William Smith, Debra McGuire, Deborah Cooke, and Ruth Ullman

By: _____
Alfred F. Maurice

DATED: June __, 1997

DeMARIA ELLIS
Attorneys for Respondent
River Vale Board of Education

By: _____
Richard H. Bauch

DATED: June __, 1997

OAL DKT. NO. EDU 7692-96
AGENCY DKT. NO. 201-5/96

DONNA GOLDSMITH, WILLIAM SMITH, DEBRA MC GUIRE, DEBORAH COOKE AND RUTH ULLMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 14, 1997
DATE OF MAILING OCTOBER 24, 1997

540-97

P.B.K., on behalf of minor child, E.Y.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning uncle challenged the Board's determination that minor child, E.Y., was not domiciled in the District and, therefore, not entitled to a free public education in its schools.

ALJ found that E.Y. was not seeking to be educated in Tenafly solely for the purpose of receiving a free education within the District. ALJ found that E.Y. did meet the requirements of the "affidavit student" law as articulated in *Gunderson*. Thus, the ALJ concluded that E.Y. was entitled to admittance in the District's schools free of charge. Respondent's motion for summary judgment was denied.

Commissioner determined to reverse the initial decision of the ALJ. Commissioner concurred with the ALJ that the matter was properly analyzed under *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision. Commissioner noted, however, that notwithstanding petitioner's apparently undisputed claims of supporting E.Y. *gratis*, he did not provide a sworn statement by the parent or guardian, together with supporting documentation, that E.Y.'s parents are not presently capable of supporting or providing care for E.Y. due to family or economic hardship, and that E.Y. is not residing with petitioner solely for the purpose of receiving a free education in the District. (*J.B.* State Board decision) Commissioner directed petitioner to remit to the Board tuition for E.Y., prorated to the time of his ineligible attendance in the District.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3637-97
AGENCY DKT. NO. 70-2/97

P.B.K. ON BEHALF OF MINOR CHILD E.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,
Respondent

David Coffee, Esq., for petitioner
(David Coffee, attorneys)

Robert Merryman, Esq., for respondent
(Appruzzese, McDermont, Mastro & Murphy, attorneys)

Record Closed: June 9, 1997 Decided: August 21, 1997

BEFORE **IRENE JONES**, ALJ:

On February 28, 1997, petitioner, Paul B. Kim (petitioner or P.B.K.) on behalf of a minor child, E.Y., filed a petition with the Commissioner of Education (Commissioner) seeking to have E.Y. admitted to the Tenafly Public School System. Respondent, Tenafly Board of Education, filed an Answer to the petition on March 20, 1997 wherein

it admitted that it had denied E.Y. admission to its public school district because E.Y. failed to meet the legal requirements for admission. On March 27, 1997, the Commissioner transmitted the matter to the Office of Administrative Law for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 14F-1 to 13. A hearing was scheduled for June 11, 1997. The hearing was adjourned to allow for the disposition of the respondent's motion for summary judgment which was filed on May 19, 1997. On June 5, 1997, petitioner filed a brief in opposition to motion. On June 9, 1997, the respondent field a reply brief and the record was closed.

ISSUES

Whether the respondent's motion for summary judgment should be granted. Whether the petitioner has established that E.Y. is entitled to a free public education in the respondent's school district pursuant to *N.J.S.A.* 18A:38-1.

STATEMENT OF THE FACTS

I **FIND** the following facts to be undisputed and thus they are adopted as the **FACTS**:

E.Y. is a citizen of the United States. His parents, however, reside in Seoul, South Korea. E.Y. recently returned to the United States in order to continue his education and resides with his uncle in Tenafly, New Jersey. One week after his return to the country, E.Y. attempted to enroll in the Tenafly School District but was denied admission. Thereafter, petitioner, pursuant to *N.J.S.A.* 18A:38-1, submitted a sworn statement with the Secretary of the Board of Education that E.Y.'s parents have relinquished custody and control of their son, to him. Petitione is E.Y.'s uncle. Further, that he is supporting E.Y. gratis and that he lives with the petitioner and his wife year round. In re ɔonse to questions 7 and 8 of the sworn statement, petitioner stated that E.Y. had left his parents in order to continue his education in the United States.

Respondent concedes that the documents submitted by the petitioner satisfy the requirements of *N.J.S.A.* 18A:38-1 in all but two respects. Respondent contends that the documents fail to establish that E.Y. is living with petitioner and his aunt due to family or economic hardship. Further, the documents affirmatively demonstrate that E.Y. is living with the petitioner solely for the purpose of receiving a free public education within the district. Respondent relies on sworn statement of the petitioner which provides:

> Q. Explain in detail why the child is not living with his/her natural parents.
>
> A. Is an American citizen. His parents currently resides (sic) in Seoul Korea. "E" want (sic)to continue his education in the United States. I am his uncle.

Further, the affidavit of E.Y.'s parents provides:

> Q. Explain in detail why the child is not living with you.
>
> A. "E.Y." is residing with his uncle ("P.B.K.") because I ("E.Y.'s parent") currently reside in Seoul Korea and "E." wants to continue his education in the United States.

Thus, the sworn affidavits undisputedly demonstrate that that E.Y. now lives in Tenafly so that he can complete his education in the United States.

DISCUSSION, FINDINGS AND CONCLUSION

Respondent moves for summary judgment on the basis there are no material facts in dispute. The only disputed issue concern the application of the applicable law to the instant facts.

Petitioner opposes summary judgment but does not present any disputed facts. Indeed, petitioner contends that the requirements of *N.J.S.A.* 18A:38-1(a) have been satisfied. Consequently, E.Y. is entitled to a free public within the respondent's school district pursuant to *N.J.S.A.* 18A:38-1. I will *sua sponte* treat petitioner's request for relief as a Cross-Motion for Summary Judgment.

In an administrative proceeding, an ALJ may grant summary decision if the papers and discovery show that no genuine issue exists as to any disputed material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b) provides as follows:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must be responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The administrative regulation is essentially the same as the court rule, *R.* 4:46-2, which governs summary judgment in civil actions. Thus, summary judgment principles and precedent are sufficiently analogous to apply to proceedings at the OAL.

Summary judgment has long been recognized as a valid procedure under which a legal issue may be quickly and inexpensively disposed of where the pleadings, affidavits, and other papers filed clearly show that no genuine issue of material fact requiring disposition at a hearing exists. *Brill v. Guardian Life Ins. Co. Of America*, 142 *N.J.* 520 (1995). The moving party bears the burden of proof and the court must draw all inferences of doubt against the movant. *Judson v. Peoples Bank & Trust Co.*, 17 *N.J.* 67, 70, 74-75 (1954).

I **FIND** that there are no genuine issues of material fact that would require a hearing in this matter. The issues herein are legal and not factual.

This matter is governed by *N.J.S.A.* 18A:38-1 which provides:

> Public schools shall be free to the following persons over five and under twenty years of age.
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. . . .

Respondent concedes that the petitioner has met the first prong of the statute. Specifically, that E.Y. is domiciled in the district. Further, that the petitioner is supporting E.Y. gratis. It argues, however, that it is the second prong of the statute that the petitioner has failed to satisfy. The documents herein fail to establish that E.Y. is with the petitioner due to family or economic hardship. Further, the documents affirmatively demonstrate that E.Y. is living with the petitioner solely for the purpose of receiving a free public education within the district."

Petitioner argues that the "affidavit student" law *N.J.S.A.* 18A:38-1(b) is inapplicable because E.Y. is in fact now domiciled with him and thus is entitled to a free public education by operation of *N.J.S.A.* 18A:38-1(a). Domicile is a matter of intention, and it can be acquired upon the "concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode. . ." *Lyon v.*

Glaser, 60 *N.J.* 259, 264 (1972). Thus once E.Y. arrived in Tenafly with the intention to remain indefinitely, he became domiciled in Tenafly.

Petitioner further contends that *N.J.S.A.* 18A:38-1b(1) in inapplicable because he is E.Y.'s guardian for all purposes. Indeed, he is in the process of being appointed E.Y.'s guardian by the Bergen County Surrogate. Moreover, *N.J.S.A.* 18A:30-16(1) is intended to apply to those minor students who are residing within the district with someone other than their parent or guardian and in a district other than that of their entitlement by parental domicile. In this case, E.Y. is living in the district with the petitioner who is E.Y.'s guardian. E.Y.'s parents are not living in this country and the welfare of E.Y. has been placed in the hands of his relatives. Of equal importance is the fact that E.Y. does not have an entitlement in any district via parental domicile. As such, if the respondent's argument were accepted, E.Y. would not be entitled to a free public education anywhere in New Jersey. Clearly, the statute was not intended to create this situation.

It is well established that domicile is obtained by an individual in three possible ways (1) by birth or place of origin; (2) through the choice of a person legally capable of choosing his or her domicile; or (3) by operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *In re Estate of Gillmore*, 101 *N.J. Super.* 77, 87 (App. Div., *certif. Den.* 52 *N.J.* 175 (1968). As a child is considered to lack capacity to acquire a new domicile by choice, it has been well settled in the school law that a child's domicile is determined by the domicile of the child's natural father. See, *Bd. of Ed. of Little Egg Harbor v. Bds of Ed., etc.,* 145 *N.J.Super.* 1, 12 (App.Div. 1975) (Morgan, J.A.D., dissenting), *rev'd per curium*, based on dissent below, 71 *N.J.* 537 (1976) (citing *Mansfield Tp. Bd. of Ed. v. State Bd. of Ed.,* 101 *N.J.L.* 474 (Sup. Ct. 1925); *Summit City Bd. of Ed. v. Millburn Twp. Bd. of Ed.,* 95 *N.J.A.R.2d* (EDU) 506, 507; *V.R. on Behalf of A.R. v. Hamburg Bd. of Ed.*, 2 *N.J.A.R.* 283, 286 (Educ. 1980), *aff'd State Bd.*, 1981 *S.L.D.* 1553, *rev'd sub nom on other grounds*, *Rabinowitz v. N.J. State Bd. of Ed.,* 550 *F.Supp.* 481 (D.N.J. 1982).

Attempts to broaden the traditional rule of domicile in order to afford a child a free public education have been rejected by the Commissioner. *See, C.N. v. South Orange and Maplewood Bd. of Ed., 96 N.J.A.R.2d* (EDU) 913 (Commissioner rejected ALJ's finding that child no longer domiciled with father when child lives with grandparents and receives no financial support from father); *T.C. v. South Orange and Maplewood School District,* 97 *N.J.A.R.2d* (EDU) 370, 374 (Commissioner refused to find child domiciled with non-parent when parent's responsibility not legally terminated). The only apparent means by which to change a child's legal domicile to other than that of the child's father, then, is through "a legal termination of parental responsibility". *V.R., supra*, at 287. Although, P.B.K. has initiated guardianship proceedings, he has not yet been successful in obtaining guardianship. Until such time, E.Y. must be considered to be domiciled with his parents in Korea.

Nonetheless, E.Y. is entitled to a free public education if he meets the requirements of the "affidavit student" law. There are four requirements imposed by N.J.S.A. 18A:38-1(b). First, the petitioner must establish domicile within respondent's school district. Second, petitioner must demonstrate that he is supporting E.Y. gratis. Third, it must be shown that E.Y.'s family is not capable of supporting or providing care for him due to family or economic hardship. Fourth, it must be shown that E.Y. is not residing with petitioner solely for the purpose of receiving a free public education in respondent's school district. The burden of proof is on the petitioner to demonstrate each and every element. *N.J.S.A.* 18A:38-1(b).

Respondent concedes that E.Y. is a U.S. citizen. He does not lose his U.S. citizenship because the marital domicile of his parents is in Seoul, Korea or because he resided with them for a period of time. *Fantony v. Fantony*, 21 *N.J.* 525, 536 (1956). One of the incidents of U.S. citizenship is that a citzen has an unqualified right to take up residence in this country, and is free to fix and change one's residence, whether in this country or abroad, for the rest of one's life without impugning the validity of one's citizenship. *Acosta v. Gaffney* 558 *F.2d* 1153 (3rd Cir. 1977). Furthermore, while the right tp a free public education is not a fundamental right protected by the Constitution,

it is also not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 *U.S.* 202, 221 (1982). Rather, education has a fundamental role in maintaining the fabric of our society, providing the basic tools by which individuals might lead economically productive lives, preparing citizens to participate effectively and intelligently in our open political system, and otherwise inculcating fundamental values necessary to the maintenance of a democratic political system. *Ibid.*

N.J.S.A. 18A:38-1(b) provides that the child cannot reside with the resident of a school district solely for the purpose of receiving a free public education within the district. Thus, by the plain meaning of the statute, if other motives besides a desire to receive a free public education within that particular school district can be found to explain why the child has taken up residence with the person domiciled in the school district, this requirement of the "affidavit student" law has been satisfied.

In this, case E.Y. has relatives domiciled in the United States who are willing to support him gratis, and this fact, more than a specific desire to go to school in Tenafly, that has dictated E.Y.'s choice of residence. Indeed, the fact that residency was estabished in Tenafly is purely happenstance. If his uncle had resided in Leonia, for example, E.Y. would have enrolled in that school district. Thus, I **FIND** E.Y. is not seeking to be educated in Tenafly solely for the purpose of receiving a free education within the district.

By operation of the affidavit student law, it must also be shown that E.Y. has been sent to live with P.B.K. due to "family or economic hardship". This requirement, however, has not been strictly construed by the Commissioner. In *Gunderson v. City of Brigatine Bd. of Ed.*, 95 *N.J.A.R.2d* (EDU) 39, the Commissioner ruled that:

> In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. *N.J. Builders, Owners, & Managers Association v. Blair*, 60 *N.J.* 330, 333 (1972). Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the

proposed remedy. *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969); *San-Lan Builders, Inc. v. Baxendale*, 28 *N.J.* 148, 155 (1958).

The amendments to *N.J.S.A.* 18A:38-1 effectuated by *P.L.* 1993, *c.* 380 were intended to ease the burden on local boards of education by attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. (See Sponsor's Statement, Senate Education Committee Statement and Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as c. 380).

The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the non-parent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, do(sic) to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the education of all its children. *Sabella v. Lacey Tp.*, 204 *N.J. Super.* 55, 60 (App. Div. 1985); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.*, 52 *N.J.* 73, 77 (1968).
[*Id,* at 42 (emphasis added)]

I **FIND** that E.Y. has met the requirements of the "affidavit student" law as articulated by the Commissioner in *Gunderson*, *supra*. E.Y. has no home, or possibility of school attendance, other than with the non-parent district resident and ... such resident is for all intents and purposes the sole caretaker and supporter of the child. Ibid. It is undisputed that the petitioner has taken full charge of E.Y.'s welfare, and is currently in the process of obtaining guardianship over E.Y.. As noted by petitioner, E.Y. would otherwise have no entitlement to an education anywhere in the U.S. The spirit of the law in this case should control over the letter, for to hold otherwise would work a substantial injustice by harming a party the legislature never meant to penalize, and would subvert the state's interest in providing an education for its children. For the

foregoing reasons, I **CONCLUDE** that E.Y. is entitled to admittance in the respondent's school district.

It is therefore **ORDERED** that E.Y. shall be admitted to the respondent's school district and this matter is hereby **DISMISSED**. It is further **ORDERED** that respondent's motion for Summary Judgment is hereby **DENIED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/20/97
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

August 27, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 28 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. EDU 3637-97
AGENCY DKT. NO. 70-2/97

P.B.K., on behalf of minor child, E.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to reverse the initial decision of the ALJ, for the reasons set forth herein.

Initially, the Commissioner concurs with the ALJ's and the Board's view that, since petitioner has not brought forth proof that he has gained legal custody of his nephew, then E.Y. cannot be found to be domiciled with him, since the domicile of an unemancipated minor follows that of the parent or guardian having legal control over him. See *Clifton Board of Education v. Vincent Sauro and Mildred Sauro,* 96 *N.J.A.R.* 2*d* (EDU) 497 at 500, citing

Mansfield Twp. v. State Board of Education, 101 *N.J.L.* 474, 478 (Sup. Ct. 1925). Thus, the matter is properly analyzed under *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision.

The Commissioner further agrees with the Board that, notwithstanding petitioner's apparently undisputed claims that he is supporting E.Y. *gratis*, that he will assume all personal obligations for E.Y. relative to school requirements, and that he intends to keep E.Y. and support him gratuitously for a longer period than the school term, petitioner must also provide a sworn statement by the child's parent or guardian, together with supporting documentation, that E.Y's parents are "not capable of supporting or providing care for the child due to a family or economic hardship *and* that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.***" (emphasis added) (*N.J.S.A* 18A:38-1b(1)) See, *J.B. on behalf of her grandchild, R.H. v. Board of Education of the Twp. of Ocean, Monmouth County*, decided by State Board of Education September 3, 1997.

Here, both petitioner and E.Y.'s parents have specifically affirmed that E.Y. is living with his uncle because he "wants to continue his education in the United States." (Initial Decision at p. 3, citing parental affidavit) Further, as the Board noted in its exceptions, petitioner has not established, nor has he even claimed, that E.Y.'s parents, due to family or economic hardship, are not presently capable of supporting or providing care for E.Y.; instead, petitioner incorrectly argues that this provision of the statute is inapplicable in this matter. In this regard, the Commissioner is cognizant of the State Board's recent guidance concerning a petitioner's burden to demonstrate family or economic hardship in order to fulfill the requirements of the affidavit student statute. The State Board has specifically provided that

> ***in order to satisfy that standard, the family or economic hardship must be real and demonstrable, evincing a current incapability on the part of [the minor child's] parents to support him or provide care as the result of that hardship." (*J.B., supra*, slip opinion at p. 6)

Accordingly, the initial decision of the ALJ determining that E.Y. is entitled to admittance in the Board's district is reversed. Further, with respect to the ALJ's statement that, absent a conclusion that E.Y. is entitled to admittance in the Board's district, E.Y. "***would otherwise have no entitlement to an education anywhere in the U.S." (initial decision at p. 9), the Commissioner notes that, should E.Y.'s parents wish to procure an education for their son in a school district in New Jersey, they may presumably do so, with the consent of the local board, by paying the necessary tuition, in accordance with *N.J.S.A.* 18A:38-3. Having determined, however, that petitioner fails to meet the relevant statutory requirements, the Commissioner cannot find that E.Y. is entitled to a *free* education and, accordingly, directs, pursuant to *N.J.S.A.* 18A:38-1b(1), that petitioner remit to the Board tuition for E.Y., prorated to the time of his ineligible attendance in the District.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 14, 1997
DATE OF MAILING OCTOB ER 14, 1997

540-97

EDU #3637-97
C # 540-97
SB # 92-97

P.B.K., on behalf of minor child, E.Y.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 14, 1997

For the Petitioner-Appellant, Cillick & Sprague (Michael J. Sprague, Esq., of Counsel)

For the Respondent-Respondent, Apruzzese, McDermott, Mastro & Murphy (Robert Merryman, Esq., of Counsel)

The petitioner's motion to supplement the record on appeal is granted, N.J.A.C. 6:2-1.9, and we stay the decision of the Commissioner of Education sua sponte pending our final determination on the merits of this matter.

April 1, 1998

Date of mailing APR 03 1998

540-97

EDU #3637-97
C # 540-97
SB # 92-97

P.B.K., on behalf of minor child, E.Y.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 14, 1997

Decision on motion by the State Board of Education, April 1, 1998

For the Petitioner-Appellant, Cillick & Sprague (Michael J. Sprague, Esq., of Counsel)

For the Respondent-Respondent, Apruzzese, McDermott, Mastro & Murphy (Robert Merryman, Esq., of Counsel)

P.B.K. (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education alleging that his nephew, E.Y., who resided with him in Tenafly, was entitled to a free public education in that district pursuant to N.J.S.A. 18A:38-1.[1] E.Y., an

[1] N.J.S.A. 18A:38-1 provides, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
> a. Any person who is domiciled within the school district;
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as

JAN. 5, 2000

American citizen, had resided with his parents in South Korea before moving to Tenafly in December 1996 to live with the petitioner. The Board of Education of the Borough of Tenafly (hereinafter "Board") countered that E.Y. had failed to meet the legal requirements for a free public education in the district. The Board subsequently filed a motion for summary decision.

On August 21, 1997, an administrative law judge ("ALJ"), finding that there were no genuine issues of material fact, concluded that the petitioner had established that E.Y. was entitled to a free public education in Tenafly. The ALJ found that E.Y. was not seeking to be educated in Tenafly solely for the purpose of receiving a free public education in the district and that he had otherwise met the requirements of N.J.S.A. 18A:38-1b. The ALJ stressed that "petitioner has taken full charge of E.Y.'s welfare, and is currently in the process of obtaining guardianship over E.Y. As noted by petitioner, E.Y. would otherwise have no entitlement to an education anywhere in the U.S." Initial Decision, slip op. at 9. Treating the petitioner's request for relief as a cross-motion for summary decision, the ALJ recommended that E.Y. be admitted to the Tenafly district and that the Board's motion for summary decision be denied.

> if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district....

On October 14, 1997, the Commissioner rejected the ALJ's recommendation, concluding that petitioner had not established that E.Y. was entitled to a free public education in Tenafly. Initially, the Commissioner agreed with the ALJ that "since petitioner has not brought forth proof that he has gained legal custody of his nephew, then E.Y. cannot be found to be domiciled with him, since the domicile of an unemancipated minor follows that of the parent or guardian having legal control over him." Commissioner's Decision, slip op. at 12. The Commissioner found that "petitioner has not established, nor has he even claimed, that E.Y.'s parents, due to family or economic hardship, are not presently capable of supporting or providing care for E.Y.," id. at 13, as required by N.J.S.A. 18A:38-1b(1). The Commissioner observed that "should E.Y.'s parents wish to procure an education for their son in a school district in New Jersey, they may presumably do so, with the consent of the local board, by paying the necessary tuition in accordance with N.J.S.A. 18A:38-3." Id. at 14. Accordingly, the Commissioner directed the petitioner to remit tuition to the Board for the period of E.Y.'s attendance in the district.

Petitioner filed the instant appeal to the State Board. He also filed a motion seeking to supplement the record on appeal with 1) an affidavit of E.Y.'s father averring that E.Y. was living with the petitioner as the result of a family and economic hardship, and 2) Letters of Guardianship issued by the Bergen County Surrogate on June 11, 1997 appointing petitioner as the legal guardian of E.Y.

On April 1, 1998, the State Board granted the petitioner's motion to supplement the record and, in addition, stayed the decision of the Commissioner sua sponte pending its final determination on the merits of this matter.

After a careful review of the record as supplemented on appeal, we conclude that E.Y. was entitled to a free public education in the Tenafly school district.

As pointed out by the Commissioner, the domicile of an unemancipated minor follows that of the parent or guardian having legal control over him. Thus, once the petitioner was appointed E.Y.'s legal guardian on June 11, 1997, the inquiry became whether he was domiciled in Tenafly. V.H., on behalf of minor, J.T. v. Board of Education of the Township of Quinton, decided by the Commissioner of Education, October 15, 1996, aff'd by the State Board of Education, May 7, 1997. The Board does not dispute the fact that the petitioner has been domiciled in Tenafly during all periods relevant to this matter. Nor is there any indication of fraud on his part. Given these circumstances, we conclude that E.Y. was entitled to a free public education in the Tenafly school district pursuant to N.J.S.A. 18A:38-1a once the petitioner was appointed as his legal guardian.

The only remaining issue involves the period between December 1996, when E.Y. began to live with the petitioner in Tenafly, and June 11, 1997, when the petitioner became E.Y.'s legal guardian. In his affidavit submitted in supplementation of the record, E.Y.'s father, H.K.Y., avers that E.Y. had been born in California and had lived there until the family moved to Korea when he was three. According to H.K.Y., his son had attended the international school in Korea "at substantial expense to us" in preparation for attending college in the United States. In 1994, H.K.Y. lost his job with Citibank and was unemployed for two years before securing a position at a "substantially lower salary." He indicates that the cost of sending E.Y. to the

international school was an expense he could no longer afford. H.K.Y. further avers that:

> 7. The public high school in Seoul is not an option due to the fact that E.Y. is an American citizen and because he had attended the international middle school. At the international school, he had been instructed in English, and the curriculum and cultural environment were substantially different from that in the public school. E.Y. does not have the foundation in the Korean language necessary to succeed at an advanced educational level in the public school. His status as an American citizen is cause for harassment at the hands of students at the public school.
>
> 8. Thus, the family was faced with the prospect of not being able to provide our son with a proper education due to economic hardship. Although I am employed, my salary is not sufficient enough to be able to pay the international school tuition while providing for the other needs of my family....
>
> 9. ...It was solely for the reason of economic hardship that E.Y. moved to Tenafly to live with his uncle, who has obtained legal guardianship of him....

Although the record does not indicate when the petitioner applied to become E.Y.'s legal guardian, a consent form submitted by H.K.Y. to the Bergen County Surrogate's Court assenting to the appointment of the petitioner as his son's guardian was notarized on January 21, 1997, shortly after E.Y. began to live with the petitioner in Tenafly. As previously indicated, petitioner was appointed E.Y.'s legal guardian on June 11, 1997. Given the unique circumstances before us and on the basis of the record as supplemented, we conclude that the petitioner has demonstrated that E.Y.'s parents were not capable of supporting or providing care for him due to a family or economic hardship and that E.Y. was not residing with the petitioner solely for the purpose of receiving a free public education in the district.

Consequently, on the basis of the record as supplemented on appeal, we conclude that E.Y. was entitled to a free public education in the Tenafly school district commencing in December 1996, when he began to live with the petitioner.[2]

Attorney exceptions are noted.

January 5, 2000

Date of mailing JAN - 7 2000

[2] In response to exceptions filed by the Tenafly Board to the report of our Legal Committee, we note that our review of this matter is not limited to consideration of the documents which the petitioner had provided to the Board at the time he was attempting to enroll E.Y. in the district. Rather, the issue before us is whether–on the basis of the entire record developed during these proceedings–E.Y. was entitled to a free public education in the Tenafly district under the standard set forth in N.J.S.A. 18A:38-1. We reiterate in that regard that the petitioner had not filed a motion for summary decision with the ALJ. Rather, the ALJ treated the petitioner's claim for relief as a motion for summary decision and determined on the basis of the record before him that the petitioner had established E.Y.'s entitlement to attend school in Tenafly. Hence, the petitioner had not submitted documents in support of such a motion during the proceedings in the Office of Administrative Law.

Moreover, in any event, N.J.A.C. 6:2-1.9 expressly authorizes the State Board to direct supplementation of the record if "[a]t any time during the pendency of the appeal...it appears that evidence unadduced at the proceedings below may be material to the issues on appeal...." By decision dated April 1, 1998, we granted the petitioner's request to supplement the record with, inter alia, the affidavit of E.Y.'s father. Such document was, therefore, part of the record before us during our review of the merits of this case.

541-97

541-97

ROSELLA JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 17, 1997

State of New Jersey
Office of Administrative Law

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3820-97
AGENCY DKT. NO. 80-3/97

ROSELLA JOHNSON,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Claudine M. Liss, Esq., for petitioner
(Eugene G. Liss, attorney)

Derlys Maria Gutierrez, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record closed: September 3, 1997 Decided: September 3, 1997

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

This matter was transmitted to the Office of Administrative Law on April 11, 1997 for a hearing pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Sept. 3, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Sept. 9, 1997
DATE

Receipt Acknowledged:
D Vasiliadis/jr
DEPARTMENT OF EDUCATION

SEP 11 1997
DATE

Mailed to Parties:
Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jrp

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SEP 3 1 19 PM '97

SETTLEMENT AGREEMENT

OAL DKT. NO. EDU 3820-97

AGENCY DKT. NO. 80-3/97

ROSELLA JOHNSON,

Petitioner,

v.

NEWARK PUBLIC SCHOOLS,

Respondent.

The parties in the above matter, having amicably resolved their dispute, agree as follows:

1. Rosella Johnson will be rehired to a tenured teaching position at the Newark Public Schools, in accordance with her teaching certificate, effective September 1, 1997.

2. Ms. Johnson will retain her accrued seniority in effect on February 1, 1997. Ms. Johnson will not accrue seniority for the period of time from February 1, 1997 through September 1, 1997.

3. Ms. Johnson will retain accrued sick days that were not used as of February 1, 1997.

4. The Newark Public Schools agree to pay Ms. Johnson back pay in the sum of Eight Thousand Dollars and no cents ($8,000.00) subject to usual and ordinary payroll deductions (excluding pension contributions and medical insurance premiums), within 30 days of the approval of the Commissioner.

5. Ms. Johnson waives all rights she may have to additional back pay, monetary damages or other compensation and attorneys' fees and waives any and all other claims she may have had against the Newark Public Schools.

6. This agreement does not constitute an admission of liability by the Newark Public Schools.

7. This agreement shall not be construed as precedent in any future or pending action against the Newark Public Schools.

8. The parties understand and agree that it is Ms. Johnson's obligation to notify the Teachers Pension and Annuity Fund (TPAF) advising of her rehiring effective September 1, 1997, and that all necessary pension adjustments are issues to be resolved by her and by the TPAF and not the responsibility of the Newark Public Schools.

DATED: September 3, 1997

For Petitioner

Rosella Johnson

Claudine M. Liss, Esq.

For Respondent:

Derlys M. Gutierrez, Esq.
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A., attorneys)

md

OAL DKT. NO. EDU 3820-97
AGENCY DKT. NO. 80-3/97

ROSELLA JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 17, 1997
DATE OF MAILING OCTOBER 17, 1997

543-97

543-97

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

PETITIONER,

V.

M.L., on behalf of her minor children, F.L. and M.L.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9785-95

AGENCY DKT. NO. 47-3/95

OAL DKT. NO. EDU 9786-95

AGENCY DKT. NO. 46-3/95

Consolidated

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,

Petitioner,

v.

M.L. ON BEHALF OF HER MINOR CHILDREN F.L. AND M.L.,

Respondents.

Kenneth J. Lindenfelser, Esq., for petitioner
(Koch, Koch & Bennett, attorneys)

Anabela Dacruz-Melo, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A., attorneys)

Record Closed: September 8, 1997 Decided: September 8, 1997

BEFORE **MARYLOUISE LUCCHI-MCCLOUD**, ALJ:

These matters were transmitted to the Office of Administrative Law on September 7, 1995, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

9/2/97
DATE

MARYLOUISE LUCCHI-MCCLOUD, ALJ

Receipt Acknowledged:

Sept. 10, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 11 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

njf

SEP 1 1:35 PM '07

Koch, Koch & Bennett, Esqs.
70 Midland Avenue
Kearny, NJ 07032
(201) 991-1111
Attorney for Petitioner
Board of Education of the Town of Kearny

STATE OF NEW JERSEY

BOARD OF EDUCATION OF THE TOWN OF KEARNY,	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	DEPARTMENT OF EDUCATION
-v-	
MARIA LEMOS ON BEHALF OF HER MINOR CHILDREN F.L. and M.L.	OAL DOCKET NOS. EDUOS 09785-95N and EDUOS 09786-95N
Respondent.	STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, the Board of Education of the Town of Kearny (hereinafter "KBOE) and Maria Lemos, by and through their respective attorneys, as follows:

WHEREAS, KBOE has filed the above petitions against Maria Lemos alleging improper attendance in the KBOE school district by her children, F.L and M.L.; and

WHEREAS, said petitions sought tuition reimbursement in excess of $17,000.00 for the periods in question, and

WHEREAS, Maria Lemos disputes the facts and amounts.

NOW THEREFORE in consideration of their mutual promises and other valuable consideration, the parties agree as follows:

1. Ms. Lemos agrees to pay the KBOE $5,000.00 as tuition reimbursement for F.L. and $5,000.00 as tuition reimbursement for M.L. for a total of $10,000.00.

2. Said amount will be paid as follows: $100.00 per month beginning September 1, 1997 and every month thereafter until such time as Maria Lemos sells the condominium she currently occupies or pays a total of $10,000.00. At the time of sale of the condominium, any proceeds will be used to pay off the balance of the $10,000.00. In the event said proceeds are not sufficient to cover the balance due, the remaining amount due will be paid off at the rate of $100.00 per month. All monthly payments will be due on the first of each month. Checks should be made payable to the Kearny Board of Education and mailed in care of Kenneth J. Lindenfelser, Esq. Koch, Koch & Bennett, P.O. Box 495, 70 Midland Avenue, Kearny, NJ 07032.

3. In the event any payment is not received within 10 days of its due date, it is hereby agreed that KBOE may enter judgment against Maria Lemos for the full amount remaining unpaid in the Superior Court of New Jersey.

4. The parties hereby release and waive any claims or counterclaims that each may have against the other with respect to the subject matter of this lawsuit, except as otherwise provided herein.

5. KBOE hereby agrees to dismiss this action with prejudice upon payment in full from Maria Lemos.

Dated:

Kenneth J. Lindenfelser, Esq.
Petitioner's Attorney

Dated: 5/25/17

Anabela Dacruz-Melo, Esq.
Respondent's Attorney

OAL DKT. NOS. EDU 9785-95 and EDU 9786-95 (CONSOLIDATED)
AGENCY DKT. NOS. 47-3/95 and 46-3/95

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.L., on behalf of her minor children, F.L. and M.L.,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed with prejudice, subject to compliance with the terms of the settlement. However, consistent with the terms of the settlement, the Commissioner's acceptance herein does not preclude the Board from moving for judgment in Superior Court in the event the agreed-upon monies are not remitted.

COMMISSIONER OF EDUCATION

OCTOBER 20, 1997
DATE OF MAILING OCTOBER 20, 1997

5-44-97

544-97

MARK BOGDANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10754-96

AGENCY DKT. NO. 523-11/96

MARK BOGDANY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

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

James P. Granello, Esq., for respondent

Record Closed: September 9, 1997 Decided: September 9, 1997

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on November 7, 1996, when Mark Bogdany filed a petition of appeal with the Commissioner of Education seeking an order, inter alia, enforcing petitioner's recall rights to the position of social studies teacher and placing petitioner in a social studies teaching position. An answer on behalf of respondent was filed on November 15, 1996 and on December 6, 1996, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13.

A prehearing conference was conducted on April 30, 1997, at which time counsel for respondent agreed to provide certain information to counsel for petitioner which might resolve the issues in the case. During a supplemental prehearing conference on May 22, 1997, counsel for petitioner represented that the materials he had received appeared to eliminate the areas of dispute, that he would confirm with his client that the petition of appeal should be withdrawn and that written confirmation of the withdrawal would follow within a few weeks. Having received nothing from counsel for petitioner, on June 12, 1997, the undersigned wrote to Mr. Klausner requesting that he forward written confirmation that the petition of appeal in this matter is withdrawn. Thereafter the secretary to the undersigned placed numerous telephone calls to Mr. Klausner's office requesting that he reply to the June 12, 1997 letter. By letter dated August 27, 1997, the undersigned again wrote to Mr. Klausner, as follows:

> When we spoke on May 22, 1997 you indicated that the information provided by Mr. Granello at my request appeared to eliminate the areas of dispute and that you would confirm with your client that the petition of appeal should be withdrawn. I thereafter wrote to you by letter dated June 12, 1997, copy attached. My secretary has called you a number of times since to request that you forward a letter withdrawing the petition. Please have your letter of withdrawal on my desk no later than 5 p.m. on September 8, 1997. Failure to comply with this directive necessarily will result in the issuance of an initial decision dismissing the matter for lack of prosecution.

To date, no responding communication has been received from petitioner's counsel. Based upon all of the foregoing, it is hereby **ORDERED** that the within matter is **DISMISSED WITH PREJUDICE** for lack of prosecution.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9-9-97
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

9/11/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 12 1997
DATE

Barbara A Hamek
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 10754-96
AGENCY DKT. NO. 523-11/96

MARK BOGDANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon his independent review of the record, the Commissioner determines to affirm the recommended decision of the Administrative Law Judge, dismissing this matter for lack of prosecution, for the reasons expressed therein.

Accordingly, the within Petition of Appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 20, 1997
DATE OF MAILING OCTOBER 20, 1997

545-97

545-97

IN THE MATTER OF THE TENURE	:	
HEARING OF SAMUEL CORTI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY,	:	
_____	:	

OCTOBER 20, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2685-97
AGENCY DKT. NO. 94-3/97

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Petitioner,
v.
SAMUEL CORTI, TENURE HEARING,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, Council, George & Dortch, attorneys)

David B. Beckett, Esq., for respondent (Szagerman, Lakind, Blumstein, Watter & Blader, attorneys)

Record Closed: September 8, 1997 Decided: September 9, 1997

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 9, 1997, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation of dismissal indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

September 9, 1997
DATE

Anthony T. Bruno
ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

9/15/97
DATE

DMA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 18 1997
DATE

Barbara A. Hamed
OFFICE OF ADMINISTRATIVE LAW

tmp

SZAFERMAN, LAKIND, BLUMSTEIN,
WATTER & BLADER, P.C.
By: David B. Beckett, Esquire
Quakerbridge Executive Center/Suite 104
101 Grovers Mill Road
Lawrenceville, New Jersey 08648
(609) 275-0400
Attorneys for Samuel Corti

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

1997 SEP -8 P 1:03

STATE OF NEW JERSEY
DEPARTMENT OF PERSONNEL
OFFICE OF ADMINISTRATIVE LAW

CORTI, SAMUEL TENURE
HEARING, BOE OF THE CITY OF
TRENTON, MERCER COUNTY

OAL DOCKET NO. EDUTH 02685-97S
AGENCY REF. NO. 94-3/97
TRANSMITTING AGENCY:
DEPARTMENT OF EDUCATION
JUDGE: BRUNO, ANTHONY

ADMINISTRATIVE ACTION

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties through their counsel having discussed the tenure charges and appeal that have been filed by the Trenton Board of Education and joined by Samuel Corti, Jr., hereby stipulate and agree that the appeal that has been filed before the Commissioner of Education shall be dismissed with Prejudice as Mr. Corti is a custodial employee who is employed pursuant to a year to year contract that renews annually.

FOR SAMUEL CORTI:

SZAFERMAN, LAKIND, BLUMSTEIN,
WATTER & BLADER, P.C.

By: David Beckett
David B. Beckett, Esq.

Dated: 9-4-97

FOR TRENTON BOARD OF EDUCATION:

SUMNERS, COUNCIL, GEORGE
& DORTCH, D.C.

By: Thomas W. Sumners
Thomas W. Sumners, Jr., Esq.

Dated: Aug 27, 1997

OAL DKT. NO. EDU 2685-97
AGENCY DKT. NO. 94-3/97

IN THE MATTER OF THE TENURE	:	
HEARING OF SAMUEL CORTI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY,	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 20, 1997
DATE OF MAILING OCTOBER 20, 1997

547-97

W.G. AND I.G., on behalf of minor children, P.R. AND A.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

OCTOBER 22, 1997

OAL DKT. NOS. EDU 11372-95 and EDU 7572-96 (ON REMAND)
AGENCY DKT. NO. 377-9/93

W.G. AND I.G., on behalf of minor children, P.R. AND A.R.,	
PETITIONERS,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	DECISION ON REMAND
RESPONDENT.	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOB ER 22, 1997
DATE OF MAILING OCTOBER 22, 1997

548-97

548-97

EVELYN GLENN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 22, 1997

OAL DKT. NO. EDU 3473-95
AGENCY DKT. NO. 45-3/95

EVELYN GLENN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 22, 1997
DATE OF MAILING OCTOBER 22, 1997

549-97

549-97

E. McE. AND R. McE., on behalf of their minor child, J. McE.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 22, 1997

OAL DKT. NO. EDU 11119-96
AGENCY DKT. NO. 317-8/96

E. McE. AND R. McE., on behalf of their minor child, J. McE.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 22, 1997
DATE OF MAILING OCTOBER 22, 1997

550-97

550-97 E

P.E, on behalf of minor, G.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

OCTOBER 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 8479-97
AGENCY DKT. NO. 381-10/97

P.E. ON BEHALF OF MINOR
CHILD, G.E.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
FREEHOLD REGIONAL SCHOOL
DISTRICT, MONMOUTH COUNTY,
Respondent.

Joel G. Scharff, Esq., for the petitioner (Ruderman and Glickman, attorneys)

James E. Collins, Esq., for the respondent (Cerrato, Dawes, Collins, Baker and Brown, attorneys)

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

This matter concerns an application for emergent relief filed with the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9. The matter was transmitted to the Office of Administrative Law on October 9, 1997, pursuant to N.J.S.A. 52:14F-1 through -13. Oral argument was heard on October 10, 1997. At the oral argument, I indicated that I would keep the record open until October 14, 1997 for receipt of supplemental legal briefs.

I **FIND** that the pertinent facts are undisputed.

G.E. is a senior in the Marlboro High School of the Freehold Regional High School District and is captain of the boys' varsity soccer team. On September 23, 1997, he was observed by a faculty member smoking a cigarette on school property. G.E. was told to go to the office where he signed a suspension form for a violation of the school's chemical substances policy, which was established in 1989. The definition of "chemical substances" includes tobacco and provides for a minimum suspension of two months from sport team activities.

G.E. does not deny that he was smoking a cigarette on school property and he knew that the penalty was a two month suspension. This penalty is listed in the student handbook and is contained in an attachment to the athletic eligibility form which was signed by G.E. and his parents. According to G.E., he was upset on September 23,1997 because he was slightly injured during a soccer game, his grandmother had an operation and his younger brother injured his knee while playing soccer. G.E. forgot he was smoking when he drove onto the school property.

G.E. plans to go to college, and his participation in soccer team activities during his senior year may be a factor considered by college officials in deciding whether to accept him as well as his eligibility for financial assistance.

On September 24, 1997, G.E. and his parents meet with James Mullevey, the principal of Marlboro High School, the vice-principal, and an assistant Superintendent regarding the penalty. The petitioner was advised that the penalty would not be reduced. G.E.'s parents asked for an in-person hearing by the Board of Education. The Board reviewed the matter on the papers, and deferred to the administrator's decision.

On behalf of the petitioner, Joel G. Scharff, Esq., argued that the petitioner has meet the requirements for emergency relief. He argued that the penalty in this matter is equal to an expulsion from the soccer team and is an extreme penalty for a minor violation. Also, Mr. Scharff argued that G.E. was deprived of his due process rights and that he should have been given a full

hearing by the school officials and by the board of education. R.R. v. Bd. Of Ed. Shore Reg. High School, 109 N.J. Super. 337 (Ch. Div. 1970).

Lastly, Mr. Scharff argued that the respondent was bound by NJSIAA rules and that the school's rule regarding chemical substances (which includes tobacco) was in conflict with the NJSIAA rule regarding chemical substances (which does not include tobacco) (P-1). Mr. Scharff argued that the NJSIAA rules preempted any conflicting school rule.

On behalf of the respondent, James E. Collins, Esq., argued that there was no due process violation and that G.E. had an opportunity to present his position regarding the penalty when he and his parents meet with the school officials. Also, Mr. Collins stated that the board of education considered the matter based on the written record, which includes a letter from G.E. (R-1) and a letter from his father (R-2). Mr. Collins noted that the penalty for cigarette smoking on school property is clearly stated in the student handbook and in the attachment to the athletic eligibility form which was signed by G.E. and his parents.

Mr. Collins argued that the petitioner had not shown that the rules of the NJSIAA preempted the respondent's rule regarding cigarette smoking, and that the portion of the NJSIAA rules introduced into evidence as P-1 does not deal with tobacco violations.

Lastly, Mr. Collins argued that the petitioner has not meet the prerequisites for emergency relief. G.E. has not shown a reasonable likelihood that he will succeed since the respondent's penalty rule is reasonable and G.E. was aware of the rule prior to the violation. G.E. has not shown irreparable harm since there is only about two weeks left in the soccer season, and G.E. will be able to participate in other sports during the remainder of his senior year. According to Mr. Collins, the granting of emergency relief will cause a greater harm to the school since it will send a message to the students that they can violate the school rules and not pay the penalty.

To qualify for emergency relief, the petitioner must show he meets the following four prerequisites: a reasonable likelihood of success on the merits, an irreparable harm to the petitioner, a settled legal right, and a showing that petitioner will suffer a greater hardship if relief is denied in relationship to any hardship on the respondent, N.J.A.C. 1:1-12.6, Crowe v. DeGioia,

90 N.J. 126, 132-34 (1982). I **CONCLUDE** that the petitioner has not established a reasonable likelihood of success on the merits.

It is unlikely that the petitioner will be able to show that the penalty for cigarette smoking on school property is unreasonable or that the school did not give G.E. an adequate opportunity to present his defenses. The courts have recognized that the nature of the hearing to be afforded to a student depends on the circumstances of the case, Shore Reg. High School. In this matter, there are no factual disputes regarding the violation, and the sole issue was whether the school should reduce the penalty. G.E. had the opportunity to try to convince the school officials that they should mitigate the penalty.

As to the NJSIAA rules, I **CONCLUDE** that the petitioner has not shown a likelihood of success in his argument that the NJSIAA rules preempt the school's rule regarding cigarette smoking on school property. The portion of the NJSIAA rules presented by the petitioner only govern the use of alcoholic beverages and illegal substances during and after games (R-1), and does not contain any language which would prohibit a school from establishing a tobacco ban.

Based on the foregoing, I **CONCLUDE** that the petitioner has failed to establish the prerequisites for emergency relief, and it is **ORDERED** that the petition be **DENIED**.

This order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergency relief in accordance with N.J.S.A. 52:14B-10.

October 14, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

P-1 NJSIAA Procedures, p. 110

For the Respondent:

R-1 Letter from G.E. to James Mullevey, dated September 23, 1997

R-2 Letter from P.E. to the Board members, dated September 26, 1997

R-3 Marked for identification only

WITNESSES:

For the Petitioner:

P.E.

For the Respondent:

None

OAL DKT. NO. EDU 8479-97
AGENCY DKT. NO. 381-10/97

P.E, on behalf of minor, G.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this matter, including the audiotape of emergent proceedings by the Administrative Law Judge (ALJ), and the initial decision on Motion for Emergent Relief of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ denying emergent relief as petitioner failed to meet the standards for such relief as set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) and *N.J.A.C.* 1:1-12.6, *R.* 4:52-1.

Accordingly, the ALJ's determination to deny emergent relief is adopted for the reasons expressed therein and, the relief sought by petitioner as to his return to the soccer team now being moot, this matter shall proceed at the OAL to the extent that petitioner wishes to pursue issues raised concerning allegations of infirmity in respondent's school policy.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

OCTOBER 22, 1997
DATE OF MAILING OCTOBER 22, 1997

552-97

M.R., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 23, 1997

OAL DKT. NO. EDU 3636-97
AGENCY DKT. NO. 66-2/97

M.R., on behalf of minor child, M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 23, 1997
DATE OF MAILING OCTOBER 23, 1997

553-97

553-97

G.M.D., on behalf of minor child, L.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 23, 1997

OAL DKT. NO. EDU 11287-96
AGENCY DKT. NO. 404-9/96

G.M.D., on behalf of minor child, L.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 23, 1997
DATE OF MAILING OCTOBER 23, 1997

554-97

FRANK POCIUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 23, 1997

OAL DKT. NO. EDU 6245-96
AGENCY DKT. NO. 235-6/96

FRANK POCIUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOB ER 23, 1997
DATE OF MAILING OCTOBER 23, 1997

555-97

555-97

MARGARET WEBB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 23, 1997

OAL DKT. NO. EDU 9648-96
AGENCY DKT. NO. 347-8/96

MARGARET WEBB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 23, 1997
DATE OF MAILING OCTOB ER 23, 1997

560-97

DOVER TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9101-96

DOVER TRANSPORTATION, INC.,

Petitioner,

v.

ROSELLE BOARD OF EDUCATION,

Respondent.

Samuel Rosenberg, Esq., for petitioner
(Bendit, Weinstock & Sharbaugh, attorneys)

Neil M. Cohen, Esq., for respondent
(Gill & Cohen, attorneys)

Record Closed: September 9, 1997 Decided: September 11, 1997

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in August 1996 as a result of the filing of

a petition of appeal by Dover Transportation, Inc. challenging the respondent Board's award of certain transportation routes to another bidder. A hearing scheduled for September 3, 1996 was adjourned at my suggestion in light of the fact that no hearing had been provided to the petitioner by the respondent with respect to its action. Counsel agreed that such a hearing would be held and that jurisdiction would be retained by me pending the outcome of the same.

Following a hearing at the local level the matter was not resolved and a plenary hearing was scheduled to be conducted by the undersigned Administrative Law Judge for late May 1997. On the first date of that hearing counsel conferred with one another and with their respective clients and a tentative settlement was reached with the understanding that the terms and conditions would be reduced to writing and submitted in a Stipulation of Settlement.

I now have received the fully executed Stipulation of Settlement which contains the agreement reached between the parties and which has been signed by the petitioner's president, the respondent's president and by counsel.

I have reviewed the terms of the Stipulation of Settlement and I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures on the Stipulation.

2. The settlement fully disposes of all the issues in controversy and is consistent with law.

I **CONCLUDE** the agreement meets the requirements of *N.J.A.C.* 1:1-19.1. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED.**

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

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

Sept 11, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 19 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mvh

GILL & COHEN, P.C.
42 Church Street
Montclair, New Jersey 07042
(201) 783-3410
Attorney for Respondent

SEP 9 1 15 PM '97

DOVER TRANSPORTATION, INC.	:	BEFORE: THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	
v.	:	OAL DOCKET NO. EDU-9101-96
	:	-Civil Action-
ROSELLE BOARD OF EDUCATION		
Respondent.	:	**STIPULATION OF SETTLEMENT**

THIS MATTER in the above-entitled action having been amicably settled and adjusted between the Petitioner Dover Transportation Inc., and Respondent, Roselle Board of Education, and the following represent the entire Stipulation of Settlement.

1. Petitioner and Respondent each waive any and all claims which they may have against each other arising out of this matter.

2. The Resolution of the Roselle Board of Education was the result of a September 16, 1996 hearing ordered by the Administrative Law Judge and represented a preliminary determination and said Resolution and facts therein have not been finally determined by an Administrative Law Judge, or the Commissioner of Education.

3. This matter has been settled before the Administrative Law Judge without any final adjudicated findings of lack of responsibility by Petitioner.

4. Dover Bus Company shall not be denied the opportunity to Bid with the Roselle Board of Education at the next transportation bid opportunity.

5. The Administrative law Judge asks the Roselle Board of Education to consider the opening of the bus routes in question to public bidding.

6. The Petition is dismissed with prejudice and without costs or attorney's fees as to either party.

HON. STEPHEN G. WEISS, A.L.J.

We hereby consent to
the form of this Agreement

BENDIT, WEINSTOCK & SHARBAUGH

By: _____
SAMUEL ROSENBERG, ESQ.
Attorney for Petitioner

GILL & COHEN, P.C.

By: _____
NEIL M. COHEN, ESQ.
Attorney for Respondent

DOVER TRANSPORTATION CO.,

By: _____
GARY FOSSETT, PRESIDENT

ROSELLE BOARD OF EDUCATION

By: _____
J. ALAN MCGARRY, PRESIDENT

OAL DKT. NO. EDU 9101-96
AGENCY DKT. NO. 353-8/96

DOVER TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 29, 1997
DATE OF MAILING OCTOBER 29, 1997

State of New Jersey

DEPARTMENT OF EDUCATION
CN 500
TRENTON NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

LEO KLAGHOLZ
Commissioner

October 29, 1997

Samuel Rosenberg, Esq.
Bendit, Weinstock & Sharbaugh
80 Main Street
West Orange, NJ 07052

Neil Cohen, Esq.
Gill & Cohen
43 Church Street
Montclair, NJ 07042

Dear Parties:

DOVER TRANSPORTATION, INC. V. BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, AGENCY DKT. NO. 353-8/96

We are enclosing a copy of the decision of the Commissioner of Education dated October 29, 1997, in the above-entitled matter. Appeals of decisions rendered by the Commissioner must be filed with the State Board of Education pursuant to *N.J.A.C.* 6:2-1.1 et seq. except for matters relative to the New Jersey State Interscholastic Athletic Association and State Department of Education employee contractual matters.

Sincerely,

Deborah N. Antanaitis, Director
Bureau of Controversies and Disputes

DNA/temp:o/krr/Dover
Enclosure
c: Board Secretary
County Superintendent

560-97

DOVER TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9101-96

DOVER TRANSPORTATION, INC.,

Petitioner,

v.

ROSELLE BOARD OF EDUCATION,

Respondent.

Samuel Rosenberg, Esq., for petitioner
(Bendit, Weinstock & Sharbaugh, attorneys)

Neil M. Cohen, Esq., for respondent
(Gill & Cohen, attorneys)

Record Closed: September 9, 1997 Decided: September 11, 1997

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in August 1996 as a result of the filing of

a petition of appeal by Dover Transportation, Inc. challenging the respondent Board's award of certain transportation routes to another bidder. A hearing scheduled for September 3, 1996 was adjourned at my suggestion in light of the fact that no hearing had been provided to the petitioner by the respondent with respect to its action. Counsel agreed that such a hearing would be held and that jurisdiction would be retained by me pending the outcome of the same.

Following a hearing at the local level the matter was not resolved and a plenary hearing was scheduled to be conducted by the undersigned Administrative Law Judge for late May 1997. On the first date of that hearing counsel conferred with one another and with their respective clients and a tentative settlement was reached with the understanding that the terms and conditions would be reduced to writing and submitted in a Stipulation of Settlement.

I now have received the fully executed Stipulation of Settlement which contains the agreement reached between the parties and which has been signed by the petitioner's president, the respondent's president and by counsel.

I have reviewed the terms of the Stipulation of Settlement and I **FIND** as follows:

1. The parties voluntarily have agreed to the settlement as evidenced by the signatures on the Stipulation.

2. The settlement fully disposes of all the issues in controversy and is consistent with law.

I **CONCLUDE** the agreement meets the requirements of *N.J.A.C.* 1:1-19.1. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED.**

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

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

Sept. 11, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

9/17/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 19 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mvh

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SEP 9 1 15 PM '97

GILL & COHEN, P.C.
42 Church Street
Montclair, New Jersey 07042
(201) 783-3410
Attorney for Respondent

DOVER TRANSPORTATION, INC.	:	BEFORE: THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	
v.	:	OAL DOCKET NO. EDU-9101-96
	:	-Civil Action-
ROSELLE BOARD OF EDUCATION		
Respondent.	:	**STIPULATION OF SETTLEMENT**

THIS MATTER in the above-entitled action having been amicably settled and adjusted between the Petitioner Dover Transportation Inc., and Respondent, Roselle Board of Education, and the following represent the entire Stipulation of Settlement.

1. Petitioner and Respondent each waive any and all claims which they may have against each other arising out of this matter.

2. The Resolution of the Roselle Board of Education was the result of a September 16, 1996 hearing ordered by the Administrative Law Judge and represented a preliminary determination and said Resolution and facts therein have not been finally determined by an Administrative Law Judge, or the Commissioner of Education.

3. This matter has been settled before the Administrative Law Judge without any final adjudicated findings of lack of responsibility by Petitioner.

4. Dover Bus Company shall not be denied the opportunity to Bid with the Roselle Board of Education at the next transportation bid opportunity.

5. The Administrative law Judge asks the Roselle Board of Education to consider the opening of the bus routes in question to public bidding.

6. The Petition is dismissed with prejudice and without costs or attorney's fees as to either party.

HON. STEPHEN G. WEISS, A.L.J.

We hereby consent to
the form of this Agreement

BENDIT, WEINSTOCK & SHARBAUGH

By: _____
SAMUEL ROSENBERG, ESQ.
Attorney for Petitioner

GILL & COHEN, P.C.

By: _____
NEIL M. COHEN, ESQ.
Attorney for Respondent

DOVER TRANSPORTATION CO.,

By: _____
GARY FOSSETT, PRESIDENT

ROSELLE BOARD OF EDUCATION

By: _____
J. ALAN MCGARRY, PRESIDENT

OAL DKT. NO. EDU 9101-96
AGENCY DKT. NO. 353-8/96

DOVER TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 29, 1997
DATE OF MAILING OCTOBER 29, 1997

561-97

561-97

STELLA TITINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9647-96

AGENCY. NO.: 346-8/96

STELLA TITINO,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: September 11, 1997 Decided: September 12, 1997

BEFORE: **JEFFREY A. GERSON**, ALJ

This matter was transmitted to the Office of Administrative Law (OAL) on September 25, 1996, for determination as a contested case, pursuant to *N.J.S.A. 52:14B et seq. and N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C. 1:1-19.1* and I hereby approve same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

9/12/97
DATE

JEFFREY A. GERSON,
Administrative Law Judge

9/19/97
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

SEP 19 1997
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/g

SEP 11 3 43

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

STELLA TITINO, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency No. 346-8/96 OAL DKT NO. EDUOR-09647-96N STIPULATION OF SETTLEMENT

THIS MATTER having been amicably adjusted by and between the parties, it is hereby stipulated as follows:

1. Respondent shall restore four days to petitioner's sick leave bank.

2. As petitioner has retired from her employment with respondent, petitioner shall be permitted to "cash in" these four sick days.

3. All other claims are withdrawn, with prejudice.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH

DATED: August 29, 1997

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent

OAL DKT. NO. EDU 9647-96
AGENCY DKT. NO. 346-8/96

STELLA TITINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 29, 1997
DATE OF MAILING OCTOBER 29, 1997

562-97

562-97

K.H., on behalf of minor child, B.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

OCTOBER 29, 1997

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00959-97S

AGENCY DKT. NO. 47-2/97

K.H. ON BEHALF OF MINOR CHILD, B.H.

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF RUMSON, MONMOUTH COUNTY,

Respondent.

Michael J. Gross, Esq., for petitioner (Kenney & Gross, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: September 15, 1997 Decided: September 17, 1997

BEFORE **BARBARA A. HARNED**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 25, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

9/17/97
DATE

Barbara A. Harned
BARBARA A. HARNED, CHIEF ALJ

Receipt Acknowledged:

9/23/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 24 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

gjb

SETTLEMENT AGREEMENT

This Agreement, made this day of August, 1997, by and between:

THE BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, COUNTY OF MONMOUTH ("Board"),

and

KATHLEEN HUNTER ("Ms. Hunter").

RECITALS:

A. During the schools years 1994-1995, 1995-1996 and 1996-1997, Ms. Hunter resided in the Borough of Fair Haven with her child.

B. In the school years 1995-1996 and 1996-1997, Ms. Hunter sent her child to the Rumson School District.

C. Ms. Hunter was aware that, as a non-resident of the Borough of Rumson, her child was only permitted to attend the Rumson School District tuition-free if she was a resident of the Borough of Rumson.

D. Ms. Hunter understood, based on warnings and information provided to her by the the Superintendent, that she was obligated to pay tuition for her child's attendance at the Rumson School District while a resident of Fair Haven.

E. The Board's resolution that Ms. Hunter was not domiciled within the Borough of Rumson during the 1995-1996 school year and 1996-1997 school year is accurate, attached and incorporated herein by reference.

SEP 15 11 20 AM '97
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

F. On or about February of 1997, Ms. Hunter filed a Petition with the Commissioner of Education claiming residence in Rumson during the above referenced school years, to which the Board filed an Answer contesting the allegations, requesting the Commissioner to find that Ms. Hunter was not domiciled in Rumson Borough and impose tuition for the time periods when Ms. Hunter was not domiciled in the Rumson School District.

G. Ms. Hunter has no proof of her domicile in the Borough of Rumson.

H. The Board does not wish to incur the costs associated with the hearing process, the decision and the collection of tuition, which costs may exceed the tuition to be charged.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS HEREIN CONTAINED, the Board and Ms. Hunter agree as follows:

1. The Recitals are incorporated herein.

2. Ms. Hunter acknowledges that she was not domiciled within the Borough of Rumson during the school years 1995-1996 and 1996-1997, and that as a result of her non-residence she would have been obligated to pay tuition for her child's attendance at the Rumson schools.

3. Given Ms. Hunter's admissions as set forth herein, the Board agrees that it will not seek tuition or its collection in this or any other forum for the two school years.

4. The Board and Ms. Hunter agree to exchange general releases, the only exception to those releases being the terms and conditions of this Settlement Agreement.

5. The Petition and Answer shall be dismissed with prejudice.

Attest:

Secretary

BOARD OF EDUCATION OF THE BOROUGH OF RUMSON

By: _____
President

Witness

KATHLEEN HUNTER

Dated: 5/19/97

a:\agreements\settle.02 (dcg)

OAL DKT. NO. EDU 00959-97S
AGENCY DKT. NO. 47-2/97

K.H., on behalf of minor child, B.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUMSON, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

OCTOBER 29, 1997
DATE OF MAILING OCTOBER 29, 1997

OAL DKT. NO. EDU 3632-97
AGENCY DKT. NO. 77-3/97

J.S.C. AND V.C., on behalf of minor child, A.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. It is noted that the within Board sought and received an extension of time within which to file exceptions in this matter. Its exceptions were timely filed in accordance with the extended timeline and were duly considered in the Commissioner's determination of this case.

Upon careful review and consideration, the Commissioner affirms the conclusion of the Administrative Law Judge (ALJ) that, under the circumstances existing herein, the requirements of *N.J.S.A.* 18A:38-1b(1) have been satisfied, thereby entitling minor child, A.L., to receive a free public education in the District for the period of enrollment at issue. As such, the Board's counterclaim for payment of tuition must be dismissed. In reaching this determination, the Commissioner accepts the credibility assessments reached by the ALJ in that she had the

benefit of observing the witnesses first hand and the record before the Commissioner provides no basis for overturning such assessments.*

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. The Board's counterclaim for tuition is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

* Notwithstanding the fact that the Board's exceptions raised arguments challenging factual findings and credibility assessments made by the ALJ, it did not provide transcripts of the hearing below for the Commissioner's consideration (*see In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987)), nor did it supply the tape recording which it contends contains certain admissions of petitioners supporting the Board's position. Consequently, the Board's exceptions challenging such credibility assessments and the factual findings predicated thereupon are rejected as being without merit.

OCTOBER 29, 1997
DATE OF MAILING OCTOBER 29, 1997

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Sept. 17, 1997
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

9/24/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

For Petitioners:

J.C.

V.C.

A.L.

For Respondent:

Manuel E. Deus

Dr. James McNasby

Joint Exhibits

J-1 Letter from A.L.'s aunt, Mary Gordon, September 19, 1996

J-2 Affidavit, A.L.'s father, September 23, 1996

J-3 Affidavit, A.L.'s aunt, September 23, 1996

J-4 Affidavit of Parent/Guardian, January 28, 1997

J-5 Affidavit of Resident, J.C. and V.C., January 29, 1997

J-6 Letter, Deus to A.L.'s father, January 31, 1997

J-7 Letter, Deus to A.L. and J.S.C., February 11, 1997

Having had an opportunity to hear the testimony of J.C., V.C., and A.L., and having observed their demeanor, I **FIND** their testimony wholly and completely credible. The District claimed that their testimony was incredible not because of contrary evidence that they introduced but because in our society, people who have only known someone for four months do not take that person into their home for free and treat them as one of their own children. While this is generally true, that is an unfortunate comment on our society, and the petitioners and A.L. have convinced me that in this case, an unusually generous and caring event indeed occurred.

Based on their testimony, I **FIND** the following **FACTS**. A.L. lived in petitioners' home in the District and was supported by petitioners *gratis*. He was treated during the period of time when he was there as the petitioners' own child. Petitioners assumed all the personal obligations for the child relative to the school requirements. Petitioners were willing to open their home to the child beyond the school term, if necessary, through the time he went to junior college.

Further, I **FIND** that A.L.'s father was not capable of providing support and care for the child due to both family and economic hardships. The father had been working both a full-time and a part-time job just to support himself; the arrival of his teenage son plainly strained his already strained finances. By contrast, petitioners offered A.L. his own room, regular meals, driving instructions, vacations, clothes, allowance, and basketball fees. The father's need to work so many hours created a dearth of supervision that was a family hardship. The fact that the father has taken his son back into his home now that the family's economic and financial hardships have been alleviated corroborates this finding.

Additionally, I **FIND** that the child was not residing within the District solely for purposes of receiving a free education within the District. The reason for this finding was that petitioners were willing to go to extraordinary lengths here to help this child. They recognized a troubled child, who had been wandering in many different places

and wound up at their dinner table. They perceived A.L.'s need for stability and guidance in his life and offered to provide them for an extended period of time. Keeping A.L. in the high school was not a purpose in and of itself, but rather one of the factors necessary to provide much needed stability for this youth. If the sole purpose had been for A.L. to receive a free education in the District, petitioners would not have provided all the other support and opportunities to A.L., such as allowance, vacations, help with homework, driving instructions, and even advice and goal setting.

Just as family discord has been found to constitute hardship entitling the student to public education under the statute, so too does the family hardship that A.L. faced because his father worked two jobs just to make ends meet and was unable to give him support or supervision. *See, R.H. v. Ocean Co. Bd. of Ed.*, 96 *N.J.A.R. 2d* (EDU) 629. Indeed, the unique and compelling circumstances in this case arise to the same level of hardship as did the circumstances in *R.H.* "To hold otherwise harms a party the legislature never meant to penalize...and overlooks the substantial state interest in ensuring the education of all its children...." *Gundersen v. Bd. of Ed. of the City of Brigantine, Atlantic Co.*, 95 *N.J.A.R. 2d* (EDU) 39, 42. "The intent of the 'affidavit student' law is not now and never has been to deny an education to a child whose living arrangements may not be contemplated by the statutory scheme...." *Id.*

Based on the above, I **CONCLUDE** that petitioners satisfied the residency requirements pursuant to *N.J.S.A.* 18A:38-1(b)1. Consistent with the above, I **CONCLUDE** that petitioners are not liable for tuition to the Board during the period of time that A.L. went to school in the District.

ORDER

I **ORDER** that the petitioner's' petition to allow A.L. to go to school in the District is hereby **DISMISSED** as moot. I **ORDER** that the District's counterclaim for payment of tuition is **DISMISSED WITH PREJUDICE**.

He generally based his recommendations on the information in the affidavits. In this case, he based his decision to recommend that A.L. be removed from the District school on the discrepancies in the affidavits as well as conversations with teachers. For instance, the affidavits said that there was no health insurance and at the hearing, A.L.'s father said that he had covered his son with health insurance. He remembers that A.L. testified that he was making $250 per week.[1] He said that J.C. said that he had offered A.L. a chance to live with his family because he did not want A.L. to move and go to Dover High School and he never discussed supervision. J.C. kept saying over and over at the hearing, "We just want to help this kid. We don't want the system to lose another kid." After hearing all the evidence, his recommendation was the same as he did not believe that any hardship existed.

DISCUSSION AND CONCLUSION OF LAW

The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the district and is supporting the child *gratis* and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the district solely for the purposes of receiving a free public education in the district. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the

[1] A.L.'s father's 1996 tax return showed that he made $12,568 in 1996.

> validity of the claim by the resident, the board may deny admission to the child.

Thus, the proofs in this matter must show that 1) petitioners are domiciled within the District; 2) petitioners are supporting A.L. *gratis*; 3) A.L.'s parents are not capable of supporting or caring for him due to family or economic hardship, and 4) A.L. is not residing with petitioners solely for the purpose of receiving a free public education in the District.

Here, the District challenged the reasons given by petitioners for taking A.L. in their home as incredible. Because credibility is an issue, the obligation and responsibility of the undersigned administrative law judge is to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value a fact finder gives to a witness's testimony. The word contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner which it hangs together with other evidence. *Carbo v. United States,* 314 *F.2d.* 718 (9th Cir. 1963). The terms have been defined as testimony which must proceed from the mouth of credible witnesses and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor,* 38 *N.J. Super.* 6, 24 (App. Div. 1955). The fact finder is expected to base decisions of credibility on his or her common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837 (1973).

The credibility of each witness is to be judged separately but after testing the credibility of each witness's testimony, the fact finder as an additional factor in determining the truth or falsity of the charges may examine the testimony of all of the witnesses to determine if there are similarities in their factual allegations. It is not expected that the witnesses will testify to the same incident using exactly the same language. In addition, human experience teaches us that individual observations vary based on matters as simple as where they were located during an incident and as complex as their background and environment.

A.L. had met J.C.'s son on his third day at school and soon started eating dinner regularly at the petitioners' house. He had had a problem at the mall in October and missed a court date in November. In January J.C. went with him to straighten out the matter. He has contact with his dad whom he saw once or twice a week. He recently went to Canada on a trip with petitioners' family which was a lot of fun.

A.L. said that living with petitioners had given him a new view of what life could be like. He talked a lot to J.C. who convinced him that he should have goals and plans for the future. He has been thinking for the first time that he would like to become a teacher and help kids. J.C. has convinced him that just "hanging out" with no aim is "not where it's at." Some of the rules in J.C.'s house were difficult to live by, but he was willing to abide by the rules in order to continue living with petitioners. He also expressed his gratitude towards both Mr. and Mrs. C. for everything that they had done for him so far.

Manuel E. Deus

Manuel E. Deus, the business administrator and board secretary of the District, testified that one of his responsibilities as board secretary is residency of the students. He became involved with A.L. in September 1996, when A.L.'s aunt first signed an affidavit of residency because there was no lease bearing the parents' names. After residency verification, A.L. was admitted into school the next day.

In the second or third week of January 1997, Deus heard from a teacher that A.L. was moving with his father to another school system. Later he heard that A.L. was staying in the District with someone else. He sent the standard affidavits to the father and the resident to be filled out. The signed affidavits were returned approximately January 29, 1997, and they raised some concerns due to certain inconsistencies.

Both affidavits stated that A.L. was living with petitioners because A.L.'s arrival had been unexpected and A.L.'s father was unable to support his son. The father's

affidavit erroneously said that A.L. had been living with J.C. for three years. Moreover, the father's affidavit did not answer the question, "The pupil will or will not (circle one) be residing with the individual named for the sole purpose of receiving a free public education in the district." The father also said that both J.C. and he would be claiming A.L. as a dependent in 1997. Both affidavits denied that there was any health insurance for A.L., although it came out at the hearing that the father had health insurance for A.L. Because the application was considered incomplete and inconsistent, Deus reported it to the superintendent of schools, who decided that a board hearing was necessary.

On January 31, 1997, the District sent a notice to A.L.'s father that the superintendent was making an application to have A.L. removed from the District school, as it had determined that A.L. was not living in the home of a District resident and being supported by that resident *gratis* due to a family or economical hardship. The letter also informed A.L. that he was entitled to come to a hearing on February 10, 1997. After the hearing, at which the father and J.C. testified, the Board decided that A.L. was not entitled to a free public education in District schools pursuant to *N.J.S.A.* 18A:38-1(b).

Because this petition was filed in a timely manner, A.L. was not removed from the school and completed the school year. Deus testified that the yearly school tuition is $12,200 per pupil. The District had heard from A.L.'s counselor that the original plan was that the father and son were going to move to the new district together. They said that A.L. told the guidance counselor that he was moving in with petitioners so that he could continue to attend the high school.

Dr. James McNasby

Dr. James McNasby, superintendent of schools for respondent, testified that part of his duties included making recommendations to the Board in reference to residency.

Both V.C. and J.C. had spoken to school officials concerning A.L.'s progress during the time A.L. was under their care. A.L. also had had some problems with the police before moving in with the family. J.C. went once by himself with A.L. and another time with A.L.'s father to discuss A.L.'s problem with the juvenile authorities. When the District sent affidavits of residency, J.C. and A.L.'s father worked on the affidavits together. Any discrepancy was totally inadvertent.

At no time did he receive any money from A.L.'s father for the support of A.L. The family took A.L. into their home not so he could stay in the District but rather to give him some stability, help him grow up and get through high school. They did this because they thought it was the Christian thing to do to help someone in need. J.C. has a college degree in education and he worked to help kids whenever he could. He went through tough times when he was A.L.'s age and if people had not extended themselves, he might have been lost. The whole family was willing to extend themselves to give A.L. a chance at a better life.

At the hearing, J.C. testified that he had recently spoken to A.L.'s father who had gotten a new job with daytime hours which paid twice as much as his former job. If he passed the probationary period, they were going to discuss whether, because his financial position had changed as well as his ability to be home in the evenings, A.L. should return to live with him.

V.C.

V.C., the wife of J.C., testified that the family made a very deliberate decision to take in A.L. The arrangement was that A.L. would be given chores but that he also would be helped with school work, he would be given allowance and go on any family vacations. In the beginning what she objected to most was having to drive a third child around like she drove her two others, but she and her husband and her two children agreed that if A.L. came into the house, he would come on an equal basis. She

thought that A.L. should not move with his father because the father really was barely able to afford to take care of himself, let alone a child. She felt that A.L. had been shuffled around too many times and was having problems because his father was not able to supervise him, which held the potential for A.L. getting into trouble. Additionally, she knew that A.L. did not want to move because A.L. was happy where he was. The father was moving into a one-bedroom apartment which would mean that A.L. would not still have his own bedroom. In petitioners' house, A.L. was given his own bedroom. They had bought him clothes and personal items. He was going for his driver's license and they were providing for driver's education. V.C. was trying to find a job for A.L. so that he will both be able to make money and have something to do with his time in the afternoons. Additionally, they enrolled him in an AAU basketball league and paid for him. Petitioners also set boundaries for A.L. and have given him a curfew and a phone curfew.

A. L.

A.L., the minor in question, testified that until September 1996, he had been living with his mother on public assistance in Florida. He and his friends got into some trouble and he was placed on probation. After probation, his mother sent him to live with his father so that he did not get into more trouble. His mother gave his father only one week's notice that she was sending him. At that time, his father was living in a one-bedroom apartment with his sister (A.L.'s aunt) and his father was sleeping on the sofa in the living room. When A.L. arrived, he also stayed in the living room. His aunt worked full time and his father worked a full-time and a part-time job, so he did not have much adult supervision; mainly, he hung out with friends or at the mall. His father worked in a canning factory as well as a fast food restaurant and got home around midnight. In Florida he had missed so much school that although he was almost seventeen, he only had ten high school credits.

Petitioners claimed that the minor child was entitled to a free education pursuant to *N.J.S.A.* 18A:38-1(b)1, as he was being kept in the home of another person domiciled within the school district and was supported by that other person. Respondent claims that A.L. was being kept in the home of petitioners for the sole purpose of attending District schools. Respondent has filed a counterclaim for payment of tuition.

On March 27, 1997, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on June 17, 1997. The record was held open for submission of additional documents by petitioners until June 27, 1997, with the *proviso* that respondent, after examining the documents, would have the choice of asking for another hearing date. After petitioners' submissions of additional documents, respondent chose not to ask for another hearing date. On July 26, 1997, J.C. notified the undersigned that because A.L.'s father's economic and personal situation had changed, he was able to take his son back into his household. Upon receipt of written arguments from the parties, the record was closed on August 5, 1997. On August 21, 1997, counsel for the District notified the undersigned that A.L. had transferred to Dover High School on August 7, 1997. Therefore, the remaining issue is the District's counterclaim for payment of out-of-district tuition for the five months that A.L. attended the high school after his father had moved out of the District.

FACTUAL DISCUSSION

J. C.

J.C., a resident of the District, testified that in September 1996, his son met the minor in question here, A.L., and they became friends. A.L. began coming over the petitioners' house a great deal and playing ball with his son. Soon A.L. became a regular at the dinner table and on occasion he slept over. J.C. and his family got to

know A.L. and liked him a lot. They discovered that he had come from a troubled background and that his present living situation was not stable.

In January 1997, J.C.'s son told him that A.L. was going to move and leave the school district because A.L.'s father was unable to afford the apartment he was living in and was moving to a cheaper apartment in another school district. J.C. had investigated the family situation and knew that A.L. as running around a lot without the supervision of his father. J.C. believed that A.L. had finally found a small degree of stability in his current situation which included spending a lot of time at petitioners' home. After consulting with his wife and then with his two children, J.C. met with A.L.'s father and offered to take A.L. into petitioners' home. He made this decision because the father was having a difficult time supporting himself, let alone A.L., by working two jobs and thus was unable to give A.L. much needed support and supervision. Moreover, A.L. had a history of unsuccessful times at school and he was having the most successful year he had ever had. J.C. felt that if A.L. had to be uprooted and make a new set of friends and moved to another school, it could very well set him back and deter him from his beginning steps towards success and stability.

J.C. brought A.L. into his home without receiving any money from A.L.'s father. While A.L.'s father did have health insurance that covered his son, there were no health insurance claims. For instance, J.C. bought a brace for A.L. when A.L. sprained his ankle. The arrangement agreed to by the entire family was that if A.L. was brought into the house, he would be treated like the other two children. A.L. received allowance but also had family responsibilities. J.C.'s goal was to help raise the child and make him responsible. The family offered to take A.L. not only through high school but also at least through community college. J.C. knew that when A.L. was living with his father, A.L. was not eating regularly. His father worked at a fast food restaurant and the main thing A.L. had to eat was chicken. J.C. had seen that A.L. needed help and support during the fall and he had tried to provide it in a limited way. J.C. felt that, if he did not intercede further, another kid would be lost because no one cared.

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J.S.C. AND V.C., on behalf of minor child, A.L., :

:

PETITIONERS,

:

V. : COMMISSIONER OF EDUCATION

:

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY, : DECISION

:

RESPONDENT.

:

SYNOPSIS

Petitioners, District residents who took in A.L., contested the Board's residency determination.

In light of testimony, the ALJ concluded that petitioners satisfied the residency requirements pursuant to *N.J.S.A.* 18A:38-1b(1). ALJ found that petitioners took in A.L. as their own child; they supported him *gratis* as A.L.'s father was not capable of providing support and care for the child due to both family and economic hardships. Thus, the ALJ found that the child was not residing within the District solely for purposes of receiving a free education within the District. ALJ concluded petitioners were not liable for tuition to the Board during the period of time that A.L. went to school in the District; and, therefore, the Board's counterclaim for payment of tuition was dismissed with prejudice. ALJ determined that petitioners' petition to allow A.L. to go to school in the District should be dismissed as moot in that the new employment of A.L.'s father had alleviated the family and economic hardships so as to permit A.L. to once again live with his father.

Accepting credibility assessments reached by the ALJ, the Commissioner adopted the initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3632-97

AGENCY DKT. NO. 77-3/97

J.S.C. AND V.C. ON BEHALF
OF MINOR CHILD A.L.,

Petitioners,

v.

BOARD OF EDUCATION OF MORRIS
HILLS REGIONAL SCHOOL DISTRICT,
MORRIS COUNTY,

Respondent.

J.S.C. and V.C., *pro se*

Joanne L. Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: August 5, 1997 Decided: September 19, 1997

BEFORE **MARGARET M. HAYDEN,** ALJ:

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

Petitioners contest respondent's determination that minor child A.L. was not entitled to a free public education in the Morris Hills Regional School District (District).

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M.C. AND R.C., on behalf of minor child, M.J.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

OCTOBER 29, 1997

OAL DKT. NO. EDU 4725-97
AGENCY DKT. NO. 190-6/97

M.C. AND R.C., on behalf of minor child, M.J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 29, 1997
DATE OF MAILIN G OCTOBER 29, 1997

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565-97

M.Y. AND S.A.Y., on behalf of A.Y. and L.Y., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY, : DECISION

RESPONDENT. :

:

OCTOBER 29, 1997

OAL DKT. NO. EDU 3963-97
AGENCY DKT. NO. 99-3/97

M.Y. AND S.A.Y., on behalf of A.Y. and L.Y.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 29, 1997
DATE OF MAILING OCTOBER 29, 1997

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566-97

JUDE VALLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

OCTOBER 29, 1997

OAL DKT. NO. EDU 09488-96
AGENCY DKT. NO. 269-7/96

JUDE VALLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

OCTOBER 29, 1997
DATE OF MAILING OCTOBER 29, 1997

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C #471-97E
C #567-97
SB # 91-97

J.G.M., on behalf of minor child, J.M.. :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, October 27, 1997

For the Petitioner-Appellant, J.G.M., pro se

For the Respondent-Respondent, Gilmore & Monahan (Stephen K. Foran, Esq., of Counsel)

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

February 4, 1998

Date of mailing FEB 04 1998

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K.W., on behalf of minor child, C.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

NOVEMBER 3, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING APPLICATION FOR TEMPORARY EMERGENT RELIEF

OAL DKT. NO. EDU 8651-97

AGENCY DKT. NO. 399-10/97

K. W. ON BEHALF OF MINOR CHILD, C.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, Council, George & Dortch, attorneys)

John G. Dyer, III, Esq., for respondent

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was opened before the undersigned on an application for temporary emergent relief. K.W., on behalf of her minor child, C.W., (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education on October 21, 1997, together with a motion for emergent

relief. The motion seeks an order staying the ten day suspension which was imposed upon C.W. as disciplinary action commencing October 15, 1997, pending a determination by the Commissioner after a plenary hearing. On October 21, 1997 the matter was transmitted to the Office of Administrative Law for determination pursuant to N.J.A.C. 1:1-12.6. Oral argument on the motion was scheduled for October 27, 1997. Following a telephone conference call with both parties which was initiated by the undersigned on October 24, 1997, respondent agreed to readmit C.W. to school on October 27, 1997 and to withhold the final two days of the ten day suspension pending a determination on the within motion. An answer and responding papers were filed on behalf of respondent on October 27, 1997. Oral argument was conducted by telephone conference call, also on October 27, 1997.

FINDINGS OF FACT

The following undisputed facts appear from the petition, the answer and the motion papers filed by counsel.

C.W. is enrolled as a student in respondent's school district and attends Fisher Middle School. On Friday, October 10, 1997, C.W. and another student, R.J., were involved in an altercation on the school bus after school. K.W., mother of C.W., was one of two parents who contacted Vice Principal Darryl Jackson to report the incident. Mr. Jackson had not been aware of the incident and indicated that he would look into the situation as soon as the students returned to school on October 14, 1997 (Monday, October 13, 1997 was a school holiday). On October 14, 1997, Mr. Jackson spoke individually with each of the two students involved, C.W. and R.J., and received written statements from each student. Although there were many witnesses to the incidents occurring on the school bus and directly upon departure, both students involved had identified D.B. and D.C. as students who had observed the incidents and accordingly, Mr. Jackson thereafter met separately with D.B. and with D.C. He received written statements from each of these students as well. After speaking with the students and reading their statements, Mr. Jackson concluded that both C.W. and R.J. had been engaged in a fight, that blows were exchanged and that both parties appeared to be willing participants. He also concluded that the incident was

more than a mere scuffle between students, and accordingly, pursuant to the Fisher Middle School Behavioral Guide, he imposed the ten day out of school suspension specified for a first offense of "Fighting (Physical combat between two or more students)." Mr. Jackson advised R.J. and C.W. separately of the conclusions of his investigation. Both were afforded an opportunity to respond. C.W.'s mother appealed the suspension to the Superintendent. In the Superintendent's absence Assistant Superintendent Raymond Broach met with K.W. The Assistant Superintendent affirmed the administrative disciplinary action. K.W. then withdrew C.W. as a student from the Ewing public schools. She thereafter determined to re-enroll C.W., however, and as previously noted, C.W. has been permitted to attend classes commencing on October 27, 1997 and until the Commissioner issues a determination in the within matter. Respondent has agreed to consider C.W.'s absences from school between October 15, 1997 and October 27, 1997 as suspension days served.

APPLICABLE LAW AND DISCUSSION

Pursuant to the standards articulated in Crowe v. DeGioia, 90 N.J. 120 (1982), which are incorporated by reference in N.J.A.C. 6:24-1.5(b), to establish entitlement to emergent relief petitioner must demonstrate: 1) the likelihood of irreparable harm, 2) settled legal principles governing the right to relief in the controversy, 3) a reasonable probability of ultimate success on the merits, i.e., "a preliminary injunction should not issue where all material facts are controverted" and 4) a balancing of the relative hardships to the parties in granting or denying relief such that the equities favor the grant of temporary relief to maintain the status quo pending the outcome of a final hearing.

In the within matter, there can be no reasonable argument made by petitioner that permitting the final two days of the suspension to be served would cause irreparable harm. Because of the time involved in processing the application for emergent relief, eight of the ten days have already been served; the work missed can certainly be made up, and should petitioner ultimately prevail upon the merits, the disciplinary record can be expunged. The legal principles involved are clear, i.e., N.J.S.A. 18A:37-2(d), identifies "physical assault upon another pupil" as

conduct which shall constitute good cause for suspension or expulsion of a pupil from the public schools in New Jersey. It is also well settled that actions of local boards which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Board of Education, 60 N.J. Super. 28 (App. Div. 1960). Petitioner no longer alleges that the due process rights guaranteed to C.W. prior to the imposition of a disciplinary suspension, i.e., notice and an opportunity to be heard, have been violated, and under the Kopera standard, the argument that the sanction imposed was too harsh is not one which is likely to prevail. K.L. v. Matawan-Aberdeen High School District, 91 N.J.A.R. 2d (EDU) 74, 76. Furthermore, the material facts are definitely in issue. Although from the statement written by C.W. one might conclude that she was the innocent victim of R.J.'s aggression, the statements of R.J. and two other witnesses, D.B. and D.C., set forth numerous facts which are inconsistent with C.W.'s position. It appears that there was ample evidence to support Mr. Jackson's conclusion that C.W. was a willing participant in a fight rather than simply an innocent victim. The sanction imposed by Mr. Jackson, a ten day suspension from school, is the sanction specified in the Disciplinary Handbook distributed to students for "Fighting (Physical combat between two or more students)". The disciplinary policy further specifies that incidents occurring on the school bus shall be handled as outlined in the policies just as though the offense took place in school.

The equities which must be balanced here are respondent's interests in protecting the integrity of the disciplinary process and petitioner's interest in attending school for two additional days. Respondent argues, persuasively, that interference with its ability to impose short-term disciplinary actions under circumstances such as those in the within matter would erode its authority to control disruptive behavior and to maintain a safe school environment.

The appropriate standard of review of the Board's action in this matter is set forth in Kopera v. West Orange Board of Education, supra. Where the issue is one involving the exercise of a local board's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Id. at 297. Actions of local boards of education which lie

within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Quinlin v. Board of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966); K.L. v. Matawan/Aberdeen High School Dist., 92 N.J.A.R. 2d. (EDU) 74; M.G. v. Monmouth Regional High School, 91 N.J.A.R. 2d. (EDU) 38. Although it is possible that petitioner may meet this standard following a plenary hearing, it is by no means "reasonably probable" on the basis of the facts in the emergent relief papers. Petitioner has failed to satisfy the conditions for imposition of the extraordinary pre-trial remedy which she seeks. Accordingly, the motion for emergent relief must be **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **Commissioner** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

Oct 28, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

OAL DKT. NO. EDU 8651-97
AGENCY DKT. NO. 399-10/97

K.W., on behalf of minor child, C.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

The record of this emergent matter, including the audio tape of the telephonic hearing conducted on October 27, 1997, and the Order of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon such review*, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to meet the standards for the granting of emergent relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Accordingly, the recommended Order of the ALJ denying petitioner's Motion for Emergent Relief is adopted for the reasons well expressed therein and this matter shall proceed to a plenary hearing on its merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

*It is noted that the record reflects that, although the instant emergent relief motion seeks an order staying the Board-imposed 10-day suspension of C.W. which began on October 15, 1997, such motion was not filed with the Commissioner until October 21, 1997, and was transmitted to the OAL for adjudication, via facsimile, on that same date.

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IVEY AVERY, PERCY DARE, AND JANICE WILLIAMS,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, tenured teacher specialists whose 12-month positions which required instructional certificates were abolished in July 1993, contested their reassignment to 10-month classroom teaching positions, averring that the Board continued their 12-month positions staffing them with nontenured individuals, thus, violating petitioners' tenure and seniority rights.

ALJ considered the duties required by fourteen positions to which petitioners claimed entitlement. ALJ determined that petitioners had no rights to five positions that were vacant or abolished as of the RIF and were never filled. Also, they had no entitlement to hold two positions, Bilingual Parent-Community Liaison and Computer Technician, which required unique qualifications. The scope of the determination of petitioners' tenure and seniority rights was limited, therefore, to seven positions. However, the ALJ made no finding as to entitlement to two positions which were never submitted to the county superintendent for a determination of the proper certification required. ALJ found that Petitioners Dare and Avery were entitled to four of the five remaining positions with the difference in compensation. Petitioner Williams had no entitlement to any of the above positions as her position as personnel specialist was more administrative in nature, requiring no interaction with students or parents, and not implementing plans or programs that have a direct effect on curriculum and school policy. Her claims were dismissed.

Commissioner reversed in part the initial decision as he was not persuaded that the circumstances herein supported the conclusion that petitioners were subjected to a RIF. Petitioners were never dismissed from employment; rather, the Commissioner found that the Board acted pursuant to its managerial prerogative to transfer teaching staff members within the scope of their certification. Commissioner found, however, that petitioners were subject to a reduction in salary violating their tenure rights. Commissioner directed that petitioners must be reinstated to their respective salaries as of April 1993, and given the differential of what they actually received and what they should have received in subsequent years. Commissioner noted that the Board may elect to freeze petitioners at their prior salary until such wages are in accord with the teachers' salary guide.

NOVEMBER 3, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8316-93

AGENCY DKT. NO. 196-6/93

IVEY AVERY, PERCY DARE, AND JANICE WILLIAMS,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Jacob Green, Esq., for respondent (Green & Dzwilewski, attorneys)

Record Closed: June 23, 1997 Decided: August 4, 1997

BEFORE **STEVEN C. REBACK,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 8, 1993, the individual petitioners filed their petition of appeal before the Commissioner of Education. They each alleged that they are tenured teaching staff members employed by respondent (the "Board" or "Trenton"). Each, at one time, held a twelve-month

teaching staff position, which had been abolished by respondent for reasons of economy or efficiency, and the basis of the petitioners' appeal is their respective assertions that they possess various bumping rights based upon their tenure and seniority.

On August 23, 1993, the respondent filed its answer before the Commissioner and essentially denied that any of the petitioners were accorded less rights than they would otherwise have been entitled to under the education laws and that, further, the petitioners have failed to state a claim upon which relief could be granted. Thereafter, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13, on or about September 1, 1993.

Following extensive prehearing discovery and conferences, it was finally decided between counsel that the matter should be submitted on cross-motions for summary decision. I did not oppose that approach. As a condition to it, however, it was agreed that counsel for the petitioner would reach out to any and all of those individuals who could be potentially negatively impacted by a determination in this proceeding in which any or all of the petitioners could prevail by way of tenure, seniority and bumping rights, and advise the former of their rights to intervene. Mr. Friedman comported with this request. After approximately a thirty-day period following placing these individuals on notice, none of the individuals placed on notice either moved to intervene or participate. Accordingly, I closed the record on June 23, 1997, the date measuring approximately thirty days from when the last letter advising potential intervenors of their rights was mailed by petitioners' counsel.

THE FACTS AND ANALYSIS

The facts of this matter have been stipulated, and can be summarized as follows.

Petitioners Percy Dare, Ivy Avery, and Janice Williams were all employed by respondent Trenton Board of Education as "teacher specialists." These positions were twelve month positions that required instructional certificates although they apparently involved duties that were predominantly administrative in nature. The petitioners were assigned to these positions at various times, but all had their positions abolished in July of 1993. Almost immediately

subsequent to the abolishment, petitioners were assigned to positions that were identical to the abolished positions, except that the new positions were only ten-month positions with the concomitant reduction in salary. Petitioners allege that this reassignment violated their tenure, and that they are eligible through their seniority rights to various twelve month "teacher specialist" positions held by teachers with tenure junior to theirs.

In total petitioners claim that there are fourteen positions to which one or all of them are entitled. The tenure of each petitioner, and the validity of their claims to each of the fourteen positions, will be discussed in detail *infra*. Before addressing the validity of the tenure claims, however, certain preliminary issues need to be addressed.

Preliminary Issues

A. Whether the Reassignments Violated Petitioners' Tenure Rights

Rather than concede that a RIF has occurred which triggers issues of tenure and seniority, respondent has characterized its action as a simple transfer of full-time employees to other full-time positions, with no reduction in compensation. Specifically, respondent argues that the tenure rights of the petitioners were not violated because their reassignment from twelve month positions to ten month positions did not reduce their employment status, i.e. they were still "full-time" employees, and because the transfers did not reduce the rate of their compensation. Respondent cites to three cases for support of this notion -- *Williams v. Plainfield Bd. of Ed.*, 1979 *S.L.D.* 220, *rev'd* State Bd. of Ed., 1980 *S.L.D.* 1552, *aff'd* 176 *N.J. Super.* 154 (App. Div. 1980), *certif. denied*, 87 *N.J.* 306 (1981); *Basset v. Oakland Bd. of Ed.*, 223 *N.J. Super.* 136 (App. Div. 1988); and *Casey v. Cinnaminson Bd. of Ed.*, 95 *N.J.A.R.*2d (EDU) 585 (State Bd. of Ed.). These cases, however, are not on point.

A teaching staff members' tenure rights are established at *N.J.S.A.* 18A:28-5, which provides that a teacher that has achieved tenure "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such teaching staff member or other just cause. . . ." Generally, when construing a statute, a court "must first look at the wording of the statute to ascertain its plain meaning and intent. If a statute's language is

'plain and clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms.' " *State in Interest of V.M.*, 279 *N.J. Super.* 535, 536-37 (App. Div. 1995), quoting *Dep't of Law and Public Safety v. Bigham*, 119 *N.J.* 646, 651 (1990) (other citations omitted). In applying the plain meaning of *N.J.S.A.* 18A:28-5, the petitioners' tenure rights were violated. The petitioners are being paid 17% less now than when they were in twelve-month positions. Their compensation has been reduced.

The cases cited by respondent do not support its argument that actual compensation may be decreased as long as the rate of compensation is maintained. In *Williams*, *supra*, the petitioner's salary was not decreased; she was paid the same as an elementary school principal as she was in her previous position of high school principal. Therefore it was held in that case that her tenure rights were not violated because her salary was not reduced, even though her future salary expectancy was.

In *Bassett*, *supra*, a reading teacher had her full-time position reduced to part-time. The teacher did not contest the reduction to part-time status, nor the reduction in salary; she instead challenged the lower rate of compensation at which she was being paid. Reduction in actual compensation was not even at issue in *Barrett*, *supra*, rendering that case inapplicable.

Finally, *Casey*, *supra*, is likewise inapposite. In that case a teacher's aide holding a ten-month position was reassigned to a twelve-month library clerk position. The increase in months of work resulted in an *increase* in her annual salary, although her rate of compensation, and therefore monthly salary, was decreased. The State Board held that even though petitioner's salary was technically increased, the fact that her rate of salary and monthly salary were decreased violated her tenure rights. This case illustrates the broad interpretation that is given to salary protections. Thus, even if salary is increased, it still must be in a manner that maintains the integrity of the tenured employee's rate of compensation. Where salary is decreased, however, there can be no question that it must be in a manner consistent with the employee's tenure rights.

Respondent's action of abolishing the twelve month positions of petitioners actually constituted a RIF. Such RIF's are "entirely within the authority of the board if done for reasons of economy." *Klinger v. Cranbury Tp. Bd. of Ed.*, 190 *N.J. Super.* 354, 357 (App. Div. 1982).

There has been no contention that the RIF in this matter was not entirely legitimate. Nonetheless, the RIF must "be made on the basis of seniority according to standards . . . established by the commissioner with the approval of the state board." *N.J.S.A.* 18A:28-9. It is this statutory section that petitioners allege respondent violated.

Respondent has contended that if it is found that a RIF did occur petitioners' bumping rights "would require that the board continue to pay the twelve-month salary to any tenured teacher bumped from his or her 12-month position by any of the Petitioners herein" (Respondent's Brief at 14-15). This is simply not the case. If the RIF was undertaken for bona fide economic reasons, the reduction in salary would be legitimate. However, that does not mean that petitioners are required to bear the brunt of that reduction. That determination is made by application of the seniority regulations.

B. Whether Petitioners were Entitled to Vacant Positions

Petitioners contend that they are entitled to the compensation of certain positions from the time those positions became vacant until the time those positions were actually abolished. Respondent counters that the decision to fill a vacant position rests solely in the discretion of the school board, and that it cannot be forced to fill a vacancy it has determined to let languish.

For support of their position, petitioners cite to *Gainer v. Wayne Twp. Bd. of Ed.*, 94 *N.J.A.R.*2d (EDU) 217. In that case the petitioner, a tenured supplemental English teacher, was informed at the close of the school year that she would not be retained for the next year. During the summer, an English teaching position opened up, which the school board decided to fill with a non-tenured teacher. Prior to the start of the next academic year, but after the board filled the teacher position with the non-tenured teacher, petitioner was given a position identical to the one she had just lost, without any reduction in pay. Nonetheless, petitioner asserted that her tenure rights were violated because she should have been assigned to the English teaching position, which had a higher salary than the position she originally held and to which she was subsequently reassigned.

The ALJ in that matter denied petitioner's claim, finding that no reduction in force occurred because petitioner was reassigned to a position before the start of the school year. The Commissioner upheld the ALJ, but for different reasons. The Commissioner found that a RIF had in fact occurred, because petitioner received a letter informing her that her position had been abolished. Instead, the Commissioner found that petitioner's tenure rights were not violated because she was recalled before the start of the school year, and was therefore saved harmless by virtue of the recall. The State Board of Education reversed the Commissioner. The Board found that petitioner's tenure rights were activated from the moment of receipt of the letter, that she therefore should have been placed on a preferred eligibility list, and that she had entitlement to the higher-salaried teaching position over the non-tenured teacher. *Id.*, at 222-23

Gainer illustrates that tenure rights are not dependent upon the start of a school year for activation; it does not stand for the proposition that teachers are entitled to vacant positions that school boards have determined to leave unfilled. The petitioner in that case claimed entitlement to a position the board had determined to fill with a non-tenured teacher. That action violated petitioner's tenure rights because she should have been immediately placed on a preferred eligibility list. When the board determined to fill the vacant position, her name should have come up first. *Gainer* therefore does not lend support to petitioners' position.

A case more on point is *MacMillan, et al. v. East Brunswick Bd. of Ed.*, 1990 *S.L.D.* 1. In that matter, several department chairs had their positions abolished. During that time, a vacancy existed as a chair of the mathematics/computer-science department. Two of the petitioners acknowledged that the decision to fill the vacant positions rests within the discretion of the school board, but claimed that if the school board did decide to fill the position they would have first rights thereto. *Id.*, at 13. Since the board had not filled the mathematics/computer-science chair position, the ALJ dismissed that part of the complaint as there was "no authority to compel the Board to have filled the position." *Id.*, at 19.

Petitioners' right to be put on a preferred eligibility list effective as of the date of the abolishment of their positions does not mean that they have the power to force the school board to fill a position it has determined to leave vacant. Petitioners' tenure rights do not supersede a school board's right to reduce the number of its teaching staff. *N.J.S.A.* 18A:28-9.

C. Whether Petitioners are Entitled to Positions with Unique Qualifications

Petitioners claim entitlement to two positions with unique qualifications not possessed by any of them. Specifically, petitioners claim that they are entitled to the "Bilingual Parent-Community Liaison" teacher specialist position, and the "Computer Technician" position. The job description for the Bilingual Parent-Community Liaison position clearly requires that the employee be proficient in both Spanish and English. *See*, Joint Exhibit #33. The Computer Technician position does not have a job description, but the duties have been described by the parties as entailing "computer repair and maintenance of the district's computers and computer network (involving thousands of computers), attending to and maintaining the computer system and software, updating computers with software updates and other modifications, purchases of parts, etc."

None of the petitioners is bilingual, nor do any of them possess any technical skill in computers. Nonetheless, each claims a right to these positions. Petitioners cite to *Johnson v. Englewood Bd. of Educ.*, 1985 *S.L.D.* 618, *aff'd* 1987 *S.L.D.* 2613, and *South River Educ. Ass'n. v. South River Bd. of Educ.*, 1987 *S.L.D.* 2724. Those cases, along with *Herbert v. Middletown Twp. Bd. of Educ.*, 1989 *S.L.D.* 2148, stand for the rule that although a school district may require qualifications or credentials for an unrecognized title in hiring or promotions, those additional qualifications cannot defeat the tenure or seniority rights of RIF'ed teaching staff members. This doctrine, however, has been significantly curtailed by the recent decision of *White v. Bloomfield Bd. of Ed. and Rosamilia*, 96 *N.J.A.R.*2d (EDU) 846.

In *White*, *supra*, the petitioner held the position of Supervisor of Health and Physical Education, whose position was abolished. The board subsequently sought to hire a Supervisor of Elementary Education, an unrecognized title that had been approved by the County Superintendent, and which was listed as requiring a supervisor/administrative and an instructional certificate, as well as requiring a Master's degree and five years of elementary teaching and/or supervisory experience. Although petitioner held both certificates, the board nonetheless refused to appoint him to the position as it argued that an elementary endorsement was also required by

the position, even though such requirement was not explicitly mentioned in the job description submitted to the County Superintendent.

The ALJ denied petitioner's claim. He entertained "little doubt, at the very least, that an elementary educational endorsement implicitly was required as witnessed by the clear description of the need for five or more years of elementary teaching and/or elementary supervisory experience." *Id.*, at 850. Thus, even though the endorsement requirement was not explicitly listed in the job description, the ALJ found the nature of the job demanded that the employee meet that "local" qualification. "[T]hat requirement seems to me to be so basic as to be among the essence of the new position." *Id.*, at 851.

Likewise, proficiency in English and Spanish goes to the essence of the Bilingual Parent-Community Liaison position. In this respect the instant matter differs from *Johnson*, *supra*. In *Johnson*, the petitioner was a school social worker who had her position abolished. Subsequently, a social worker with less seniority was appointed to the position of bilingual social worker. This position required certification as a school social worker, as well as proficiency in English and Spanish. Petitioner held the required certification, but could not speak Spanish. Nonetheless, petitioner claimed entitlement to the position.

In granting petitioner's claim, the state board of education found that there was little difference between the duties performed by a school social worker and a bilingual school social worker, and that only three of twelve of the listed duties required any proficiency in Spanish. *Id.*, at 2615. Such is not the case here. Proficiency in Spanish is the very heart of the Bilingual Parent-Community Liaison position. The duties in this case involve direct contact with the Spanish-speaking community. The Liaison has to be able to conduct seminars and informational meetings, and also assists in the translation of informational materials. Someone with no knowledge of Spanish would not be able to perform the position's basic functions.

Such is even more the case for the position of computer technician. Petitioners would be wholly unable to perform any of the functions required by that position. Furthermore, there is nothing to suggest that computer technician belongs to the same job category as the petitioners. This position is an unrecognized title for which certification was never established and a job

description never written. Just because the person currently holding the position holds an instructional certificate and used to teach computers, it does not necessarily follow that the same certification is required for his subsequent position. If this employee decided to become a janitor, that does not mean that an instructional certificate would thereafter be required to fulfill janitorial duties.

II. Individual Tenure Claims

A. Percy Dare

Petitioner Dare has been tenured the longest of all the petitioners. He was hired by respondent in September of 1969, and held his position as Community Relations Specialist and Trenton Follow Through Resource Center Manager from July 1, 1978 until June 30, 1993, accruing fifteen years tenure in that position. He has been employed as a "teacher specialist" since 1970, and therefore claims twenty-three years in seniority.

Petitioner claims entitlement to fourteen positions, including:

1. Early Childhood Transition Program Specialist, Head Start, and Early Childhood Position Grant
2. Teacher Specialist for Business and Industry Liaison
3. Teacher Specialist Follow-Thru Program
4. Teacher Specialist, Parent Community Relations
5. Peer Leadership Teacher
6. Teacher Specialist, Program for Adolescent Mothers
7. Personnel Specialist, Compensation
8. Family and Support Services Specialist and Head Start Public School Early Childhood Transition Grant
9. Follow-thru Staff Trainer, Teacher Specialist Follow-thru Trainer
10. OSR Teacher Specialist
11. Coordinator of Records, Benefits and Salary Guide Placement
12. Teacher Specialist, Adult Education, New Jersey Youth Core
13. Teacher Specialist, Bilingual Parent Community Liaison

14. Computer Technician

However, positions eight through twelve were vacant or abolished as of the RIF, and were never filled. As discussed above, petitioners had no rights to these positions. Furthermore, also as discussed above, petitioners were not qualified to hold positions thirteen or fourteen and therefore have no entitlement to those positions. Therefore, the scope of the determination of petitioner's tenure and seniority rights is limited to positions one through seven.

The first step in analyzing petitioner's claim to positions one through seven is to determine whether he had tenure in his "teacher specialist" position, and whether those rights entitle him to any of the controverted positions. In determining whether petitioner was entitled to tenure in his position, it is merely necessary to apply the three-prong test applied by the Supreme Court in *Spiewak v. Rutherford Bd. of Ed.*, 90 *N.J.* 63, 74 (1982) -- "an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." Applying this test it is plain that petitioner has achieved tenure. He is in a position of employment with respondent that requires him to hold a valid instructional certificate and has served in that position for more than three years. *See*, *N.J.S.A.* 18A:28-5. Petitioner has achieved tenure under his instructional certificate. Therefore, any positions to which his certification entitle him must be granted to petitioner over non-tenured personnel.

Petitioner alleges that positions number one and seven listed above are held by non-tenured teachers, and that therefore he has superior rights to those positions. Both of the current occupants of those positions, Sylvia Brown and Lillian Minus, however, had obtained tenure as teachers under their instructional certificates. Thus they have achieved tenure to all positions to which their certification entitles them. *Ellicot v. Board of Educ.*, 251 *N.J. Super.* 342, 348-349 (App. Div. 1991); *Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239, 242 (App. Div. 1987); *Capodilupo v. W. Orange Tp. Ed. Bd.*, 218 *N.J. Super.* 510, 514 (App. Div. 1987). Because the "teacher specialist" positions require only an instructional certificate and no specific endorsements, the occupants of positions one and seven effectively transfer their tenure from their

recognized teaching positions to their more recent appointments to unrecognized "teacher specialist" appointments.[1]

The tenure of Brown and Minus in the teacher specialist positions is also not affected by the fact that they were transferred from their teaching positions into their "teacher specialist" positions. *N.J.S.A.* 18A:28-6 provides:

> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter . . . shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position. . . .

This section has been interpreted to apply only to those transfers made between separately tenurable positions, and not to positions included under the educational services or instructional certificate. *See*, *Kletzin v. Bd. of Educ. of Borough of Spotswood*, 92 *N.J.A.R.*2d (EDU) 367, 368, *aff'd*, 261 *N.J. Super.* 549 (App. Div. 1993), *aff'd*, 136 *N.J.* 275 (1994). Because the transfers of Brown and Minus were to positions included under the certificate to which they had achieved tenure, such tenure is transferable to the new positions and is not barred by *N.J.S.A.* 18A:28-6.

Because all of the positions to which petitioner claims entitlement were held by tenured teaching staff members, petitioner's entitlement to those positions is determined by operation of the seniority regulations. *Bednar*, *supra*, 221 *N.J. Super.* at 243. Those regulations provide that

> (b) Seniority, pursuant to *N.J.S.A.* 18A:29-9 *et seq.*, shall be determined according to the number of academic or

[1] It should be noted that the decisions in *Dennery v. Bd. of Ed.*, 131 *N.J.* 626 (1993), and *Nelson v. Bd. of Ed. of Old Bridge*, 148 *N.J.* 358 (1997), while significant decisions pertaining to the tenure rights of teachers, are not immediately relevant to the case at hand. Those cases dealt with the transferability of tenure across different certificates, and across different endorsements, respectively. As petitioners are not attempting to transfer tenure across certificates, and no endorsements were required for any of the positions involved in the instant matter, *Dennery*, *supra*, and *Nelson*, *supra*, do not apply. Further, those cases never modified or overruled the holdings in *Ellicot*, *supra*, *Bednar*, *supra*, or *Capodilupo*, *supra*. The holding in those cases are therefore still the controlling law.

> calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided.' ...
> [*N.J.A.C.* 6:3-5.1(b)]

The regulation establishing categories of employment, however, do not have a provision for "teacher specialist," or any other unrecognized title. *See*, *N.J.A.C.* 6:3-5.1(*l*). The regulation authorizing the use of unrecognized titles, *N.J.A.C.* 6:11-3.3, provides that:

> (b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year. *Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis.*
> [Emphasis added]

Furthermore, the seniority regulations also provide that:

> (g) Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title. *Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.3.*
> [*N.J.A.C.* 6:3-5.1(g) (Emphasis added)]

Therefore, in order to determine whether petitioner has any entitlement to the controverted positions, it is necessary to examine petitioner's title and job description, and compare it to the titles and job descriptions of the controverted positions. It has been found that:

> When deciding competing tenure and seniority claims, courts "look to the substance rather than the form." *Viemeister v. Prospect Park Bd. of Ed.*, 5 *N.J. Super.* 214, 218 (App. Div. 1949). Thus, the nature of the work done, not the title, is "the crucial factor." *Quinlan v. North Bergen Bd. of Ed.*, 73 *N.J. Super.* 40, 48 (App. Div. 1962). "[T]he duties performed, rather than the title of the position or job description, are controlling." *Christie v. East Orange Bd. of Ed.*, 1985 *S.L.D.* (Comm'r 1985), slip. op. at 14. . . . Seniority regulations codify this approach by clarifying that "[w]here the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title." *N.J.A.C.* 6:3-1.10(g).
> [*Kornberg v. Bd. of Ed. of Twp. of North Bergen*, 92 *N.J.A.R.*2d (EDU) 120, 121]

Petitioner Percy Dare was employed by respondent under the position title "Community Relations Specialist and Trenton Follow Through Resource Manager." This position required a valid NJ Instructional Certificate, a Master's Degree, and a minimum of 3 years experience as an elementary teacher. *See*, Joint Exhibit 3. The duties of this position were listed as follows:

1. Implements the Trenton Follow Through Resource Center as specified in the program application.

2. Prepares the Resource Center proposal and budget.

3. Assumes responsibility for the development, publication and distribution of training and demonstration materials regarding the Behavior Analysis Approach.

4. Designs and maintains appropriate records and follow-up activities for visitors and inquiries about the Resource Center facilities and materials.

5. Plans and writes submissions for presentations and exhibits about the Follow-Through Program at professional conferences and national Diffusion Network State Facilitators.

6. Prepares Follow Through Program brochures for dissemination.

7. Disseminates Resource Center activities and services to other school districts.

8. Assists with the training of local Follow Through Program staff in the use of resource materials.

9. Provides technical assistance and monitors program implementation at the local site.

10. Schedules interviews and writes information for newspapers, radio and television.

11. Participates in staff meetings and securing funds for Follow Through on the state and national levels.

12. Prepares press releases of district activities for publication.

13. Prepares flyers, brochures, district calendar and other public relations materials, including district desegregation activities and budget releases.

14. Assists in the design of test profiles for developmental and remedial instructional planning.

15. Designs and prepares district publications and exhibits upon request, and monitors graphic artist projects to be included in public releases.

16. Serves as member of board of directors for the Screen Printing Collaborative.

17. Design, edit and publish all publications printed by the Community Relations press at the Board of Education Administration Building.

18. Assists in designing district planning models.

19. Performs such other tasks and assumes such responsibilities as assigned by the Director of School Operations-Elementary/Director of Planning, Research and Evaluation.

[Joint Exhibit 3]

The first position that petitioner Dare claims entitlement to is "Early Childhood/Transition Program Specialist--Head Start/Public School Early Childhood Transition Grant." This position requires a valid instructional certificate, a master's degree in Early Childhood/Elementary Education, Curriculum Development, or Urban Education, and five years of classroom experience. The duties of this position are enumerated as follows:

1. Plan and supervise educational activities designed to assist families, administrators and teachers to respond to educational needs of children, including training.

2. Assist with the design, implementation and supervision of a developmental educational and support program in cooperation with parental involvement efforts undertaken pursuant to the Follow Through Act, Chapter 1 of Title I of the Elementary and Secondary Education Act and the Education of the Handicapped Act.

3. Conduct training or other assistance for families, administrators, teachers and paraprofessionals in enhancing developmental continuity between Head Start and Public School educational programs for young children and their families.

4. Develop Individual Student Transition Plans detailing educational service needs and plan for providing or access of these services.

5. Develop and implement plans to support active involvement of parents in the education of their children.

6. Assist with the coordination and collaboration between Head Start and the public school to include community, County and State social/human service, health, mental health, employment and support agencies and organizations.

7. Assist with the coordination and implementation of transition activities, including staff meetings, training, student assessment, transfer of information between Head Start and Public School and parental communication.

8. Conduct home visits and complete family intake interviews.

9. Prepare reports, applications, budgets, and maintains appropriate computerized records.

10. Prepare materials for dissemination to parent and community groups.

11. Attend meetings and conferences, where appropriate in an effort to keep abreast of current developments.

12. Insures compliance with relations and timelines established by the Head Start/Public School Early Childhood Transition Program.

13. Complete Annual Early Childhood Education Transition Delivery Plan and conducts annual program self-assessment.

14. Perform such other tasks and assume such other responsibilities as assigned by the Director of School Operations-Elementary.

[Joint Exhibit 7]

A comparison of the duties required of a "Community Relations Specialist and Trenton Follow Through Resource Manager" and an "Early Childhood/Transitions Program Specialist--Head Start/Public School Early Childhood Transition Grant" reveals that they are similar enough to belong to the same category of employment. Both require the implementation of government funded programs; the preparation of reports, applications, and budgets; interaction with parents and other community groups; the publication of informational materials; and the coordination and conducting of meetings.

The second position petitioner Dare claims entitlement to is "Teacher Specialist for Business and Industry Liaison." This position requires a valid instructional certificate and three years classroom experience. The duties for this position are enumerated as follows:

1. To serve as liaison between Trenton Public Schools and Mercer County for student job placement.

2. To establish criteria and to identify students for participation in the 10,000 jobs program.

3. To complete and update student education records and job placement records.

4. To monitor student attendance, academic progress and graduation requirements for program participants.

5. Research and develop special programs to reach potential dropouts.

6. To complete end of year follow-up surveys and reports.

7. Implementation of 10,000 Graduates . . . 10,000 Jobs Program in accordance with State guidelines and District Proposal.

8. Confer with guidance staff regarding student placement.

9. Coordination with existing Career Resource Center.

10. Provide student and parent orientation.

11. Investigate funding for expansion and/or continuation of program during upcoming school year(s).

12. Performs such other appropriate duties and assumes such other appropriate responsibilities as assigned by immediate supervisor.

A comparison of the duties required of a "Community Relations Specialist and Trenton Follow Through Resource Manager" and a "Teacher Specialist for Business and Industry Liaison" reveals that they are similar enough to belong to the same category of employment. Both require the implementation of government funded programs; the maintenance of records; interaction with parents and other community groups; and the designing of various programs and tests.

The third position to which petitioner Dare claims entitlement is "Teacher Specialist-Follow Through Program." That position requires a valid instructional certificate, experience in Follow Through Behavior Analysis Approach, and five years successful experience in the Follow Through Program. The duties for this position are enumerated as follows:

1. Assists the Director of School Operations/Elementary/Follow Through Program in the

general management of the Follow Through Program toward the goal of optimum performance of personnel and pupils.

2. Develops, schedules, and monitors all Follow Through instructional aides, and in-service programs (teachers, teacher aides, parent educators).

3. Assists with the preparation of the Follow Through proposal and budget.

4. Participates in staff meetings and securing funds for Follow Through on the State and national levels.

5. Develops and schedules grade level in-service committees, meetings and agencies.

6. Takes responsibility for selection and requisition of Follow Through equipment, supplies and materials.

7. Maintains rapport with all Follow Through principals and staff.

8. Collects and maintains data designed to provide meaningful evaluation of the Follow Through Program.

9. Develops curriculum relevant to the needs of the program.

10. Performs as liaison with Behavior Analysis Sponsor representative and Trenton Project.

11. Produces and disseminates information and materials to Follow Through instructional staff.

12. Develops and oversees Follow Through Testing Program as outlined by the Sponsor, Behavior Analysis.

13. Evaluates the operation of the Follow Through Program.

14. Assists in the preparation of written reports and maintains appropriate records.

15. Reinforces the classroom staff by demonstrating teaching techniques, observation and critical evaluation of Behavior Analysis procedures.

16. Implements the Follow Through Behavior Analysis Program as specified in the program application at Caldwalader School in K-Grade 3 and one Follow Through class at Grant, Monument, Parker, Rivera, and Wilson Schools.

17. Develops curriculum relevant to the needs of the program.

18. Works with the P.A.C. Committee and conducts regularly scheduled meetings.

19. Serves as resource person to project director.

20. Performs such other tasks and assumes such other responsibilities as assigned by the Director of School Operations-Elementary.

A comparison of the duties required of a "Community Relations Specialist and Trenton Follow Through Resource Manager" and a "Teacher Specialist-Follow Through Program" reveals that they are similar enough to belong to the same category of employment. Both require the implementation of government funded programs; the preparation of reports, applications, and budgets; the development of programs; interaction with parents and other community groups; and the coordination and conducting of meetings.

The fourth position claimed by petitioner Dare is "Teacher Specialist, Parent Community Relations." This position required an instructional certificate. The duties for this position are enumerated as follows:

1. Plans and conducts training seminars for parents.

2. Assists parents and the community in the interpretation of the school district's Basic Skills Improvement Program in compliance with federal, state and local board of education rules and regulations.

3. Plans activities which encourage parent and community participation in school activities.

4. Works closely with the office of Basic Skills Director and supervisors.

5. Directs the planning, development and production of informational materials supportive of the district Chapter I/SCE parent education.

6. Works directly with district, area and school-site staff, PAC's, PTA's PTO's, Citizen's Advisory Committees and parent groups in initiating, interpreting and implementing parental education programs.

A comparison of the duties required of a "Community Relations Specialist and Trenton Follow Through Resource Manager" and a "Teacher Specialist, Parent Community Relations" reveals that they are similar enough to belong to the same category of employment. Both require the implementation of government funded programs; the development of programs; interaction with parents and other community groups; and the coordination and conducting of meetings.

The fifth position claimed by petitioner Dare is "Peer Leadership Teacher." This position requires a valid instructional certificate, five years secondary level teaching experience, and successful completion of peer leadership training. The duties of this position are enumerated as follows:

1. Develops peer group calendar, provides materials for daily leadership training, weekly peer group activities and peer group events.

2. Participates in peer leadership events.

3. Organizes and schedules peer group events for parent groups, tutoring, peer leaders and advisors, i.e., reservations, transportation, food, publicity.

4. Coordinates peer leaders' participation in all community events, i.e., Youth Speaks weekly radio broadcast; Board of Education meetings; youth council meetings.

5. Facilitates and conduct advisor planning meetings.

6. Assists with implementation of after-school tutoring.

7. Assists with crisis intervention among peer group members and peer leaders.

8. Confers with students about grades, personal growth and development.

9. Meets with advisors to discuss and calculate peer leaders' grades.

10. Coordinates the planning and implementation of all retreats, faculty exchanges, parents' night and presentations.

11. Acts as a liaison with administration, parents, faculty, counselors, community services and other peer programs.

12. Coordinates and participates in continual evaluation of all phases of the peer leadership processes.

13. Disseminates information, assists with planning and is actively involved in peer parents' groups.

14. Assists in making program changes based on evaluations.

15. Makes budget request, monitors and disseminates funds.

A comparison of the duties required of a "Community Relations Specialist and Trenton Follow Through Resource Manager" and a "Peer Leadership Teacher" reveals that they are similar enough to belong to the same category of employment. Both require the development of programs; the preparation of reports, applications, and budgets; interaction with parents and other community groups; and the coordination and conducting of meetings.

The sixth position to which petitioner Dare claims entitlement is "Teacher Specialist-Program for Adolescent Mothers." This position was never submitted to the county superintendent for approval, and no certification for the position was ever established. It is therefore impossible to determine whether petitioner Dare has any seniority entitlement to this position. Maintenance of this position by respondent is an *ultra vires* act as they have failed to comply with *N.J.A.C.* 6:11-3.3(b). Respondent is therefore directed to comply with *N.J.A.C.* 6:11-3.3(b) and submit the position to the county superintendent for a determination of the proper certification required. Because there remains a genuine issue of material fact as to the proper certification of this position, petitioners Dare, Avery and Williams' motion for summary decision with respect to this position must be **DENIED**.

The last position claimed by petitioner Dare is "Personnel Specialist-Compensation." The only qualifications listed in the job description for this position was a Bachelor's Degree and three years of appropriate personnel office experience. This position was occupied by Robert Nast in July of 1993 when petitioner's position was abolished. Nast later retired at the close of the 1994 school year, and the position was never filled and later abolished. Before serving in this position, Nast served as "Personnel Specialist-Unemployment Compensation." That position did require an instructional certificate, before it was abolished in July 1993 and Nast was reassigned to the "Personnel Specialist-Compensation" position. A material issue of fact exists as to whether an instructional certificate was also required for the "Personnel Specialist-Compensation" position. Respondent must seek clarification from the county superintendent as to what certification is required for the position in order to comply with *N.J.A.C.* 6:11-3.3(b). Because there remains a genuine issue of material fact as to the proper certification of this position, petitioners Dare, Avery and Williams' motion for summary decision with respect to this position must be denied.

Because petitioner Dare's employment is in the same category as positions one through five, the seniority he has accrued in his "Community Relations Specialist and Trenton Follow Through Resource Manager" position is creditable as against those five positions. Dare began in the "Community Relations Specialist" position in July of 1978, and the position was abolished in July of 1993. Dare therefore has 15 years of service credited to his "specialist" position. Dare also claims that he has been employed in "specialist" positions since 1970, giving him twenty-three years of creditable service. Dare has not, however, specified which positions he held in the eight years before 1978, and has not submitted job descriptions for these supposed "specialist" positions. There is therefore no way to determine whether these positions were substantively similar enough to belong to the same category as the "Community Relations Specialist" position. Because issues of fact must be resolved in favor of the non-moving party when deciding summary decision motions, Dare can only be credited with fifteen years of "specialist" service.

Moving to the first position claimed by Dare, "Early Childhood/Transition Program Specialist- Head Start/ Public School Early Childhood Transition Grant," it appears the Dare had an entitlement to the position at the time of the RIF. This position is currently held by Sylvia Brown. Ms. Brown was appointed to this position in August of 1992. She previously held

and

1. Assists in the implementation of the Desegregation Plan for Educational Excellence.

2. Provides direct assistance to principals in developing desegregation activities.

3. Assists in the planning of desegregation related inservice training for district staff.

4. Responsible for the collection and organization of all necessary statistical information, and maintenance of data files.

5. Develops appropriate instrumentation and forms for monthly monitoring, observes program and activities in schools, and assists in their evaluation.

6. Submits bi-weekly reports to Director of Planning, Research and Evaluation.

7. Coordinates transportation for Magnet activities.

8. Organizes committees of teachers and community to develop new desegregation programs and activities for integration into the plan.

9. Insures compliance with regulations and timelines established by the N.J. Office of Equal Educational Opportunity.

10. Assists in the preparation of monthly list of classified personnel vacancies.

11. Assists in the preparation of monthly agenda items related to classified personnel.

12. Assists in the development of job descriptions for classified positions.

13. Assists in updating seniority lists of classified personnel.

14. Assists in verifying accuracy of classified personnel data.

15. Performs such other tasks and assumes such other responsibilities as assigned by the Director of Planning, Research and Evaluation and the Director of Personnel.

For the reasons discussed above, the only positions to which petitioner Avery could potentially have any entitlement to are positions one through five. A comparison of her two positions and those five reveal that they are substantively similar enough to constitute employment in the same category. All to some degree require the implementation of government programs; development of programs; the preparation of reports, applications, and budgets; interaction with parents and other community groups; and/or the coordination and conducting of meetings.

Petitioner Avery does not have a claim to positions one or three, as the incumbents in those positions had greater creditable service. Petitioner Avery's claims to positions two, four, and five are subject to petitioner Dare's superior claims to those positions. After he has made his election, Avery may be entitled either to instatement into position five, or claim one years worth of pay difference for either position two or four.

C. Janice Williams

Petitioner Williams' claims are identical to those of petitioners Dare and Avery. She worked in a "specialist" position, "Personnel Specialist-Substitution Officer." She began this position in January of 1984, giving her 8½ years of creditable time. That position required a valid instructional certificate, and three years teaching experience. The duties of those positions are enumerated as follows:

1. Plans, organizes and administrates the overall substitute program for all instructional personnel.

2. Conducts research on substitute teacher operations.

3. Endeavors to reduce teacher absentee rate by working with principals and representatives of the T.E.A.

4. Assumes responsibility for all accounting procedures regarding substitutes.

5. Interviews all substitute candidates.

6. Recommends certified substitutes to principals for long term assignments.

7. Creates and maintains active substitute personnel files.

8. Writes special reports as needed.

9. Prepares and updates vacancy listings.

10. Works with accounting department regarding substitute funds, Home Instruction and Special Education substitute funds.

11. Ensures funding for substitutes is charged to proper account.

12. Prepares all items regarding substitutes for Board agenda.

13. Other duties and responsibilities as assigned by Director of Certified Personnel.

For the reasons discussed above, the only positions to which petitioner Williams could potentially have any entitlement to are positions 1 through 5. A comparison of the duties of "Personnel Specialist-Substitution Office" and those five positions, however, reveal that they are not part of the same category. Petitioner Williams' position was much more administrative in nature, requiring no interaction with students or parents, and not implementing plans or programs that have a direct effect on curriculum and school policy. She therefore has no entitlement to any of those positions and her claims should be **DISMISSED**.

It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/4/97
DATE

STEVEN C. REBACK, ALJ

8/6/97
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

AUG 8 1997
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

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EXHIBITS

Joint Exhibits:

J-1 Job description, Teacher Specialist for Community Relations/School Operations

J-2 Job description, Community Relations Specialist and Trenton Follow Through Resource Center Manager

J-3 Job description, Community Relations Specialist and Trenton Follow Through Resource Center Manager

J-4 Announcement of Vacancy, Staff Trainer - Follow Through (Resource Center Budget), dated September 20, 1979

J-5 Job description, Coordinator of Records/Benefits/Salary Guide Placement

J-6 Job description, Coordinator, Computer Education and Training

J-7 Job description, Early Childhood/Transition Program Specialist--Head Start/Public School Early Childhood Transition Grant

J-8 Job description, Substance Awareness Specialist - Drug Free Schools and Communities Act Program

J-9 Job description, Emergency Grant Specialist - Drug Free Schools and Communities Act Program

J-10 Job description, Family and Support Services Specialist--Head Start/Public School Early Childhood Transition Grant

J-11 Job description, Teacher Specialist - Follow Through Program

J-12 Job description, Follow Through Curriculum Specialist

J-13 Announcement of Vacancy, Follow Through Curriculum Specialist, dated January 30, 1978

J-14 Job description, Curriculum Specialist

J-15 Job description, Follow Through Staff Trainer

J-16 Job description, Guidance Counselor - Career Resource

J-17 Job description, Job Developer - Operation School Renewal

J-18 Announcement of Vacancy, Job Placement Coordinator - OSR, dated February 25, 1986

J-19 Job description, OSR Teacher Specialist

J-20 Letter to Mildred Williams from respondent, dated March 27, 1987

J-21 Proposed job description for PAM Liaison Unit person

J-22 Job description, Personnel Specialist - Compensation

J-23 Job description, Personnel Specialist - Unemployment Compensation

J-24 Job description, Personnel Specialist/Unemployment Compensation

J-25 Job description, Personnel Specialist/Unemployment Compensation

J-26 Job description, Personnel Specialist - Substitute Office

J-27 Job description, Personnel Specialist - Substitution Officer

J-28 Job description, Personnel Specialist/Substitution Officer

J-29 Job description, Personnel Specialist/Substitution Officer

J-30 Announcement of Vacancy, Personnel Specialist/Substitution Officer, dated October 31, 1983

J-31 Job description, Research Specialist for the Office of Planning, Research and Evaluation

J-32 Job description, Teacher Specialist - Office of Planning, Research and Evaluation

J-33 Job description, Specialist - Bilingual Parent-Community Liaison

J-34 Announcement of Vacancy, Teacher Specialist - Parent/Community Relations, dated June 9, 1988

J-35 Job description, Teacher Specialist - Parent/Community Relations

J-36 Job description, Teacher Specialist - Desegregation/Classified Personnel

J-37 Job description, Teacher Specialist for Guidance Activities/Student Attendance and Special Education Services

J-38 Job description, Teacher Specialist for Business and Industry Liaising

J-39 Job description, Teacher Specialist, Adult Education/New Jersey Youth Corps

J-40 Job description, Video/Audio Visual Specialist

J-41 Announcement of Vacancy, Audio Visual Specialist, dated January 30, 1978

J-42 Request for Approval of Unrecognized Titles, 1986-87 School Year, dated November 6, 1986

J-43 Memorandum to respondent from Greta D. Shepherd, County Superintendent of Schools, dated December 29, 1986

J-44 Request for Approval of Unrecognized Titles, 1986-87 School Year, dated January 9, 1987

J-45 Request for Approval of Unrecognized Titles, 1986-87 School Year, dated May 1, 1987

J-46 Request for Approval of Unrecognized Titles, 1986-87 School Year, dated June 25, 1987

J-47 Request for Approval of Unrecognized Titles, 1987-88 School Year, dated January 26, 1988

J-48 Request for Approval of Unrecognized Titles, 1987-88 School Year, dated May 5, 1988

J-49 Request for Approval of Unrecognized Titles, 1988-89 School Year, dated May 16, 1988

J-50 Memorandum to respondent from Greta D. Shepherd, County Superintendent of Schools, dated October 3, 1988

J-51 Memorandum to respondent from Barbara Anderson, County Superintendent of Schools, dated December 1, 1989

J-52 Request for Approval of Unrecognized Titles, 1990-91 School Year, dated July 27, 1990

J-53 Memorandum to respondent from Barbara Anderson, County Superintendent of Schools, dated October 1, 1990

J-54 Memorandum to Melvin Klein, Interim Superintendent of Schools, from Barbara Anderson, County Superintendent of Schools, dated December 1, 1989

J-55 Request for Approval of Unrecognized Titles, 1990-91 School Year, dated April 30, 1991

J-56 Memorandum to Bernice Venable, Chief School Administrator, from Barbara Anderson, County Superintendent of Schools, dated September 10, 1991

J-57 Request for Approval of Unrecognized Titles, 1991-92 School Year, dated December 17, 1991

J-58 Memorandum to Bernice Venable, Chief School Administrator, from Barbara Anderson, County Superintendent of Schools, dated October 8, 1992

J-59 Job description, Peer Leadership Teacher

J-60 Job description, Senior Army Instructor/Specialist

OAL DKT. NO. EDU 8316-93
AGENCY DKT. NO. 196-6/93

IVEY AVERY, PERCY DARE, AND JANICE WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' and respondent's exceptions, and petitioners' reply thereto, are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review, the Commissioner determines to reverse the initial decision of the ALJ, for the reasons set forth below, in that he is not persuaded that the circumstances herein support the conclusion that petitioners were subjected to a reduction in force (RIF), pursuant to *N.J.S.A.* 18A:28-9.

Initially, the Commissioner observes that *N.J.S.A.* 18A:28-9 provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to *reduce the number of teaching staff members, employed in the district* whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or a change in the administrative or

> supervisory organization of the district or for other good cause upon compliance with the provisions of this article. (emphasis added) *N.J.S.A.* 18A:28-9.

The Commissioner is further mindful that the meaning of a statute is first derived by looking at its plain language. Where that language "is clear and unambiguous, it will be given effect 'absent any *specific* indication of legislative intent to the contrary.'" (emphasis in text) *Chase Manhattan Bank v. Josephson*, 135 *N.J.* 209, 225, 227 (1994). As the State Board of Education noted in *Gainer,* "It is well established that such reduction occurs whenever the *number* of teaching staff is reduced. *Downs v. Board of Education of Hoboken Dist.*, 13 *N.J. Misc.* 853 (1935).***" (emphasis in text) *Gainer, supra*, at 223. Although petitioners note that a RIF has been found to have occurred where a staff member's position was reduced from full-time status to part-time status, see *Bednar, supra,*[1] *Klinger, supra,*[2] and *Popovich v. Bd. of Ed. of the Borough of Wharton,* 1975 *S.L.D.* 737, 745,[3] such is not the case herein.

In the instant matter, although petitioners' former 12-month positions as "teacher specialists" were abolished in April of 1993, petitioners affirmed that "*[a]t the same time,* Respondent informed [them] that they would be placed in 10-month positions as Classroom Teachers,[4] effective for 1993-94 school year, and that they would not be employed or

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[1] In *Bednar*, petitioner's full-time position as an elementary art teacher was reduced to a part-time elementary art teaching position. *Bednar, supra,* at 240.

[2] In *Klinger*, notwithstanding that the Appellate Division cites to *Popovich, infra,* for the broad principle that a "[r]eduction in hours of employment is considered a reduction in force," *Klinger, supra,* at 357, both the petitioners in *Klinger* and in *Popovich* were specifically full-time teachers reduced to part-time employment. In *Klinger*, petitioner was a full-time physical education teacher whose position was reduced to part-time as a result of declining enrollment. *Klinger* at 356.

[3] In *Popovich*, petitioner was a full-time vocal music teacher whose position was reduced to three days per week. *Popovich* at 737.

[4] Notwithstanding the ALJ's statement that the newly-assigned positions "***were identical to the abolished positions, except that the new positions were only ten-month positions with the concomitant reduction in salary" (Initial Decision at p. 3), the Commissioner finds noteworthy that petitioners repeatedly assert that the new positions were, in fact, classroom teaching positions, an assignment which they characterized as a "demotion." (Petitioners' Brief in Support of Motion For Summary Disposition at pp. 3, 8) In that the Board does not dispute that the new positions were teaching positions, the Commissioner so finds.

compensated during July or August of 1993." (emphasis added) (Petition of Appeal at p. 3, paragraph 14) Petitioners do not assert, and neither does the record suggest, that they were, at any time, dismissed from employment in the District. Where the board has not reduced the number of staff members employed in the district either by termination of employment or by diminution of full-time positions to part-time positions as in *Bednar, Klinger,* and *Popovich*, the Commissioner is not convinced that the seniority regulations, which were established to effectuate a RIF pursuant to *N.J.S.A* 18A:28-9 *et seq.*, must nevertheless attach, as petitioners so contend.[5] To accept petitioners' argument that the abolishment of their positions, under these circumstances, compels the application of the seniority regulations, would constitute a capitulation to semantics at the expense of sound educational policy. Thus, since the seniority regulations are not implicated in this matter, the Commissioner does not reach to petitioners' allegations that their seniority rights were subsequently violated.

Rather, the Commissioner finds that the Board acted pursuant to its managerial prerogative to transfer teaching staff members. Petitioners, who acquired tenure as teachers, and not as "teacher/specialists," were transferred within the scope of their certificates to alternative teaching assignments, *i.e.*, as classroom teachers. The Commissioner recognizes that "a tenured teacher may be 'transferred' or reassigned within the scope of the endorsements on his or her Instructional Certificate *** but may not be transferred involuntarily from one position to another." *Howley and Bookholdt v. Ewing Township Board of Education*, 1982 *S.L.D.* 1328, 1340, aff'd State Board June 1, 1983. Here, petitioners cannot claim that the classroom teaching

[5] To the extent the language of the regulations governing seniority found at *N.J.A.C.* 6:3-5.1 *et seq.* appear to contradict the Commissioner's conclusion herein, it is noted that such regulations must be read to be consistent with *N.J.S.A.* 18A:28-9 *et seq. Carpenito v. Rumson Borough Board of Education, Monmouth County*, 96 *N.J.A.R.* 2d (EDU) 959, 963, 964.

assignments are different "positions" for the purpose of a tenure analysis. "***[T]he Commissioner has consistently maintained that, with unrecognized titles, the scope of a position for purposes of tenure entitlement is that of the endorsement(s) required to hold it.***" *MacMillan, supra,* at 22. The teacher/specialist positions formerly held by petitioners merely required that they hold instructional certificates, with no specific endorsements. Not unlike the State Board's observations in *Williams,* the certification required of the teacher/specialists and of these classroom teachers is the same, tenure as a teacher can be accrued in both titles, and the duties to be performed as classroom teachers "are of no less importance from an educational standpoint." *Williams, supra*, at 158.

However, the Commissioner concurs with the ALJ's view that petitioners were subjected to a reduction in salary and their respective tenure rights, therefore, were violated by the transfer. In this regard, the Commissioner determines that the Board must now reinstate petitioners to their respective salaries as of April 1993, and must reimburse them for the salary differential between what they actually received in the 1993-94, 1994-95, 1995-96, and 1996-97 school years, and what they would have received, had they been compensated with the same salaries and emoluments they enjoyed in their roles as "teacher/specialists."[6] In so finding, the Commissioner notes that the Board may elect to freeze petitioners at their respective prior salaries until such wages are in accord with the teachers' salary guide. *Richard Siss v. Board of Education of the City of Long Branch, Monmouth County*, Commissioner's Decision (unpublished) April 1, 1980, aff'd State Board November 5, 1980, New Jersey Superior Court Appellate Division decision, February 24, 1982, A-1630-80T2.

[6] In that petitioners have "no vested right in any future increases in salary," *Williams, supra,* at 162, they are not entitled to salary and emoluments beyond that which they had received as of April 1993.

Accordingly, the initial decision of the ALJ is reversed to the extent set forth herein. The Board is directed to compensate petitioners, consistent with the Commissioner's directive above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 3, 1997
DATE OF MAILING NOVEMB ER 3, 1997

574-97

574-97

VINCENT FINCH,
PETITIONER,
V.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
RESPONDENT,

AND

VIRGINIA MC ALINDEN,
PETITIONER,
V.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
RESPONDENT,

AND

GEORGE BROWNLEE,
PETITIONER,
V.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 3, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
LACK OF PROSECUITION

OAL DKT. NO. EDU 10607-94
AGENCY DKT. NO. 401-9/94

OAL DKT. NO. EDU10608-94
AGENCY DKT. NO. 402-9/94

OAL DKT. NO. EDU 12474-94
AGENCY DKT. NO. 400-9/94

VINCENT FINCH,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

VIRGINIA MCALINDEN,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

GEORGE BROWNLEE,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Anthony P. Sciarillo, Esq., for petitioners

Gregory Johnson, Esq., for respondent, State Operated School District of the City of Newark,

Record Closed: September 15, 1997 Decided: September 22, 1997

BEFORE **ARNOLD SAMUELS**, ALJ:

The three petitioners, Vincent Finch, Virginia McAlinden and George Brownlee, are teaching staff members in the State Operated School District of the City of Newark formerly the Board of Education of the City of Newark (Board). They filed verified complaints with the Commissioner of Education in September 1994, appealing actions taken by the Board to withhold their salary increments for the 1994-95 school year.

In October and December 1994 the three matters were transmitted by the Commissioner of Education to the Office of Administrative Law (OAL) for hearing and determination as contested cases pursuant to *N.J.S.A.* 52:14F-1 to 13. A prehearing conference was held on March 27, 1995 which fixed hearing dates in early September 1995, provided for discovery and ordered consolidation of the three cases for all future proceedings. A separate Order of Consolidation was also filed on April 21, 1995.

On the first hearing day, December 4, 1995, counsel advised that the underlying grounds for the increment withholdings were not contested, but that the only issue related to the question of whether the procedures followed by the Board in giving notices of its actions to the petitioners were legally sustainable. Counsel agreed that the matter could be determined, as a matter of law, based on stipulations of fact that they would prepare and file. The hearing was then adjourned, pending the submission of the stipulations of fact, within sixty-days.

The stipulations were not filed within the allotted time. In a telephone conference held on April 29, 1996, counsel advised that the stipulations were still being prepared, and would be filed by no later than June 21, 1996, to be followed by briefs within thirty-days thereafter.

The stipulations were not filed as scheduled. A further inquiry by letter on September 6, 1996 was followed by advice from counsel that the stipulations were still not finalized and would be submitted by December 31, 1996; later extended to January 15, 1997.

The stipulations were not filed by the date indicated above, and a letter from counsel was received on February 19, 1997 stating that the proposed stipulations had been exchanged between the parties and revisions were being considered.

Nothing was filed thereafter, and the three files remained dormant for another five or six months, without advice or communication of any kind from counsel.

On August 15, 1997 this judge wrote to both attorneys informing them that the cases dated back to December 1995 and had consistently been delayed thereafter because of assurances about a stipulation of fact that was never submitted. Counsel were reminded that the last correspondence was dated February 19, 1997, and that the matters had been pending for too long. Counsel were informed that unless definitive advice was received within the next ten days (following the August 15, 1997 letter) the three cases would be dismissed.

To date, no response or communication of any kind has been received.

Based on the foregoing, I **CONCLUDE** that the petitioners no longer request relief or are interested in pursuing their appeals. It is therefore **ORDERED** that these

matters be **DISMISSED** for lack of prosecution and abandonment of the petitions, in accordance with *N.J.A.C.* 1:1-14.4(a).

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 22, 1997
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

9/30/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NOS. EDU 10607-94, 10608-94, 12472-94
AGENCY DKT. NOS. 401-9/94, 402-9/94, 400-9/94

VINCENT FINCH, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, RESPONDENT,	:	
AND	:	
VIRGINIA MC ALINDEN, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, RESPONDENT,	:	COMMISSIONER OF EDUCATION DECISION
AND	:	
GEORGE BROWNLEE, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY, RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the consolidated matters herein should be dismissed for failure to prosecute based on the circumstances set forth in the initial decision.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL dismissing the instant Petitions of Appeal as his final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 3, 1997
DATE OF MAILING NOVEMB ER 3, 1997

575-97

D.C., on behalf of minor child, L.M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 3, 1997

OAL DKT. NO. EDU 987-97
AGENCY DKT. NO. 26-1/97

D.C., on behalf of minor child, L.M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 3, 1997
DATE OF MAILING NOVEMBER 3, 1997

576-97

RAYMOND DWYER, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CAMILLE FITZPATRICK,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 3, 1997

OAL DKT. NO. EDU 5906-97
AGENCY DKT. NO. 173-5/97

RAYMOND DWYER, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CAMILLE FITZPATRICK,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 3, 1997
DATE OF MAILING NOVEMBER 3, 1997

577-97

MARGARET MONK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 3, 1997

OAL DKT. NO. EDU 4014-97
AGENCY DKT. NO. 119-4/97

MARGARET MONK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 3, 1997
DATE OF MAILING NOVEMBER 3, 1997

579-97

579-97 SEC

IN THE MATTER OF TIMOTHY KLEIN, :

BOARD MEMBER, SALEM COUNTY : COMMISSIONER OF EDUCATION

SPECIAL SERVICES SCHOOL : DECISION

DISTRICT, SALEM COUNTY. :

_____:

NOVEMBER 5, 1997

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
TIMOTHY KLEIN,	:	
Salem County Special Services	:	
School District	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-31 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Timothy Klein is a member of the Board of Education of the Salem County Special Services School District and thus a "school official" under the Act; and

WHEREAS, the deadline to file his disclosure statement was April 30, 1997; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that Mr. Klein did not file his disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission did not take action against school officials who failed to file disclosure statements until July 1997; and

WHEREAS, the Commission issued an Order on July 22, 1997, directing Timothy Klein to Show Cause why the Commission should not find him in violation of the Act for failing to file his disclosure statement; and

WHEREAS, Mr. Klein failed to reply to the Order to Show Cause although the return receipt indicates that he received the Order on August 4, 1997; and

WHEREAS, on September 5, 1997, the Commission notified Mr. Klein that the Commission would discuss this matter at its September 23, 1997 meeting, that he had the right to attend, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission's staff called Mr. Klein's district to inquire as to why he had not filed and was advised in writing by the Assistant to the Business Administrator that Mr. Klein "has been given the opportunity to provide his financial disclosure statement, but has declined"; and

WHEREAS, the Commission finds that his failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-26; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is removal from the board, especially in light of his failure to respond to any of the Commission's correspondence;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Tim Klein violated N.J.S.A. 18A:12-26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: September 26, 1997

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, PO 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

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IN THE MATTER OF TIMOTHY KLEIN,	:	
BOARD MEMBER, SALEM COUNTY	:	COMMISSIONER OF EDUCATION
SPECIAL SERVICES SCHOOL	:	DECISION
DISTRICT, SALEM COUNTY.	:	
	:	

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named school official for failure to file an annual financial disclosure statement required by *N.J.S.A.* 18A:12-26 on or before April 30 of each year, or within 30 days of election or appointment; and

Whereas, the School Ethics Commission sent ample notice, including an Order to Show Cause pursuant to *N.J.A.C.* 6:3-9.3(i), to the above-named school official concerning his failure to file an annual financial disclosure statement; and

Whereas, the Commission voted on September 23, 1997, to recommend removal of the above-named school official for failure to file an annual financial disclosure statement in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on September 26, 1997, the above-named school official was afforded an opportunity to submit to the Commissioner comments regarding said resolution recommending his removal from Board membership; and

Whereas, the above-named school official filed no response to the Commissioner regarding this sanction; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission, and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.

COMMISSIONER OF EDUCATION

NOVEMBER 5, 1997
DATE OF MAILING NOVEMBER 5, 1997

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580-97 E

JACK JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

NOVEMBER 5, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 9421-97

Agency Dkt. No. 356-9/97

JACK JACOBS

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY

Respondents.

Jack Jacobs, *pro se*

Phillip E. Stern, Esq., for respondents

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

Petitioner, Jack Jacobs, seeks emergent relief of transportation from respondent, Board of Education of the Northern Valley School District (District), for his son, Daniel, age 17. Daniel is not enrolled in the District. Instead, he receives home schooling. In July 1997, Jacobs enrolled Daniel in the Bergen County Technical School for school year 1997-1998. Daniel now receives home schooling in the morning and attends vocational school in the afternoon.

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

Jacobs drives his son to and from school which is 12 miles each way. Jacobs asserts that the District must provide transportation for his son. He relies on the acceptance of Daniel as a student by the Bergen County Technical School and a document from the District regarding payment of tuition for Daniel's attendance at the vocational school. Additionally, Jacobs maintains that it is a hardship to drive his son to school everyday because it interferes with his work schedule. Jacobs owns and operates a small business.

The District argues that it is not required to provide transportation to students who are not enrolled in the District. Indeed, such a precedent would result in financial hardship. Further, petitioner has not met the standard for emergent relief.

I have considered carefully the position of the parties. The purpose of emergent relief is to preserve the status quo pending the outcome of a full hearing on the merits. *N.J.A.C.* 1:1-12.6 (a) provides that "where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon the application of a party". In *Crowe v DeGioia,* 90 *N.J.* 126 (1982), the court was guided by "certain fundamental principals" to determine whether emergent relief should be granted.

First, the moving party must show that emergent relief is necessary to prevent irreparable harm. Harm is considered irreparable if it cannot be redressed adequately by money damages. Here, if petitioner prevails, he can be reimbursed for transportation costs. Thus, neither petitioner nor his son will suffer irreparable harm if transportation is not immediately provided by the District.

Second, the moving party must make a preliminary showing of a reasonable probability of ultimate success on the merits. Parents who elect to educate their children at home must demonstrate to the local school district that the instruction provided is equivalent to that provided in the public schools. *N.J.S.A.* 18A:38-25. The

obligations of local school districts to students receiving home schooling are limited. For example, students who are instructed at home are not carried on local registers and "have no right to attendance at any school function limited to enrolled students or to participate in extra-curricular activities." Memorandum, Re: Commonly Asked Questions Relating to Home Schooling, The Department of Education, March 10, 1982. Moreover, they enjoy no entitlement to any diploma or certificate of completion issued by the local school district. *Ibid.* *N.J.S.A.* 18A:39-1 sets forth when a local school district is obligated to provide transportation. In some instances, local school districts are required to provide payment in lieu of transportation. Here, it is undisputed that Daniel is not enrolled in the District. Moreover, the District has not developed his curriculum or referred him to the vocational school. Petitioner has not made a preliminary showing of a reasonable probability that he will succeed on the merits.

To determine whether petitioner's request for emergent relief should be granted, I have also balanced the relative hardship of each party. The trip to the vocation school takes approximately 50 minutes each way. Indeed, the time that petitioner takes to drive his son to school may interfere with operating a business. Although petitioner did not quantify any financial hardship, he explained that the nature of his business required his presence. On the other hand, the District will incur additional expenses if it is directed to provide transportation pending the result of a full hearing on the merits.

Based on the above, I **CONCLUDE** that petitioner has failed to show that irreparable harm will result if emergent relief of transportation is denied.

Therefore, it is **ORDERED** that petitioner's request for emergent relief of transportation is **DENIED**.

This order may be reviewed by the **Department of Education** either upon interlocutory review, pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

October 8, 1997
DATE

Mumtaz Bari Brown
MUMTAZ BARI-BROWN, ALJ

cb

OAL DKT. NO. EDU 9421-97
AGENCY DKT. NO. 356-9/97

JACK JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter and the initial order of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, which included an audio cassette tape of the hearing conducted at the OAL, the Commissioner determines to reverse the initial decision of the Administrative Law Judge. Initially, the Commissioner observes that the sole relief requested by petitioner is transportation for his son, D.J., a home-schooled student, to the Bergen County Vocational-Technical School, where it is undisputed that D.J. has been admitted.[1] Petitioner acknowledges that his son is not presently enrolled in the Northern Valley Regional School District. However, as required by law, respondent is apparently paying D.J.'s tuition to the vocational school, as petitioner, notwithstanding his initial prayer in the Petition of Appeal, did not request relief in the form of tuition at the hearing.[2]

[1] It is noted that, although petitioner named the Bergen County Superintendent of Schools as respondent in his initial filings, along with the Board of Education of the Northern Valley Regional School District, the Bergen County Superintendent is deemed severed from this matter since petitioner's allegations and requested relief do not in any way involve the County Superintendent.

[2] Although tuition appears to no longer be an issue in this matter, to the extent it was duly raised in the Petition of Appeal and may later be disputed, the Commissioner finds that the Board is obligated, pursuant to *N.J.S.A.* 18A:54-20.1, to pay the tuition for D.J. to the county vocational program, as he is a resident of the District.

The Commissioner recognizes that the pupil transportation statute provides, in pertinent part, that

> [w]henever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than 2 1/2 miles from their public school of attendance, the district shall provide transportation to and from school for these pupils. *N.J.S.A.* 18A:39-1.

The Board does not contest that D.J. is entitled to be admitted to the Bergen County Vocational-Technical School, notwithstanding that he is not enrolled in the Northern Valley Regional School District. *N.J.S.A.* 18A:54-20.1. Where a student is attending a public vocational school by statutory right, with tuition paid by the local district of residence, the pupil transportation statute does *not* require that the student be "enrolled" in the responsible local district in order to be entitled to transportation services from that district. Instead, the statute merely requires that the student reside in the district and live remote from the "public school of attendance."[3]

Accordingly, the initial decision of the OAL is reversed. Respondent is hereby directed to provide transportation for D.J. to the Bergen County Vocational-Technical School, pursuant to *N.J.S.A.* 18A:39-1, and this matter shall be returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[3]The circumstance presented herein is to be clearly distinguished from attendance at out-of-district public schools on a voluntary tuition basis pursuant to *N.J.S.A.* 18A:38-3, which, for transportation purposes, is analogous to attendance at a nonpublic school.

580-97

EDU #9421-97
C # 580-97E
SB # 94-97

JACK JACOBS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 5, 1997

For the Petitioner-Respondent, Jack Jacobs, pro se

For the Respondent-Appellant, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Cheri L. Maxwell, Esq., of Counsel)

After reviewing the record developed thus far in this matter and the papers submitted in this appeal, the State Board of Education affirms that portion of the Commissioner's determination which awarded petitioner the transportation costs he had requested in his application for emergent relief. We do so, however, under the applicable legal standard for such relief, Crowe v. De Gioia, 90 N.J. 126 (1982), rather than on the merits of petitioner's claim for transportation. In addition, under the De Gioia standard, we set aside that portion of the Commissioner's decision which would expand emergent relief to include the payment of tuition by the Northern Valley Regional School District. Since petitioner did not seek the payment of tuition during the

3/4/98

proceedings in the Office of Administrative Law on his application for emergent relief, he has not demonstrated his entitlement to such relief at this time.

Pursuant to our determination, we direct the Commissioner to transmit this matter to the Office of Administrative Law for initial determination of the merits of petitioner's claims to both transportation and tuition. In view of our decision herein, we need not act on the Board's motion for a stay of the Commissioner's directive that it now pay petitioner's tuition.

March 4, 1998

Date of mailing MAR 06 1998

581-97

S.W.H. AND D.S.H., on behalf of minor children, J.H.L. AND J.H.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning relatives challenged Board's residency determination that minor nieces, J.H.L. and J.H.L., were not domiciled in the District.

Citing *Gunderson*, the ALJ found that petitioners met the requirements of the "affidavit student" law. Petitioners did prove that they were the sole caretakers and supporters of the children. ALJ concluded the children were not seeking to be educated in Fort Lee solely for the purpose of receiving a free education; thus, J.H.L. and J.H.L. were entitled to admittance in the District.

Commissioner adopted findings and determination in initial decision as his own.

NOVEMBER 10, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3305-96
AGENCY DKT. No. 69-2/96

S.W.H. AND D.S.H. ON BEHALF OF MINOR CHILDREN J.H.L. AND J.H.L.,
Petitioner,
v.
BOARD OF EDUCATION OF FORTLEE, BERGEN COUNTY,
Respondent.

Keith J. Roberts, Esq, for petitioners

Robert T. Tessaro., Esq., for respondent

Record Closed: September 11, 1997 Decided: September 17, 1997

BEFORE **IRENE JONES,** ALJ:

On February 26, 1996, petitioners, Sang Woo Han and Dae Sook Han, on behalf of two minor nieces J.H.L. and J.H.L., filed a petition with the Commissioner of Education (Commissioner) seeking to have their nieces admitted to the Fort Lee Public School System. Respondent, Fort Lee Board of Education, filed an Answer to the petition on March 8, 1996 wherein it admitted that it had denied the petitioners' request for admission to its public school district because they had failed to meet the legal

requirements for admission. Nevertheless, respondents allowed the minor children to attend school pending the disposition of the instant matter. On March 18, 1996, the Commissioner transmitted the matter to the Office of Administrative Law for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 14F-1 to 13. A hearing was held on July 9, 1997. The record closed on September 14, 1997 upon submission of briefs by the parties.

ISSUES

Whether the petitioners has established that J.H.L. and J.H.L. are entitled to a free public education in the respondent's school district pursuant to *N.J.S.A.* 18A:38-1.

STATEMENT OF THE FACTS

I **FIND** the following facts to be undisputed and thus they are adopted as the **FACTS**.

The petitioners, S.W.H. and D.S.H. reside in the Borough of Fort Lee. On or about December 26, 1995, Mrs. Boo-Rim Ahn, (Ahn) the sister of the petitioner, D.S.H. sent her two children from Seoul, Korea to live with the petitioners. Mrs. Ahn is a divorcee and is employed as a professional concert violinist with the Korea Broadcasting System Orchestra.

As a professional violinist, Mrs. Ahn is required to travel extensively around the world performing in such places as United States, Osaka, Japan, Vienna, Sydney and Australia. In addition, she is required to attend rehearsals. The constant travel requirements and time commitments has caused an inability for Mrs. Ahn to care for her children. Thus, she has relinquished all legal and parental responsibility to the petitioners. (P-2). Mr. Sung Hee Lee is the childrens' natural father and he also resides in Seoul, Korea also. According to Mrs. Ahns, he has "no personal or significant contact with Mr. Lee."

Petitioner, Mr. Han testified that he is the sole supporter of the two children. It is illegal to send money out of Korea and thus he receives no financial aid from his sister in law. He is currently self-employed at Gate Tour & Travel. The petitioners also have two children of their own, one of whom is a full-time out of state college student and the remaining child is at home. The four children are declared as dependents on the petitioners tax return. In 1996, the petitioners filed a joint tax return reporting income of $27,000. However, Mr. Han noted that he was laid off for six months in 1996 and thus his income was down from the $50,000 of income he had reported in 1995. While his income for 1996 was reduced, Mr. Han testified that it was not a financial hardship because the family lives a very modest life style.

DISCUSSION, FINDINGS AND CONCLUSION

Respondent contends that the petitioners have failed to meet the required burden of proof. First "it strains credibility that the petitioner's are the sole supporters of the children given their income.

Second, the fact that the children intend to remain with the petitioners only until they go to college, defeats the supposition that this is a long term transfer of guardianship. Rather, it supports that the present living arrangement is solely to obtain a free public education in a renowned public school district.

Third, the respondent asserts that petitioners have failed to show that there is a family or economic hardship. Petitioners have failed to demonstrate that the Mrs. Ahn's business travels renders her incapable of providing for her children. *J.B. v. Ocean Twp. Bd. of Ed.*, 96 *N.J.A.R.2d* 628 (1996).

Petitioners contend that they have satisfied by a preponderance of the credible evidence that the children are not solely in the District to receive a free education. Further, they have demonstrated a legitimate family hardship within the intendment of

N.J.S.A. 18A:38-1(b). The law does not preclude the natural mother from granting guardianship of her minor children to her immediate family with the benefit of a free public education. The family hardship of divorce and Mrs. Ahn's inability to care for her children with the restraints of her profession satisfies the statute. Hardship may take many forms. Further, the application of the hardship element of the statute must not overshadow the general intent of the statute which permits entry of a student to the district who demonstrates good faith, *bona fide* gratis guardianship of non-parents, and actual permanent domicile in the district.

Further, the Board's reliance on *J.B. v. Ocean Twp. Bd. of Ed.,* 96 *N.J.A.R.2d* 628 (1996), is misguided. The Commissioner's analysis of the statute in the *Ocean* decision does not, in any way, support a finding that the minors in the instant case are not entitled to a free public education. The hardship analysis in the *Ocean* decision, as decided on remand, clearly states that "the absence of evidence on the record to rebut petitioner's account of the genesis of the current living arrangement precludes the Commissioner from finding that such arrangement is merely a facade to allow R.H. to attend Ocean Twp. . . . the essential evil which the pertinent statute attempts to defeat. *J.B. v. Ocean Twp. Bd. of Ed., supra.*

This matter is governed by *N.J.S.A.* 18A:38-1 which provides:

> Public Schools shall be free to the following persons over five and under twenty years of age.
>
> a. Any person who is domiciled within the school district;
>
> b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his

> tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. . . .

There are four requirements imposed by *N.J.S.A.* 18A:38-1(b). First, the petitioners must establish domicile within respondent's school district. Second, the petitioners must demonstrate that they are supporting their nieces gratis. Third, it must be shown that the children's family is not capable of supporting or providing care for them due to family or economic hardship. Fourth, it must be shown that the children are not residing with the petitioners solely for the purpose of receiving a free public education in respondent's school district. The burden of proof is on the petitioners to demonstrate each and every element. *N.J.S.A.* 18A:38-1(b).

N.J.S.A. 18A:38-1(b) provides that the child cannot reside with the resident of a school district solely for the purpose of receiving a free public education within the district. Thus, by the plain meaning of the statute, if other motives besides a desire to receive a free public education within that particular school district can be found to explain why the child has taken up residence with the person domiciled in the school district, this requirement of the "affidavit student" law has been satisfied.

In this case, the children have relatives domiciled in the United States who are willing to support them gratis, and this fact, more than a specific desire to go to school in Fort Lee, that has dictated their choice of residence. Indeed, the fact that residency was established in Fort Lee is purely happenstance. If their relatives had resided in Teneck, for example, they would have enrolled in that school district. Thus, I **FIND** J.H.L. and J.H.L. are not seeking to be educated in Fort Lee solely for the purpose of receiving a free education within a "renowned school district."

By operation of the affidavit student law, it must also be shown that J.H.L. have been sent to live with the petitioners due to "family or economic hardship". This requirement, however, has not been strictly construed by the Commissioner. In *Gunderson v. City of Brigantine Bd. of Ed.*, 95 *N.J.A.R.2d* (EDU) 39, the Commissioner ruled that:

> In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. *N.J. Builders, Owners, & Managers Association v. Blair*, 60 *N.J.* 330, 333 (1972). Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy. *Brewer v. Porch*, 53 *N.J.* 167, 174 (1969); *San-Lan Builders, Inc. v. Baxendale*, 28 *N.J.* 148, 155 (1958).
>
> The amendments to *N.J.S.A.* 18A:38-1 effectuated by P.L. 1993, c. 380 were intended to ease the burden on local boards of education by attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile. (See Sponsor's Statement, Senate Education Committee Statement ad Governor's Conditional Veto Message to Senate Bill No. 1447 of 1993, enacted as c. 380).
>
> The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the nonparent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, do(sic) to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in ensuring the

> education of all its children. *Sabella v. Lacey Tp.*, 204 *N.J. Super* 55, 60 (App. Div. 1985); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins. Co.*, 52 *N.J.* 73, 77 (1968). [*Id*, at 42 (*emphasis added*)]

I **FIND** that the petitioners have met the requirements of the "affidavit student" law as articulated by the Commissioner in Gunderson, supra. The children have no possibility of school attendance, in any district in the State other than with the non-parent district resident. Thus, the petitioners are for all intents and purposes the sole caretaker and supporter of the children. *Ibid.* It is undisputed that the petitioners has taken full charge of the children's welfare. The children herein would have no entitlement to an education anywhere in the U.S. The spirit of the law in this case should control over the letter, for to hold otherwise would work a substantial injustice by harming a party the legislature never meant to penalize, and would subvert the state's interest in providing an education for its children.

In *J.B. v. Ocean Twp Bd. Of Ed.,* 96 *N.J.A.R.2d* 628 (1996) the Commissioner's decision on remand makes clear that a family hardship can exist notwithstanding that the natural parents are financially capable of taking care of their child. However, a family hardship will exist where the facts demonstrate that the parents are incapable of meeting the child's emotional, social and developmental needs. In the instant matter, respondent have not rebutted that Mrs. Ahn's professional commitments render her incapable of caring for the children. Nor did the respondent refute that the father has no contact with his children. Likewise, there is insufficient evidence to refute that the petitioners are the sole caretakers. While one may speculate that $27,000 is insufficient to provide for a family of four, such speculation does rise to competent evidence. I am, in any event, persuaded by Mr. Han's testimony that the family lives modestly and the level of his earnings does not present a financial hardship for the family.

For the foregoing reasons, I **CONCLUDE** that J.H.L. and J.H.L. are entitled to admittance in the respondent's school district.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

9/17/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 30 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

S.W.H. AND D.S.H., on behalf of minor children, J.H.L. AND J.H.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were filed on an untimely basis and, therefore, such exceptions are not considered herein.[1]

Upon a careful and independent review, the Commissioner concurs with the findings of the Administrative Law Judge (ALJ) as clarified herein. Initially, the Commissioner agrees that, pursuant to *N.J.S.A.* 18A:38-1, minors J.H.L. and J.H.L. are entitled to a free public education in respondent's District. In this regard, the Commissioner is cognizant of the State Board's recent guidance concerning a petitioner's burden to demonstrate family or economic hardship in order to fulfill the requirements of the affidavit student statute. The State Board has specifically provided that

> ***in order to satisfy that standard, the family or economic hardship must be real and demonstrable, evincing a current

[1] Respondent's exceptions, due on October 14, 1997, were received in the Office of the Commissioner and by the Bureau of Controversies and Disputes on October 15, 1997. In that there was no indication by respondent that they were faxed or proof that they were otherwise filed on October 14, 1997, they may not be considered pursuant to *N.J.A.C.* 1:1-18.4(a).

> incapability on the part of [the minor children's] parents to support [them] or provide care as the result of that hardship." (*J.B., on behalf of her grandchild, R.H. v. Board of Education of the Twp. of Ocean, Monmouth County*, decided by the State Board of Education September 3, 1997, slip opinion at p. 6)

Here, petitioners have established before the ALJ that the minors' parent is presently incapable of supporting or providing care for her children, due to family hardship, in that she is a professional concert violinist who is required to constantly travel around the world and is, therefore, unable to meet the childrens' emotional, social and developmental needs or provide a stable home environment. The Commissioner has no cause to question the ALJ's assessment of petitioners' credibility as such assessment is not belied by the record.

Accordingly, the Commissioner affirms the initial decision of the OAL for the reasons expressed therein. [2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[2] To the extent that the ALJ's comments at page 5 might be subject to misconstrual, the Commissioner clarifies that a finding of intent to attend school in a district other than that of domicile, so as to preclude eligibility for attendance at school under *N.J.S.A.* 38-1b, does not require that the family have chosen the particular district at issue, as opposed to some other district within the country or state, as the intended district of attendance. See *P.B.K., on behalf of minor child, E.Y. v. Board of Education of the Borough of Tenafly, Bergen County*, decided by the Commissioner October 14, 1997.

NOVEMBER 10, 1997
DATE OF MAILING NOVEMBER 10, 1997

581-97

EDU #3305-96
C # 581-97
SB # 96-97

S.W.H. AND D.S.H., on behalf of minor children, J.H.L. AND J.H.L.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 10, 1997

For the Petitioners-Respondents, Keith J. Roberts, Esq.

For the Respondent-Appellant, Robert T. Tessaro, Esq.

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

March 4, 1998

Date of mailing MAR 06 1998

584-97

584-97

DONALD GARLANGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, tenured teacher at Ancora Psychiatric Hospital, asserted respondent N.J. Department of Human Services improperly issued a written reprimand to him. Petitioner sought expungement.

ALJ found that respondent failed to follow the proper procedures for imposing disciplinary action which would result in a reduction in salary. Following intradepartmental hearing and the recommendation of the hearing officer, respondent recognized its error and imposed a written reprimand instead of suspension. If respondent had wished to suspend petitioner without pay, it would have had to follow the procedures set forth at *N.J.A.C.* 10:11-1.8(b) through (h) and *N.J.A.C.* 6:24-5.4. No such suspension was ever imposed. Thus, ALJ determined that to contest the validity of his reprimand, petitioner should have sought relief in the appropriate forum not before the Commissioner of Education. Petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

NOVEMBER 13, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION

TO DISMISS

OAL DKT. NO. EDU 2637-97

AGENCY DKT. NO. 62-2/97

DONALD GARLANGER,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,

Respondent.

Geoffrey B. Gompers, Esq., for petitioner

Jennifer Meyer-Mahoney, Deputy Attorney General, for respondent (Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: August 19, 1997 Decided: October 2, 1997

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on February 14, 1997, when Donald Garlanger (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order, inter alia, expunging from his personnel records a written reprimand issued to him by the State

Department of Human Services, Ancora Psychiatric Hospital (hereinafter respondent). On March 14, 1997, an answer on behalf of respondent and a notice of motion to dismiss the petition along with supporting papers were filed. Petitioner filed a response to the motion on March 31, 1997, wherein he requested oral argument. Oral argument on the motion was considered by telephone conference call on June 25, 1997, at which time the undersigned requested additional documentation from respondent's attorney. The affidavit and time records which had been requested were supplied by respondent's counsel under cover letter dated July 10, 1997. Petitioner filed a letter reply dated July 30, 1997, and forwarded a copy of Ancora's notice of official reprimand which remains in petitioner's personnel file. This latter document was received on August 19, 1997, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a disposition of this motion are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner is a tenured Teacher I employed by the Department of Human Services and assigned to Ancora Psychiatric Hospital. On or about May 8, 1996, respondent issued to petitioner a "Notice of Suspension from Duty Without Pay" setting forth the following charges and specifications:

CHARGES:

1. A-11.1 - Leaving assigned work area without permission but not creating a danger to persons or property.

2. C-25.1 - Threatening and intimidating a fellow employee on State property.

SPECIFICATIONS:

1. On 3/28/96 between 9:15 a.m. and 9:30 you were in the Vocational Rehab wing and Maple Center during your scheduled program time without permission from your supervisor. On 4/16/96 you left the Maple School area from 1:30 until 2:30 p.m. without permission from your supervisor.

2. On 3/28/96 you followed Ms. Davis from the Vocational wing to the center of Maple yelling at and about her. On 3/29/96 you pointed your finger within 6 inches of Ms. Cohan's chest stating loudly that she was "in trouble" and "violating federal law."

An intra-departmental hearing was conducted on June 26, 1996, July 11, 1996 and September 26, 1996, following which the hearing officer concluded that management had met the burden of proof by a preponderance of the credible evidence and recommended that petitioner receive a 5-day suspension. By letter dated November 20, 1996, respondent wrote to petitioner as follows:

> Please be advised that your disciplinary action dated May 8, 1996 for a five (5) day suspension has been reconsidered and a penalty of an Official Reprimand is being imposed. The disciplinary action appeal hearing that was held on June 26, 1996, July 11, 1996 and September 26, 1996 will constitute your institutional appeal hearing.
>
> If you wish to appeal the penalty of this Official Reprimand further, you may do so by checking C. on Part III of the enclosed form.

Respondent acknowledges that it failed to follow the procedures set forth at N.J.A.C. 6:24-5.4, which are required before a tenured teaching staff member may be reduced in compensation or removed. By way of explanation for its failure to follow tenure procedures, respondent states that Ancora Psychiatric Hospital employs very few teachers and consequently is not familiar with tenure hearings and did not realize that petitioner should be treated differently than the other

members of the professional unit represented by CWA. No portion of the proposed 5-day suspension was ever served and petitioner did not suffer any reduction in compensation as a result of the disciplinary proceedings against him. The May 8, 1996 Notice of Suspension from Duty Without Pay has been removed from petitioner's personnel file and replaced with a Notice of Official Reprimand, dated November 20, 1996.

APPLICABLE LAW AND DISCUSSION

As a tenured teacher petitioner is entitled to the protections of the Teacher Tenure Act, N.J.S.A. 18A:60-1 to 60-3. N.J.S.A. 18A:60-2, relevant to dismissal and reduction in salary for tenured personnel at State institutions provides:

> No such professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher, or other person employed in a teaching capacity, so under tenure, shall be dismissed or subjected to a reduction in salary except for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. (N.J.S.A. 18A:6-9 to 6-29)

Regulations adopted by the Department of Human Services implementing the provisions of N.J.S.A. 18A:60-1 and 18A:60-1.1, are also relevant to a determination in this matter and provide in pertinent part:

> N.J.A.C. 10:11-1.8 Disciplinary action-tenured staff
>
> (a) In a case where disciplinary action is recommended or implemented, which does not result in dismissal or reduction in salary, as a result of charges made against a tenured employee of the Department of Human Services, the appointing authority (in conjunction with the Supervisor of Education, for all instructional staff) shall act in accordance with Department of Human Services Administrative Order 4:08, a copy of which may be obtained from the employing facility.

> (b) In a case where disciplinary action will result in dismissal or reduction in salary, the charges shall be filed with the Director of Employee Relations. The charges shall be accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person or persons instituting such charges.
>
> . . .

Unquestionably, in the within matter respondent failed to follow the proper procedures for imposing disciplinary action which would result in a reduction in salary. Following the intra-departmental hearing and the recommendation of the hearing officer, respondent obviously recognized its error and imposed instead a written reprimand. If respondent had wished to suspend petitioner without pay, it would have had to follow the procedures set forth at N.J.A.C. 10:11-1.8(b) through (h) and N.J.A.C. 6:24-5.4. No such suspension was ever imposed in the within matter, however. Respondent disciplined petitioner by imposing an official reprimand for leaving his assigned work area without permission and for threatening and intimidating a fellow employee. The jurisdiction of the Commissioner of Education extends to controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. The only school laws cited by petitioner are those protecting his tenure rights. No statute or regulation is cited which entitles a tenured teacher at a State institution to a hearing before the Commissioner to review the appropriateness of a reprimand unaccompanied by any salary reduction or loss of position, and I am not aware of any such legal authority which would entitle petitioner to a plenary hearing herein. Respondent utilized the disciplinary procedures established pursuant to N.J.A.C. 10:11-1.8 for imposing progressive discipline upon employees of the Department of Human Services (Administrative Order 4:08). If petitioner wished to contest the validity of his reprimand, he should have sought relief in the appropriate forum for such an appeal, not before the Commissioner of Education.*

---

* The petition also alleges retaliation for union activities, but the Commissioner of Education is not the appropriate forum for resolving that labor relations issue, either.

For all of the foregoing reasons, it is **ORDERED** that the Petition of Appeal is hereby **DISMISSED** and the within proceedings are hereby **CONCLUDED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 2, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10/3/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 6 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 2637-97
AGENCY DKT. NO. 62-2/97

DONALD GARLANGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge's (ALJ) view that the within matter is properly dismissed. When respondent determined that it failed to follow proper procedures for imposing disciplinary action upon a tenured staff member which would result in a reduction in salary, respondent reconsidered its penalty and, instead, imposed a penalty of reprimand. Having done so, its action no longer implicated *N.J.S.A.* 18A:60-2. Any matters remaining are, as noted by the ALJ, outside the jurisdiction of the Commissioner.

Accordingly, the initial decision of the ALJ is affirmed for the reasons expressed therein. The Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 13, 1997
DATE OF MAILING NOVEMBER 13, 1997

585-97

585-97

JOHN SCOTT,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF JOHN SCOTT, SCHOOL DISTRICT OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOL, OCEAN COUNTY.	:	
_____	:	

NOVEMBER 13, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

APPROVING SETTLEMENT

OAL DKT. NOS. EDU 4546-96,
EDU 6243-96 & EDU 957-97
AGENCY DKT. NOS. #150-4/96,
118-5/96 & 38-1/97
(CONSOLIDATED)

JOHN SCOTT,

Petitioner,

v

BOARD OF EDUCATION OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOLS,

Respondent.

and

BOARD OF EDUCATION OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOLS,

Petitioner,

v.

JOHN SCOTT,

Respondent.

Arnold M. Mellk, Esq., for John Scott (Wills, O'Neill & Mellk, attorneys)

Robert C. Shea, Esq., for the Board of Education of the Ocean County Vocational-Technical Schools (Shea & Novy, attorneys)

Record Closed: September 30, 1997 Decided: September 30, 1997

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENTS OF THE CASES

John Scott, a tenured teacher in the Ocean County Vocational-Technical School, operated by the Board of Education of the Ocean County Vocational School (BOE) was the subject of tenure charges and, citing N.J.S.A. 18A:6-8.3, -14, Mr. Scott demanded an order requiring the BOE to provide pay, etc. Thereafter, the BOE eliminated Mr. Scott's position and he claimed that the BOE acted in bad faith. N.J.S.A. 18A:6-10, -11. The cases have been settled as evidenced by the attached stipulation of settlement.

PROCEDURAL HISTORY

EDU 4546-96

On April 26, 1996, Mr. Scott's verified petition demanding an order directing the BOE to pay his salary, etc., was filed with the Department of Education and, on May 13, 1996, the BOE's answer to the verified petition was filed. N.J.S.A. 18A:6-9. The Department transmitted the matter to the Office of Administrative Law (OAL) where, on May 28, 1996, it was filed as a contested case, bearing OAL docket number EDU 4546-96. N.J.S.A. 52:14B-2(b). On June 11, 1996, Mr. Scott's papers in support of his motion for summary judgment were filed in the OAL and, on July 8, 1996, the BOE's responding papers were so filed.

EDU 6243-96

On May 1, 1996, the BOE's tenure charges against Mr. Scott were filed with the Commissioner of the Department of Education. N.J.S.A. 18A:6-11. On June 21, 1996, Mr. Scott's answer to the tenure charges was so filed. The Department transmitted the matter to the OAL where, on July 8, 1996, it was filed as a contested case, bearing OAL docket number EDU 6243-96.

The cases were consolidated and, in my September 25, 1996 "Order Granting Motion for Partial Summary Decision," I ordered BOE to pay to Mr. Scott's full pay or salary, etc., for the period from April 8 to May 1, 1996. N.J.A.C. 1:1-17.3.

Mr. Scott's papers in support of the motion for an order requiring the BOE to pay Mr. Scott's full salary pursuant to N.J.S.A. 18A:6-14 were filed on October 16, 1996 and, in my October 31, 1996 "Order Granting Motion for Partial Summary Decision," I ordered BOE to pay to Mr. Scott's full pay or salary, etc., "less any sums received by [Mr. Scott] by way of pay or salary from any substituted employment assumed during such period of suspension," conditioned upon Mr. Scott's submission to the BOE of information relative to his income.

EDU 957-97

On January 31, 1997, Mr. Scott's petition challenging the BOE's abolition of his position was filed and, on February 13, 1997, the BOE's answer to the petition was filed with the Commissioner of the Department of Education. The Department transmitted the matter to the OAL where, on February 25, 1997, it was filed as a contested case, bearing OAL docket number EDU 957-97.

The cases were consolidated and scheduled for a hearing in May 1997 and, on April 14, 1997, the BOE filed a motion for summary decision, dismissing EDU 957-97. Mr. Scott filed a letter brief in opposition to the motion. Before a decision on the motion or the hearing occurred, the attorneys prepared a settlement agreement, conditioned upon approval by the BOE. The BOE did not approve of the settlement agreement and I notified the attorneys of the following: The

BOE's exhibits in support of its motion include the Superintendent's affidavit and the BOE's resolution explaining and citing reasons of economy as the basis of the elimination of Mr. Scott's position. Mr. Scott's letter brief suggested that the reasons of economy were a pretext for releasing Mr. Scott. However, Mr. Scott no submitted competent evidence of bad faith sufficient to create a genuine issue of material fact. Consequently, in a letter/order, dated September 4, 1997, granted the BOE's motion to dismiss EDU 957-97. N.J.A.C. 1:1-12.5; Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, (App. Div. 1995), certif. den. 145 N.J. 372 (1996); Guarini v. Ocean County Vocational-Technical School District, 96 N.J.A.R. 2d (EDU) 331).

On September 18, 1997, the cases were scheduled for hearing. At that time, on a taped record made in the OAL, the parties entered into the settlement agreement whereby they agreed to withdraw and settlement of the claims, etc., set forth in these cases. On September 30, 1997, the attached, written, executed stipulation of settlement agreement and a joint certification of counsel were filed.

FINDINGS OF FACT & CONCLUSIONS OF LAW

I have reviewed the settlement agreement and I **FIND** and **CONCLUDE**:

1. The parties have voluntarily entered into the settlement agreement.

2. The settlement disposes of all issues in controversy and is consistent with the law.

3. The settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and should be approved.

ORDER

I approve the settlement agreement, **ORDER** that the parties comply with it and **ORDER** that these proceedings be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec 30, 1997
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

10/2/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

Arnold M. Mellk, Esq.
WILLS, O'NEILL & MELLK
10 Nassau Street, P.O. Box 614
Princeton, New Jersey 08542
609-924-0700
Attorneys for Petitioner

JOHN SCOTT, Petitioner, v. OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT OCEAN COUNTY, Respondent.	:	STATE OF NEW JERSEY COMMISSION OF EDUCATION OAL Docket No. EDU 4546-96, Agency Ref. No. 150-4/96 OAL Docket No. EDUOR 00957-97S Agency Ref. No. 38-1/97 OAL Docket No. EDUTH 06243-96S Agency Ref. No. 118-5/96S **STIPULATION OF SETTLEMENT**

On September 8, 1997, the parties placed on the record before the Honorable John K. Tassini, ALJ, the following terms for a full and final resolution of the above-captioned matters, subject to the approval of the Commissioner of Education. The individual parties have acknowledged to the court their understanding of and agreement to these terms and to the fact that the agreement was reached voluntarily. The court has indicated its approval of this resolution.

1. John Scott will withdraw, with prejudice, his petition, OAL Docket No. EDU 4546-96 EDUOR 00957-97S, Agency Ref. No. 150-4/96 38-1/97, and the Ocean County Vocational-Technical School District Board of Education, upon approval by the Commissioner of Education, withdraws the tenure charges against John Scott, OAL Docket No. EDUTH 06243-96S, Agency Ref. No. 118-5/96.

2. John Scott shall resign from the Ocean County Vocational-Technical School

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

effective the date of the Commissioner's approval of this agreement. His resignation shall be in good standing.

3. The Board of Education shall pay to John Scott, $5,000.00, lump sum, in consideration for any and all claims for back pay.

4. The parties shall agree to execute mutual releases which shall incorporate therein all terms of the settlement relating to the within matters.

5. The parties fully agree and understand that the terms and conditions as set forth within are subject to confidentiality.

6. The parties fully understand and agree that John Scott forgoes his right of appeal regarding the Order entered on September 4, 1997 with regard to EDUOR 00957-97S relating to the Reduction in Force Motion for Summary Judgment.

7. The Ocean County Vocational-Technical Schools fully understands and agrees that there shall be no appeal relating to the Order entered by this Court as it relates to EDUTH 4546-96S.

SHEA & NOVY
Attorneys for Ocean Co. Vo-Tech Schools

By: _____
Robert C. Shea

Date: September 25, 1997

WILLS, O'NEILL & MELLK
Attorneys for John Scott

By: _____
Arnold M. Mellk

Date: September 12, 1997

jlh/c:njea/scott/sttlmnt.stp

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& MELLK
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P.O. BOX 614
PRINCETON, NJ 08542

JOHN SCOTT,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF JOHN SCOTT, SCHOOL DISTRICT OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOL, OCEAN COUNTY.	:	

The record and initial decision incorporating a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured since he cannot be satisfied by the present record that the proposed settlement meets the *Cardonick* standards for settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 846.

It is well established that, having once taken up the burden of tenure charges, the Board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them.

In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, affirmed with modification by the State Board of Education November 2, 1983, affirmed N.J. Superior Court Appellate Division January 30, 1986. The present record contains no such explanation.

Further, there is no indication that the within teaching staff member was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer tenure determinations to the State Board of Examiners for possible revocation of certificate.

Therefore, while the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Additionally, the Commissioner is constrained to note that the language of the settlement on its face does not appear to contemplate that the settlement document will become a matter of public record as contested matters before the Commissioner generally are pursuant to *N.J.S.A.* 18A:6-9, when transmitted to the OAL pursuant to *N.J.A.C.* 6:24-1.1 and *N.J.A.C.* 1:1-1. *et seq.*

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate explication and clarification. If the parties are unwilling or unable to reach accord on a modified or more fully explicated agreement for submission to the Commissioner, the matter shall proceed to a determination on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 13, 1997
DATE OF MAILING NOVEMBER 13, 1997

585-97

EDU #4546-96, #6243-96 and #957-97(consolidated)
C # 585-97
SB # 42-98

JOHN SCOTT,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, OCEAN COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-APPELLANT,	:	DECISION
AND	:	
IN THE MATTER OF THE TENURE HEARING OF JOHN SCOTT, SCHOOL DISTRICT OF THE OCEAN COUNTY VOCATIONAL-TECHNICAL SCHOOL, OCEAN COUNTY.	:	

Decided by the Commissioner of Education, November 13, 1997

For the Petitioner/Respondent-Respondent, Wills, O'Neill & Mellk (Arnold C. Mellk, Esq., of Counsel)

For the Respondent/Petitioner-Appellant, Shea & Novy (Robert C. Shea, Esq., of Counsel)

The Board of Education of the Ocean County Vocational-Technical School District (hereinafter "Board") certified tenure charges of unbecoming conduct against John Scott (hereinafter "appellant"). a tenured teaching staff member. On November 13, 1997, the Commissioner of Education rejected a proposed settlement agreement entered into between appellant and the Board. The Commissioner stressed

June 3, 1998

that while he did not preclude the possibility of a settlement in this case, he found it necessary to ensure that the terms of the settlement were in accord with the principles expressed in Cardonick v. Board of Education of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. He therefore remanded this matter to the Office of Administrative Law for "revision of the settlement terms or other appropriate explication and clarification." Commissioner's Decision, slip op. at 8.

On February 6, 1998, appellant filed a notice of appeal from the Commissioner's decision with the State Board of Education. On April 27, 1998, the Director of the State Board Appeals Office advised appellant that the briefing schedule was being placed in abeyance pending the State Board's consideration of his request to file his notice out of time.

We find that the determination from which appellant is seeking to appeal is interlocutory in nature. Consequently, we have treated his notice as a request for leave to appeal an interlocutory decision. N.J.A.C. 6:2-2.3. After reviewing the papers submitted, we deny appellant's request pursuant to our discretion under N.J.A.C. 1:1-14.10. "[I]nterlocutory review may be granted only in the interest of justice or for good cause shown." In re Certain Sections of the Uniform Admin. Procedure Rules, 90 N.J. 85 (1982). We find that appellant has not demonstrated good cause requiring our review of the Commissioner's determination at this time. We add, moreover, that appellant's request was filed nearly three months after the Commissioner rendered his decision. N.J.A.C. 6:2-2.3 requires a motion for leave to appeal an interlocutory decision to be filed within five days after that decision.[1] Hence, appellant's request was

[1] By contrast, we note that an appeal to the State Board from a final decision of the Commissioner must be taken "within 30 days after the decision appealed from is filed." N.J.S.A. 18A:6-28.

also untimely, and we find no basis in this instance for relaxing the filing requirement. We note, in addition, that interlocutory rulings may be subject to review by the State Board upon appeal from a final decision of the Commissioner on the merits of the case. N.J.A.C. 1:1-14.10.

June 3, 1998

Date of mailing JUN 03 1998

586-97

586-97

D. McL., on behalf of minor child, D.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 13, 1997

OAL DKT. NO. EDU 2812-97
AGENCY DKT. NO. 79-3/97

D. McL., on behalf of minor child, D.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on October 23, 1997, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 13, 1997
DATE OF MAILING NOVEMBER 13, 1997

587-97

ROBERT PIZZELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 14, 1997

OAL DKT. NO. EDU 5143-97
AGENCY DKT. NO. 414-9/96

ROBERT PIZZELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 14,1997
DATE OF MAILING NOVEMBER 14,1997

588-97

588-97

K.K.P., on behalf of minor children, J.K.P. and S.K.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 14, 1997

OAL DKT. NO. EDU 1737-97
AGENCY DKT. NO. 22-1/97

K.K.P., on behalf of minor children, J.K.P. and S.K.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 14, 1997
DATE OF MAILING NOVEMBER 14, 1997

87-97

589-97
(87-97)

A.K., on behalf of minor child, M.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 14, 1997

OAL DKT. NO. EDU 3352-97
AGENCY DKT. NO. 387-9/95

A.K., on behalf of minor child, M.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 14, 1997
DATE OF MAILING NOVEMBER 14, 1997

592-97

592-97 R

J.B. AND N.B., as guardians *ad litem* for J.B., AND J.B., individually,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning parents of J.B. alleged Board's denial of their son's entry into the National Honor Society (NHS) as a senior high school student was arbitrary, capricious and unreasonable.

ALJ dismissed petition as moot by virtue of J.B.'s graduation from high school in 1993. Commissioner adopted findings and determination in the initial decision. State Board remanded matter to the Commissioner, finding that dismissing the petition as moot effectively denied administrative review to students rejected for NHS membership during their senior year.

On remand, Commissioner concurred with the ALJ that the decision to reject J.B.'s senior year application for admission to membership in the Jefferson High School chapter of the NHS was not arbitrary, capricious, discriminatory, an abuse of discretion or in violation of any legal rule, regulation or standard and, therefore, such decision had to be upheld. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2826-95

(ON REMAND FROM EDU 7503-93)

AGENCY DKT. NO. 242-6/93

J.B. AND N.B., AS GUARDIANS AD LITEM FOR J.B., AND J.B. INDIVIDUALLY,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

Respondent.

Richard J. Schachter, Esq., for petitioners (Schachter, Trombadore, Offen, Stanton and Pavics, attorneys)

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti and Woodruff, attorneys)

Record Closed: February 24, 1997 Decided: October 1, 1997

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

PROCEDURAL HISTORY

This matter is before me on remand from the November 2, 1994 decision of the State Board of Education which reversed the Commissioner's adoption in March 1994 of my January 1994 determination to dismiss the petition on the basis that since J.B.

had graduated high school the petition was "moot". See, *J.B. and N.B., etc. v Bd. of Educ. of Tp. of Jefferson*, State Bd. of Ed., Docket No. 17-94, dec'd. Nov. 2, 1994. The underlying case involves a petition filed by petitioners in June 1993 challenging the respondent Board's refusal during his senior year at Jefferson High School (1992-93) to invite him to membership in the local chapter of the National Honor Society (hereinafter "NHS"). As noted, J.B. graduated from Jefferson High School in June 1993 and in January 1994 I decided his graduation made the issue "moot". The State Board, on appeal, reversed and held that since the petition had been filed while J.B. was still a senior in high school, the dismissal effectively denied administrative review to him and to other students rejected for NHS selection in their senior year..

Accordingly, the State Board remanded the case and several days of hearings were conducted during September, October and November 1995, and in June and November 1996. Although the record closed in February 1997 following my receipt of post-hearing submissions, this Initial Decision has been the subject of four orders extending the time of decision date to October 9, 1997.

Before I make my Findings of Fact it is appropriate, I believe, to first briefly review previous litigation between the same parties which involve the Board's denial of NHS membership to J.B. in his junior year in 1991-92. In particular, J.B. applied to be invited to NHS membership during the Fall of 1991 and was rejected. J.B. challenged the Board's action and after a hearing before Administrative Law Judge Marylouise Lucchi-McCloud in late 1992 she dismissed the petition. Her April 1993 decision subsequently was affirmed both by the Commissioner and by the State Board of Education, as well as by the Appellate Division. See, 94 *N.J.A.R.* 2d (EDU) 119, 96 *N.J.A.R.* 2d (ED) 159. Thereafter, certification was denied by the New Jersey Supreme Court. *J.B. v. Bd. of Educ. of Jefferson Tp.*, 142 *N.J.* 452 (1995). The instant petition challenging the senior year rejection had been filed in June 1993 while the rejection of the junior year application was pending appeal to the State Board from Judge Lucchi-McCloud's Initial Decision and the Commissioner's affirmance of it..

FINDINGS OF FACT

The following are my Findings of Fact based upon the testimony and documentary evidence:

1. The petitioners in this case, J.B. and N.B., are the parents and at the time the petition was filed in June 1993, were designated guardians *ad litem* for their then minor son, J.B., also a petitioner.

2. J.B. entered Jefferson Township High School in September 1989 as a freshman and graduated in June 1993.

3. Following his graduation, J.B. attended the University of Pennsylvania, beginning in September 1993. (Presumably, he received an undergraduate degree from that institution in June 1997).

4. Upon entering his junior year at Jefferson High School in September 1991 J.B. qualified academically for invitation to apply for membership to the local NHS chapter since he had a minimum grade point average (GPA) (3.5).

5. After submitting his application in his junior year J.B.'s name was included on a list of NHS academically eligible students distributed to all teaching faculty, who then were asked to rate those students whom they knew on a scale of 0 to 4 in the categories of character, leadership and service (Exhibit P-19).

6. The faculty advisor to the NHS during both J.B.'s junior and senior years at Jefferson High School was Ms. Myrna Speert whose responsibility included averaging the ratings received from faculty members, and then adding add each student's GPA to produce a total numerical score. In his junior year, based upon that rating process, J.B. ranked 35th out of 50 students found to be eligible.

7. The NHS Handbook provides that decision as to admission to membership is the responsibility of the individual chapter and the selection procedure should be published. To that end, the procedure used at Jefferson High School was, in fact, published in the student handbook (Exhibit P-3).

8. The student handbook also provides that candidates for admission to membership in the NHS must submit a resume or biographical statement setting forth their curricular and their extra-curricular activities. With respect to his junior year application in 1991, J.B. submitted a handwritten summary of those activities (Exhibit P-2) which was copied and disseminated to each of the five members of the faculty selection committee. That "resume" was accompanied by the ratings tabulated by Ms. Speert, as well as the student's name, grade, class rank and GPA.

9. In J.B.'s junior year the five faculty members on the selection committee were Ms. Weir, Mr. Crespo, Mr. Wynne, Ms. VanDunk and Mr. Evans.

10. That group discussed each student individually and voted as to whether or not to offer membership to him or her. In order to be accepted into the NHS a student must receive a positive vote from at least three of the five members of the committee. With respect to his junior year application J.B. received five negative votes and no positive votes. Thus, he was not offered membership. Out of 50 qualified students, 23 were accepted and 27, including J.B., were rejected.

11. J.B.'s rejection in his junior year was challenged by him and an appeal followed through the local appeals process.

12. After J.B.'s rejection at the local level was upheld, he filed a petition of appeal with the Commissioner and the matter was transmitted to the Office Administrative Law. Plenary hearings were conducted by Administrative Law Judge Marylouise Lucchi-McCloud, beginning in September 1992 (Exhibits P-25a, 25b, 25c). In April 1993 she dismissed J.B.'s appeal.

13. The initial decision by Judge Lucchi-McCloud subsequently was affirmed through both the administrative and judicial process. Thus, it was determined that the Board's decision to reject J.B.'s application for junior year admission to the NHS was neither arbitrary, discriminatory nor capricious and was consonant with established law. In its affirmance of the administrative determinations below, the Appellate Division observed that: "An applicant for membership in the Society must have not only a sufficient grade point average (which J.B. indisputably possessed) but also demonstrate such intangible qualities as character, leadership and service. . . . In its handbook, the Society states that 'membership should never be considered on the basis of grades alone' and that leadership is 'highly important for membership selection.'" *J.B. v. Jefferson Tp. Bd. of Ed.*, 96 *N.J.A.R.* 2d (EDU) 159.

14. In reaching its decision to affirm the determinations below, the Appellate Division also commented upon some of the credentials listed by J.B. in his junior year application, including his participation in varsity soccer and wrestling for three years, various honor courses he had taken, his membership in certain extra-curricular programs and his claim to three years of actual participation as a member of the Student Council. The Court noted that although J.B. had been elected (or selected) to the Student Council during his first two years at Jefferson High School only, and not his third year; nevertheless, he listed three years of participation because, " . . . he felt he was an active member since he knew the leaders of the Student Council and discussed projects with them." *J.B. v. Jefferson Twp. Board of Ed., supra.*

15. In his senior year, during the pendency of his appeal from the Commissioner's affirmance of Judge Lucchi-McCloud's decision, J.B. again applied for admission to NHS membership. The same procedure for faculty balloting described above was utilized including, in particular, the faculty ranking described by Ms. Speert. This time J.B.'s overall rank,

based upon his GPA and faculty rating, dropped to 67th (out of 97 applicants) (Exhibit R-2).[1]

16. The resume submitted by J.B. in his senior year (Exhibit P-1) was almost identical to the resume he had submitted a year earlier (Exhibit P-2). He later explained to the high school principal, Mr. Ross, that he did so since, as far as he was concerned, his junior year application should have been sufficient for admission into the NHS.

17. Two of the five faculty members who were on the selection committee in 1991-92 also were on the committee in 1992-93 which reviewed J.B.'s senior year application - Messrs. Crespo and Evans. Three new members also participated in J.B.'s senior year, Ms. Black, Mr. Tummillo and Mr. Yahnko.

18. The new selection committee reviewed J.B.'s senior year resume, along with the faculty ranking and other information, and discussed J.B.'s application. All testified at the hearing before me. Crespo voted "no" on J.B.'s senior year application for the following major reasons: (a) he had a "real problem" with J.B.'s continued listing of three years participation on Student Council since J.B., in his view, should have known better than to claim such continued activity; (b) some of the other activities listed by J.B. were of little significance; and (c) there was nearly a total lack of reference to any fourth year activities even though J.B. was involved in them.

19. The other faculty member who reviewed J.B.'s application both in his junior and senior years was Evans, a guidance counselor. He abstained on J.B.'s senior year application because J.B.'s resume basically was the same one submitted for the junior year. According to Evans, J.B. did not take the opportunity to present himself in his best light and was particularly perturbed that J.B. used essentially the same resume. This resulted in a

[1] Although this exhibit is "sealed", that is to protect the confidentiality of the names of other candidates in 1992-93. J.B.'s name and rank is not sealed.

failure to show a continuation of activities into his senior year. As Evans put it, the resume did not reflect, "the [J.] I expected". Nevertheless, he abstained on the application rather than voting "no".

20. A new member on the selection committee during J.B.'s senior year was Yahnko, a physical education instructor and athletic coach. He recalled that with respect to the applicants generally, the committee discussed their service, leadership and character. In his view, simply being on the list essentially qualified the applicant academically.

21. As far as Yahnko was concerned, there was no fixed definition binding on each member as to what "character", "leadership" and "service" were intended to mean, and each individual committee member could apply his or her own standard within the parameters set forth in the NHS handbook. Yahnko, too, was struck by the fact that J.B.'s senior year application failed to reveal his participation at all in athletics in his senior year, and he wondered why there were no such references. In his view, it was common for senior year applicants to put down activities which they expected to be undertaking during their senior year, particularly in the area of athletics where the season may not have begun.[2] Indeed, Yankho was bothered by the fact that J.B. did not even note that he was the captain of the soccer team - an omission that made Yahnko uncomfortable.

22. Yahnko recalled commenting to other committee members about the absence of any reference by J.B. to his participation or expected participation as a senior in soccer and wrestling. In his view, J.B.'s application was "shoddily done". Indeed, Yahnko felt that J.B.'s submission did not appear to be "a serious application".

[2] In fact, when J.B. applied for NHS admission in the beginning of his junior year in 1991 he did include reference to three years' participation in soccer, wrestling, etc. (Exhibit P-1).

23. Despite his concerns, Yahnko, like Evans, also abstained from voting on J.B.'s senior year application because it was not really "serious". Thus, he could not bring himself to vote "yes".

24. A fourth member of the senior year selection committee was Peter Tummillo, Jr. He did not know J.B. and never had personal contact with him. Tummillo voted "no" because, in his view, the resume failed to show growth or development into the senior year. Also, the rank by the teachers (67 out of 97) was low.

25. Tummillo also recalled that there was some mention that the senior year resume submitted by J.B. was a "near duplication" of the junior year application and although the committee did not have the junior year application before it there was "disappointment" concerning that situation. Essentially, however, Tummillo's negative vote stemmed from the poor resume submitted; in particular, the absence of senior year activities.

26. The fifth member of the selection committee during J.B.'s senior year was Black, a school nurse. One reason she voted "no" was that the resume did not reveal J.B. was captain of the soccer team even though she knew that he had been selected for that position. She did not know that he also was captain of the wresting team.

27. As far as Black was concerned she looked primarily for service to the school and did not see much of that in J.B.'s submission. In this respect she does not consider participation in sports as "service" to the school since that is basically an activity that is strictly related to what the individual wants for him or herself. In voting in the negative she was prompted in part by J.B.'s failure even to put down what he did in his senior year since she expects to see what students do or intend to do. In this respect, of course, the senior year application by J.B. indicated to her that he was not that interested in NHS membership.

28. Black also testified to an incident involving the wrestling team of which J.B. was a member. On one occasion she essentially "barged in" to the boys' locker room in order to retrieve a scale. Since some of the team members were in a state of undress it was embarrassing for them. Black agreed that, "I made a mistake". She was chastised for the incident and later she apologized to the team, having been directed to do so by senior administration. However, Black insisted that the incident did not play any part in her determination to reject J.B.'s senior year application (Exhibits P-21, 22, 24). [3]

29. Ms. Speert, although not a selection committee member, was the NHS advisor and essentially superintended the process during J.B.'s senior year (Exhibit P-18). She spoke to the committee at the outset of its deliberations and recalled a general reaction of surprise concerning the resume's near duplication to the previous year.

30. Following its review of J.B.'s submission for his senior year, the committee voted. J.B. received three negative votes (Crespo, Tummillo and Black) and no affirmative votes (Evans and Yahnko abstained). Thus, J.B. was not invited to membership in the NHS. Following the rejection of his senior year application J.B. filed a written appeal. As a result of its review the appeals committee voted unanimously not to disturb the selection committee's decision and this appeal followed (Exhibits P-10 to P-15).

31. J.B. also testified at the hearing before me and maintained he believed it was not appropriate to include any activity on his senior application that he had not yet "completed" since, during the appeal of his junior year denial, certain comments were made by committee members which led him to conclude that unless an activity had fully been completed he would not be credited for it. Thus, he did not list the fact that he was, or would be, captain of both the varsity soccer and varsity wrestling teams

[3] These exhibits relate to personnel action involving Black and the locker room incident. They, too, are "under seal" but available for agency review.

in his senior year. Nor did he even list fourth year participation on those teams.

32. J.B. also testified that he left out certain other activities because he understood from comments made by Crespo during the junior year selection process that no credit would be given to him for such activities, such as participation in New Jersey Boy's State. On the other hand, J.B. repeated his participation in an oratorical contest because, in his view, it was a "strong" activity, time-consuming and deserving of special recognition because he specifically was asked by the speech teacher to participate both in and out of school.

33. With respect to his again claiming in his senior year application that he had three years of participation on Student Council, J.B. explained that although in his junior year he was neither elected by his peers nor selected by any teacher; nevertheless, he felt comfortable including the three year reference since he was "involved" with members of the Student Council through discussions and sharing of ideas with them. Now, with a more mature understanding, J.B. agreed it likely was "a mistake" to have done this.

34. Essentially, J.B. claimed he did not expect his senior year resume to be compared to his junior year resume, and he could see no reason why that should have been done. He only learned about this comparison when the principal asked him why he did not "update" his application. J.B. agreed he responded to Ross that he felt the junior year application should have been sufficient to qualify him for NHS membership and felt his senior year application was as complete as it needed to be.

35. On cross-examination, J.B. reiterated it was his understanding that he was not supposed to include activities which were not "completed" and that is why he omitted references, for example, to senior year participation in soccer and wrestling, not to mention his captaincy of the varsity teams in both those sports.

36. Testimony also was received from the father of J.B. (also initialed "J.B".) He said he counseled his son not to include any activity in his senior year application that was not "fully completed" in order to avoid any claim that J.B. somehow was involved in resume "inflation". Mr. B., too, recalled that during the junior year appeal process some committee members had criticized J.B.'s inclusion of certain activities which either were not completed or took place outside the school context. That is why his son's participation in New Jersey Boy's State, clearly a leadership activity, was omitted. Also, although his son already had been chosen captain of the varsity soccer team at the beginning of his senior year, he believed J.B. did not list this on the resume because the season was not yet completed.

37. J.B.'s father reiterated what his son had said about the erroneous reference to three years participation on Student Council activities - that it was based upon J.B.'s remaining active with persons who were on the Council.

DISCUSSION

Had I been a member of the faculty selection committee reviewing J.B.'s application during his senior year in 1992-93, possibly I might have voted in the affirmative. Although J.B.'s faculty ranking in 1992 was only 67 out of 97, his academic credentials certainly were exemplary as his Ivy League college acceptance makes plain. His athletic accomplishments were, of course, outstanding. Also, as J.B. candidly conceded, in retrospect it was "a mistake" to claim three years actual participation on Student Council when he knew this was not the case. Nonetheless, my personal view is not relevant at all. What is critical is whether the articulated reasons of the committee members, and the credibility of their testimony, show the absence of any improper taint.

First, it is clear to me that any one of the selection committee members could find that the submission, for all practical purposes, of very nearly the same resume by

J.B. for his senior year as the one he submitted in his junior year was an "in your face" act, incompatible with the type of conduct to be expected of an NHS applicant. Thus, I am convinced, having heard all the testimony, that the committee's decision in J.B.'s senior year not to invite him to membership in the NHS at Jefferson High School even if predicated on that basis alone, was not arbitrary, capricious, discriminatory, an abuse of discretion or in violation of any legal rule, regulation or standard.

Further, although J.B. ultimately did admit at the hearing before me that his three year Student Council reference was a "mistake", arguably it was more than that. This student knowingly represented he served for three years as a Student Council member when he knew this was not true. That conduct, too, standing alone, reasonably would justify a determination by any member of the selection committee (as it did) to reject the application. It was not a misunderstanding, a misinterpretation, a miscommunication or any other such benign act. Again, while I, personally, might have overlooked that immature act in light of the variety of other accomplishments displayed by this student academically, athletically and otherwise, I cannot fault any committee person for voting against J.B.'s membership, in whole or in part, because of that deliberate "puffery".

Although J.B.'s stated motive for submitting nearly the identical resume in his senior year was that his junior year resume should itself have been sufficient to qualify him for membership, I cannot find legal fault with any one of the members of the committee for reaching a contrary conclusion. It was the wrong message to send to the committee and the negative reaction of some members to it was understandable and appropriate. Put another way, I cannot say it was arbitrary, capricious or unreasonable for members of the committee to be dismayed by it, whether or not they believed it represented a deliberate "insult". Indeed, although one might give J.B. the benefit of the doubt that he believed sincerely that unless an activity was "completed" it should not be included in the senior year resume, that claim certainly can be seen as a "stretch" insofar as credibility is concerned. It is inexplicable to me why J.B., who already had been selected captain of the soccer team, either did not include that on his initial resume, or later amend the resume, to make that important selection known to the committee members during his senior year evaluation process. The notion that a

young man who is or will be the captain of two separate varsity major high school sports athletic teams would omit reference to those accomplishments in an NHS application process borders on the preposterous. At the very least, it was not arbitrary, capricious, discriminatory or an abuse of discretion for selection committee members to be so disappointed with these and other omissions that they would vote to deny J.B.'s application.

There are, of course, many State and Federal administrative and judicial decisions which stand for the proposition that decisions by faculty selection committees concerning membership in various entities such as the NHS may not be set aside unless they are demonstrated to be arbitrary, capricious, unreasonable or an abuse of discretion. The mere fact that "subjectivity" may be part of the process does not establish any taint. The cases cited by the Board in its post-hearing submissions make that point. See, *e.g., Dangler v. Yorktown Central Schools*, 771 *F. Supp.* 625 (S.D.N.Y. 1991); 77 *F. Supp.* 1175 (S.D.N.Y. 1991); and *Miller v. Goldberg*, 43 *N.Y.S.* 2d 828 (1981). See also, *J.B.A. and A.M.A. v. Bernardsville Bd. of Educ.*, 4 *N.J.A.R.* 136 (1981).

Petitioners' post-hearing submissions maintain that the Board's decision was improper since the "standards" followed were "unduly vague" and left to each individual member great latitude for determining what was or was not important. To some extent, of course, this latter assertion is true. However, the process followed in connection with J.B.'s senior year application was the same in every substantial respect as the junior year application process and, like that year, did not deviate in any respect from the evaluation process for all the other candidates. That junior year process was reviewed carefully by Judge Lucchi-McCloud, the Commissioner, the State Board and the Appellate Division and passed muster with all of them. Again, as noted by the Appellate Division in its decision in February 1995, in addition to academic qualifications, a successful applicant for NHS also must demonstrate such intangible qualities as character, leadership and service. In the view of the senior year selection committee, J.B. did not demonstrate that he had those qualities sufficient to deserve an invitation to NHS membership. Whether I agree or not with that assessment is not

pertinent. It was their decision to make and they did so in proper fashion. True, some committee members gave greater weight than others to various aspects of the application. But nowhere, neither in case law nor in any other authority, not to mention common sense, is there a requirement that they must act in "lock step". "Inconsistent" application of standards may merely mean that some members view some aspects of an applicant's credentials to be more important than others. That is not arbitrary, capricious or discriminatory. Furthermore, all of that aside, J.B.'s erroneous claim to three years actual participation on Student Council, his rank of 67 out of 97 eligible students, and his aggressive submission of basically the same resume in his senior year as he submitted the year before, were reasons enough for some members properly to reject his application despite J.B.'s academic, athletic and other accomplishments. Again, a young man who in his senior year is captain of the soccer team and does not reveal this, a young man who knows he was not a member of the Student Council for three years, but represents that he was, a young man who somewhat incredibly takes the view that unless an activity is "fully completed" it should not be included, is not a young man who has an inalienable right to membership to the NHS. Again, the "judgment call" was for the committee members to make, not an ALJ, nor the Commissioner. The "call" made by the selection committee in this case was within the parameters established by law.

I also have scrutinized the other arguments made by J.B. with respect to his claim that some of the committee members harbored a personal animus against him and/or failed to give him proper credit for some of his extracurricular activities. None of those contentions are supported by the proofs and are all rejected. Having had the opportunity closely to observe the school system's witnesses during the course of their testimony I am convinced of their credibility. Simply put, for the reasons each member honestly expressed on the record during the course of his or her testimony, I **FIND** that the determination made by each was free of any taint requiring that the decision to reject J.B. for admission to the NHS be set aside.

CONCLUSION AND ORDER

Based upon my review and consideration of the testimony and the documentary evidence in this case, I therefore **CONCLUDE** that the decision to reject J.B.'s senior year application for admission to membership in the Jefferson High School chapter of the NHS was neither arbitrary, capricious, unreasonable, discriminatory, an abuse of discretion nor otherwise in violation of any law or regulation and should be upheld. I therefore **ORDER** that the petition of appeal be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 1, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

10/3/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 7 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Witness List:

J.B. (father of J.B.)
N.B. (mother of J.B.)
J.B. (petitioner)
Myrna Speert
Kathleen Vuich
James Tasker
Diana Norton
Louis W. Migliacci
Robert J. Ross
Michael L. Rossetti, Jr.
Michael Yahnko
Peter Tummillo, Jr.
Alexis Black
Randolph Evans
Sylvio Crespo, Jr.

Exhibit List:

P-1 Resume submitted by J.B. in 1991 for junior year NHS membership
P-2 Resume submitted by J.B. in 1992 for senior year NHS membership
P-3 Excerpt from Jefferson High School Student Handbook
P-4 Excerpt from selection procedure for NHS
P-5 NHS handbook, 1987
P-6 Exemplar of letter of invitation for consideration for NHS membership
P-7 Letter to Ross from father of J.B.
P-8 Letter from Ross to father of J.B.
P-9 Letter from father of J.B. to Ross
P-10 Letter from father of J.B. to Rubin

P-11 Letter from Reilly to father of J.B.

P-12 Letter from father of J.B, to Tasker

P-13 Letter from father of J.B. to Ross

P-14 Letter from father of J.B. to Ross

P-15 Letter from J.B. to Ross

P-16 Resume of Je.B (brother of J.B.)

P-17 Student progress report of J.B. (1990-91)

P-18 Student progress report of J.B. (1991-92)

P-19 Memorandum to faculty from Speert

P-20 List of student names

P-21 Memorandum [under seal]

P-22 Letter [under seal]

P-23 (for identification) Copy of resume of J.B.

P-24 Memorandum from Black to Rubin (under seal)

P-25A Transcript of hearing before Judge Lucchi-McCloud, September 1, 1992

P-25B Transcript of hearing before Judge Lucchi-McCloud, September 2, 1992

P-25C Transcript of hearing before Judge Lucchi-McCloud, October 28, 1992

P-26 Photocopy of photographs of Biology League team

R-1 Handwritten resumes of JeB and J.B.

R-2 Class rank list for 1992-93 [under seal]

J.B. AND N.B., as guardians *ad litem* for J.B., AND J.B., individually,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Board's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered in the Commissioner's determination of this case.

Upon his independent review,[1] the Commissioner concurs with the conclusion of the Administrative Law Judge (ALJ) that the decision to reject J.B.'s senior year application for admission to membership in the Jefferson High School chapter of the National Honor Society was not arbitrary, capricious, discriminatory, an abuse of discretion or in violation of any legal rule, regulation or standard and, therefore, such decision must be upheld.[2]

[1] It is noted that the within record includes transcripts of the hearing conducted at the OAL on June 21, 1995, October 16, 1995, October 17, 1995, October 18, 1995, November 2, 1995, and June 4, 1996.
[2] Petitioners' exceptions urging a contrary finding essentially reiterate arguments advanced before the ALJ and are found to be without merit.

Accordingly, the initial decision of the OAL is affirmed for the reasons well stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 14, 1997
DATE OF MAILING NOVEMBER 14, 1997

593-97

593-97

PATRICIA BAUERNHUBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11229-95

AGENCY DKT. NO. 342-8/95

PATRICIA BAUERNHUBER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP,

Respondent.

Nancy Oxfeld, Esq., for petitioner

Nicholas Celso III, Esq., for respondent

Record Closed: September 26, 1997 Decided: October 2, 1997

BEFORE **MARYLOUISE LUCCHI-McCLOUD**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 2, 1995, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10/2/97
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

10/8/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 10 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

SEP 26 4 15 PM '97

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
Ten James Street
Florham Park, New Jersey 07932
(201) 301-0001
Attorneys for Respondent, Board of
Education of the City of Orange

PATRICIA BAUERNHUBER,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	:	OAL Docket No. EDU 11229-95
vs.	:	Agency Docket No. 342-8/95
BOARD OF EDUCATION OF THE CITY OF ORANGE,	:	
Respondent.	:	

STIPULATION OF SETTLEMENT AND RELEASE

The parties to this Stipulation of Settlement and Release ("Stipulation"), Patricia Bauernhuber ("Bauernhuber") and the Orange Board of Education (the "Board"), desiring to avoid the time and expense of continued litigation and further desiring to amicably resolve the above-captioned matter, and having negotiated in good faith prior to reaching agreement as to the terms of this Stipulation of Settlement, hereby set forth their agreement as follows:

1. The Board shall reinstate into Bauernhuber's accumulated sick leave bank twenty-five (25) sick days.

2. Any subsequent use of or payment for accumulated sick leave shall comport with existing collective bargaining contractual limitations, Board policies and regulations.

3. In consideration for restoring to Bauernhuber twenty-five (25) sick days as set forth in Paragraph 1, Bauernhuber will withdraw, with prejudice, her petition in the above captioned matter, docketed as OAL Docket No. EDU 11229-95, Agency Docket No. 342-8/95, by executing and filing with the Commissioner of Education and the Office of Administrative Law a Notice of Withdrawal, thus forever releasing the Board from any and all claims arising under or relating in any way to the above docketed matter.

4. In consideration for the promises made hereunder, Bauernhuber forever releases the Board from any and all claims arising under or relating in any manner whatsoever to the above-captioned action. Bauernhuber specifically releases and gives up any and all future claims which she may have against the Board arising from or relating to the above-captioned action, including, but not limited to, claims arising under (1) the Constitution of the United States; (2) the Americans with Disabilities Act, 29 U.S.C. § 791 et seq.; (3) the Constitution of the State of New Jersey; (4) any express or implied contracts in effect; (5) any collective negotiations agreement(s); (6) federal or state common law; (7) the Education Laws of the State of New Jersey, N.J.S.A. 18A:1-1 et seq.; and (8) any federal, state or local statutes, ordinances and regulations.

5. The parties agree that this Stipulation shall not be used for any purpose whatsoever in any pending or future matter, suit, proceeding or action between the parties or between the Board and the Orange Education Association. This Stipulation is not and shall not in any way be construed as an admission by Bauernhuber. Nor shall it be construed as an admission by the Board, or any of its officials, officers, agents, attorneys, employees or representatives of the commission of any acts of wrongdoing whatsoever against Bauernhuber,

by itself or any other person or entity, or that the Board, or any of its directors, officers, officials, agents, employees or representatives violated any federal or state constitutional prohibitions or any federal, state or local law, ordinance or regulation, or that any employment decision or action affecting Bauernhuber was the result of any acts which were unwarranted, unjustified, discriminatory, otherwise unlawful or in violation of an express or implied contract of employment, or in breach of any statute, regulation or public policy of the State of New Jersey, but instead constitutes the good faith settlement of all matters and the Board specifically disclaims any liability to Bauernhuber or any other person or entity, on the part of itself, its officials, officers, officials, agents, employees or representatives. The parties have entered into this Stipulation for the sole purpose of resolving claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court or administrative agency and neither party shall purport to be the prevailing party in this action.

6. The parties covenant and agree that they will keep the terms, amount and existence of the agreement set forth in this Stipulation completely confidential, and that they will not hereafter disclose, except as may be required by law, any information concerning the existence or terms of this Stipulation to any person, partnership, corporation, association or other legal entity, except pursuant to a Court Order, subpoena disposition notice, written interrogatories or similar formal legal request for information that provides for the imposition of sanctions for non-compliance therewith, or with the written authorization of the Board.

7. This Stipulation represents the full and complete agreement of the parties hereto and may be modified only by a writing signed by all parties hereto. This Stipulation supersedes

any and all prior or contemporaneous written and/or oral statements or representations.

8. Should any provision of this Stipulation be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be part of this Agreement.

WHEREFORE THE PARTIES HERETO SET THEIR HANDS.

Patricia Bauernhuber

PATRICIA BAUERNHUBER

ORANGE BOARD OF EDUCATION

By: Gwendolynne A. Blakely

Dated: February 21, 1997

OAL DKT. NO. EDU 11229-95
AGENCY DKT. NO. 342-8/95

PATRICIA BAUERNHUBER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed,* subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

* In that the Commissioner's acceptance of this settlement concludes this matter as a contested case, a formal withdrawal of the matter by petitioner, as envisioned by provision 3 of the parties' settlement agreement, is unnecessary.

NOVEMBER 14, 1997
DATE OF MAILING NOVEMBER 14, 1997

594-97

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
KENNETH L. DURHAM, JR.,	:	DECISION
RESPONDENT.	:	

NOVEMBER 14, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4726-97

AGENCY REF. NO. 109-3/97

FAIRFIELD TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

KENNETH L. DURHAM, JR.,

Respondent.

Joseph Chiarello, Esq., for petitioner (Jacob & Ferrigno, attorneys)

No one appeared for respondent

Record Closed: October 6, 1997 Decided: October 21, 1997

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Fairfield Township Board of Education (Board) filed a petition for Declaratory Ruling against respondent, Kenneth L. Durham, Jr., seeking a monetary judgment against him in the amount of $3,325.17 because it alleged that he enrolled his children in the Fairfield Township School District when they were residents of Bridgeton City and not entitled to a free education in

Fairfield. Although respondent never appeared or otherwise answered the petition the Commissioner of Education nevertheless transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -15, the act creating the OAL, *N.J.S.A.* 52:14F-1 to -13 and *N.J.A.C.* 6:24-1.10 and 2.1.

FACTUAL DISCUSSION

Petitioner served respondent by regular mail and hand delivery with a letter dated December 23, 1996, advising respondent that his children were not domiciled in Fairfield Township, that he did not attend a hearing on the issue conducted by the Board on December 18, 1996 and that he had 21 days, pursuant to *N.J.S.A.* 18A:38-1 *et seq.* to appeal the Board's decision to charge him tuition and/or remove his children from the school.

The Board subsequently served respondent by regular mail and hand delivery with a letter dated February 5, 1997, demanding payment of its tuition bill calculated as follows:

Christina - $6,782.00 divided by 182 days = $37.26 per day

Days attended:	September - 16 x $37.26	= $596.16
	October - 16 x 37.26	= 596.16
	November - 16 x 7.26	= 484.38
	December - 5 x 37.26	= 186.30
	TOTAL DUE -	$1,863.00

Kenneth - $5,662.00 divided by 182 days = $31.11 per day

Days attended:	September - 15 x $31.11	= $466.65
	October - 19 x 31.11	= 591.09
	November - 11 x 31.11	= 342.21
	December - 2 x 31.11	= 62.22
	TOTAL DUE -	$1,462.17

TOTAL DUE FOR BOTH CHILDREN $3, 325.17

On March 31, 1997, the Director of the Bureau of Controversies and Disputes in the Department of Education wrote to respondent and advised him that he had 20 days to file a response to the petition.

On April 11, 1997, petitioner's attorney wrote to the Director and advised that it had a "green card" from someone receiving respondent's mail at 1518 Third Avenue, Seabrook, New Jersey. He also advised the Director that respondent had an address at 43A Reeves Road, Bridgeton, New Jersey. He had no phone number for respondent. The "green card" provided by the Post Office appears to be signed by David Shoup.

On April 15, 1997, petitioner's attorney provided the Director with copies of certified mail sent to respondent at both addresses. The letter addressed to 43A Reeves Road was returned marked "Unclaimed." The letter addressed to 1518 Third Avenue was returned undeliverable at that address and someone wrote the 43A Reeves address on the envelope.

On April 15, 1997, the Director again wrote to respondent, via both certified and regular mail, at both addresses, that he had 20 days to answer the petition.

On April 24, 1997, the Director wrote to petitioner's attorney and advised him to serve the petition by hand.

On April 30, 1997, at 4:17 p.m., Kenneth Durham signed a receipt acknowledging service of papers from petitioner's attorneys at 278 Reeves Road, Bridgeton, New Jersey.

On June 9, 1997, the Commissioner transmitted the matter to the OAL to be heard as a contested case.

The OAL mailed a notice to Kenneth L. Durham requesting that he supply the OAL with a telephone number for a prehearing telephone conference scheduled on Thursday, September 25, 1997, at 1:00 p.m. He did not respond.

On Thursday, September 25, 1997, at 1:00 a telephone conference was conducted. Respondent did not contact either the OAL or respondent's attorney or participate in the conference.

I, therefore, **FIND and CONCLUDE** that respondent has abandoned any counterclaim or defense he may have had to this claim for tuition. *See Board of Education of Livingston, Essex County* 96 *N.J.A.R.* 2*d.* (EDU) 536.

Accordingly, it is **ORDERED** that summary judgment shall be granted to the Board and that respondent shall pay tuition in the amount of $3,325.17 due to the Board for the period of September, October, November and December when respondent's son and daughter attended free public school in Fairfield Township as non-resident pupils. There being no provision for the grant of attorney's fees or costs within the Commissioner's authority, said fees and costs are not granted.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10/21/97
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

10/24/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 4726-97
AGENCY DKT. NO. 109-3/97

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
KENNETH L. DURHAM, JR.,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that respondent's failure to comply with repeated directives from the Department and subsequently from the ALJ, especially where respondent's agent apparently signed for and accepted one letter demanding a response to the petition, equates to the abandonment of any counterclaim or defense respondent may have.

Accordingly, the decision of the OAL is affirmed for the reasons expressed therein; summary judgment is entered in favor of the Board; and respondent is hereby assessed tuition in the amount of $3,325.17, covering the period of his children's illegal attendance in the public schools of Fairfield.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 14, 1997
DATE OF MAILING NOVEMBER 14, 1997

595-97

595-97

HELEN O' NEAL, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY, : DECISION

RESPONDENT. :

:

SYNOPSIS

Petitioner, tenured school social worker, contended Board's refusal to reemploy her for the 1996-97 school year violated her tenure and seniority rights. Board abolished her position pursuant to a RIF and assigned her duties to a subcontractor. Board asserted it was in receipt of two waivers from the Commissioner concerning the provisions of certain Child Study Team (CST) functions, specifically social worker services.

ALJ found that the record clearly demonstrated that the Commissioner, with approval of the State Board, granted the Board a waiver from certain administrative regulations to allow the Board to cotract for the services of a school social worker and to determine which assessments are appropriate for initial evaluations. Thus, the ALJ concluded that the Board's action to contract with the Salem County Special Services School District to perform the functions of its required school social worker services was proper and in accordance with the Commissioner's authority. ALJ concluded that the Board's action to abolish petitioner's position of school social worker was taken pursuant to *N.J.S.A.* 18A:28-9 for reasons of economy and in no manner violated her tenure or seniority rights. Petitioner's motion for summary decision was dismissed.

Commissioner affirmed initial decision, but directed County Superintendent to inquire into Board's possible noncompliance with the conditions upon which the waiver was granted.

November 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6476-96

AGENCY REF. NO. 190-5/96

HELEN O'NEAL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

John T. Barbour, Esq., for respondent

Record Closed: June 30, 1997 Decided: August 13, 1997

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Helen O'Neal, a tenured school social worker in the employ of the Board of Education of the City of Salem (Board) alleges, among other things, that the Board's action to abolish her position pursuant to a reduction in force (RIF) and assign her duties to a

subcontractor is in contravention of her tenure rights under *N.J.S.A.* 18A:28-5 and in violation of her seniority and re-employment rights subsumed within *N.J.S.A.* 18A:28-11 and *N.J.S.A.* 18A:28-12.

The Board denies that it violated any of petitioner's tenure and/or seniority rights and asserts, among other things, that it is in receipt of two waivers from the Commissioner of Education (Commissioner) concerning the provisions of certain Child Study Team (CST) functions specifically, social worker services.

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case, pursuant to the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -15, the act creating the OAL, *N.J.S.A.* 52:14F-1 to -13. Pursuant to a Prehearing Conference and Prehearing Order, the parties cross-moved for Summary Decision pursuant to *N.J.A.C.* 1:1-12.5, and *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67 (1954). The parties submitted their respective briefs of law, certification and exhibits and the hearing record closed on June 30, 1997.

ARGUMENTS OF THE PARTIES

Petitioner's Position

Petitioner, Helen O'Neal, is a tenured school social worker who was employed by the respondent, Salem Board of Education from November 1978 to November 14, 1996.[1]

Respondent, Salem City Board of Education is responsible for the administration of all schools within the Salem City School District and is the employer of the petitioner in this matter.

Petitioner was advised on April 30, 1996, that the Board at a meeting on April 24, 1996, had terminated Ms. O'Neal's employment for the 1996-97 school year. In earlier correspondence

[1] After being employed on a full-time basis through the 1995-95 school year petitioner was employed on a 2 days per week basis from September 16, 1996 through November 15, 1996. Although petitioner was assigned social assessments for this period, petitioner was not allowed to participate in Child Study Team meetings or staffings nor was her opinion solicited on any of the cases that she worked on during this period.

the Board had advised petitioner that it was the Board's intention to terminate petitioner, pursuant to a RIF, and to enter into some type of privatization or subcontracting venture to arrange for the provision of certain limited social worker services previously supplied to the Salem City School District for a period of 18 years by petitioner.

The respondent Board is statutorily obligated to provide school social worker services as part of the District's CST. (*See, N.J.A.C.* 6:28-3.1 through *N.J.A.C.* 6:28-3.8). The Board by abolishing petitioner's position as a school social worker has ignored relevant Commissioner decisions, State Board of Education decisions and Appellate Division decisions that have required that "core" CST services, including services provided by school social workers, be provided by employees of the local Board and not provided through privatization or subcontracting arrangements. Annexed hereto as Exhibits "A and B" are the State Board of Education and Appellate Division decisions in a case involving the *Watchung Hills School District* and the Commissioner's decision *Elson v. Hudson County Vocational and Technical School District.* (Exhibit "D"). Also annexed hereto is the very recent Commissioner decision, *Vicenzino v. Board of Education of the Township of Bedminister* (Exhibit "E") (Decided February 5, 1997) in which the Commissioner determined that the Board's termination of Ms. Vicenzino, a tenured school social worker (like the petitioner in the instant matter) and a member of the District's "core" CST, and its re-allocation of at least some of her duties to an outside contractor was violative of *N.J.A.C.* 6:28-3.1(b) and *N.J.A.C.* 6:28-5.1(c)1 and Ms. Vicenzino's tenure rights.

The actions of the respondent Board in purportedly abolishing petitioner's position, while announcing its intention to enter into some type of subcontracting relationship with either a private contractor or an Educational Services Commission (ESC), to provide certain of the social worker services previously provided by petitioner is in clear contravention of petitioner's tenure rights pursuant to *N.J.S.A.* 18A:28-5 and is a violation of petitioner's seniority and re-employment rights subsumed within *N.J.S.A.* 18A:28-11 and *N.J.S.A.* 18A:28-12.

By virtue of the Board's refusal to re-employ petitioner as a school social worker for the entire 1996-97 school year[2] within the Salem City School District respondent has violated petitioner's tenure rights pursuant to *N.J.S.A.* 18A:28-5 and her seniority rights pursuant to *N.J.S.A.* 18A:28-10, *N.J.S.A.* 18A:28-11, *N.J.S.A.* 28-12 and *N.J.A.C.* 6:3-1.10 *et seq.*

The petitioner also contended that the Board's decision to eliminate the in district position of school social worker would result in the Board's failure to properly provide district school children, their parents and district teaching personnel with required educational services that can only legally be supplied by a properly certificated school social worker employed by the Board.

Annexed hereto is an Affidavit prepared by the petitioner Helen O'Neal which, in pertinent part, delineates the myriad of duties previously performed by Ms. O'Neal as a school social worker within the Salem City School District, consistent with administrative regulations mandating specific services to be performed by school social workers both as members of a school district's "core" CST and as educational services personnel who are required to perform other social school worker duties consistent with educational statutes and regulations. It is submitted that as a result of the Board's decision to terminate Ms. O'Neal the Board no longer is able to provide mandated social worker services to school children and their parents within the Salem City School District.

This brief has been prepared in support of petitioner's Motion for Summary Decision in this matter.

[2] As noted earlier respondent was employed on a 2/5's contractual basis for the period between September 16, 1996 and November 14, 1996, to provide very limited social worker services to the Board while the Board further pursued subcontracting options involving the providing of State mandated social worker services.

Point I

The Salem City Board of Education Violated the Tenure Rights, Seniority Rights and Re-Employment Entitlements of Petitioner, Helen O'Neal, When the Board Failed to Re- Employ Ms. O'Neal as a School Social Worker Within the District for the Entire 1996-7 Academic Year

It is undisputed that petitioner, Helen O'Neal, enjoyed tenure as a teaching staff member (*i.e.*, as a school social worker and a member of the district's Child Study Team) within the Board's employ pursuant to *N.J.S.A.* 18A:28-5. *N.J.S.A.* 18A:28-5 states, in part, that "The services of all teaching staff members including all teachers . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners, serving in any school district or under any Board of Education . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by (*N.J.S.A.* 18A:6-9 *et seq.*) . . . ." It is uncontroverted that petitioner at all times performed all of her many assigned school social worker duties in a professional and competent manner. The Board did not terminate Ms. O'Neal "for cause."

The Board relied exclusively upon the prescriptions of *N.J.S.A* 18A:28-9 (Reductions of Force; Power to Reduce and Reasons for Reductions) to support its decision to terminate the employment of Ms. O'Neal. Petitioner also cites *N.J.S.A.* 18A:28-12 (Dismissal of persons having tenure on reduction; re-employment).

The significance to be attached to the rights of teachers under tenure has been the subject of considerable analysis by the Courts, the Legislature and the administrative agencies.

In Downs v. Board of Education, Hoboken, 13 *N.J. Misc.* 853 (Sup. Ct. 1935), the Court stated:

> The Teacher Tenure Act is not a gesture but a provision of law to protect teachers in their position by reason of years of experience. While in the interest of economy, reductions in number may be made, those having tenure should have preference in appointment where vacancies occur.

The Commissioner has consistently upheld the seniority/re-employment rights of tenured employees in the context of a reduction in force. *Dedrick v. Board of Education, Hammonton,* 1977 *S.L.D.* 1043; *Polaski vs. Board of Education, Burlington County Vocational Technical High School,* 1977 *S.L.D.* 346; *McKay vs. Board of Education, Red Bank,* 1972 *S.L.D.* 606; *Reinish vs. Board of Education, Cliffside Park,* 1965 *S.L.D.* 50, aff'd State Board of Education, 1966 *S.L.D.* 252, aff'd Appellate Division, 1966 *S.L.D.* 253; *David vs. Board of Education, Cliffside Park,* 1965 *S.L.D.* 56, aff'd State Board of Education, 1966 *S.L.D.* 223, aff'd Appellate Division, 1966 *S.L.D.* 223. These cases clearly hold that tenure employees must be retained if positions for which they are qualified exist in the district and are held by individuals with lesser or no seniority.

In the instant matter it is first averred that there was no legitimate RIF effectuated by the Board pursuant to *N.J.S.A.* 18A:28-9. The facts in this matter indicate that the Board's intention was not an actual abolishment of a position, pursuant to *N.J.S.A.* 18A:28-9, but a mere re-organization and transfer of duties from a tenured school social worker to a less expensive provider through the mechanism of contracting out certain social worker services to a County Educational Services Commission or private contractor.[3] Under these circumstances it is averred that the Board's actions taken in the instant matter falls squarely within the prohibitions of cases such as *Viemeister vs. Prospect Park Board of Education,* 5 *N.J. Super.* 215 (App. Div. 1947) which prohibit the mere transfer, through any mechanism, of the duties of a particular position to another individual in violation of the incumbent employee's tenure and seniority rights.

[3] The Board has never provided details to the petitioner regarding the "specifics" of its sub-contracting decision.

In *Viemeister*, after abolishing a principal's position ostensibly pursuant to *N.J.S.A.* 18A:28-9, the Board proceeded to re-assign the principal's duties to another employee. The Court found that the incumbent's tenure rights had been violated because "in substance the principalship was continued but transferred . . ." *Id.* at 218.

In the instant matter the respondent Board apparently asserts that the economic savings purportedly realized by it as a result of replacing Ms. O'Neal, as a tenured school social worker, with an out-of-district lower paid independent contractor, provided for apparently through a sub-contracting arrangement with a County Educational Services Commission, gave it the unfetted right to invoke the prescriptions of *N.J.S.A.* 18A:28-9 and state that it had properly abolished/reduced in force the school social worker position "for reasons of economy."

It is respectfully averred that the *Viemeister* Appellate Division decision conclusively established that *N.J.S.A* 18A:28-9 could never be properly invoked to justify the termination of a tenured certificated employee when there as no actual abolishment of a position. The Appellate Division in *Jacquelyn Cochran, et al vs. Watchung Hills Regional High School Board of Education,* (unpublished decision) App. Div. Docket No. A-2327-85T7 (decided December 22, 1985) (annexed as Exhibit "A" to this brief) in striking down a similar Board effort to "RIF" tenured educational services personnel on the district's CST in order to replaced them with less costly individuals provided through a contract with a third party cited the *Viemeister* decision and concluded that:

> *Watchung* argues that its decision to reduce the (CST) positions to half-time was made for reasons of economy and that *N.J.S.A.* 18A:28-9 allows reductions in force for this reason. It is apparent that the State Board of Education's decision rests upon the Commissioner's "sense and experience' that *Watchung* was not, in fact, abolishing petitioner's position but merely dividing up their duties and distributing part of those duties to an outside contractor in violation of petitioner's tenure rights.
>
> The State Board of Education correctly noted that a local Board's decision concerning RIF are properly reviewable "to determine whether the position ostensibly abolished has not, in fact, been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights . . ."; citing *Viemeister vs.*

> *Board of Education of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949). The State Board found the local Board's action to fall squarely within the prohibition of *Viemeister* concluding "the Board's intention was not an actual abolishment of positions, but a mere re-organization and transfer of duties to a less expensive provider" *Cochran*, slip opinion at pages 3 and 4.

In the instant case it is averred that Helen O'Neal school social worker duties, as mandated by administrative regulations, were likewise not abolished; *i.e.*, her duties were to be transferred to an out of district sub-contractor, thereby circumventing petitioner's tenure rights pursuant to *N.J.S.A.* 18A:28-5.

One of the lead administrative decisions relating to local Boards efforts to "RIF" and replace tenured educational services personnel through sub-contracting arrangements with third parties is the State Board's decision in *Jacquelyn Cochran, Angela P. Piegari and Barton Lilenfield vs. Watchung Hills Regional High School Board of Education, Somerset County*, 1985 *S.L.D.* 1975, affirmed App. Div. Docket No. A-2327-85T7 (decided December 22, 1986) (annexed to this brief as Exhibit "B").

In the *Watchung Hills* litigation petitioners Cochran, Piegari and Lilenfield were all tenured teaching staff members employed by the Watchung Hills Regional High School Board of Education in full-time CST positions of Learning Disabilities Teacher/Consultant, Social Worker and School Psychologist, respectively. On April 12, 1982, the local Board voted to abolish these full-time positions for economy reasons, replacing them on May 10, 1982, with half-time positions.

In September 1982, the petitioners learned that the Watchung Hills Board of Education had contracted with the Somerset County Educational Services Commission for the provision of CST services, including some of the services previously provided by petitioners. Petitioners filed a Petition of Appeal with the Commissioner of Education, challenging the Board's actions as being in violation of their tenure and seniority rights. The Commissioner and State Board of Education sustained the ALJ's decision which held, among other things, that the holding in *Viemeister, supra.*, controlled and Watchung Hills Board was required to re-instate petitioners for the school years 1982-83 with full back pay.

The Appellate Division in the *Watchung Hills* litigation affirmed the State Board's decision in its entirety (see Exhibit "A" annexed to this brief). The Appellate Division specifically held that:

> Watchung argues that its decision to reduce the positions to half-time was made for reasons of economy and that *N.J.S.A.* 18A:28-9 allows reductions in force for this reason. It is apparent that the State Board's decision rests upon the Commissioner's "sense and experience" that Watchung was not, in fact, abolishing petitioners positions but merely dividing up their duties and distributing part of those duties to an outside contractor in violation of petitioners' tenure rights. The State Board correctly noted that a local Board's decisions concerning reduction in force are properly reviewable "to determine whether the position ostensibly abolished has not, in fact, been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights . . ."; citing *Viemeister vs. Board of Education of Prospect Park*, 5 *N.J. Super.* 215 (App. Div. 1949). The State Board fond the local Board's action to fall squarely within the prohibition of *Viemeister* concluding "the Board's intention was not an actual abolishment of positions, but a mere re-organization and transfer of duties to a less expensive provider." (Slip opinion at pages 3 and 4.)

It is averred that the *Watchung Hills* decision is dispositive of the issues raised in the instant matter, especially in light of subsequent reported administrative and judicial decisions.

Significantly, the New Jersey Supreme Court in *Impey vs. Board of Education of the Borough of Shrewsbury*, 142 *N.J.* 388 (1995), while acknowledging that a local Board could abolish an existing speech correctionist position and terminate a tenured speech correctionist for economic reasons without violating statutory tenure rights, cited the aforementioned *Cochran* case with approval and distinguished sub-contracting cases involving core CST members, *i.e.*, school social workers, school psychologist and Learning Disabilities Teacher-Consultants, from cases involving Speech Correctionists as follows:

> Petitioner *(Impey)* contends that *N.J.A.C.* 6:28-3.1 requires that the members of the CST that serve handicapped pupils be employed directly by the school district. That section provides:

> A child study team shall consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker. For pupils ages three to five, the study team shall include a speech correctionist or speech-language specialist. All members of the child study team shall be employees of a district board of education, have an identifiable, apportioned commitment to the local school district and shall be available during the hours pupils are in attendance. *[N.J.A.C* 6:28-3.1(b)1].

> Petitioner claims that she was a member of the CST employed by the district, and her replacement by the ESC, consisting of non-district personnel, to provide the services of the CST violates *N.J.A.C.* 6:28-3.1(b). However, the ALJ, Commissioner, and State Board determined that petitioner, who served a K through 8 school. was not a member of the basic CST referred to in *N.J.A.C.* 6:28-3.1. *Cf. N.J.S.A.* 18A:46-5.1 (omitting speech correctionist from definition of "basic child study team" . . . 142 *N.J.* at 395.

In the State Board's Petition for Certification Brief (Exhibit "C" annexed to this brief) that was submitted to the Supreme Court in *Impey,* the Attorney General's Office made the following argument, in distinguishing the *Impey* case (which did not involve a core CST member) from the *Cochran/Watchung Hills* case:

> The second line of cases is exemplified by *Cochrane (sic) vs. Bd. of Education of Watchung Hills,* 1983 *S.L.D.* 953, aff'd, Appellate Division (unpublished decision) (Docket No. A-2327-85T7) (decided December 22, 1986) (Aa69-Aa74). In *Cochrane,* the State Board refused to permit Watchung Hills to reduce three child study team positions to half-time and contract for the same services with an outside provider. What was dispositive in *Cochrane,* was a regulation then in effect, *N.J.A.C.* 6:28.3.1,[4] which require those filling the three positions (school psychologist, social worker and learning disabilities teacher/consultant) to be district employees. Here there is no such requirement with respect to speech correctionist. *Cochrane* properly stands only for the proposition that a district may not contract for services with an outside provider where statute or regulation requires that the service be provided by a district employee. (State Board on brief at pages 6-7).

[4] This regulation is still in effect requiring that "core" Child Study Team members remain **employees of the local Board**; *i.e.*, these positions could not be contracted out.

The Commissioner in *Elson vs. Board of Education of the Hudson County Area Vocational-Technical Schools*, 1995 *S.L.D.* _____ (decided July 10, 1995) annexed hereto as Exhibit "D") sustained the allegations of a tenured school psychologist (and "core" CST member) that his tenure and seniority rights were violated when the school district entered into a sub-contracting arrangement to provide essentially the same school psychologist services performed by Mr. Elson. The Commissioner affirmed the Findings of Fact and Conclusions of Law of the Administrative Law Judge who distinguished the *Impey* Supreme Court and who re-affirmed the continued viability of the *Watchung Hills* line of cases.

The Administrative Law Judge in *Elson* further concluded that:

> The facts of this case are more akin to those considered in *Cochran*, where a full-time in-house team was reduced to a part-time one by a RIF with a subsequent engagement of outside contractors to perform services in equal amount to those performed by the remaining part-time team, than to the facts of *Mullin*, which involved limited instances of contracting out of services. This case is distinguishable from *Impey, supra.* in which the court found broad statutory and regulatory authority for a local board to enter and to join agreements with other school districts for the provision of special education services. There is no such broad authority pertinent to child study teams in general. As discussed, a local board may only contract team evaluation and diagnostic services to supplement existing local district services, not to supplant them. (Slip opinion at pages 22-23).

Most recently, in a February 6, 1997, decision the Commissioner in *Vicenzino v. Bedminster Board of Education* (Exhibit "E"), appeal pending before the State Board concurred with the findings and conclusions of the Administrative Law Judge in that matter that the Bedminster Board's termination of petitioner Vicenzino, a tenured member of the District's "core" CST, and its reallocation of at least some of Ms. Vicenzino's duties to an outside contractor was in violation of *N.J.A.C.* 6:28-3.1(b) and *N.J.A.C.* 6:28-5.1(c)1 and petitioner Vicenzino's tenure rights. The Bedminster Board was directed to reinstate petitioner Vicenzino to her former position as a school social worker with back pay and emoluments, as appropriate, for the 1996-97 school year and thereafter.

It is respectfully submitted that in light of the above it is "plain as a pike-staff" that petitioner, Helen O'Neal, is entitled to judgment as a matter of law in the instant matter. The Salem City Board has totally ignored the significance of the cases cited in this Point which conclusively establish that local Boards may not terminate the employment of tenured "core" CST members such as school social workers and enter into sub-contracting ventures to provide said "core" CST functions. While local Boards, in limited circumstances, may supplement "core" CST functions being presently performed by local Board school social workers, school psychologists and Learning Disability Teacher-Consultants a Board cannot supplant these "core" CST members in light of the cited regulations that require that school Psychologists, Learning Disability Teacher-Consultants and school social workers be employees of a local Board.

The petitioner's Motion for Summary Judgment should be granted consistent with the cases cited in this legal point.

Point II

Assuming *Arguendo* that Limited Fact Finding is Necessary in this Proceeding it is Evident that the Need of the Salem City School District Will Not Be Satisfied Regarding the Provision of Mandated School Social Worker Services if Petitioner Is Not Reinstated to Her Full Time Social Worker Position with the District

The Salem City Board, in an attempt to distinguish the *Cochran, Elson and Vicenzino* cases extensively cited on behalf of petitioner, Helen O'Neal, appears to maintain that by entering into a contract with an unspecified ESC to only provide new social case histories for the affected classified school district children during the 1996-97 school year will satisfy "the needs of the district" concerning the provision of school social worker services and will provide a large financial savings to the Board.

For the reasons set forth in the first legal point in this brief in support of petitioner's Motion for Summary Judgment it is averred that it is of no legal moment that a local Board is able to save money or provide "equivalent" CST services as a result of sub-contracting "core" CST

functions. As summarized in the first legal point it is respectfully submitted that local Boards are absolutely prohibited from sub-contracting school psychologist, Learning Disability Teacher-Consultant or school social worker functions to ESC or any other agency since these actions would violated the cited regulations that require local Boards to insure that "core" CST members are employees of the local Board. Only in instances that are clearly not germane to the instant proceeding, wherein local Boards are merely supplementing "core" CST services that continue to be performed by local school district employed school psychologists, school social workers and Learning Disability Teacher-Consultants, can Boards be permitted to enter into supplemental contracts to provide for limited assistance from subcontracted psychologists, social workers or Learning Disability Teacher-Consultants.

Assuming *arguendo*, however, that any limited fact finding may be viewed as being necessary by the Court it is averred that the attached certification of petitioner, Helen O'Neal, conclusively establishes that the Salem City Board will, in fact, not satisfy the educational needs of the classified children in the Salem City School District in terms of rendering mandated social worker services within the district.

As evinced by the attached Affidavit of Helen O'Neal the Board simply ignores the fact that there are a myriad of school social worker duties that must be performed by school social workers in every school district in this State in order to satisfy the pertinent regulations referring to the required functions of school social workers in the elementary and secondary contexts. Petitioner cites the regulatory provisions found at *N.J.A.C.* 6:28-3.1; *N.J.A.C.* 6:28-3.4(d), (e), (f); *N.J.A.C.* 6:38-3.5(a); *N.J.A.C.* 6:28-3.6 (a), (b), (f); and, *N.J.A.C.* 6:28-2.4.

Petitioner contends that virtually none of the school social worker functions regularly performed by Helen O'Neal for the past eighteen years will be performed by any sub-contracted for per diem school social worker employed by the Board in the Salem City School District during the 1996-97 school year.

As found by the Commissioner in *Elson*, in adopting the ALJ's Findings of Fact and Conclusions of Law, the mandated duties of school social workers are many and varied. (Quotation omitted).

It may be seen by the *Elson* case that there are specific administrative regulations that mandate the many and diverse duties that must be performed by school social workers (as well as LDTC(s) and school psychologists) employed by local Boards within their respective school districts. A review of Ms. O'Neal's attached Affidavit illustrates the many duties previously performed by Ms. O'Neal, in compliance with the above cited administrative regulations, that are not being performed presently within the Salem City School District by a school social worker, or in fact, by anyone else.

For all of the reasons set forth in this additional point it is respectfully submitted that petitioner's Motion for Summary Judgment should be granted in its entirety.

In her prayer for relief, petitioner seeks an Order from the ALJ and the Commissioner granting petitioner's Motion for Summary Judgment which would require that the respondent Board:

> (a) Assign petitioner to the school social worker position within the Salem City School District for the 1996-97 school year and thereafter so as to perform the required duties as set forth within the relevant State statutes and regulations;
>
> (b) Retroactively compensate petitioner for all salary, seniority and economic benefits lost as a result of the Board's failure to re-appoint petitioner to a full time school social worker position within the District, effective the start of the 1996-97 school year, with interest;
>
> (c) Providing such other and further relief as the Commissioner deems appropriate.

The Board's Position

Counterstatement of Facts

Helen O'Neal (petitioner), is a tenured school social worker, who was employed by the respondent, Salem City Board of Education, from November 1978 to November 14, 1996. Respondent, as the local Board, is responsible for the administration of all schools within the Salem City School District and is the employer of the petitioner in this matter.

Petitioner was advised on April 30, 1996 that, at a meeting on April 24, 1996, the respondent had taken action to reduce in force petitioner's employment for the 1996-97 school year. In earlier correspondence the respondent had advised petitioner that it was the respondent's intention to consider a RIF, on economic grounds, which could eliminate the position held by petitioner. Furthermore, that the respondent was considering entering into a contracting agreement for the provision of social worker services with a non-district employee entity. The respondent Board, is statutorily authorized to provide necessary school social worker services for the Salem City School District. In order to comply with contractual notice provisions, petitioner was employed on a two days per week basis from September 16, 1996 through November 14, 1996. During that time petitioner was assigned to perform social worker duties including social assessments.

Pursuant to the State Board adopted code for the equivalency and waiver process, respondent sought and received two waivers from the Commissioner concerning the provision of certain CST functions. The following documentation demonstrates the Board's compliance with the established procedures.

> Attachment "A" is the respondent's February 26, 1996, application for a waiver to contract with an outside provider for the provision (not supplement) of basic "core" CST services.

The Board's Waiver Application states as follows:

> "Waiver" means the granting of approval to avoid compliance either with the specific procedures or the substantive requirements of a specific rule for reasons that are judged educationally, organizationally and fiscally sound.
>
> 1. List the administrative code citation(s) which the proposed waiver process will replace if approved.
>
> *N.J.A.C.* 6:28-1.1(f); *N.J.A.C.* 6:28-5.1(c)Ii.
>
> 2. Describe what the district intends to accomplish that is currently prevented or disallowed by an existing rule.
>
> Due to escalating costs of Special Education, by waiving the regulation listed in item number one, the Salem City Board would be able to reduce the cost of providing CST services by contracting with an approved clinic and agency in accordance with *N.J.A.C.* 6:28-5.1. The waiver would permit the approved clinic and agency to provide (not supplement) diagnostic services.
>
> 3. Briefly describe why a waiver is necessary to accomplish the desired objectives or measurable results.
>
> The regulations as currently written and interpreted require districts to "employ" CST members and only allows the contracting of CST services to supplement existing local district services." The waiver would allow our district to achieve our objective (as described in item #2) of providing more cost effective, cost efficient CST services.
>
> 4. Describe the process for informing the community, parents, board of education members, administration, and staff in the development of the proposal through input and public comment.
>
> The proposal was discussed at a public meeting of the Salem City Board of Education on February 14, 1996. The community was informed through Board minutes.

> 5. List the date the local board of education adopted the resolution for the proposed waiver.
>
> February 14, 1996.

Attachment "B" is the Commissioner's approval of respondent's application for a waiver to contract with an outside provider for the provision (not supplement) of basic "core" CST services, as follows:

> At the June 7, 1995, State Board meeting, the State Board adopted the code for the equivalency and waiver process. I am pleased to inform you that your request has been approved. The approval is effective for three years and you may re-submit your request for continuation at that time.

By copy of this letter, I am notifying the county superintendent of the approval of your request through the equivalency and waiver process for *N.J.A.C.* 6:28-1.1(f) & 6:28-5.1(c)1i. to:

> Your request to contract with an approved provider to provide basic CST services is approved with the condition that you implement the county superintendent's plan for the description of services required for your district.

The equivalency and waiver process is a means for school districts to seek immediate relief from troublesome rules and to develop innovative approaches and cost effective solutions that meet the individual needs of school districts. I am pleased that you chose to participate in this important initiative.

The document is dated August 21, 1996 and signed by Commissioner Klagholz.

Attachment "C" is the respondent's application for a waiver to allow CSTs to determine which assessments are appropriate for initial evaluations, which provides:

> "Waiver" means the granting of approval to avoid compliance either with the specific procedures or the substantive requirements of a specific rule for reasons that are judged educationally, organizationally and fiscally sound.

1. List the administrative code citation(s) which the proposed waiver process will replace if approved.

N.J.A.C. 6:28-3.4(d)

2. Describe what the district intends to accomplish that is currently prevented or disallowed by an existing rule.

The district will employ a more efficient process of evaluation by the use of only those assessments deemed necessary to determine eligibility. Assessments needed for an initial evaluation will be determined by the CST.

3. Briefly describe why a waiver is necessary to accomplish the desired objectives or measurable results.

Current federal code requires a multidisciplinary evaluation - a less restrictive standard than current state code. There are times when a full CST evaluation is not always necessary when conducting an initial evaluation. In addition, a medical exam is not always necessary.

As with re-evaluation, we are requesting a waiver on initial evaluations to allow the CST to determine the evaluation plan similar to the process with re-evaluations.

4. Describe the process for informing the community, parents, board of education members, administration, and staff in the development of the proposal through input and public comment.

The proposal will be discussed at a public meeting of the Salem City Board. The community will be informed through Board minutes.

5. List the date that the local board of education adopted the resolution for the proposed waiver.

June 12, 1996.

Attachment "D" is the Commissioner's approval of respondent's application for a waiver to allow CSTs to determine which assessments are appropriate for initial evaluations. The document is dated November 19, 1996 and signed by Commissioner Klagholz.

> At the June 7, 1995, State Board meeting, the State Board adopted the code for the equivalency and waiver process. I am pleased to inform you that your request has been approved. The approval is effective for three years and you may resubmit your request for continuation at that time.
>
> By copy of this letter, I am notifying the county superintendent of the approval of your request through the equivalency and waiver process to :
>
> *N.J.A.C.* 6:28-3.4(d)
>
> Allow any CSTs to determine which assessments are appropriate for initial evaluations.
>
> The equivalency and waiver process is a means for school districts to seek immediate relief from troublesome rules and to develop innovative approaches and cost effective solutions that meet the individual needs of school districts. I am pleased that you chose to participate in this important initiative.

Attachment "E" is the August 31, 1995, notice from the Commissioner concerning the adoption by the State Board of the code for the equivalency and waiver process which is set forth *in toto* hereinbelow:

> August 31, 1995
>
> TO: Members, State Board of Education
>
> FROM: Leo Klagholz, Commissioner
>
> RE: The Equivalency and Waiver Process
>
> At the June 7, 1995, State Board of Education meeting, the State Board adopted the code for equivalency and waiver process. The intent of the new rule is to provide local school districts and schools operated and regulated by the department with immediate

> relief from troublesome rules. The purpose of this memo is to describe the approval process and report the results of the first round of applications. Attached is a summary list of the applications that were considered and the recommendations that were distributed to school districts August 18.
>
> As the code was being developed, the State Board expressed a strong desire to provide a simple, straightforward application with an expeditious review and approval process. A third objective was to make equivalencies and waivers available to school districts as soon as the code was adopted. In April, school districts received an advance copy of the draft applications, the proposed code and tentative timelines for applying and receiving approval. On June 15, 1995, school districts received the final applications and a copy of the adopted code. The school districts were assured of a response by August 18 if they submitted an application to the county superintendent by July 14.
>
> Applications were received from 39 school districts in 16 counties with several districts submitting multiple applications. The applications requested equivalencies and waivers for special education, facilities, certification, curriculum, transportation and monitoring. The requests were somewhat equally divided between equivalencies and waivers. However, the same request was submitted by one district as an equivalency and by another as a waiver.
>
> Of the 50 applications received, 30 were recommended for immediate approval. Eight did not need an equivalency or waiver because the current code does not prevent the district from taking the requested action. Five were denied because the request was for a waiver to a state or federal statute. One certification request, to satisfy an individual's need, was denied because it must be considered by the State Board of Examiners through the established process.

Subsequent to its reduction in force of the petitioner and obtaining the above waivers, respondent sought out the Salem County Special Services School District as the non-district entity to provide necessary social worker services.

Attachment "F" is documentation concerning the negotiations, under the supervision of the Salem County Superintendent of Schools, with the Salem County Special Services School

District, for the provision of necessary social worker services. Attachment "F" is not repeated here.

Pursuant to the waiver allowing for the contracting for necessary social worker services, the respondent has been negotiating with the Salem County Special Services School District to be available for the provision of necessary social worker services. Since this waiver approval specifically required the County Superintendent's involvement in the implementation thereof, these negotiations have been under and subject to the supervision of the Salem County Superintendent of Schools. *See,* Attachments "A," "B" and "F."

Pursuant to the waiver allowing the respondent to utilize the applicable federal standard for determination of the necessary assessments and components for an individual evaluation, the need for social worker services has been substantially reduced. *See,* attachments "C" and "D." There has been no indication whatsoever from the Salem County Superintendent of Schools that the provision of social worker services by respondent is inadequate in any manner whatsoever, or fails to meet the requirements of the waivers granted under the waiver and equivalency process. *See,* the certification in lieu of affidavit of Richard Rhau, District Superintendent.

None of the decisions attached to petitioner's brief in support of petitioner's Summary Judgment Motion involve circumstances where approvals were sought and received under the State Board of Education's code for the equivalency and waiver process. The intent of that process is to allow local boards of education to effectuate cost savings and efficiency measures. The RIF of the petitioner and the receipt of the two above waivers provide for economy measures in conformance with the intent of the code for equivalency and waiver process.

Attachment "G" is the certification in lieu of Salem City Schools Superintendent Richard R. Rhau, which is not repeated here.

The actions of the respondent in abolishing petitioner's position, while seeking a contracting relationship with the Salem County Special Services School District to provide social worker services previously provided by petitioner is clearly not in contravention of petitioner's tenure rights pursuant to *N.J.S.A.* 18A:28-5 and is not a violation of petitioner's seniority and re-

employment rights subsumed within *N.J.S.A.* 18A:28-11 and *N.J.S.A.* 18A:28-12. The abolishment of petitioner's position was solely for reasons of economy and efficiency. The respondent has realized a substantial savings from the complained of actions that will be at least $40,000 for the 1996-97 school year based upon experience to date. *See*, the certification in lieu of affidavit of District Superintendent Richard R. Rhau, Attachment "G."

The respondent's decision to eliminate the in-district position of school social worker does not result in the Board's failure to properly provide district school children, their parents, or the district teaching personnel with required educational services.

LEGAL ARGUMENT

The petition of appeal contains two bases upon which the petitioner asserts a claim for relief in the instant matter. First, the petitioner asserts that petitioner's tenure and/or seniority rights were violated. See, paragraph number seven of the petition of appeal. Second, the petitioner asserts that "core" CST services including social worker services are required to be provided through employees of the local district rather than through any other relationship such as a contracting arrangement.

Petitioner's Tenure/Seniority Claim is Not Valid

The instant matter is not a matter of first impression with respect to petitioner's asserted claim of tenure rights. The Supreme Court has considered and rejected this argument in *Impey v. Board of Education of Shrewsbury,* 142 *N.J.* 388 (1995). At no point does petitioner assert or offer any proof that the complained of actions by the respondent were taken for other than reasons of economy and efficiency. At page 398, the Court in *Impey, Id.*, specifically stated:

> Our Courts have recognized that a local board of education has the authority to reduce its teaching force as long as that reduction is genuinely 'for reasons of economy.' . . . [r]education's in force, whether of tenured or non-tenured teachers, if done for reasons of economy, is entirely within the authority of the board.

> The determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions. (Citations omitted).

The Court's decision was based at least in part upon *N.J.S.A.* 18A:28-9 which provides that:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the numbers of pupils or of change in the administration or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

In the instant matter, the reduction in force of petitioner is clearly based upon a genuine and good faith reason of economy. The savings to the local district are significantly greater than the savings that were realized in the *Impey, Id.* decision. Herein, the savings are at least $40,000 for the 1996-97 school year alone. *See*, Attachment "G."

The petitioner in her brief herein asserts that the Court in *Impey, Id.*, by implication, restricts that decision from applying to social worker members of a CST, when the Court, at page 399, cites *Cochran v. Watchung Hills Regional High School Board of Education,* 1985, *S.L.D.* 1978. However, this reliance is totally misplaced due to the additional statement by the Court that followed the Court's citation of *Cochran,* wherein the Court specifically stated that the decision in *Cochran* was "in light of then-current statutory requirement that CST services may only be supplemented." There currently is no such statutory requirement, and hence the Court's caveat with respect to *Cochran* eliminates any significance or application of that decisions to the instant matter. Likewise, to the extent that petitioner places reliance upon decision that predated and are at variance with *Impey, supra.* such decisions are no longer valid law and must yield to the Supreme Court's decision herein.

Under the factual circumstances of the instant matter, the existence of the specific waivers granted to respondent herein, and the current status of the law, the *Impey, supra.* decision is controlling and directs the denial of petitioner's tenure/seniority based claim.

Petitioner's Claim that the Social Worker Must Be a Direct Employee is not Valid

Petitioner's asserts as a second basis for the petition of appeal that "core" or basic child study team services, including social worker services, are required to be provided through employees of the local district rather than through any other relationship such as a contracting arrangement. While the petitioner cites and relies upon *Elson v. Board of Education of the Hudson County Area Vocational-Technical Schools*, 1995 *S.L.D.*_____, and *Vicenzino v. Bedminister Board of Education,* 1997 *S.L.D.* _____, in support of this claim, those decisions differ from the instant matter in crucial factual and legal respects. In the instant matter, respondent sought and obtained a waiver from the very administrative rules that form the foundation of the decisions in those matters and the basis of the petitioner's claim in the instant matter. Respondent specifically sought and obtained a waiver from the requirement that social worker services, when provided as part of the "core" or basic child study team, are to be provided by an employee of the district. *See,* Attachments "A" and "B." Secondly, respondent sought and obtained a waiver from the requirement as to the level of social worker services that are required to be provided by the "core" or basic CST. *See,* Attachments "C" and "D." Therefore, none of the decisions that petitioner has relied upon herein are applicable or relevant to the resolution of the instant matter. Clearly, the granting of the waivers as demonstrated by Attachments "A," "B," "C" and "D" defeat the petitioners claim that social worker services of a "core" or basic CST may only be provided by employees of that specific local board of education.

Petitioner's reliance upon decisions which were based upon the very code provisions which respondent sought and obtained a waiver with respect to, clearly defeats any precedential value whatsoever that those decisions might have had. For the equivalency and waiver process to have any meaning at all, it must provide protection from litigation claims such as are involved herein.

Based upon the factual circumstances of the instant matter, the receipt of the waivers by respondent, and the existing provisions of statute and codes, the actions which are complained of in the instant Petition of Appeal do not violate any right of the petitioner. Hence, the instant Petition of Appeal should be dismissed.

CONCLUSIONS

Having carefully considered the whole record and arguments of the parties, I **CONCLUDE** that the instant matter is ripe for Summary Decision, pursuant to *N.J.A.C.* 1:1-12.5 and the criteria set forth in *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67 (1954).

Notwithstanding petitioner's legal arguments the herein record clearly demonstrates that the Commissioner, with approval of the State Board, granted the Board a waiver from the administrative regulations found at *N.J.A.C.* 6:28-1.1 to -12.1.

The statute, at *N.J.S.A.* 18A:4-15 provides that:

> The State Board shall make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this state under which it has jurisdiction.

And, at *N.J.S.A.* 18A:4-16, the law provides that:

> The State Board shall have all powers, in addition to those specifically provided by law, requisite to the performance of its duties.

Pursuant thereto, the State Board provided for the waiver of "troublesome rules" in order for local boards of education to develop cost effective solutions to vexing problems. Specifically, the Commissioner approved the Board's request through the equivalency and waiver process for

N.J.A.C. 6:28-1.1(f) and *N.J.A.C.* 6:28-5.1(c)1.i. (Attachment "B"). The Commissioner, in his approval said that:

> The equivalency and waiver process is a means for school districts to seek immediate relief from troublesome rules and to develop innovative approaches and cost effective solutions to meet the individual needs of the school district. I am pleased that you chose to participate in this important initiative. (Attachment "B").

The Commissioner, in a subsequent approval, waived the requirements at *N.J.A.C.* 6:28-3.4(d) to allow the Board's CST to determine which assessments are appropriate for initial evaluations. (Attachment "D"). Consequently, there is no need to address those decisions or case law relied upon by petitioner. The Commissioner's imprimatur for the Board's waivers puts to rest the arguments in those cited cases.

This, I **CONCLUDE** that the Board's action to contract with the Salem County Special Services School District to perform the functions of its required school social worker services was proper and in accordance with the Commissioner's authority.

I **CONCLUDE** that the Board's action to abolish petitioner's position of school social worker was taken pursuant to *N.J.S.A.* 18A:28-9 for reasons of economy and in no manner violated her tenure rights under *N.J.S.A.* 18A:28-5 nor was the action in contravention of her seniority rights pursuant to *N.J.S.A.* 18A:28-11 to -12.

ORDER

Accordingly, it is hereby **ORDERED** that Summary Decision is hereby **GRANTED to the BOARD** and that petitioner's Motion for Summary Decision is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

13 August 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

8/18/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 19 1997
DATE

Barbara A Hamad
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 6476-96
AGENCY DKT. NO 190-5/96

HELEN O' NEAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4. Reply exceptions were untimely filed by respondent and are, therefore, not considered herein.[1]

Petitioner renews her contention that pursuant to *Impey, supra*, and its progeny, a local board of education may not contract for Child Study Team (CST) services performed by core team members, *i.e.,* by school psychologists, school social workers and learning disabilities teacher consultants, who must by law be employed by the district. (Exceptions at p. 3) Even granting, however, that services may be provided by such an outside entity, in the case of a waiver, petitioner next asserts that the condition set by the Commissioner in granting the waiver was not met and, therefore, the District's failure to comply with its own stated objectives and the waiver condition negates the waiver.

Upon review, the Commissioner notes initially that *N.J.A.C.* 6:28-1.1(f), 6:28-3.4(d) and 6:28-5.1(c), as well as *Impey, supra,* and its progeny, do, in fact, require a social worker to be a member of the core CST and do, in fact, require such members to be employees of the district or of another district through joint agreement. However, in this instance,

[1] Respondent's exceptions, due on September 9, 1997, were received in the Office of the Commissioner on September 15, 1997. In that there was no indication by respondent that they were faxed or proof that they were otherwise filed prior to September 15, 1997, they may not be considered pursuant to *N.J.A.C.* 1:1-18.4(a).

N.J.A.C. 6:28-1.1(f) and 6:28-5.1(c) were waived by the Commissioner and clearly the intent of that waiver was to also waive the requirement of *N.J.A.C.* 6:28-3.4(d) with respect to District employment, notwithstanding that this particular regulation was omitted from the citation list effectuating the District's request. Therefore, petitioner cannot prevail in her argument that, notwithstanding the waiver, regulation and case law prevented the District from contracting out for core CST services on this basis.

As to petitioner's argument that the waiver was invalidated by the Board's failure to meet the condition under which it was granted, i.e., implementation of the county superintendent's plan for the description of services required for the district, the Commissioner holds that, even if it could be found in retrospect that, as events subsequently transpired, the Board failed to meet the condition imposed, its action to reduce petitioner's employment at the time the waiver was granted would still have been proper and petitioner would have no claim to reinstatement and back pay. Rather, the appropriate remedy for a demonstrated failure to meet waiver conditions would be an action on the part of the Commissioner to rescind the waiver in the event the noncompliance remains uncorrected.[2]

Accordingly, the initial decision dismissing the petition of appeal is affirmed for the reasons expressed therein, as amplified above. However, in light of the unresolved issues raised in this matter relating to possible noncompliance with the waiver's stated condition, the Commissioner hereby directs the Salem County Superintendent to inquire into the Board's provision of required social services, and to take such action as he deems appropriate should he find any deficiency in the Board's compliance.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 17, 1997
Date of Mailing, November 17, 1997

[2] Such rescission would presumably result in petitioner's recall from the preferred eligibility list, on which she would have been placed upon RIF in recognition of her tenure and seniority rights.

595-97

EDU #6476-96
C # 595-97
SB # 99-97

HELEN O'NEAL, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF SALEM, SALEM COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, November 17, 1997

For the Petitioner-Appellant, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, John T. Barbour, Esq.

This is an appeal from a summary decision in favor of the Board of Education of the City of Salem (hereinafter "Board"). The Board had applied to the Commissioner of Education for a waiver of two rules which we had adopted with respect to special education. The first regulation required that members of the basic child study team be employed, either independently or through joint agreement, by district boards of education in sufficient numbers to ensure the provision of required programs and services. N.J.A.C. 6:28-1.1(f). The second established a level of diagnostic assessment that had to be provided by restricting contracted services to independent child study team evaluations and/or diagnostic services to supplement existing local

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district services. N.J.A.C. 6:28-5.1(c)1i. In combination, these two waivers removed the regulatory barriers to subcontracting for social worker services. As a result, the Board terminated its regular social worker and planned to contract out for social work services. The social worker, Helen O'Neal (hereinafter "petitioner"), who had achieved tenure in the district as a result of such service, filed a petition of appeal with the Commissioner, alleging that the Board had violated her tenure and seniority rights in abolishing her position.

The Administrative Law Judge ("ALJ") concluded that the matter was ripe for summary decision. He found that the Board's action to contract with the Salem County Special Services School District for school social worker services was proper given the Commissioner's grant of a waiver from regulatory requirements which would otherwise have precluded such contracting. Accordingly, the ALJ concluded that the Board had acted properly for reasons of economy in abolishing petitioner's position and that it had not contravened petitioner's tenure or seniority rights.

The Commissioner adopted the ALJ's determination with modification. Initially noting that case law and regulation require a social worker to be a member of the core child study team employed by the district or of another district through joint agreement, the Commissioner stressed that the requirements of the regulations had been waived. The Commissioner corrected the waiver to include N.J.A.C. 6:28-3.4(d) (requiring that initial evaluation must include assessment by a school social worker employed by the school) and concluded that petitioner could not prevail on her argument that regulation and case law prevented contracting in this instance.

The Commissioner also rejected the petitioner's contention that the waiver was invalidated by a failure of the Board to meet the conditions of the waiver, emphasizing that such failure might invalidate the waiver but would not provide a claim to petitioner. However, the Commissioner directed the Salem County Superintendent to inquire into the Board's provision of required social work services and to take appropriate action in the event that he found any deficiency in the Board's compliance with the terms of the waiver.

Petitioner appealed to the State Board of Education, renewing her argument that the regulations and case law precluded contracting in this case. Petitioner maintains that the subcontracting was unlawful because the Board lacked the authority to provide basic child study team services by contract with a private vendor. She further argues that the Salem Board failed to comply with the conditions of the waiver and that it could not meet the needs of the school district for mandated social work services.

We have carefully reviewed the record in this matter and conclude that the ALJ and the Commissioner acted properly in granting summary decision to the Board.

Initially, we concur with petitioner that the statutory framework applicable herein precludes the contracting of the services at issue to a private vendor. However, that is not what occurred in this instance. Rather, the record establishes that the Board in this case contracted with the Salem County Special Services School District to provide the required services. In this respect, we stress that a special services school district is a public entity authorized by statute to provide such services. Nor has the petitioner offered proof or a concrete example of any failure by the Board to provide mandated

services to the pupils of the school district. Under these circumstances, the Board was entitled to summary decision.

We therefore affirm the Commissioner's decision. However, in doing so, we emphasize that N.J.A.C. 6A:14-1 et seq. became effective on July 6, 1998, and that, pursuant to N.J.A.C. 6A:14-4.10(f), the waiver at issue here expired on that date.

June 7, 2000

Date of mailing JUN 09 2000

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596-97

BOARD OF EDUCATION OF THE CITY OF ABSECON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
CITY COUNCIL OF THE CITY OF ABSECON, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Board of Education appealed action of City Council reducing, by $179,068.58, the tax levy of $5,201,617 proposed for 1997-98 school budget. Because Board had proposed budget at minimum level necessary to meet statutory requirement for "local share" under the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), City was prohibited from reducing line-item appropriations; consequently, it acted to increase allocations from surplus, from $75,000 to $254,069. City contended Board erred in not applying to an anticipated program for reduction of the required minimum local share in certain districts affected by transfer of lease purchase payments to the debt service fund.

Commissioner initially noted that the Board had not, in fact, taken advantage of the tax levy reduction program offered, and that, in the event, the program was not enacted by the Legislature. Thus, there is no current statutory authority for exception to the requirements of CEIFA. Commissioner found that City's action to reallocate surplus, while permissible under CEIFA, would leave the Board herein in the untenable position of having no undesignated, unreserved surplus at all, whereas the amount of surplus proposed by the Board ($179,069) represented an appropriate level of about 2.8% of the General Fund Budget Commissioner rejected City's attempt to identify line items where reductions could be made so as to avoid depleting surplus, finding such attempt to be impermissible under CEIFA. Reduction to tax levy was ordered restored, for a total levy of $5,201,617 as proposed by the Board.

November 17, 1997

AGENCY DKT. NO. 216-6/97

BOARD OF EDUCATION OF THE CITY OF ABSECON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
		DECISION
CITY COUNCIL OF THE CITY OF ABSECON, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

For the Board of Education, Louis J. Greco, Esq.

For the City Council, Tuohy and Tuohy (Michael J. Blee, Esq.)

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 12, 1997 through the filing of a Petition of Appeal by the Absecon Board of Education (Board), seeking restoration of reductions to the school budget made by the City Council of the City of Absecon (City) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 15, 1997.

At that election, the voters rejected a public question proposing a General Fund tax levy of $5,201,617 for the 1997-98 school year. On May 15, 1997, following consultation with the Board as required by law, the City adopted a resolution determining to certify a General Fund tax levy of $5,022,548.42 as sufficient to provide for a thorough and efficient system of education (T&E) in the District. This amount represented a reduction of $179,068.58 from the tax levy proposed by the Board, and was effectuated through an increase in appropriation of surplus, consistent with the directive of the State Department of Education that appropriations could not be reduced since the amount proposed by the Board represented the minimum tax levy required to meet the statutory local share of the cost of providing T&E. (As set forth below, however, the City concurrently contended that this statutory minimum levy could be reduced by the

Commissioner, or alternatively, that equivalent reductions could be effectuated through a total of fourteen line items for the reasons stated.) By resolution dated June 3, 1997, the Board determined to appeal the City's reduction and duly filed the within petition.

The amounts in dispute in this appeal are thus as follows:

Tax Levy Proposed by Board		Tax Levy Certified by City	
General Fund	$5,201,617.00	General Fund	$5,022,548.42
Amount of Reduction by City		Amount of Reduction in Dispute	
General Fund	$ 179,068.58	General Fund	$ 179,068.58

An answer to the Board's petition was filed by the City on July 10, 1997, together with an addendum explaining what the City believed to be an unusual circumstance related to the appeal. On July 14, 1997, the City filed its position statement required pursuant to *N.J.A.C.* 6:24-7.8, followed by a response to the Board's position on August 8, 1997 and a final summation on August 18, 1997. The Board submitted a combined position statement and response on July 29, 1997, and elected not to file a final summation thereafter.

In addition, as the parties had been advised by letter from the Assistant Commissioner dated April 16, 1997, distributed through the County Superintendent to boards and municipalities experiencing budget defeats and again in conjunction with proceedings herein, as part of the record of the within appeal, the Commissioner is taking official notice of the Board's revised budget and its June 30 financial report to be filed by August 1 pursuant to *N.J.S.A.* 18A:17-10, as well as applicable portions of the School Report Card and the Comparative Spending Guide. That same notice further provided that official notice would be taken of the annual audit for purposes of verifying surplus information given in the June 30 report and any prior year data relied upon by the Commissioner in making his determinations.

Consistent with the above, upon receipt of the City's summation on August 18, 1997, the record of the within appeal was closed and the matter duly proceeded to determination herein.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education. The Legislature by way of statutory scheme has delegated the responsibility for providing such thorough and efficient system to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner's standard has historically been whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T&E. *Board of Education of East Brunswick Township v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) and *Board of Education of Deptford Township v. Mayor and Council of Deptford Township,* 116 *N.J.* 305 (1989). However, on December 20, 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), wherein a prescribed level of expenditure range was established as sufficient for provision of T&E. Appeal of General Fund budget amounts in excess of that range, following voter defeat and municipal reduction, was expressly restricted to grounds of negative impact on the stability of the district given the need for long-term planning and budgeting, while budgets within the established range could be appealed on either stability or T&E grounds; budgets proposed or reduced below the established range required automatic review by the Commissioner and a showing by the governing body that reduction would not negatively impact the district's stability or its ability to provide T&E. (*P.L.* 1996, *c.* 138; *N.J.S.A.* 18A:7F-1 *et seq.*)

In the present instance, the Board proposed a General Fund budget below the T&E amount established for the District pursuant to CEIFA. Accordingly, the within review is a mandatory one, and the burden of proof lies with the City.

Additionally, CEIFA provides for support of the public schools through a combination of State aid and a minimum level of local resources ("required local share").

The latter is individually calculated for each district and establishes the minimum tax levy that must be certified to support the district's base budget. In the present instance, the amount proposed by the Board, $5,201,617, represents that minimum amount.

POSITIONS OF THE PARTIES

The City argues that the Board was given the opportunity, by letter dated March 12, 1997, from the Department of Education's Director of Finance, to apply for an adjustment to the statutorily required minimum "local share" tax levy, based on the District's having been required by CEIFA to transfer lease purchase payments to the debt service fund so as to result in an overall increase in taxes when the unaided portion of the lease purchase payments was combined with the required local share. (City's Position Statement, Exhibit A) The Board failed to exercise this option, the City opines, then made spending increases over the prior year so as to reach the statutory minimum tax levy in an effort to circumvent the City's ability to make reductions. Later, when the City inquired about its ability to make reductions (City's Position Statement, Exhibit D), it was advised by letter from the Commissioner that no reductions could be made to appropriations, and that the amount of tax levy proposed by the Board represented the District's statutory minimum local share; however, that levy could be reduced by appropriation of additional general fund balance (surplus) or increase of miscellaneous revenue. (City's Position Statement, Exhibit E) Having determined that no increase to miscellaneous revenue was possible, the City contends that it took the only available option to respect the wishes of voters, who overwhelmingly rejected the proposed budget, and increased the appropriation from surplus. It also, however, identified specific line items in which it believed the District could make reductions so as to avoid having to appropriate the additional surplus. The City urges the Commissioner to preserve the sanctity of the voting process, and to not overlook the fact that the Board took advantage of a loophole in CEIFA by failing to exercise the option of lowering the minimum required tax levy when it was offered, regardless of the fact that the option was never incorporated as part of the FY 98 Appropriations Act.

The Board, in turn, argues that the City ignores both the clear dictates of the law and the programmatic, operational and stability needs of the District. It

emphasizes that the tax levy reduction option offered to districts in March 1997 is, in fact, no longer available, and was not at the time the City made its reductions; and, further, that the District cannot reduce appropriations under CEIFA even if it could make the specific line-item adjustments proposed by the City, which it cannot without impairing T&E and stability. Ultimately, the City's action has left the District in an untenable position as to its reserve of undesignated surplus, and such action cannot be sustained herein.

COMMISSIONER'S DETERMINATION

Upon review, the Commissioner finds that the City's position in this matter essentially rests upon the Board's failure to apply for an adjustment to the statutorily required minimum tax levy under CEIFA, as it was advised it could do by the Department of Education; in effect, the City seeks to have that adjustment made by the Commissioner herein. In order to utilize this adjustment, the Board would have had to apply to the Commissioner prior to setting its budget, demonstrating to the Commissioner's satisfaction that a reduction could be made without detrimental impact on the district's educational offerings. The Board, however, voted not to exercise this option. In addition, the offer embodied in the Department's letter of invitation was expressly contingent on the inclusion of effectuating language by the Legislature, and its adoption by the Governor, in the FY 98 Appropriations Act; indeed, the letter specifically states that, should such language not be adopted, any reduction of tax levy made in anticipation of such adoption will be subject to adjustment (City's Position Statement, Exhibit A, page 2, paragraph 2). As events transpired, no district elected to apply to the program, so it was not necessary for the Legislature to include language authorizing adjustment of minimum tax levy, as set forth in the referenced letter, in the bill enacted as the FY 98 Appropriations Act (*P.L.* 1997, *c.* 131). Accordingly, the program anticipated by the Department became null and void from its outset, and there is no statutory basis on which the action sought by the City may be taken. The budget appeal process cannot serve as a forum for the City's redress, on its own behalf and that of the voters, of the Board's express discretionary determination not to apply for tax relief; that is a matter for which Board members will be held accountable at the annual school election.

In view of the above, within the context of the present proceedings, the provisions of CEIFA must control as a matter of law. As the City has previously been apprised by the Commissioner, CEIFA does not permit a governing body to make reductions to line-item appropriations in a defeated budget under the circumstances present herein; it may only increase allocations from surplus or amounts of miscellaneous revenue. Thus, the action taken by the City to increase allocations from surplus was permissible under CEIFA, but must now be subjected to scrutiny in terms of its impact on the District's budget.

In its advertised annual school district budget statement, the Board had allocated $75,000 of unreserved surplus as revenue, leaving $179,069, or about 2.8% of its total general fund budget, as undesignated unreserved surplus. Both the Board's annual financial report filed pursuant to *N.J.S.A.* 18A:17-10 (June 30 Board Secretary's report) and its annual audit reveal a surplus comparable to that projected by the Board in preparing its budget. Therefore, the Commissioner determines that appropriation of an additional $179,068.58 as proposed by the City, would leave the District in the entirely untenable position of having essentially no surplus at all. In this regard, the Commissioner notes the City's identification of fourteen line items where it believes the Board can make reductions so as to accommodate a reduced tax levy without depleting surplus. The Commissioner must reject this approach, however, as a "back door" means of effectuating reductions expressly prohibited by CEIFA, as well as prior Commissioner directive. Therefore, the City's action cannot be sustained and the tax levy proposed by the Board must be restored.

SUMMARY

In summary, the Commissioner directs restoration of the City's increase to revenue as set forth below.

General Fund Tax Levy Certified by Governing Body:	$5,022,548.42
Restoration of Reduction to Tax Levy:	179,068.58
Amount of Restoration To Be Funded by Surplus:	N/A
Total General Fund Tax Levy for 1997-98:	$5,201.617.00

Accordingly, the Atlantic County Board of Taxation is directed to make the necessary adjustments as set forth above to reflect a total of $5,201,617 to be raised in tax levy for General Fund purposes of the Absecon Board of Education for the 1997-98 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 17, 1997
Date of Mailing, November 17, 1997

597-97

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

PETITIONER,

V.

ROSETTA FORNINO-GONZALEZ, VINCENZA FORNINO AND JOHN FORNINO,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 19, 1997

OAL DKT. NO. EDU 7334-97
AGENCY DKT. NO. 197-6/97

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
ROSETTA FORNINO-GONZALEZ, VINCENZA FORNINO AND JOHN FORNINO,	:	
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 19, 1997
DATE OF MAILING NOVEMBER 19, 1997

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598-97

DAVID L. FLORA AND GAYLE B. FLORA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 19, 1997

OAL DKT. NO. EDU 7832-97
AGENCY DKT. NO. 302-8/97

DAVID L. FLORA AND GAYLE B. FLORA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 19, 1997

599-97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY REGIONAL HIGH SCHOOL DISTRICT, AND MATHIS CONSTRUCTION,	:	DECISION
RESPONDENTS.	:	
	:	

NOVEMBER 19, 1997

OAL DKT. NO. EDU 6491-97
AGENCY DKT. NO. 279-7/97

BUENA PLUMBING, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY REGIONAL HIGH SCHOOL DISTRICT, AND MATHIS CONSTRUCTION,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 19, 1997
DATE OF MAILINGNOVEMBER 19, 1997

600-97

600-97

HUNTERDON COUNTY POLYTECH EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON COUNTY POLYTECH VOCATIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 19, 1997

OAL DKT. NO. EDU 8439-96
AGENCY DKT. NO. 332-8/96

HUNTERDON COUNTY POLYTECH EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON COUNTY POLYTECH VOCATIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 19, 1997
DATE OFMAILING NOVEMBER 19, 1997

603-97

603-97

DR. JOHN M. SHERRY, ASSISTANT COMMISSIONER, DIVISION OF FIELD SERVICES,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
		ORDER
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY AND DR. H. BENJAMIN WILLIAMS, SUPERINTENDENT, ATLANTIC CITY SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
RESPONDENTS.	:	

For Petitioner, Peter Verniero, Attorney General of New Jersey
(John K. Worthington, Deputy Attorney General, appearing)

For Respondents, Michael C. Epps, Esq., General Counsel for the Atlantic City Board of Education

WHEREAS, this matter was opened before the Commissioner of Education on November 5, 1997, upon the filing by the Assistant Commissioner of a petition with form of order directing respondents to show cause as to why the Commissioner of Education should not issue an order requiring that the Atlantic City School District remove all fifth grade students from the New Albany Middle School (Albany Avenue School) by December 1, 1997, due to the inability of the district to provide a safe and appropriate environment for such students within that facility; and

WHEREAS, the Commissioner of Education issued said form of order on November 6, 1997, directing that it be served upon respondents within two (2) days thereafter, that respondents be afforded seven (7) calendar days from service to file an answer, and that petitioner be afforded four (4) calendar days from service of answer to file a reply; and

WHEREAS, the parties filed timely and substantial papers in response to the Commissioner's directive, including papers from the District detailing the actions it had taken and was continuing to take as part of its plan to ensure the suitability of the school building, as well as reply papers detailing the results of a site visit conducted by the Assistant Commissioner on November 17, 1997 in order to assess the progress made by the district in recent weeks; and

WHEREAS, such papers have now been reviewed, together with the petition and supporting materials submitted by the Assistant Commissioner, and, based upon such review, the Commissioner finds numerous causes for continued and even heightened concern, including the inadequacy of supervision and security in several regards, an assessment borne out by ongoing incidents of violence, including an incident during the site visit where one student was slashed by another and required hospital treatment as a result; the inadequate or non-operational state of equipment intended to enhance safety or necessary for health; the overcrowding of the cafeteria and gymnasium and the absence of certain programs such as library, computer lab and recess; the high rate of staff absenteeism, inability to obtain substitutes and mixed staff morale; and the inadequate or untimely provision of student educational materials; and

WHEREAS, under these circumstances, the Commissioner finds that, notwithstanding respondents' efforts to improve the safety and educational appropriateness of the New Albany Middle School, the school remains unsuitable for fifth grade students, who cannot be provided with the thorough and efficient education to which they are entitled by law in an environment where inadequate provisions have been made for their presence and where their health and safety are jeopardized on a daily basis; and

WHEREAS, the Commissioner has, further, carefully considered respondents' arguments as to the alleged negative impact of moving fifth grade students from the New Albany School at this time, including a need for additional transportation, the objection of certain parents, the costs and administrative difficulties associated with moving, disruption of programming for affected students at both the New Albany School

and the schools to which students would be reassigned, loss of anticipated space for Pre-K programs, increased class size and the potential for staff reduction; and

WHEREAS, based upon review of the record, the Commissioner has found these concerns to be either without merit based on the alternative facilities available and their location, or of lesser importance when weighed against the ongoing threat to the students' health and safety that would result from their continued attendance at the New Albany School; and

WHEREAS, while cognizant of the district's efforts and the authority a board of education will ordinarily have over its own school system, as well as of the sentiments of certain segments of the community which have expressed support for the District herein, the Commissioner will not ignore his obligation to act on behalf of the children whose interests he is charged with protecting, when it has been clearly demonstrated to him that the local board of education cannot guarantee the basic safety and educational adequacy of the environment it is providing for those children; now therefore,

IT IS ORDERED this 19th day of November 1997, that respondents will immediately take such actions as are necessary to fully effectuate, by December 1, 1997, the removal of all fifth grade students from the New Albany Middle School.

COMMISSIONER OF EDUCATION

November 19, 1997
Faxed and Mailed, November 19, 1997

603 -97

C #603-97
SB # 93-97

DR. JOHN SHERRY, ASSISTANT COMMISSIONER, DIVISION OF FIELD SERVICES,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY AND DR. H. BENJAMIN WILLIAMS, SUPER-INTENDENT, ATLANTIC CITY SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 19, 1997

Decision on motion by the State Board of Education, November 26, 1997

For the Petitioner-Respondent, John K. Worthington, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

For the Respondent-Appellant, Michael C. Epps, Esq.

This matter involves an appeal filed by the Board of Education of the City of Atlantic City (hereinafter "Board") on November 25, 1997 from a decision of the Commissioner of Education directing that all fifth-grade students be removed from the Albany Avenue School by December 1, 1997. At the same time, the Board sought emergent relief from the State Board in the form of a stay of the Commissioner's order pending the State Board's decision on the merits of the underlying appeal. By letter

JUNE 3, 1998

dated November 26, 1997, we denied the Board's application because it did not meet the standards which would have entitled it to emergent relief.

The parties then filed their briefs on the merits. The Board filed its appeal brief on December 15, 1997, and a Deputy Attorney General filed an answer brief on behalf of Assistant Commissioner John Sherry, who is the respondent in this appeal.

By letter of February 27, 1998, we advised both parties that since the fifth-grade students had been removed from the Albany Avenue School by December 1, 1997, as had been directed by the Commissioner, the Legal Committee was recommending to the State Board that, in the absence of any objection, the appeal be dismissed. Neither party filed any objections to such dismissal. Therefore, because the appeal is moot, and in the absence of any objection, the State Board of Education dismisses the appeal in this matter.

June 3, 1998

Date of mailing JUN 05 1998

604-97

JACQUELINE SEWING, LINDA SEGUINE AND EILEEN KACZMAREK,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

NOVEMBER 20, 1997

OAL DKT. NO. EDU 6570-96
AGENCY DKT. NO. 257-7/96

JACQUELINE SEWING, LINDA SEGUINE AND EILEEN KACZMAREK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 20, 1997
DATE OF MAILING NOVEMBER 20, 1997

605-97

ROBERT DORSETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

NOVEMBER 20, 1997

OAL DKT. NO. EDU 11310-96
AGENCY DKT. NO. 327-8/96

ROBERT DORSETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 20, 1997
DATE OF MAILING NOVEMBER 20, 1997

606-97

606-97

BARBARA HAGGENMILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 20, 1997

OAL DKT. NO. EDU 9726-96
AGENCY DKT. NO. 356-8/96

BARBARA HAGGENMILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 20, 1997
DATE OF MAILING NOVEMBER 20, 1997

607-97

B.O'N., on behalf of minor child, K.O'N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH PLAINFIELD SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 20, 1997

OAL DKT. NO. EDU 8222-97
AGENCY DKT. NO. 315-9/97

B.O'N., on behalf of minor child, K.O'N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH PLAINFIELD SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 20, 1997
DATE OF MAILING NOVEMBER 20, 1997

601-97

S.N. AND J.N., on behalf of minor child, R.N., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF HAZLET, MONMOUTH COUNTY,

:

RESPONDENT.

:

NOVEMBER 19, 1997

OAL DKT. NO. EDU 4829-97
AGENCY DKT. NO. 208-6/97

S.N. AND J.N., on behalf of minor child, R.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 19, 1997
DATE OF MAILINGNOVEMBER 19, 1997

603-97

619-97M
(603-97)

DR. JOHN M. SHERRY, ASSISTANT COMMISSIONER, DIVISION OF FIELD SERVICES,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
		DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY AND DR. H. BENJAMIN WILLIAMS, SUPERINTENDENT, ATLANTIC CITY SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
RESPONDENTS.	:	

For Movants-Respondents, Michael C. Epps, Esq., General Counsel for the Atlantic City Board of Education

For Respondent-Petitioner, Peter Verniero, Attorney General of New Jersey (John K. Worthington, Deputy Attorney General, appearing)

This matter comes before the Commissioner of Education by way of a motion, filed this date on behalf of respondents, seeking a stay pending appeal of the Order of November 19, 1997, directing that all fifth grade students be removed from the New Albany Middle School (Albany Avenue School) by December 1, 1997, due to the inability of respondents to provide a safe and appropriate environment for such students within that facility.

In their moving papers, respondents argue that they clearly meet the criteria for granting of a stay pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Respondents contend that they will suffer irreparable harm in the absence of a stay, as, should they prevail on the merits of their appeal, no recompense could be made for the cost and disruption attendant upon relocating the fifth grade students. They further contend that their legal right to the relief they request is well settled, as the discretionary authority of local boards of education to operate their districts without the Commissioner's substitution of his judgment for theirs is well established. Finally, they contend that the weighing of equities in this matter

lies in their favor, as no harm will come to petitioner if a stay is issued, while respondents stand to suffer significant harm in the absence of a stay.

Respondents then renew the arguments made in conjunction with the prior order, including the history of the students' assignment to the former Atlantic City High School building as an attempt to comply with a corrective action plan imposed by the Department of Education while still meeting local needs, the fiscal constraints under which the district is currently operating, the disruption that will fall upon students uprooted mid-year from the physical and educational environment to which they are accustomed, the "ripple" effect of the move upon staff and students throughout the district, the efforts made by the district to improve safety within the building, the statements of support from parents and staff, and the limited interaction within the school building of the fifth graders and the older students who have been the source of the disciplinary problems that formed the primary basis for the Commissioner's directive.

Upon review, the Commissioner remains unpersuaded by respondents' arguments. While cognizant of respondents' efforts to improve the safety and educational appropriateness of the New Albany Middle School, and of the difficulties attendant upon moving a grade in mid-year under any circumstances, the Commissioner must still find that the safety and well-being of children takes precedence over these considerations. Nothing in respondents' papers would serve to refute the Commissioner's prior conclusion that the New Albany School remains unsuitable for fifth grade students, nor have any arguments been brought forth to counter the statements in the affidavit of the Assistant Commissioner noting the availability of alternative facilities that would minimize the disruption and cost anticipated by the district as a consequence of the move.[1]

This being so, the Commissioner cannot find that respondents have met the criteria for grant of a stay. To the contrary, it is the potential for harm to children in this matter that is truly irreparable, and far greater than any cost or inconvenience to the district that ensuring their safety might entail. Moreover, the Commissioner cannot

[1] In this regard, the Commissioner notes that the case relied upon by respondent for the proposition that the Commissioner has not previously supported mid-year moves, *Bond v. Camden Board of Education*, 93 *N.J.A.R.2d* (EDU) 577, 579, did not in any way involve issues of student health and safety, but rather involved an improper delegation of the board's decision-making authority.

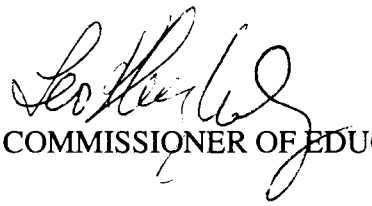
conclude that the law is settled as claimed by respondents, as it is equally well established that a local board's authority to operate its own district is circumscribed by the Commissioner's broader authority to ensure provision of a safe and adequate environment for the delivery of a thorough and efficient system of education.

Therefore, as in his prior order, the Commissioner here reiterates that where students are not receiving the thorough and efficient education to which they are entitled by law because they are placed by their local board of education in an environment where inadequate provisions have been made for their presence and where their health and safety are jeopardized on a daily basis, the Commissioner will not ignore his obligation to act.

Accordingly, respondents' motion for a stay of the Order of November 19, 1997, is DENIED, and respondents are once again directed to immediately take such actions as are necessary to fully effectuate, by December 1, 1997, the removal of all fifth grade students from the New Albany Middle School.

Respondents' request for oral argument is noted and denied as unnecessary to a determination in this matter.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

NOVEMBER 25, 1997
DATE OF MAILING NOVEMBER 25, 1997

608-97

ANGELO VELASQUEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 20, 1997

OAL DKT. NO. EDU 8276-95
AGENCY DKT. NO. 303-7/95

ANGELO VELASQUEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 20, 1997
DATE OF MAILING NOVEMBER 20, 1997

609-97

LOUISE SPRINGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 20, 1997

OAL DKT. NO. EDU 11004-96
AGENCY DKT. NO. 377-9/96

LOUISE SPRINGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LEONIA, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER20, 1997
DATE OF MAILING NOVEMBER 20, 1997

610-97

M.C.F., on behalf of minor child, L.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 20, 1997

OAL DKT. NO. EDU 2821-97
AGENCY DKT. NO. 97-3/97

M.C.F., on behalf of minor child, L.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 20, 1997

611-97

RAY OTTO PETERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL HIGH SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 20, 1997

OAL DKT. NO. EDU 5559-97
AGENCY DKT. NO. 133-4/97

RAY OTTO PETERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTH WARREN REGIONAL HIGH SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

NOVEMBER 20, 1997
DATE OF MAILING NOVEMBER 20, 1997

612-97

612-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JEAN HOFFER,	:	
NEW JERSEY DEPARTMENT OF	:	COMMISSIONER OF EDUCATION
CORRECTIONS.	:	DECISION
	:	

NOVEMBER 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8405-96

AGENCY DKT. NO. 278-7/96

IN THE MATTER OF THE TENURE HEARING OF JEAN HOFFER, DEPARTMENT OF CORRECTIONS

Mary F. Rubinstein, Deputy Attorney General for the Department of Corrections (Peter Verniero, Attorney General of New Jersey, attorney)

Paul Muller, Esq., for Jean Hoffer (Weissman & Mintz, attorneys)

Record Closed: October 9, 1997 Decided: October 14, 1997

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

This matter concerns the tenure charges filed by the Department of Corrections against the respondent, Jean Hoffer, for inappropriate behavior as a teacher. The petitioner requested a hearing. The matter was transmitted to the Office of Administrative Law on September 20, 1996, for a hearing pursuant to N.J.S.A. 52:14F-1 to -15 and N.J.S.A. 52:14B-1 to -13.

The matter was assigned to Administrative Law Judge Steven Reback, who had a number of conferences with the parties. The matter was scheduled for hearing on January 15 and 16, 1998.

On October 2, 1997, the respondent filed a motion for emergent relief. Judge Reback is on vacation and the motion was assigned to me. The oral argument on the motion was scheduled for October 9, 1997. On that date, the parties conferred and agreed to a settlement of the entire matter. The attached stipulation sets forth the terms of the settlement and is incorporated herein.

I have reviewed the record and the settlement terms, and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement, and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

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

October 14, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

10/16/97
DATE

DNH
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 17 1997
DATE

Barbara A Harnesk
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

PETER VERNIERO
Attorney General of New Jersey
Attorney for New Jersey Department
of Corrections
R. J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

By: Mary F. Rubinstein
Deputy Attorney General
(609) 292-5214

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDUTH 08405-96S

I/M/O TENURE HEARING OF)
JEAN HOFFER

SETTLEMENT AGREEMENT

WHEREAS the parties agree to settle this matter, noting that the public policy of New Jersey strongly encourages settlement.

IT IS HEREBY AGREED AND STIPULATED by and between the parties to this action that this matter is settled for the following reasons:

1. The costs of continuing to prosecute the tenure claims against the Respondent Jean Hoffer are expected to be substantial.

2. The disruption of the routine at Edna Mahon Correctional Facility which would be occasioned by the continued litigation as well as any unwanted publicity which could result from this litigation outweigh any advantage to continuing the litigation in this matter.

3. The parties have reached a mutually acceptable agreement concerning the payment of salary and Respondent has agreed to waive attorneys fees.

4. Expeditious resolution of this matter will serve the needs of the students at Edna Mahon Correctional Facility by allowing the position formerly held by Ms. Hoffer to be filled, thus enhancing the educational environment in the correctional facility.

5. This agreement contains a provision for a resignation in good standing and a commitment not to seek further employment from the Department of Corrections, thus allaying any concerns raised by the tenure charges.

IT IS HEREBY AGREED AND STIPULATED by and between the parties to this action that this matter is settled in accordance with the following terms:

1. Jean Hoffer and the New Jersey Department of Corrections have reached an amicable and full settlement of any and all claims contained in the June 26, 1996 tenure charges.

2. The Department of Corrections agrees to restore Jean Hoffer to full pay status immediately, including the medical and dental coverage to which she would have been entitled as a full time employee, retroactively from the pay period ending May 9, 1997. The Department agrees to maintain that status until December 9, 1997. The Department agrees to forward a check for the amount of the retroactive salary on or before November 21, 1997.

3. Jean Hoffer shall submit a properly completed application for disability retirement on or before December 9, 1997.

4. The Department of Corrections agrees to support Ms. Hoffer's application for disability retirement by handling the application as expeditiously as possible.

5. Jean Hoffer agrees that on December 9, 1997 she will be resigned in good standing from her position as a tenured teacher with the Department of Corrections. Any outcome or decision on her

application for disability retirement by the Division of Pensions and Benefits will have no effect on the resignation in good standing. Ms. Hoffer also agrees not to seek reemployment with the Department of Corrections.

6. Jean Hoffer shall withdraw her appeal of the charges contained in the June 26, 1996 letter and waives any right to a hearing.

7. Jean Hoffer agrees to waive any right to salary she would have received during the 120 days of unpaid leave following the certification of the charges against her.

8. The Department of Corrections agrees to withdraw the tenure charges against Jean Hoffer and have the respondent's personnel file and computer records reflect that the tenure charges filed against her were withdrawn by the Department of Corrections under a Settlement Agreement and that the 120 days of unpaid leave was not disciplinary in nature.

9. Nothing contained in this agreement shall be construed as an admission of liability by any party and shall not serve as a precedent in any subsequent matter.

10. The Respondent will not receive any counsel fees, costs or any monetary relief, other than the pay to which she is entitled, as a result of this settlement.

11. The parties agree to waive the filing of exceptions to the initial decision which would recommend the approval of the settlement agreement as a complete and final disposition of this matter.

12. The Respondent is aware that pursuant to N.J.A.C. 6:11-33.6(a)1, the Commissioner of Education shall forward this settlement agreement to the State Board of Examiners for review and

determination of possible revocation or suspension of Respondent's certificate. The State Board of Examiners may make new factual findings and issue an order to show cause and a statement of charges upon which revocation or suspension may be considered.

13. The parties acknowledge that this Agreement may not be consummated until approved by the Commissioner of Education. Any disapproval by the Commissioner of Education shall not interfere with the rights of either party to pursue this matter further.

Weissman & Mintz
Attorney for Jean Hoffer

By: Paul Muller, Esq. Dated: 10/9/97

Jean Hoffer, Respondent Dated: 10/9/97

PETER VERNIERO
ATTORNEY GENERAL

By: Mary F. Rubinstein Dated: 10/9/97
Mary F. Rubinstein
Deputy Attorney General
Attorney for Department of Corrections

OAL DKT. NO. EDU 8405-96
AGENCY DKT. NO. 278-7/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JEAN HOFFER,	:	
NEW JERSEY DEPARTMENT OF	:	COMMISSIONER OF EDUCATION
CORRECTIONS.	:	DECISION
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement, and referred to the State Board of Examiners for action as it deems appropriate.

COMMISSIONER OF EDUCATION

NOVEMBER 21, 1997
DATE OF MAILING NOVEMBER 21, 1997

613-97

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD YANDOLINO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION, HUDSON COUNTY.	:	
_____	:	

NOVEMBER 21, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9057-96

IN THE MATTER OF THE TENURE HEARING OF DONALD YANDOLINO, BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY

Louis C. Rosen, Esq., for petitioner Union City Board of Education

Gregory T. Syrek, Esq., for respondent Donald Yandolino (Bucceri and Pincus, attorneys)

Record Closed: October 3, 1997 Decided: October 6, 1997

BEFORE **MARIE P. SIMONELLI,** A.L.J.:

The matter was transmitted to the Office of Administrative Law on August 26, 1996 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Hearings were scheduled on September 16, 17 and 18, 1997 at the OAL in Newark, New Jersey.

On September 16, 1997, the parties resolved this matter. On October 3, 1997, the parties submitted the attached Agreement indicating the terms of agreement which are incorporated herein by reference.

I have reviewed the record and settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

October 6, 1997
DATE

MARIE P. SIMONELLI, A.L.J.

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 16 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

md

[redacted]

AGREEMENT

Agreement between the Union [redacted] Board of Education and Donald Yandolino, dated ~~this~~ this 16th day of September, 1997 settles, ~~ends~~ and discontinues the tenure charges filed under O.A.L. Docket No. EDU 7951-96 N (Agency Ref. No. 298-7/96) and captioned In the Matter of the Tenure Hearing of Donald Yandolino and the Board of Education of the City of Union City on the following terms and conditions:

1) Respondent Donald Yandolino agrees to resign in good standing from his employment with the Union City Board of Education effective immediately.

[redacted] ~~Respondent Donald~~

2) Respondent Donald Yandolino shall be paid for his accrued vacation days. The agreed upon total for such accrued vacation days is 42 days, which shall be paid as part of regular payroll. Appropriate deductions and withholdings shall be made.

3) Respondent Donald Yandoli[illegible] shall continue to be covered under the Board's health care program

until thirty days after the approval of this agreement by the Commissioner of Education. At such point, Yandolino's rights under COBRA shall be available to him.

4) A letter of reference shall be prepared by the Board of Education and placed in Yandolino's file specifying the years of employment, duties performed and that his resignation was in good standing. No further information regarding Yandolino's employment history shall be provided to a potential employer.

5) Yandolino hereby waives and releases all claims that could have been made against the Board of Education, its agents, servants and employees.

6) Yandolino's resignation and this agreement are conditioned on and subject to approval by the Union City Board of Education, Marie P. Simonelli, A.L.J. and the Commissioner of Education.

DONALD YANDOLINO

CARL JOHNSON

GREGORY T. SYREK

LOUIS C. ROSEN

OAL DKT. NO. EDU 9057-96
AGENCY DKT. NO. 320-8/96

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD YANDOLINO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION, HUDSON COUNTY.	:	
	:	

The record and initial decision incorporating a joint stipulation of settlement rendered by the Office of Administrative Law (OAL) have been reviewed.

Upon careful and independent review of the full record of this matter and the terms of the proposed settlement agreement, the Commissioner is compelled to reject such agreement as it is currently structured. While the Commissioner allows parties broad latitude in crafting settlement agreements and may approve a settlement which limits the release of information concerning a party's performance and conduct while employed by the district, see *Barbara Holder v. Board of Education of the Township of Piscataway, Middlesex County,* reversed State Board April 7, 1993, the Commissioner will not approve a settlement term that would expressly require a district to falsely represent that a resignation was in good standing.

Further, the Commissioner notes that the language of the settlement on its face does not appear to contemplate that the settlement document will become a matter of public record, as does a contested matter before the Commissioner pursuant to *N.J.S.A.* 18A:6-9, transmitted to the OAL pursuant to *N.J.A.C.* 6:24-1.1 and *N.J.A.C.* 1:1-1. *et seq.*

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action consistent with the discussion above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing on the merits in accordance with applicable rules.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 21, 1997
DATE OF MAILING NOVEMBER 21, 1997

614-97

614-97

IN THE MATTER OF THE TENURE	:	
HEARING OF STEPHEN GEORGE,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF OLD BRIDGE,	:	DECISION
MIDDLESEX COUNTY.	:	
_____	:	

NOVEMBER 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6533-97

AGENCY DKT. NO. 254-7/97

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

Petitioner,

v.

STEPHEN GEORGE,

Respondent.

Francis X. Journick, Jr., Esq., for petitioner (Wilentz, Goldman and Spitzer, attorneys)

Gail Oxfeld Kanef, Esq., for respondent (Balk, Oxfeld, Mandell and Cohen, attorneys)

Record Closed: October 16, 1997 Decided: October 22, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a filing by the Old Bridge Board of Education ("petitioner") of tenure charges against Stephen George ("respondent") with the Commissioner of Education on July 10, 1997. The matter was transmitted to the Office of Administrative Law on August 6, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

October 22, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

10/24/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

Attachment

RECEIVED
OCT 16 9 32 AM '97
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095-0958
(908) 636-8000
Attorneys for Petitioner
Old Bridge Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-06533-97S
AGENCY REF. NO. 254-7/97

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY, Petitioner, v. STEPHEN GEORGE, Respondent.	On Referral from the Commissioner of Education **STIPULATION OF SETTLEMENT**

WHEREAS, petitioner, Board of Education of the Township of Old Bridge (the "Board"), filed a Statement of Tenure Charges and Statement of Evidence Under Oath (the "Tenure Charges") with the Commissioner of Education seeking, among other relief, the termination of the Board's employment of respondent, Stephen George; and

WHEREAS, respondent timely filed an answer to the Tenure Charges denying the allegations contained therein and

disputing the Board's entitlement to the termination of respondent's employment or other relief; and

WHEREAS, the Board and respondent have conferred with respect to this matter and have mutually agreed upon certain terms by which this matter may be settled, such terms being set forth in this Stipulation of Settlement; and

WHEREAS, the settlement of this matter and the dismissal of the Tenure Charges is in the public interest and consistent with the policies of the Commissioner of Education because the Board will save the expense of prosecuting the Tenure Charges and since respondent is a non-certificated employee who is retiring from his employment, the Commissioner need not consider whether any additional remedies, such as the revocation of any certificate issued by the Commissioner, is appropriate in this case;

IT IS hereby stipulated and agreed by and between the Board and respondent as follows:

1. Respondent shall and hereby does resign from the employ of the Board effective as of July 1, 1997. In consideration of respondent's retirement, the Board shall pay respondent his salary through June 30, 1997, plus two additional month's of salary, plus the value of five (5) vacation days.

2. Respondent hereby waives all rights to continued employment or reemployment by the Board, including but not

limited to any and all rights based on tenure and/or seniority and any and all rights to be recalled to employment by the Board or appear on any recall or other list of employees eligible for employment or reemployment by the Board. Respondent also hereby waives and releases any and all claims, whether known or unknown, against the Board which arise out of or relate to his employment by the Board, including but not limited to claims for unpaid salary or other employment benefits. Similarly, the Board hereby waives and releases any and all claims, whether known or unknown, against respondent which arise out of or relate to his employment by the Board.

3. This Stipulation of Settlement is subject to and contingent upon approval by the Board, such approval to be in the form of a resolution adopted by the Board. This Stipulation of Settlement is also subject to and conditioned upon approval by the Commissioner of Education.

4. Nothing in this Stipulation of Settlement shall constitute an admission of law or fact by either the Board or respondent.

WILENTZ, GOLDMAN & SPITZER A Professional Corporation Attorneys for Petitioner Old Bridge Board of Education	BALK, OXFELD, MANDELL & COHEN Attorneys for Respondent Stephen George
By: _____ FRANCIS X. JOURNICK, JR. DATED: ~~September~~ October 16, 1997	By: _____ GAIL OXFELD-KANEF DATED: September , 1997

OAL DKT. NO. EDU 6533-97
AGENCY DKT. NO. 254-7/97

IN THE MATTER OF THE TENURE	:	
HEARING OF STEPHEN GEORGE,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF OLD BRIDGE,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the initial decision incorporating a stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.* The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

* It is noted that Term 3 of the Settlement Agreement specifies that such agreement is subject to, and contingent upon, approval by the Board, in the form of a resolution. Because agency approval renders this settlement a final decision pursuant to *N.J.A.C.* 1:1-19.1(c)2, accord to its terms by all necessary parties must be accomplished *prior to* the Commissioner's approval. However, since the record of this matter contains correspondence dated October 13,1997, from the Board's counsel which indicates that the Board adopted a resolution approving the settlement, approval of the settlement can be granted.

615-97

NANCY CARLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CENTRAL REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10854-96

AGENCY DKT. NO. 545-11/96

NANCY CARLE,

Petitioner,

v.

BOARD OF EDUCATION OF CENTRAL REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

Michael B. Berman, Esq., for petitioner (Collins and Berman, attorneys)

Thomas G. Gannon, Esq., for respondent (Hiering, Hoffman, & Gannon, attorneys)

Record Closed: October 21, 1997 Decided: October 21, 1997

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, an athletic trainer previously employed by respondent until her layoff, contests respondent's refusal to reappoint and restore her to her former position for school year 1996-97

and alleges that this violates her tenure and other rights. Petitioner filed a petition of appeal on November 15, 1996, and the matter was transmitted to the Office of Administrative Law (OAL) on December 11, 1996, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge (ALJ) and was scheduled for a telephone prehearing conference on April 16,1997. At that conference, the attorneys indicated that they believed that the facts in this matter could be stipulated and that they would prepare a stipulation of facts for submission to the undersigned. When they could not agree to the stipulations, the matter was scheduled for status conferences on July 30, 1997 and September 11, 1997, and a hearing was scheduled for October 20 and 21, 1997.

The hearing date of October 20, 1997, was converted to a telephone settlement conference. When a settlement could not be effectuated on that date, the hearing scheduled for October 21, 1997, was commenced. Prior to the commencement of the hearing, the parties entered into additional settlement discussions and have agreed to settle this matter, and they have prepared the attached stipulation of settlement which is annexed hereto as Exhibit A indicating the terms of settlement. In addition, they set forth on the record the terms of the settlement, which are as follows:

1. The instant petition of appeal before the Commissioner of Education is hereby withdrawn.
2. The respondent Board of Education shall make a good faith effort to re-employ the petitioner in the first available position for which she is qualified and for which the respondent may choose to fill at its option. The parties agree that this stipulation of settlement is not a promise of employment, but that the petitioner will be assumed to be a qualified candidate in those areas of her certification and/or training. The respondent acknowledges that there will be an opening for a health and physical education teacher in January 1998. Respondent shall give due consideration to petitioner for this position upon application filed by petitioner and subject to proper certification.

Petitioner was placed under oath and indicated that she is entering into this stipulation of settlement voluntarily. Attorney for respondent represented that he had full authority to enter into this stipulation of settlement.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

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

October 21, 1997
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

10/23/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 24 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lam

NANCY CARLE,
Petitioner,
-vs-
CENTRAL REGIONAL
SCHOOL DISTRICT,
Respondent,

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JER
OAL Docket No. EDUCR 10854-96S
Agency Ref. No. 545-11/96

STIPULATION OF SETTLEMENT

The matter in difference in the above-captioned matter having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

1. The instant Petition of Appeal Before the Commissioner of Education is thereby withdrawn.

2. The Respondent Board of Education shall make a good faith effort ~~to~~ re-employ the Petitioner in the FIRST AVAILABLE position for which she is qualified and for which the Respondent ~~will~~ may choose to fill at its option. The parties agree that this ~~Agreement~~ Stipulation of Settlement is not a promise of employment but that the Petitioner will be assumed to be ~~the~~ a most qualified CANDIDATE IN those AREAS of her certification AND/OR TRAINING. The Respondent acknowledges that there will be an opening for a health & Physical Education teacher IN JANUARY, 1998. Respondent shall give due consideration to Petitioner for this position upon application filed by Petitioner and subject to proper certification.

Central Regional
School District,
Respondent

NANCY Carle, Petitioner,

Nancy J. Carle

(Exhibit A)
jm.

OAL DKT. NO. EDU 10854-96
AGENCY DKT. NO. 545-11/96

NANCY CARLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CENTRAL REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 24, 1997
DATE OF MAILING NOVEMBER 24, 1997

617-97

ALLISON DEVINNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

NOVEMBER 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10765-96

AGENCY DKT. 502-10/96

ALLISON DEVINNEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,

Respondent.

Allen S. Zeller, Esq., for petitioner, (Freeman, Zeller & Bryant, attorneys)

Paul Carr, Esq., for respondent, (Murray & Carr, attorneys)

Record Closed: October 21, 1997 Decided: October 22, 1997

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

This matter was transmitted to the Office of Administrative Law on December 6, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

22 October 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10/24/97
DATE

D. N. Centanaltes/jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

Zeller & Bryant
ATTORNEYS AT LAW

ZELLER AND BRYANT
Attorneys for Petitioner

WOODCREST PAVILION
Ten Melrose Avenue - Suite 400
Cherry Hill, New Jersey 08003
Phone: (609) 428-6600

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO: EDUOR10765-96S
AGENCY REFERENCE NO: 502-10/96

ALLISON DEVINNEY,

Petitioner,

v.

Civil Action

EGG HARBOR TOWNSHIP
BOARD OF EDUCATION,

Respondent.

STIPULATION OF SETTLEMENT
AND DISMISSAL WITHOUT PREJUDICE

It is hereby stipulated and agreed by and between the parties as to the following facts and representations:

1. Petitioner, Allison Devinney was AND IS employed by Respondent, Egg Harbor Township Board of Education on a full time basis commencing on or about September 1, 1992.

2. Petitioner was employed as a learning consultant in grades 3 through 5 and was appropriately certified by the State of New Jersey to hold the position of learning consultant.

3. On or about August 1, 1996 Petitioner was advised by Respondent of the implementation of a reduction of force which

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TEN MELROSE AVENUE
SUITE 400
CHERRY HILL, NJ 08003
609-428-6600
s-7004

eliminated Petitioner's learning consultant position effective the school year beginning on or about September 1, 1996.

4. Effective with the commencement of the school year beginning on or about September 1, 1996, Petitioner was reassigned by Respondent to a teaching assignment. Petitioner was appropriately certified by the State of New Jersey with an elementary education certification. Petitioner continued her employment in that position for the remainder of the school year ending on or about June 30, 1997.

5. Kathy Collett, another employee employed by Respondent as a learning consultant and who, as alleged by Respondent, maintained equal seniority to Petitioner was maintained in a learning consultant's position for the 1996-1997 school year.

6. Both Petitioner and Kathy Collett are tenured employees pursuant to N.J.S.A. 18A:~~17-2~~. 28-5

7. Petitioner filed a petition of appeal with the New Jersey Commissioner of Education Office alleging, among other things, that her seniority and tenure rights were violated as a result of the aforementioned reduction in force and her transfer to a teaching position.

8. In or about May, 1997, Respondent notified Petitioner that commencing with the school year beginning on or about September 1, 1997 Petitioner's former position of learning consultant was being reinstated by the District and that

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SUITE 400
CHERRY HILL, NJ 08003
609-428-6600

Petitioner would be reassigned to her former position as learning consultant commencing on or about September 1, 1997.

9. Petitioner received no loss of seniority or salary or diminution or reduction of any benefits as a result of her teaching assignment during the 1996-1997 school year.

10. On or about September 1, 1997, concurrent with the commencement of the 1997-1998 school year, Petitioner was reassigned by Respondent to her former position as a learning consultant and is presently employed in that capacity.

Based upon the foregoing, it is stipulated and agreed by the parties that the relief sought by Petitioner in the Petition filed herein is moot and that the Petition is hereby withdrawn without prejudice to either party and without prejudice to Petitioner's right to assert appropriate seniority claims in the future including the seniority claims set forth in this petition in the event that the facts and circumstances so warrant.

DATED: September 17, 1997

ZELLER AND BRYANT
Attorneys for Petitioner

By: _____
ALLEN S. ZELLER, Esquire

DATED: OCT 17, 1997

MURRAY & CARR
Attorneys for Respondent

By: _____
PAUL J. CARR, Esquire

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OAL DKT. NO. EDU 10765-96
AGENCY DKT. NO. 502-10/96

ALLISON DEVINNEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

NOVEMBER 24, 1997
DATE OF MAILING NOVEMBER 24, 1997

621-97

621-97

OLD BRIDGE TOWNSHIP EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning education association and members alleged that Board of Education had acted outside the scope of its authority in creating the position of "registered nurse," which required a nursing license but no educational certification, that the Board and County Superintendent had erred in holding that County Superintendent approval was not necessary for such position, and that the position as implemented by the Board improperly usurped the role of the certified school nurse. Petitioners sought declaration from Commissioner that nursing services in the school setting must be provided by certified school nurse.

ALJ dismissed petition, finding no violation of law in the Board's action, holding instead that such action was within the scope of the Board's discretionary authority and was properly taken for reasons of economy and efficiency. ALJ further concluded that County Superintendent approval for the position was unnecessary, and that the position did not impermissibly require the holder to perform duties reserved to the school nurse.

Commissioner affirmed initial decision with amplification, drawing a distinction between those duties designated by statute or regulation as "school nursing services" and other nursing services provided in the school setting. The Commissioner held that the former must be provided by certified school nurses, while the latter may be provided by any qualified person, licensed and supervised, where the duties so require, in accordance with the nursing practice law (*N.J.S.A.* 45:11-23 *et seq.*) The Commissioner found approval by the County Superintendent for establishment of noncertified professional nursing positions to be unnecessary, beyond reviewing proposed job descriptions to ensure that they do not include duties requiring educational certification. However, the Commissioner did find that, in the present instance, the distribution of duties between the school nurse and registered nurse resulted in vision and hearing tests independently being administered by the registered nurse, rather than by the school nurse with the assistance of the registered nurse, and directed the Board to reform its practice in this area.

NOVEMBER 26, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 4459-96
AND EDU 4981-96
AGENCY DKT. NOS. 114-3/96
AND 186-5/96
(CONSOLIDATED)

OLD BRIDGE TOWNSHIP EDUCATION ASSOCIATION, BARBARA TJORNHOM, PATRICIA GELLER, SUSAN GARRUTO AND AGNES QUINN,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLDBRIDGE,

Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Francis X. Journick, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: August 8, 1997 Decided: August 19, 1997

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

The Oldbridge Township Education Association and the individually named petitioners alleged that the Oldbridge Township Board of Education, respondent, has assigned an uncertified and unqualified person or persons to the duties of school nurse.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for a determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through -13.

The petitioners assert the Board lacks the authority to create a position entitled Registered Nurse, that even if the Board has the authority to create the position, that it did so improperly because the position was not approved by the Middlesex County Superintendent of Schools and, finally, even if the County Superintendent approved the position, she did so improvidently. The Board asserts it has the statutory authority to create the positions, that its discretion in creating the position is presumed valid and that it did seek the approval of the County Superintendent, but was advised that her approval was not necessary.

FACTUAL BACKGROUND

On April 30, 1996, the Board approved creation of the position "Registered Nurse." The Board simultaneously adopted a job description for the position (Exhibit A).

By letter dated May 3, 1996, the Assistant Superintendent of Schools requested the approval of the Registered Nurse title by the Middlesex County Superintendent of Schools (Exhibit B). The County Superintendent of Schools replied on May 13, 1996 (Exhibit C), stating:

> . . . that it is not necessary to submit a request for approval for an unrecognized title for a registered nurse.
>
> A registered nurse may be hired by a district, as per your job description, to assist in the responsibilities of a certified school nurse.

The petitioners filed a verified petition of appeal with the Commissioner of Education on March 22, 1996. They sought an order restraining the Board from using uncertified personnel to perform the duties of the position of school nurse, directing the Board to employ a sufficient number of certified school nurses in each of its schools to assure adequate provision of nursing services in each school and restraining the Board from maintaining the position of registered or any other type of nurse in any of its schools and requiring the Board to employ certified school nurses in each of its schools. This petition was directed at the Board's assignment of a registered nurse to the McDivitt School. On April 10, 1996, the Board filed an answer to the petition. The registered nurse subsequently left the position and the Board has not assigned a replacement registered nurse to the McDivitt School. For all intents and purposes, the first petition is moot.

On May 23, 1996, the petitioners filed a second verified petition of appeal with the same allegations and demands, this time with respect to the Board's assignment of a registered nurse to the Cooper School. On June 14, 1996, the Board filed its answer.

An order issued for good cause shown to permit the deposition of Sharon Lane, R.N., employed by the Board in the Cooper School. The deposition took place on January 30, 1997. Cooper has intervened and is a party hereto. The matter was scheduled for hearing on September 10 and 11, 1997. The Board moved and the petitioners cross-moved for summary decision. On August 8, 1997, the intervenor represented that she joined with the Board in its motion for summary decision.

ARGUMENTS

The Board

The Board argues that summary decision should be entered in its favor because there is no genuine issue as to any material fact. The Board possess the statutory authority to create the position of Registered Nurse and its exercise of that authority is presumed valid unless shown to be arbitrary, capricious or unreasonable. The Board sought the approval of the County

Superintendent of Schools for the Registered Nurse position and satisfied any obligation to obtain such approval.

Although not articulated in the petition, if the petitioners argue that the proper duties of the registered nurse position are an issue, the duties assigned to the position and actually performed by the registered nurse do not impinge on the duties reserved to certified school nurses. Because the creation and filling of the registered nurse position was within the Board's discretion and, at the same time, reduced the cost of its educational program, the decision is not arbitrary, capricious or unreasonable and, therefore, should be upheld. As the registered nurse position is designed and as it is practiced, it is consistent with all applicable statutes and regulations. It does not impose on any protected rights or interests of the petitioners. Under these circumstances, summary decision should be granted to the Board and the petition should be dismissed.

The Petitioners

The petitioners assert that the position, either by its job description or by actual duties performed, constitutes the position of a certified school nurse. Although the Board argues that the registered nurse merely assists the school nurse in delivering nursing services to pupils, the petitioners insist that a registered nurse currently employed by the Board in fact performs certified school nurse duties.

The petitioners are entitled to summary judgment as a matter of law because there is no genuine issue with respect to any material fact. The facts being agreed upon or at least uncontested, the law requires a decision for the petitioners.

The registered nurses employed by the board are not merely assisting the certified school nurses in their duties, but are essentially performing the duties of the certified school nurses in violation of the law. In any event, the position of registered nurse was not properly approved by the County Superintendent of Schools as required by *N.J.A.C.* 6:11-4.6. To the extent that the Board relies on statements by the County Superintendent that her approval of the position is not necessary, the law states otherwise and, even if the determination made by the County

Superintendent is valid, it is not binding on the petitioners in this matter or on this tribunal. Furthermore, since the duties performed by the registered nurses are, in actuality, duties that require certification as a school nurse, the assertion concerning County Superintendent approval is wrong. Accordingly, the petitioners' motion for summary decision should be granted and the Board should be directed to cease employment of noncertified registered nurses and, instead, appoint certified school nurses to the contested positions.

DETERMINATION

One of the first considerations of nurse duties appears in *Scrupski and Soden v. Bd. of Ed. of Warren Township.*, 1977 S.L.D. 1047. The Warren Township Board employed three school nurses. Two were employed full-time and the third was employed part-time. Each was certified. During the 1974-75 academic year, the Board decided to abolish one full-time position and the part-time position, both of which were held by nontenured petitioners. The Board then resolved to create five positions entitled "school health aide." The petitioners were notified of this. The Board submitted an application to the Office of the County Superintendent to secure approval for the five proposed positions. Eventually, the County Superintendent approved the application on a trial basis. He cautioned the board that the school health aide may not assume the duties and responsibilities of school nurse.

The Commissioner compared the job description of the school health aide with that of school nurse.

The Commissioner held that *N.J.S.A.* 18A:40-1 requires every Board of Education to employ one or more school nurses. A school nurse is defined, at *N.J.S.A.* 18A:1-1, as a teaching staff member. *N.J.S.A.* 18A:26-2 provides that no teaching staff member shall be employed in the public schools unless the person is the holder of a valid certified to teach, administer, direct or supervising the teaching, instruction or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in the public schools.

The requirements for possession of certificates to teach are established by State Board of Examiners. *N.J.S.A.* 18A:6-38. The requirements for a school nurse certificate are set forth at

N.J.A.C. 6:11-12.8. The certificate acquired pursuant to that rule authorizes the possessor to provide service as a school nurse and to teach areas related to health.

In the 1974-75 school year, the Warren Township Board employed two full-time school nurses and one part-time school nurse, each of whom was properly certified. These three persons were notified that their positions were to be eliminated. The Board then directed the superintendent to proceed with a plan for full nurse coverage, including one full-time certified school nurse and five school health aides, who were required to be registered nurses.

In *Scrupski*, the Commissioner held that the Board did not eliminate one and one-half school nurse positions, but relegated the one and one-half school nurse teaching positions to five teaching aide positions contrary to the provisions of *N.J.A.C.* 6:11-4.9(a). In sum, the Commissioner held that the Board replaced teaching staff members with aides. The Commissioner went on the observe that if the assigned duties of the school health aide were solely of a clerical nature, then there would be no sound reason to require the aide to also be a registered nurse. The Commissioner held that Board's actions improper and contrary to State Board rules and regulations. He made clear, however, that the holding did not preclude the Warren Township Board or any other board from eliminating teaching staff positions or from reductions in force providing those actions were consistent with the statutes and the positions properly eliminated. No board has authority to replace the duties of a teaching staff member by assigning those duties to an aide.

The schools of each school district are under the supervision and control of a local Board of Education. *N.J.A.C.* 18A:10-1. Boards of Education are statutory creatures and are designed to perform a State function at a local level. Therefore, their powers are derived from the Legislature and they can perform only those acts for which expressed or implied authority exists in law or in rules and regulations. *N.J.S.A.* 18A:11-1 authorizes Boards to perform all acts and do all things, consistent with law and State Board rules, necessary for the proper conduct, equipment and maintenance of the public schools. Dozens of statutes grant express powers. For example, *N.J.S.A.* 18A:49-1 authorizes Boards to establish and maintain public evening schools for the instruction of foreign born residents. Other powers are more generally derived from the plenary powers mentioned above. Among other things, the Board may reduce the number of its

employees (a reduction in force or RIF) for reasons of economy or more efficient organization. A Board's action is presumed valid. *K.L. v. Bd. of Ed. of Matawan-Aberdeen High School District,* 91 *N.J.A.R.* 2nd (EDU) 74; *Kopera v. West Orange Board of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The presumption, of course, is rebuttable. However, a party attacking the presumption must show by a preponderance of the evidence in the record that the complained of action was arbitrary, capricious, unreasonable or any of these.

In the present matter, the Board decided to establish registered nurse positions to assist school nurses. Not coincidentally, this would make possible a reduction in the number of school nurses and a concomitant reduction in salaries. *N.J.A.C.* 6:11-4.6(a) requires that school aides or classroom aides, assisting the in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved by the county superintendent of schools. Inasmuch as school nurses are certified professional personnel and the registered nurses would work under their direction, the district sought the County Superintendent's approval. As noted in the factual background above, the County Superintendent advised that it was not necessary to submit a request for approval for unrecognized title for a registered nurse. The County Superintendent also advised that a registered nurse may be hired by a district, as per the Board's job description, to assist in the responsibilities of a certified school nurse. The latter statement relates directly to *N.J.A.C.* 6:11-4.6(b) which states:

> Current rules require school districts employing aides to develop job descriptions and standards for appointment. These descriptions and standards should be based on study of local needs. The nature of the job descriptions will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.

The Board suggests that the County Superintendent's letter is an approval of the registered nurse position. Alternatively, if it is not an approval of the Registered Nurse position, then it is a determination by the County Superintendent that such approval is not necessary. I **FIND** that the County Superintendent determined in this regard that an approval under *N.J.A.C.* 6:11-4.6 was not necessary.

The Board provided the Registered Nurse job description to the County Superintendent. The County Superintendent refers to the job description. She raised no question about the duties the job description contains as they relate to those duties reserved by statute or regulation to certified school nurses.

While it is clear that each school district must employ a certified school nurse, *N.J.S.A.* 18A:40-1; *N.J.A.C.* 6:29-1.2, there is no requirement that a certified school nurse be present in each school building. *Bound Brook Ed. Ass'n v. Bd. of Ed. of Bound Brook*, 1988 S.L.D. 352. Certain duties are reserved to certified school nurses even in schools where the nurse is not present. *Plainfield Ed. Ass'n v. Bd. of Ed. of Plainfield*, OAL Dkt. EDU 0278-81 (Nov, 9, 1982), adopted, Comm'r of Ed. (Dec. 27, 1992), aff'd, St. Bd. of Ed. (June 2, 1983).

Comparing the duties reserved to certified school nurses by statue and regulation with the duties identified in Exhibit D, I **FIND** no impermissible overlap.

The Commissioner has permitted the assignment of non-certified assistants to certified school nurses when the assistants were not performing duties reserved to certified school nurses. *Bernards Ed. Ass'n v. Bd. of Ed. of Bernards Township,* 1981 S.L.D. 1070, aff'd St. Bd. of Ed. 1982 S.L.D. 1443, aff'd N.J. App. Div. (May 18, 1983, A-4211-81T3) (unreported). In that case, the use of noncertified registered nurses as assistants to the certified school nurse was approved because they were under the direction of the certified school nurse and a "wholesale transfer," of certified school nursing duties was not involving as it had been in *Scrupski,* above. Indeed, a review of all cases on point clearly shows that assignment of a registered nurse as an assistant to the certified school nurse is permissible provided the assistant position is clearly that. This must be reflected in the job description. The certified school nurse must remain responsible for the duties reserved to her or him.

In consideration of the foregoing, I **FIND:**

1. The Old Bridge Township Board of Education created the noncertified title of Registered Nurse by resolution dated April 30, 1996;

2. The Board sought County Superintendent approval of the title before adoption but was advised that none was needed;

3. The job description simultaneously adopted sets forth with particularity the performance responsibilities of the position;

4. The job description states, and a fair reading of it makes clear, that a Registered Nurse assists one or more certified school nurses "in the efficient operation of the school health program";

5. The Board acted within the scope of authority delegated to it by the Legislature when it created the Registered Nurse position; and

6. There has been no showing that the Board's act was arbitrary, capricious or unreasonable.

Accordingly, I **CONCLUDE** that there has been no violation of statute or regulation as alleged in the petition of appeal. The Old Bridge Township Board of Education appropriately exercised authority granted to it by the Legislature. The act was not arbitrary, capricious, unreasonable or done for a proscribed reason. The burden of proof not having been met, I **CONCLUDE** that the petition must be **DISMISSED**. It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

19 AUGUST 1997
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/22/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

/cat

List of Witnesses

For Petitioner:

None

For Respondent:

None

List of Exhibits

For Petitioner:

None

For Respondent:

Exhibit A	Job Description, Registered Nurse, April 30, 1996
Exhibit B	Letter, George to Guidette, May 3, 1996
Exhibit C	Letter, Guidette to George, May 13, 1996
Exhibit D	Job Description, School Nurse, September 1979

OLD BRIDGE TOWNSHIP EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4, as were replies by the Board of Education.

In urging rejection of the initial decision, petitioners contend that the ALJ both erred in his ultimate findings and failed to offer a sufficient explanation for them, as required in the Administrative Procedure Act. Petitioners allege that, in making his judgments, the ALJ ignored a crucial factual document, i.e., the deposition of Sharon Lane demonstrating the breadth of duties she actually performed, as well as petitioners' arguments based upon it, and inexplicably closed the record prior to receipt of petitioners' timely brief filed in reply to the Board's cross motion for summary decision. Petitioners argue that an appropriate review of the full record of this matter will reveal that, even accepting *arguendo* that duties not reserved to a certified school nurse may in theory be performed by other appropriately licensed personnel, Ms. Lane's deposition demonstrates that such a distinction will not work in practice and that performance by other staff of any duties which are not in the nature of those assigned to an aide will inevitably result in the duties of a certified school nurse being performed by a noncertificated person, contrary to law.

The Board, in turn, urges acceptance of the initial decision as procedurally sufficient, legally correct and fully supported by the factual record, including the deposition cited by petitioners.

Upon review, the Commissioner initially finds that, while the ALJ may not have set forth at length the factual and legal analysis underlying his conclusions with respect to the contents of Ms. Lane's deposition, such does not rise to the level of invalidating the decision, nor does it impede the Commissioner's ability to make a determination in this matter. Further, upon consideration of applicable law, the record of the contested case, the arguments of parties and sound educational policy, the Commissioner concurs with the ALJ and the Board that, apart from those specific statutory and regulatory duties that expressly require performance by a "school nurse," health and related services in the school setting not necessitating an educational certificate may be provided by any appropriately licensed health professional supervised in accordance with the terms of their licensure.

It is clear that under the education laws, each school district must employ at least one school nurse, who must be appropriately certified by the State Board of Examiners and is considered a teaching staff member for purposes of salary, tenure and evaluation. *N.J.S.A.* 18A:40-1, 18A:26-2, 18A:1-1, 18A:28-5, 18A:29-4.2; *N.J.A.C.* 6:11-11.7, 6:3-4.1/3, 6:29-1.2(b)[1] The duties expressly reserved to "school nurses" are recognized as "school nursing services" pursuant to *N.J.S.A.* 18A:40-3.1, and include lecturing to teachers on recognition and prevention of communicable disease and other health concerns (*N.J.S.A.* 18A:40-3; *N.J.A.C.* 6:29-1.2(b)1vi), maintaining pupil health records and assisting the medical inspector with physical examinations, including vision and hearing exams (*N.J.S.A.* 18A:40-4; *N.J.A.C.* 6:29-1.2(b)1i, 6:29-1.2(b)1iv, 6:29-2.1), examining pupils for the presence of scoliosis (18A:40-4.3; *N.J.A.C.* 6:29-1.2(b)1ii), recommending exclusion from school due to illness or exposure to disease (18A:40-7/8; *N.J.A.C.* 6:29-1.2(b)1v), reporting, receipt of reports and examinations in instances of

[1] A registered nurse may, upon receipt of a county substitute certificate pursuant to *N.J.A.C.* 6:11-4.5, substitute for a certified school nurse on a short-term basis within the express limitations prescribed by that rule.

suspected substance abuse (18A:40A-12, *N.J.A.C.* 6:29-6.5), vision screenings, health appraisals and various consultative functions with respect to evaluation for and provision of special education services (*N.J.A.C.* 6:28-3.2 *et seq.*, 6:28-11.3 *et seq.*), audiometric screening (*N.J.S.A.* 18A:40-4; *N.J.A.C.* 6:29-1.2(b)iii, 6:29-5.1), maintaining awareness of safe procedures for handling of body fluids (*N.J.A.C.* 6:29-2.5), accessing employee health records when permitted by the employee (*N.J.A.C.* 6:29-7.4), serving as liaison to the local board of health on issues relating to pregnancy and prenatal health (*N.J.A.C.* 8:52-5.3), administration of Snellen vision screenings for special learner's permits for obtaining a driver's license (*N.J.A.C.* 13:21-7.1 *et seq.*), testing for tuberculosis infection (*N.J.A.C.* 6:29-2.3), and completion or approval, as designated thereon, of health forms required to be submitted to the State. Additionally, where so assigned, the school nurse will provide instruction to students within the limitations of the school nurse endorsement (*N.J.S.A.* 18A:26-2; *N.J.A.C.* 6:11-11.7, 6:29-4.2).[2]

As these services are both required by law and, apart from pupil instruction, specifically reserved to certificated school nurses, each board of education must employ a sufficient number of such nurses to ensure their adequate provision. *N.J.S.A.* 18A:40-1, 18A:40-3.1 However, where education law is silent on the provision of specific nursing services and support functions related to them, and such services do not otherwise require educational certification, there is nothing to prevent a board of education from duly determining, for reasons of economy or efficiency, that these nursing services will be provided by health professionals who hold the requisite license from, and are supervised in accordance with the requirements of, the Board of Nursing pursuant to *N.J.S.A.* 45:11-23 *et seq.*, but are not additionally certified by the State Board of Examiners. *Communications Workers of America, Local 1033 v. New Jersey Department of Education, Marie H. Katzenbach School for the Deaf,* decided by the State Board of Education, April 1, 1992, 92 *N.J.A.R.*2d (EDU) 326 Additionally, there is nothing to prevent duly licensed professionals or other qualified persons (e.g., clerical aides) from *assisting* certificated school nurses in the performance of duties reserved by law to such

[2]It is noted that noncertificated nurses may serve as resource persons for family life programs pursuant to 6:29-4.2(h), but may not actually instruct pupils.

nurses, so long as they do not actually *perform* the function at issue except as delegated by the school nurse, and so long as professionals practicing under authority of a license are supervised in accordance with any conditions specified by the terms of that license.

With regard to the question of County Superintendent approval for establishment of the position of "registered nurse," the Commissioner concurs with the ALJ that no such approval is necessary. Noncertificated health care positions entailing duties requiring professional licensure are not "unrecognized titles" within the intendment of *N.J.A.C.* 6:11-3.3, which applies to certificated teaching staff positions and provides a mechanism for identifying the appropriate recognized educational (legal) title for such positions so as to determine the particular certificate and endorsement that will be necessary to hold it. Nor are they "paraprofessional aides" requiring approval pursuant to *N.J.A.C.* 6:11-4.6. In the case of positions to be held by licensed health care professionals, review by the County Superintendent would be limited to assessment of the job description at hand to advise as to whether, on its face, such description includes duties necessitating a school nurse endorsement or other educational certificate in addition to, or instead of, the license proposed by a board. However, the County Superintendent has neither the authority nor the expertise to determine the appropriateness of the nursing license proposed for the specified duties, such being the purview of the Board of Nursing pursuant to *N.J.S.A.* 45:11-23 *et seq.* and *N.J.A.C.* 13:37-1.1 *et seq.*

In the instant matter, then, as concluded by the ALJ, the Board acted within the scope of its lawful discretionary authority to design a nursing position where the job duties do not, on their face, usurp functions reserved to the certified school nurse. Neither did it need the County Superintendent's approval to establish this position, once it was determined that the job description did not facially require duties reserved to the holder of a school nurse endorsement or other educational certificate.

As correctly noted by petitioners, however, that does not end the inquiry herein. Once a noncertificated nursing position is designed and established, its actual implementation must still conform to applicable education law. Here, petitioners claim that the deposition of Sharon Lane demonstrates a lack of such conformance, and further

contend that, as a distinction between certified and noncertified nursing services cannot be maintained in practice, the only appropriate remedy is a directive that all nursing services in the school setting be performed by certified school nurses.

The Commissioner has carefully considered petitioners' argument and reviewed the deposition of Ms. Lane in light of it. Upon such review, the Commissioner is ultimately unpersuaded by petitioners' claim, as he finds that virtually all of the instances where petitioners allege usurpation of the role of the certified school nurse are based upon the district's job description for that position, or upon prior case law rooted in analysis of tenure rights and allegations that boards had attempted to thwart them through hiring of aides, rather than upon the statutory and regulatory limitations on a board's authority where employment claims are not at issue. The fact that a registered nurse may be assigned to a particular school, work alone for most of the time, report to school administrators rather than the school nurse, have contact with pupils, parents and other medical professionals, and fulfill many of the functions performed by school nurses in the buildings to which they are assigned, does not, in itself, create a violation of education law; rather, it reflects the fact that school nurses can and do perform a variety of services in their positions that do not necessarily require educational certification or direct reporting to a senior medical professional. On the other hand, a board may not, as the Board herein clearly has done with vision and hearing tests for the school to which Ms. Lane is assigned, have its noncertificated nurse independently performing functions reserved to the school nurse and then simply have the school nurse review and approve the results; the role of the noncertificated nurse in such functions must be clearly limited to provision of *assistance*.[3]

The Commissioner believes, however, that duties can be divided and assignments maintained that will preserve this distinction. He declines, therefore, to hold that all nursing services provided in the school setting *must* be performed by a certified school nurse, but stresses that the job description and assignment of any noncertified

[3] It is noted that this role does not necessarily require an organizational structure where the noncertificated nurse reports to, or is evaluated by, the school nurse whom he or she is assigned to assist. However, in devising such structures, care must be taken that the separate supervision and delegation requirements of nursing law are considered and applied.

providers may not require or permit them to actually perform functions specifically reserved by law to the school nurse, except as delegated by him or her, or which otherwise require educational certification, and that all such providers must, where required, be appropriately licensed and supervised in accordance with *N.J.S.A.* 45:11-23 *et seq.*

Accordingly, the initial decision of the Office of Administrative Law dismissing the petition of appeal is affirmed for the reasons expressed therein, as amplified above. Consistent with the decision herein, however, the Board is directed to revise its assignments with respect to vision and hearing tests so as to ensure that they are provided in conformance with the requirements of law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 26, 1997
DATE OF MAILING NOVEMBER 26, 1997

621-97

EDU #4459-96 and #4981-96 (consolidated)
C # 621-97
SB # 101-97

OLD BRIDGE TOWNSHIP EDUCATION ASSOCIATION, ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, November 26, 1997

For the Petitioners-Appellants, Zazzali, Zazzali, Fagella & Nowak (Kathleen A. Naprstek, Esq., of Counsel)

For the Respondent-Respondent, Wilentz, Goldman & Spitzer (Francis X. Journick, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein, with the following clarification. We stress that duties which may be performed only by a staff member possessing certification as a school nurse, N.J.A.C. 6:11-11.7, may not be delegated to an individual who does not possess such certification.

April 1, 1998

Date of mailing APR 03 1998

625-97

JOHN DI MENNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAPE MAY TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 4, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2849-97

AGENCY DKT. 49-2/97

JOHN DiMENNA,

Petitioner,

v.

BOARD OF ECUATION OF THE CAPE MAY TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY,

Respondent.

Richard Friedman, Esq., for petitioner, (Zazzali, Zazzali, Fagella and Nowak, attorneys)

James Waldron, Esq., for respondent

Record Closed: October 17, 1997 Decided: October 17, 1997

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

This matter was transmitted to the Office of Administrative Law on April 21, 1997, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14-F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

17 October 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

10/22/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 23 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

SETTLEMENT AGREEMENT

The parties to this matter hereby agree to amicably resolve the disputes between them, in particular the matters now pending before the Commissioner of Education and Office of Administrative Law, Agency Docket No. 49-2/97 and OAL Docket No.: EDUOR 02849-97S, and before the United States District Court, District of New Jersey, under Civil No. 96-5432 (JBS), subject to the terms and conditions set forth below:

1. For purposes of this agreement, Defendants Board of Education of the Cape May County Technical School District and Wilbur Kistler shall hereinafter both be referred to as the Board, and plaintiff John DiMenna shall hereinafter be referred to as the employee.

2. The Board agrees to pay the employee the gross amount of $20,316.00, subject to standard and ordinary deductions.

3. The amount to be paid to the employee is based upon the gross amount of $24,700.00 in lost salary for the period of September 1, 1996 through his return to employment in March of 1997, less unemployment benefits received by the employee in the amount of $5,740.00, plus $1,156.00 which the employee and/or plaintiff Eileen DiMenna were compelled to pay or lost as the result of the loss of health insurance benefits which were not provided to the employee and his dependents between the period of September 1, 1996 until his return to employment, plus $200.00 additional damages due to out of pocket medical expenses and work search costs.

4. A. The total sum to be paid therefore amounts to $20,316.00, and the parties agree that this constitutes lost salary in the amount of $24,700.00, minus unemployment benefits in the amount of $5,750.00, plus the additional damages described above.

B. The parties recognize that employee received unemployment benefits in the total amount of $9,412.00 between July 6, 1996 and January 4, 1997, that the sum of $5,740.00 is attributable to benefits paid to employee during the school year, and that the sum of $3,672.00 is attributable to unemployment benefits paid to employee during the summer months.

5. The monies paid to the employee shall be deemed to constitute back-pay, with a credit to the Board for unemployment benefits that the employee received in the amount of $5,740.00.

6. If the Department of Labor, Bureau of Benefits payment control or any other State agency seeks repayment or reimbursement for any unemployment benefits paid to the employee, the Board agrees to reimburse the Department of Labor, Bureau of Benefits Payment Control, and any other State agency for such unemployment benefits which were paid to the employee to the extent of $5,740.00, and to hold harmless and indemnify the employee for any unemployment benefits that the employee is required to repay up to the maximum amount specified herein.

7. The Board agrees to recognize and credit the employee with seniority credit retroactive to September 1, 1996, as if the employee had been employed for the entire 1996-97 school year, and that such credit and recognition shall not reduce or limit

seniority acquired by the employee prior to or after the 1996-97 school year.

8. The employee shall be entitled to all benefits, which includes sick leave, pension credit in the New Jersey Teachers' Pension & Annuity Fund, and personal days, retroactive to September 1, 1996, as if employed for the entire 1996-97 school year, without reduction or limitation of benefits acquired prior to or after the 1996-97 school year.

9. The parties agree that the employee shall pay the employee's share of pension contributions to the Teachers' Pension & Annuity Fund for the period of September 1, 1996, through his return to employment in March of 1997, that the employer shall not be liable for the employee's share thereof, that the employee shall not be liable for the employer's share thereof, that the State will contribute the employer's share of pension contributions if it agrees to do so, and that if the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions.

10. No party to this action, nor any of any party's agents, officers, representatives, or employees shall take or permit any adverse action to be taken against any other party because of the filing or defense of this litigation, the settlement of this litigation, or because of any acts or omissions of any party which were alleged to have occurred or to be related to this litigation.

11. The parties agree that the employee's certification, tenure, and seniority rights under State the law entitle him to

assignment and placement in the position of Teacher of Auto Maintenance, to which he is presently assigned.

12. The employee shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the docket number Agency Ref. No.: 49-2/97 and EDUOR 02849-97S, as well as the action pending before the United States District Court, District of New Jersey, Civil No. 96-5432 (JBS), and an appropriate consent order incorporating the settlement and dismissing this action shall be submitted to the District Court for its approval.

13. This Settlement Agreement resolves all claims between the parties arising from the termination of employee's employment which took effect June 30, 1996, and regarding the employee's allegation that defendants acted unlawfully in terminating the employee's position or abolishing his employment, and in failing to retain the employee instead of any other employee. Plaintiffs waive their right to seek attorney's fees and costs pursuant to the Civil Rights Act or any other Federal or State law. Appropriate dismissals will be filed with the respective courts.

14. This Agreement contains all of the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

_____ Dated: _____
John DiMenna

_____ Dated: _____
Eileen DiMenna

3L

Zazzali, Zazzali, Fagella & Nowak
Attorneys for Plaintiffs

By: _____ Dated: 9/10/97
Richard A. Friedman, Esq.

Cape May County Technical School
District

By: _____ Dated: 8-22-97
John H. Mead, President

Attested by:
_____ Dated: 8.22.97
George Drozdowski, Board
Secretary & Business
Administrator

James Waldron, Esq.
Attorney for Defendant
Board of Education of the Cape
May County Technical School District
and Wilbur Kistler

By: _____ Dated: 8/25/97
James Waldron, Esq.

OAL DKT. NO. EDU 2849-97
AGENCY DKT. NO. 49-2/97

JOHN DI MENNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAPE MAY TECHNICAL SCHOOL DISTRICT, CAPE MAY COUNTY;	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

December 4, 1997
Date of Mailing, December 4, 1997

626-97

626-97

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY PUCA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF WINSLOW, CAMDEN	:	
COUNTY.	:	
	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct and other just cause against respondent fifth grade teacher. Matter was on the inactive list pending criminal charges. Following Judgment of Conviction, the matter was reinstated.

Respondent having been convicted of a crime of the second degree, Endangering the Welfare of a Child, *N.J.S.A.* 2C:24-2a, and thereby automatically forfeiting his position as a teacher in accordance with *N.J.S.A.* 2C:51-1(a), and for good cause shown, the ALJ ordered the matter be removed from the inactive list and be dismissed as moot. ALJ ordered the matter referred to the State Board of Examiners.

Commissioner adopted findings and determination in initial decision and ordered matter referred to State Board of Examiners for further appropriate action.

December 4, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSING

CONTESTED CASE

OAL DKT. NO. EDU 958-97

AGENCY DKT. NO. 43-2/97

BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,

Petitioner,

v.

ANTHONY PUCA,

Respondent.

Joseph F. Betley, Esq., for petitioner (Capehardt and Scatchard, attorneys)

Michael C. Damm, Esq., for respondent (Selikoff and Cohen, attorneys)

Record Closed: October 6, 1997 Decided: October 22, 1997

BEFORE **JEFF S. MASIN**, ALJ:

This matter arises from a filing by the Winslow Township Board of Education ("petitioner") of tenure charges against Anthony Puca ("respondent") with the Commissioner of Education on February 3, 1997. The matter was transmitted from the Department of Education to the Office of Administrative Law ("OAL") on February 25, 1997, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone conference was held on May 8, 1997, resulting in the issuance of an Order of Inactivity, dated July 1, 1997, placing the matter on the inactive list for six months or until the disposition of pending criminal charges against the respondent. By letter of August 15, 1997, Counsel for the petitioner requested that the tenure charges against respondent be reinstated because of a Judgment of Conviction entered against respondent on July 17, 1997. A telephone status conference was held on September 29, 1997.

Having reviewed the record and based upon Anthony Puca having been convicted of a crime of the second degree, Endangering the Welfare of a Child, *N.J.S.A.* 2C:24-2a, and thereby automatically forfeiting his position as a teacher with the Winslow Township Board of Education in accordance with *N.J.S.A.* 2C:51-1(a), and for good cause shown, it is hereby **ORDERED** that this matter be removed from the inactive list and be **DISMISSED AS MOOT**. It is further **ORDERED** that Anthony Puca's name be referred to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6(a)2, for such further proceedings as the Board may deem appropriate.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 22, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

10/24/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT NO. EDU 958-97
AGENCY DKT. NO. 43-2/97

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY PUCA,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF WINSLOW, CAMDEN	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Respondent's exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.*

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the within tenure matter is properly dismissed as moot, in that respondent has forfeited his position pursuant to *N.J.S.A.* 2C:51-2.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate, as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 4, 1997
Date of Mailing, December 4, 1997

* Respondent's submission does not take exception to the initial decision, but asks the Commissioner to acknowledge that respondent's conviction for Endangering the Welfare of a Child is on appeal before the Appellate Division of the New Jersey Superior Court, and that said conviction may be reversed by the Superior Court, thereby compelling the restoration of his employment. However, the Commissioner would appear to be without jurisdiction to determine respondent's rights under *N.J.S.A.* 2C:51-2 and, therefore, offers no comment on respondent's contention in the present context.

627-97

NANCY J. BERNARD, KATHLEEN R. FOSTER AND STEPHEN M. KLING,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, three tenured payroll clerks, alleged the Board voted to terminate them in a reduction in force while retaining nontenured, less senior and/or nonqualified personnel in job titles for which petitioners were fully qualified and for which they claimed entitlement by virtue of their tenure rights.

In light of the testimony of witnesses and the evidence in the record, the ALJ found that the Board violated the tenure rights of petitioners under *N.J.S.A.* 18A:17-2 and that the Board owed a duty to petitioners not only to offer other positions to petitioners, but also to notify them in a clear and unequivocal manner that they were required to take steps to demonstrate their qualifications for those positions. ALJ ordered that petitioners be placed in clerk typist or class 4 secretarial positions previously held by nontenured personnel. ALJ further ordered that petitioners be made whole for any loss of salary and/or emoluments resulting from the failure to appoint petitioners to the positions to which they were entitled by virtue of their tenure rights and be appointed to the disputed positions with compensation. ALJ found that this dispute was not controlled by the collective bargaining agreement and that neither any arbitrator's decision nor the decision of PERC on the issue of whether the payroll systems administrator was a confidential position had any legal effect in this matter.

Commissioner adopted findings and determination in initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6762-96

AGENCY DKT. NO. 305-7/96

NANCY J. BERNARD, KATHLEEN R. FOSTER AND STEPHEN M. KLING,

Petitioners,

v.

BOARD OF EDUCATION OF THE WILLINGBORO PUBLIC SCHOOL DISTRICT, BURLINGTON COUNTY,

Respondent.

Keith Waldman, Esq., for petitioners (Selikoff & Cohen, attorneys)

Joan Kane Josephson, Esq., for respondent (Hill Wallach, attorneys)

Record Closed: September 29, 1997 Decided: October 23, 1997

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners who were tenured payroll clerks employed by respondent allege that respondent voted to terminate them in a reduction in force (RIF) while retaining non-tenured, less

senior and/or nonqualified personnel in job titles for which petitioners are fully qualified and for which they claim they are entitled by virtue of their tenure rights. Petitioners filed a petition of appeal on July 26, 1996, and respondent filed an answer thereto on July 31, 1996. The matter was transmitted to the Office of Administrative Law (OAL) on August 8, 1996, for hearing as a contested case. The matter was assigned to the undersigned Administrative Law Judge (ALJ) on September 17, 1996, and a telephone prehearing conference was scheduled for October 24, 1996. On that date a telephone prehearing conference was held and concluded and a prehearing order was entered. The matter was scheduled for hearing on March 24, 25 and 26, 1997.

Prior to the scheduled hearing, at the request of attorney for respondent, an order amending the prehearing order was entered.

On February 5, 1997, attorney for respondent filed a motion for summary decision which pursuant to *N.J.A.C.* 1:1-12.5(c) was submitted to the ALJ on February 19, 1997. A decision denying the motion was orally entered on March 24, 1997, the first scheduled hearing date. Hearings were held on March 24 and 25, 1997. The hearing scheduled for March 26, 1997, was adjourned due to the unavailability of a witness for petitioner. The matter was rescheduled to May 8, 1997. On May 8, 1997, the matter was heard and concluded. The record remained open to permit the parties to submit written closing arguments. Upon the submission of these closing arguments, the record was originally closed on August 12, 1997. The record was reopened on September 26, 1997, to permit the submission of missing documents in evidence. Upon the receipt of these documents, was again closed on September 29, 1997.

FACTUAL DISCUSSION

The essential allegations of petitioners are that the respondent voted to "RIF"[1] them while retaining nontenured, less senior and less qualified personnel in job titles for which petitioners are fully qualified and to which they are entitled by virtue of their tenure rights in violation of *N.J.S.A.* 18A:17-2. In response, respondent alleges that it offered other positions to petitioner and they

[1] The terms "RIFs" meaning reductions in force, and "RIFFED" meaning reduced in force, although not grammatically correct, were so commonly used by the witnesses that these terms are being used herein to reflect their testimony.

refused to take steps to demonstrate that they are qualified to hold these other positions, and as a result petitioners have waive any claims to these and any other positions.

It should be noted that the determination to deny respondent's motion for summary decision at the commencement of this proceeding was based upon the conclusion that this matter involves factual determinations which must be made as result of hearing testimony and evidence in this matter.

Petitioner, Stephen M. Kling testified that he was first employed in 1975 through June 1976 as a substitute clerk typist. He then was reemployed in 1977 as a payroll clerk until the RIF on June 30, 1996. His job title at the time of the RIF was payroll clerk. He indicated that he took two straight typing tests, one in 1975 and another in 1987. The first was for a substitute clerk typist position, but he cannot remember what the requirement was or how many words per minute he typed. He presumed he passed the test because he was given the position. He also took a typing test in 1987 and, to his knowledge, he passed it.

Mr. Kling testified that he did a great deal of work with pensions which required typing correspondence, filling out forms and preparing letters. He would also typ payroll work sheets, cash receipts and case payments journals, checks and memos. He typed 25 to 30 letters per month to the Division of Pensions. At first the payroll office was not computerized and much of the payroll work had to be done on a typewriter. At the time of the RIF the office was computerized and typing at a computer was a requirement of the payroll clark position. William Green, a member of management, was aware of what Mr. Kling's duties were on a day-to-day basis. Mr. Green started in 1991 or 1992 and before him William Stewart was the member of management who supervised payroll. Mr. Kling testified that he knows he successfully passed the typing test because he was hired as a substitute clerk typist, and this fact should be indicated on his employment records.

Mr. Kling testified that the first time he was officially notified he was being RIFFED was by a letter of April 30, 1996 (P-2). He recalled that it was April 30, 1996 that they received this notice. He was tenured because he had been employed eight and one-half years. He testified that there were a number of individuals who were not tenured but retained. He indicated that Dawnya

Ruff was moved to a secretarial position at the Willingboro High School from an accounts payable clerk position. He testified that there were quite a few other positions but he cannot recall their names.

Mr. Kling testified that a meeting occurred on May 10, 1996 (P-3) with Mr. McLaughlin, Personnel Administrator for the School District. The gist of the meeting was to tell Mr. Kling that he was going to be placed in the kitchen bookkeeper job. Mr. McLaughlin explained that this was the position that was available to Mr. Kling. Mr. Kling questioned why he would not be offered a job as a clerk typist as opposed to a ten-month position and Mr. McLaughlin said that this was the only position available to him and that it was either this or nothing.

Mr. Kling testified that the memo he received from Mr. McLaughlin dated May 14, 1996 (P-3) was puzzling to him because he told Mr. McLaughlin that he had already taken the typing test. As a result he was confused and he called Mr. McAndrew who was his union representative and Mr. McAndrew then spoke to Mr. McLaughlin. He indicated that when he received the memo (P-3) it was not his understanding that he was being required to take a typing test.

Mr. Kling next received a memo from Mr. McLaughlin dated May 22, 1996 (P-4). His reaction to this was that Mr. McLaughlin was saying that he was encouraging Mr. Kling and the others to take the test, but his understanding was that it was not required. When he received this second memo he again called Mr. McAndrew who indicated that he was going to talk to Mr. McLaughlin. The next correspondence he received was a memo from Mr. McLaughlin dated May 30, 1996 (P-5). He understood that taking a typing test was still a recommendation and not a requirement and that it only applied to secretary class four positions, which involved stenography, but not to class three or clerk typist positions. Mr. Kling again called Mr. McAndrew, gave him a copy of the memo and explained that they were still being asked to take a test. He indicated that no one else was ever required to take a second typing test.

Mr. Kling testified that his work relationship with his supervisor, Mr. Green, was not very friendly. Mr. Green would arrive in the morning would say good morning and that was the last time he would talk to anyone. There was never any other conversation. It was not a very friendly atmosphere in which to work.

Mr. Kling testified that he was aware that Dawnya Ruff was a nontenured employee retained in a job title and who was not administered a test. He knew of this because he asked Ms. Ruff and she told him she did not take a test. He was aware of this because the payroll clerks received the Board of Education agenda and they saw her name on the agenda as being hired. They were also aware that Pat Wright was retained as a non-tenured clerk typist at Memorial, although he is not sure if she took the test.

Since the RIF, Mr. Kling has been collecting unemployment and looking for a job. He has taken typing tests and he types 47 words per minute.

On cross-examination Mr. Kling indicated that when he took the typing test for substitute clerk typist he was not aware of the required score for passing the test at the time. He was also required to take the typing test for the position of payroll clerk in 1987. He did not ask what the requirement was but just took the test. He admitted that the job description for payroll clerk, the position from which he was RIFFED, does not require an individual to have competent typing skills. He denied that Mr. McLaughlin discussed that the position of secretary/bookkeeper and the position of accounts payable required a shorthand test to become a secretary. He admitted that Mr. McLaughlin mentioned that he was required to take a shorthand test to become a secretary. He also indicated that in order to be a clerk typist a typing test is required. Mr. Kling indicated that all three petitioners told Mr. McLaughlin that they had already taken a typing test and he indicated that he was going to check their files. Mr. McLaughlin did not tell them at some later time that he checked their files. Mr. McAndrew is an officer of the local education association and the matter was placed in his hands. The concerns expressed to Mr. McAndrew was that the petitioners kept receiving memos about taking the test when they had already taken the test and it had been explained to Mr. McLaughlin that they had taken the test. Mr. McAndrew said that he would speak to Mr. McLaughlin and find out what was going on. On one occasion, Mr. McAndrew said that Mr. McLaughlin told him that he was going to look into it and get back to him.

Mr. Kling admitted that Dawnya Ruff did not last very long in the position as secretary. At the time his RIF became effective on June 30, 1996, he was not aware that there were

positions in the district that were being offered to him in order for him to keep his employment with the Board. He denied that he was offered a clerk typist position. The only position he was offered was the kitchen bookkeeper job and he indicated that he was willing to accept that position.

Dawnya Ruff testified that she is not currently an employee of the respondent. She was first hired in August 1993 as an accounts payable clerk. She held that position until June 1996 when she was RIFFED. On the Monday following the RIF, she was to report for a secretarial position at the Willingboro High School. She was never told that she would be hired to a secretarial position, and she was never asked to take a typing test. She recalls receiving a memo addressed to her dated June 25, 1996, advising of her assignment as secretary at the Willingboro High School (P-7).

On cross-examination, Ms. Ruff indicated that she never worked as a secretary at the High School. Dr. Foster, the Superintendent of Schools, called Ms. Ruff into a meeting and indicated that it had been brought to her attention that Ms. Ruff was not qualified for the position. Dr. Foster apologized and said that it was an error and told her not to report on the Monday following the RIF and that the appointment was rescinded. Ms. Ruff indicated that previously she had taken the typing test but could not recall the details. She recalls that she did not pass the typing test.

Lisel D. White testified that she previously worked for the Willingboro Board of Education. She was employed between March 1993 and November 1996. She also worked as a substitute teacher in 1991. From March 1993 to November 1996 she was secretary to the chief accountant, William Green. She was required to take a typing and shorthand test in 1993 prior to getting this job as secretary to the chief accountant. At this point there was read into the record Request for Production of Documents number 16 in which it was indicated that there was no written test found in Lisel D. White's personnel folder.

Myra Yurchak testified that she holds the position of administrative clerk typist for the Willingboro Board of Education and is assigned to the personnel office. She has been employed by the Board since 1975, first from 1975 to 1977 as a guidance aide, then as a substitute clerk

typist until January 1980. She has been an administrative clerk typist from January 1980 until the present time. Until March 1997 she reported to Michael McLaughlin, personnel administrator. In her position within the personnel office, she is familiar with the Board's testing polices for clerical and secretarial staff. In 1987 the requirement for a clerk typist was a typing speed 55 words per minute. Subsequently when the Board felt that they were not getting enough people to pass that requirement, they lowered it to 45 words per minute. The current requirement is now 45 words per minute. In some cases employees' files have typing tests in them and in other cases they may not have been filed or may have been misplaced. As a result it is inconsistent. Ms. Yurchak indicated that if an individual held the position of substitute clerk typist, based on her knowledge of procedures it would be fair to say that the employee would have taken a typing test. However, she indicated that for substitute clerk typist the requirement was less than 45 words per minute and that if applicants got anywhere over 30 or 35 words per minute they would be hired as substitutes.

Ms. Yurchak testified that some time in June 1996, Mr. McLaughlin asked her to look into the personnel records to determine whether Mr. Kling, Ms. Bernard and Ms. Foster had passed typing tests. She also was asked to check the files of other employees. She indicated that they were unable to find tests in the petitioners' files.

Ms. Yurchak indicated that she confirmed to Mr. McLaughlin that substitute clerk typists are given a typing test (P-1). She testified that in her years of employment she is not familiar with any circumstance in which an employee who was formerly a secretary who has been RIFFED into another secretarial job has been asked to retake the secretarial test. She is not familiar with any situation in which a clerical employee has been RIFFED into a secretarial position and was required to take a test. She knows of only one instance where an individual has not taken a shorthand test. It was a person who worked in the Transportation Department who filed a grievance which she won, and as a result she was appointed as a secretary. On cross-examination Ms. Yurchak indicated that this individual had claimed that she was doing work beyond that of a clerk typist and was performing work in the category of payroll which is the same as a secretary. She also indicated that there were secretaries who were never really tested but this goes back about fifteen years. Now the Board tries to test everyone and tries to keep its records straight.

Michael McLauglin testified that he was employed with the Board as personnel administrator from April 29, 1996, to March 1, 1997. Ms. Yurchak and two temporaries reported to him and he reported to the superintendent. His responsibilities were to manage the personnel function of the School District which included the hiring and termination of employees, contract negotiations and grievance handling. He previously worked for the Washington Township Board of Education from January 1990 to April 1996. He is currently unemployed. He believes he is being remunerated for testifying in this matter. He indicated that his employment was terminated by the Board of Education on March 1, 1997, when he was fired.

Mr. McLaughlin testified that when he was hired on April 29, 1996, the Board was in the middle of a RIF situation. There were over 75 people on the RIF list, and 29 of them were clerical employees. He was asked to talk to Mr. Kling, Ms. Foster and Ms. Bernard, relative to their rights under the contract. When he met with them on May 10, 1996, it was his understanding that people in one category had a right to bump a non-tenured employee in another category if there were no available positions in their particular category, if they took the qualifying test. The whole issue then revolved around the qualifying tests, and whether or not they had a right to bump into any other position if they had not taken the qualifying test. His understanding was that payroll clerk positions were placed under the secretarial salary guide as a matter of form because they needed somewhere to "place" them, for want of a better term. However, if individuals were going to bump into a secretarial position they would have to qualify according to the Board's policy on qualifying tests for those position. As a result, secretarial positions required passing typing and shorthand tests. For the clerk typist positions a typing test was required. So when he met with petitioners on May 10, 1996, the purpose of the meeting was to explain to petitioners that they had a bumping right to go to a secretary position but their bumping rights required that they take the typing and shorthand tests.

Mr. McLaughlin identified three memos he prepared in connection with grievances filed by petitioners herein (P-8A, P-8B and P-8C). In these documents Mr. McLaughlin indicated that the necessary tests are the typing and shorthand tests and the tests have always formed a basis for determining if an individual has the requisite qualifications and ability to perform the job he or she is seeking. The rationale for petitioners not being offered positions is that they did not take the

tests, and the tests were necessary and had always been necessary to perform these job functions. He indicated that the position he took in the grievance denials of July 9, 1996, is consistent with the position he took in his prior memos to the petitioners (P-3, P-4 and P-5). His memo of May 14, 1996, requires petitioners to take a typing test. He indicated that this memo does not say that he requires them to take the test, or that he demanded that they take the test. He did not say in this memo that if they don't take the test they won't get the job, but he stated verbally to either Mr. McAndrew, Ms. Aldrich or Mr. Suleta that these people had to take the test in order to get the positions. He also indicated that he did not use that verbiage in the subsequent memos of May 26, 1996 (P-4) or May 30, 1996 (P-5).

Mr. McLauglin testified that his memo of June 21, 1996 (P-1), was written in the context that if there is some substantiation of the fact that the petitioners took some kind of test that he recommended that they be appointed to secretary 3 positions. He wrote this memo late in the afternoon on June 21, 1996, when he was about to report for two weeks of reserve training. He had been advised by Mr. McAndrew and Ms. Ryan of the educational association that the three petitioners had taken typing tests and he felt that if this was the case, that there may be a claim and that the Board ought to do something. As a result, he was advising the superintendent by his memo to look into this matter further. However, he later found out that the test given to substitute clerk typists was not the same as the tests given to regular contractual employees, and the requirements were significantly less. At the time, however, he thought that there may be a claim here and the Board should reconsider how to deal with these three employees. He indicated that he recommended the they be appointed as clerk typists if there was a claim.

Mr. McLaughlin was questioned whether Barbara Crammer had taken a test for the position of accounts payable clerk and he indicated that she had been administered a test and it was on her record. However, he indicated that his answers to interrogatories indicated that she had not been given a test. Mr. McLaughlin was also questioned whether Carmen Harris was given a test and the discovery response indicated that she was tested for typing when she was hired as a substitute clerk typist on October 27, 1997. His understanding was that the requirement for substitute clerk typist was around 30 words per minute and Ms. Harris tested at 26 words per minute.

On cross-examination Mr. McLaughlin indicated that in his experience he had never dealt with a layoff greater than five employees, so 75 RIFFED employees was significant. Approximately 30 of those were clerical staff members. The reasons for the RIF were economics and the budget situation as well as reorganizations that were going on district-wide. There were consolidations on the administrative side, and areas were being reduced because of budgetary concerns. The Continuing Education Department was being eliminated and in payroll the Board was bringing in an ADP payroll system which was creating a new position, payroll/systems administrator, and was reducing the three payroll clerks that were there at the time. The Board's intent was to eliminate the three payroll clerks and replace them with a payroll/systems administrator. The Board's decision was to implement the ADP payroll system and to manage that operation with part of the funds that were left over from the reduction of the three payroll clerk positions.

Mr. McLaughlin's meetings with the petitioners took place on the same day, one after the other. Mr. Kling was interested in the payroll/systems administrator position and he wanted to know if he could bump into it. However, Mr. McLaughlin explained that this was going to be a non-affiliated position and Mr. Kling indicated that he was probably going to apply for the position. Mr. Kling did apply for the position and was interviewed and he scored number two for the position, but was not hired. The position of secretary/bookkeeper in the food service department was discussed with Mr. Kling. There were discussions of several possible scenarios. Testing was discussed and Mr. McLaughlin was pretty firm on the requirement that the petitioners were going to have to take the typing and the typing and shorthand tests for any position that they were going to bump into. This was both for secretary 4 and secretary 3 level positions, secretary 3 being clerk typists.

Mr. McLaughlin was questioned about Carmen Harris' substitute clerk typing test taken in 1987. She had a raw score of 32 and after subtracting for errors, came up with a 26. She was hired as a substitute clerk typist. He indicated that 30 was what they were shooting for but if applicants came close they would be hired anyway because the district was hurting for competent help. At the time the requirement for permanent clerk typist was 55 words per minute. He also

indicated that Barbara Crammer was hired back in 1972, over 25 years ago, and that actual testing of clerical applicants did not being until the early 1980s.

Mr. McLauglin testified that his only face-to-face meetings with Mr. Kling or the other petitioners was on May 10, 1996, and that after that date he began meeting with members of the Willingboro Education Association. Usually he met with Mr. McAndrew or Karen Aldrich who was the grievance chairperson. He indicated that when the particular issue of petitioners was raised, he was questioned what he was going to do about petitioners taking the test and he responded that they would have to take the test. There came a time when he was advised that the petitioners claimed that they had taken the test, and he agreed that he would check it out. However, when he checked it out in their personnel files, there was nothing to indicate that the petitioners took the typing test. He advised Mr. McAndrew or Ms. Aldrich of this and he reiterated that they must take the test.

Mr. McLaughlin testified that William Green had no input as to the requirement that petitioners take the typing test. Mr. McLaughlin did not engage in any discussions with Mr. Green relative to the issue, but only spoke to the superintendent and business administrator about the requirement for testing.

Mr. McLaughlin testified that with respect to Dawnya Ruff, he was away on training and when he came back Ms. Ruff had already been terminated. He explained that there were 25 clerical positions that were RIFFED and 19 of them were to be called back. It was his understanding that everyone was qualified for the recall so he went by employment dates in terms of calling them back. He placed Ms. Ruff on the list believing that she was qualified, but it turned out that she was never tested for the position. With respect to Lisel White, they found no record that she took the test but everyone remembered her taking it and remembered what the outcome of the test was. Lisel White's supervisor recalls her taking and passing the test. Myra Yurchak also remembered Ms. White taking and passing the test. Mr. Green also remembered that Ms. White passed the test and was subsequently hired. Lisel White was not RIFFED and was not an affiliated person. Since she was not being RIFFED her employment history at the time was not subject to review.

Mr. McLaughlin testified as to the position of secretary/kitchen bookkeeper. In April 1996 that position was occupied by Pat Wright-Moore. It is predominantly a secretarial position with some elements of record keeping, and an individual would have to take a typing test and a dictation test in order to fill the position.

Mr. McLaughlin indicated that he was never made aware or requested any information about Mr. Kling passing a test of the Department of Civil Service.

Mr. McLaughlin testified that he made no offer of employment to any of the three petitioners in this matter on May 10, 1996. At no time did Mr. Kling ever claim that he was entitled to a position as secretary/bookkeeper. Mr. McLaughlin reiterated that the position of the district was that if someone wished to take a secretarial position they would be required to take the typing test and a shorthand test. If an individual wanted a clerk typist position in the district he or she would be required to take a typing test.

Mr. McLaughlin was questioned about the payroll/systems administrator position and indicated that it is a non-affiliated position. It is not part of the education association and not part of the clerical group and is considered part of the first level management and does not have a test requirement to it. It requires an associates degree, a higher level of understanding of the payroll system, knowledge of the ADP system and a little more expertise in terms of both the payroll function as well as the system integration function. It is a high level job. Applicants were required to be interviewed for the position.

On redirect, Mr. McLaughlin indicated that in his meeting with the petitioners it was clear that they were required to take the test in order to effect their rights under the contract. His military service was from June 22, to July 7, 1996. He admitted that of the 19 that were called back for positions after the RIF, only the three petitioners were told that their test was not in their personnel record. He admitted that he made the assumption that everyone holding a job is qualified for that job, but if they are bumping to a new position, the employee must show they are qualified by either taking the test or by providing proof that they previously passed the test. He indicated that Barbara Crammer was moved from secretary to accounts payable. He explained

that accounts payable is a secretary 4 position that would normally require a test. However, she was hired back in 1972 as a secretary before tests were instituted. When the Board instituted the test requirement it did not go back to everyone and give tests, but they grandfathered anyone holding a position. He indicated that Ms. Whelihand was the secretary of the Transportation Department who lost her job with privatization. She was on medical leave at the time and when she came back she was placed in a secretary position because she was a tenured secretary. However she was not given a test. Alice Springer was performing as secretarial bookkeeper with food services. He indicated that the position was predominantly secretarial. At the time of the RIF Gail Johnson was transferred from community information officer to clerk typist. She was previously a clerk typist who would have been tested previously for that position. STOPPED HERE

Kathleen R. Foster testified that she started her employment in November 1986 as a substitute clerk typist/PBX operator. She then went under contract as a payroll clerk and was employed in this position from August 11, 1987, until June 30, 1996. Her responsibilities as payroll clerk included handling absentees, writing up all new employees and overtime reports. In the beginning they had little typing to do and all their work was from data processing. However, beginning in 1989 they had to type all of the payroll information into the computer and all transfers, new hires and other information had to be entered by them into the computer. She indicated that there was very heavy phone contact and that all of the work had to be done on a tight schedule because of the two-week payroll cycle, and everything had to be updated constantly. She indicated that approximately 70% of her time was spent typing, and Mr. Green as a member of management would see her typing. Mr. Green supervises accounting and payroll. His desk was located in the back office so he would have to walk through the outside area past the petitioners. Mr. Green was not a hands-on type manager. She indicated that she applied for other positions in 1986 and 1987 and she believes that she passed the typing test for those positions. She believed that because she went on job interviews for the positions.

Ms. Foster first received notice of the RIF at the end of April 1996 (P-2). Subsequently they had one meeting with Mr. McLaughlin on May 10, 1996, to discuss where they would be placed. When they met with Mr. McLaughlin on May 10, he recommended that she go into the accounting department into accounts payable, Mr. Kling would go into the kitchen bookkeeper

position and Nancy Bernard would go to transportation. Mr. McLaughlin said that he strongly urged that the three of them take the typing and shorthand tests, to which she responded that she had already passed the typing test when she started and that as far as shorthand she has not done that since high school. Mr. McLaughlin then said that he would check her personnel file to see about the typing test. She indicated that the accounts payable job was offered to her at that meeting and that Mr. McLaughlin said that he would recommend it to the Board.

Ms. Foster admitted to receiving Mr. McLaughlin's memorandum of May 14, 1996, but indicated that it does not require that she take the test as a condition for being considered for a job. She also received his memorandum of May 2, 1996 (P-4). He again strongly urged that they take the test but he did not say that they had to. He did not communicate that their taking a test was a condition of their continued employment with the district. The same is true of his memo of May 30, 1996 (P-5).

Ms. Foster then spoke to Mr. McLaughlin in mid-June, 1996, and asked where the three of them would be placed and he responded that since they did not take the test that there was nothing open and they would not have a position on July 1, 1996. They then contacted Roberta Ryan, the union representative and Jim McAndrew the president of the association. She indicated that the requirement for testing was a sham requirement because of Carmen Harris who became a substitute clerk typist in 1987 or 1988. She indicated that Carmen Harris told her that she did not pass the typing test. She also indicated that Veronica Whelihand from transportation also told her that she never took the shorthand test. Ms. Whelihand was appointed as a secretary as a result of a grievance or an arbitration that she won, and she was given back pay and was placed on the secretarial list.

Ms. Foster testified that she did not take the typing test because she had already taken it and it was not required of anyone else.

Ms. Foster testified that Mr. Green did not like the petitioners and did not like her. He would pass her desk ten times a day and the only thing he would say to her was good morning and that was all he ever said. She indicated that on a number of occasions Mr. Green was made aware that it was her birthday or the birthday of Nancy Bernard and he said nothing about it. He

would not wish them Merry Christmas and he never said thank you if they came in on snow days. He would come in with Christmas gifts for different people, but with nothing for the three petitioners. However, he would be friendly with other people.

Ms. Foster indicated that since her termination she has been collecting unemployment for six months and has been applying for different positions. She is still unemployed.

Ms. Foster clarified her conversation with Carmen Harris. She indicated that Ms. Harris told her that she did not pass the typing test and that is why she was terminated after she had a contract. This was sometime in the early 1990. She went back to a position as a substitute clerk typist for a while. She indicated that she held a permanent position as clerk typist for one year and then she was terminated because she did not pass the typing test.

On cross-examination, Ms. Foster indicated that she took the typing test at the time she was first hired. She had to do 55 words per minute but she did not get the results. She then took another typing test for a permanent position as clerk typist and it was the same test but she does not know what she scored on that either. She indicated that it was mandatory to take a typing test in order to get the substitute clerk typist position. She also confirmed that she did not do much typing prior to 1989 or 1990, and that data processing did all of the typing up to that time. She did not type correspondence for Mr. Green or anyone else. She typed information reports and printed them out. She admitted that there was nothing in the job description for payroll clerk which required her to be a competent typist. She admitted that the job description for clerk typist requires an individual to have the ability to type a variety of materials. During her conversations with Mr. McLaughlin on May 10, 1996, he did not say that she needed typing skills for an accounts payable position. He said he would strongly urge her to take the typing and shorthand tests for secretary level 4 positions. She was aware that there were clerk typist positions occupied by non-tenured people and she knew from her past experience that these positions required a typing test. She admitted that when she went into the payroll clerk position in 1987, it did not require typing skills. The memo from Mr. McLaughlin says the qualifications for secretary class 4 requires shorthand and typing and that for a class 3 only a typing test is needed. She indicated that Mr. McLaughlin was recommending that she take the test. It did not alert her that if she did not take the test she would not have a job. She admitted that the memos did not promise that she

would be transferred to the accounts payable position. She thought that the matter had been taken care of by Mr. McAndrew after speaking with Mr. McLaughlin and she was under the impression that her typing test was on record and could be found.

Ms. Foster indicated that she spoke to Mr. McLaughlin in mid-June 1996, and he advised her that since she did not take the test she would not have a job. She was not given the opportunity between the middle of June and the end of June to take the test. She indicated that Ronnie Whelihand was performing additional payroll duties and she felt that she should not be considered a clerk typist. Ms. Whelihand filed a grievance and she won her case that she should be a secretary 4. She was RIFFED when she was on sick leave and when she came back she was recognized as a secretary 4 at Willingboro High School.

Ms. Foster testified that Mr. Green never did any performance evaluation of her. He also never wrote a memo that criticized her work performance. She has no knowledge of input on the part of Mr. Green requiring that she take a typing and dictation test.

On redirect examination, Ms. Foster indicated that she had to type budget numbers into the computer and that this required a high degree of accuracy.

Nancy J. Bernard testified that she started with the Willingboro Board of Education on December 5, 1988, as a payroll clerk. Her job was then basically payroll, doing time sheets, working out time cards and absence forms. When she was not on the payroll cycle she would help in the accounting department typing in accounting vouchers, processing vouchers, filing and varied other duties. However, six to nine months after she started, payroll was given a number of additional duties, including two to three hundred absence forms every payroll cycle, substitute employee information and payroll, overtime reports, and gate receipts from various games including reconciliation of the account and typing reports. She also helped the accounting department when a new computer system was instituted. They would also compare new employee cards for new employees. She and Kathy Foster's jobs were intertwined and each took over the other's duties when the other was absent.

Ms. Bernard indicated that during the last two years of her employment she spent approximately 75% of her time typing on a typewriter or on a computer. Mr. Green was the member of management that supervised her and worked in close proximity to her.

Ms. Bernard indicated that she was given a typing test when she was first hired. She saw the payroll job in the newspaper and she applied for it. She recalls taking a typing test to go on to the substitute clerk typist list. However, she never did substitute clerk typist work. She interviewed for the payroll job and received it. Previously she worked for the prosecutor's office and had to be tested for typing for that position where she spent 95% of her time typing.

Ms. Bernard indicated that she was first notified of the RIF on April 30, 1996 (P-2). She then met with Mr. McLaughlin on May 10, 1996. Ms. Bernard expressed her opinion about the various positions that should be offered to Mr. Kling, Ms. Foster and herself. She felt that she should receive the kitchen bookkeeping position. She indicated that Mr. McLaughlin contacted the Board attorney inquiring as to whether she was required to take the test. He did not promise any job to her but she felt that Mr. McLaughlin was working for the three petitioners.

Ms. Bernard testified that when Mr. McLaughlin got off the phone with Mr. Granello, the Board's attorney, he said to her that he thought that maybe she should take a test. She responded that she had already taken the typing test and he said that maybe she should take a shorthand test. She said that she had not taken shorthand since high school and he responded that he did not want to see her as uncooperative. Ms. Bernard then stated that she felt they would not get the positions because Mr. Green hates them, to which Mr. McLaughlin responded, "Oh really." She indicated that she just did not get a feeling that Mr. Green liked her. She indicated that when they were being RIFFED in 1990, her old boss, Mr. Stewart, fought for them. Mr. Green never once said that he was sorry that this was happening, that they did a good job or that he would miss them.

Ms. Bernard indicated that she was a little surprised when she received the memo from Mr. McLaughlin on May 14, 1996 (P-3), and this memo threw her. They also received another memo on May 22, 1996 (P-4). She indicated that these memos did not require that they take a test but it was recommended.

Ms. Bernard testified that the kitchen bookkeeper position was filled by Alice Springer. The PBX Operator was Marie Gregg and she was also being RIFFED. Upon receipt of the memo of May 22, 1996, Mr. Kling called Jim McAndrew again. The next communication from respondent was the memo of May 30, 1996 (P-5). Ms. Bernard testified that she thought that this was stating that if the petitioners wanted to get into a secretarial position, they were required to take typing and shorthand tests, and Mr. McLaughlin recommended their taking those tests. They again called Mr. McAndrew because they felt as if they were being harassed.

Ms. Bernard was present when Ms. Foster contacted Mr. McLaughlin in mid-June and was told that the petitioners were not being placed anywhere. They then called Roberta Ryan who was their union representative.

Ms. Bernard testified that between April 30, 1996, and the RIF, she did not receive any communication that said that she had to take the test in order to be considered for another position. Since her last employment with respondent, Ms. Bernard has been on unemployment. She has been looking for a position and wants to continue working. She has applied for thirty or forty positions.

On cross-examination, Ms. Bernard testified that when she first applied for a position with the Board in 1988 it was as payroll clerk and she was asked to take a test that day, but was not told that the typing test was to be a payroll clerk. She was told that if she took the typing test she would be placed on the substitute clark typist list in case she did not receive the payroll clerk position. She was not given a copy of the test results and she never took a dictation or shorthand test. She indicated that other than typing reports, she has never typed correspondence or substituted for Mr. Green's secretary. She admitted that after she received the RIF notice of April 29, 1996, there is nothing in writing from respondent indicating that she had a position waiting for her. Ms. Bernard admitted that in her answers to interrogatories she indicated that Mr. McLaughlinsaid he would recommend the three petitioners to various positions. However, her testimony at the hearing was that he never offered her a position. When Dawnya Ruff was terminated, Barbara Crammer, a tenured secretary 4, was hired for that position. Barbara Crammer has more years of service than the petitioners and she was hired as an accounts payable

clerk in the payroll office. Alice Springer held the kitchen bookkeeper position and she had more than three years in the position so she had tenure. Ms. Bernard knew there were a number of clerk typist positions available which were held by non-tenured employees and that a PBX operator position was held by Marie Gregg who was non-tenured. She was laid off and Gail Johnson was placed in that position.

Ms. Bernard testified that when they received the series of memos they contacted their union representative and the union took charge of the matter. From May 14, 1996 on, they did not hear anything. Ms. Bernard testified that when saw the recall list, petitioner's names were not on it. She indicated that from May 14 through the end of June 1996, they did not hear directly from any representative of the union as to what was being done on their behalf. She believed that Mr. Kling said that the union representatives were meeting with Mr. McLaughlin and that is all they knew. She admitted that notwithstanding the encouraging and urging by Mr. McLaughlin, she did not take a typing test or a dictation test. They did not hear from the union representative until after the Board meeting of June 24, 1996.

On re-direct examination, Ms. Bernard indicated that after she took the typing test in 1988, she was put on the substitute clerk typist list. She also testified that during an overlap when Oscar Jamerson and Mr. McLaughlin were both acting as personnel directors, Mr. Jamerson came to the petitioners' office and told them to sit tight and that everything was going to work out. She also indicated that while Mr. McLaughlin did not come out and say that she was going to be appointed, she believed that she would. On re-cross examination, Ms. Bernard indicated that at no time after the telephone conference between Mr. McLaughlin and Ms. Foster in mid-June 1996, did she receive anything from any representative of respondent that said that she could not take a typing test or a dictation test.

Jade T. Frederick was called as a witness. However, because her name was not provided in answers to interrogatories as a potential witness, Ms. Frederick was excluded as a witness. The parties stipulated into the record respondent's answer to petitioner's Request for Production of Documents No. 15 which states:

> Personnel records reflect Jade Thompson Frederick was tested when she was hired as a substitute clerk/typist and teacher aide in 1994.

As part of that stipulation, the parties admitted into evidence the test of Jade Thompson Frederick (P-10). The parties also stipulated into evidence the test results of Carmen Harris (P-11).

James P. McAndrew testified that he is a basic skills math teacher at Hawthorne School in the Willingboro School District and he is President of the Willingboro Education Association (WEA). He was President in 1974, 1977, in the 1980's and for the past three years. He indicated that as President of the WEA, he would become involved in RIFs and would double check to determine if they were occurring properly.

Mr. McAndrews testified that he spoke to Mr. McLaughlin and told him that he felt the petitioners should be given secretary class 4 positions based on their current positions. This was right after he received the call from Mr. Kling and he believes it was around May 14, 1996. He recommended to Mr. McLaughlin that the most efficient way of handling the recall of RIFFED tenured people would be through seniority, and Mr. McLaughlin's reaction was favorable. Mr. McLaughlin did not say anything at that point regarding testing or with respect to the petitioners herein.

Mr. McAndrew testified that he had many conversations with Mr. McLaughlin. He was also in contact with Mr. Kling quite a bit and he spoke to Mr. McLaughlin after every memo that was received by petitioners. He felt that the only test that the petitioners had to take would have been a shorthand test because that is the one they did not take previously. He felt that they would have been able to be placed into the accounts payable, the central kitchen/bookkeeper and the transportation positions. Mr. McAndrew indicated that at no time did Mr. McLaughlin ever make it known to him that petitioners' taking the tests was a requirement for their being considered for a position at the time of the RIF. This was not made known until he and Bobby Ryan met with Mr. McLaughlin concerning the petitioners on June 21, 1996. At that point Mr. McAndrew told Mr. McLaughlin that at the very least the three petitioners should have secretary class 3 positions as clerk typists since they had already taken the typing test and they had met the qualifications.

Mr. McLaughlin indicated to him that there were no records of their taking the typing tests in their personnel files to which McAndrew responded by inquiring whether there are records in everyone's files as to whether or not they have taken typing tests. As a result, it was found that a great many of the personnel files that they spot checked did not have any indication that the employee took a typing test or whether the employee passed such a test. Mr. McLaughlin then accused Mr. McAndrew of coming in at the last minute as he was ready to go on military leave. Mr. McLaughlin then agreed that he would write a memo to the superintendent recommending that the three petitioners be placed on the agenda, and that he would recommend that they be given secretary class 3 positions.

Mr. McAndrew learned for the first time that Mr. McLaughlin's recommendation was not being accepted when he saw the Board's agenda, and he was shocked when he saw that this was not occurring. He felt that petitioners were being treated differently from other people. He indicated that if respondent was going to move Barbara Crammer into an accounts payable position for which she had no knowledge whatsoever at the time and was not being required to take the test, then neither should petitioners. He indicated that years ago when people applied to go into a payroll position, the District made up a test that people had to take. The association objected to it and it was determined in arbitration that the test questions themselves were invalid. The association does not object to the right of management to test in general. He indicated that Barbara Crammer did not take a test for the secretarial position when she started in the 1970's and that she was grandfathered in and never had to take any tests. As a result of the RIF, she was placed in an accounts payable position.

Mr. McAndrew testified that after each meeting with Mr. McLaughlin he reported back to Mr. Kling and told him that Mr. McLaughlin was looking into some of his recommendations to see if they were feasible or not.

On cross-examination, Mr. McAndrew indicated that the petitioners were listed as secretary class 4 employees for salary purposes. He is not aware if a person hired for the position of payroll clerk is required to take a typing test. To his knowledge, someone hired to be a permanent clerk typist does need to take a typing test. Someone hired as a secretary needs to take a typing test and a shorthand test. He admitted that the purpose of his initial meetings with

Mr. McLaughlin was to urge that the petitioners be kept at a category 4 level. Before he met with Mr. McLaughlin for the first time, he saw the contents of the memo of May 14, 1996 (P-3). He went to Mr. McLaughlin and said that the petitioners are a category 4 under the contract and that he wanted them to have category 4 positions so that they would suffer no loss in pay. He indicated that the kitchen/bookkeeper position was occupied by Alice Springer who was a tenured employee of the District. He recommended to Mr. McLaughlin that the prudent way to handle the RIFs was to do so by seniority and that since petitioners had more seniority than Alice Springer, Alice should be bumped. He also indicated that the kitchen/bookkeeper is a class 4 position. Veronica Whelihand held the transportation position and she had tenure in the District. He admitted that, as a result, when he was discussing these positions with Mr. McLaughlin, two of the positions were currently occupied by tenured staff members. He also knew there was a vacancy in the high school for a secretary 4 position and he recommended that Barbara Crammer be put in that position. He also knew that the petitioners held clerical positions. Mr. McAndrew indicated that his first concern was to try to get petitioners into category 4 positions because of the pay differential. He knew they were qualified for class 3 positions.

William A. Green, Jr. testified that he is Chief Accountant for the Board of Education, a position he has held since March 1991. As Chief Accountant, he is responsible for the financial reporting of the District and he is in charge of the Accounting Department and payroll is a function of the Accounting Department. He supervised an accountant, Rita Walters, Lisel White, secretary to the chief accountant, the payroll function which included the three petitioners, and the accounts payable function with two employees.

Mr. Green testified that there was a reorganization of the Department that arose during budget deliberations. The central administration of the District determined that the budget had to be reduced and the superintendent through the business administrator directed that the Accounting Department would be reduced by two people. At the time they began to look at the privatization of payroll with the payroll function coming under a private organization with one person in the District responsible for operating the payroll. That person would be the payroll/systems administrator and since the position would be required to provide negotiations duties, it was determined that it would be non-affiliated. As a result, it was determined that the District would create a new position, payroll/systems administrator, and the three existing payroll

clerk positions would be eliminated. The Board approved this and approved the privatization of payroll. As a result the payroll/systems administrator position was posted and individuals were interviewed. A committee was involved in the interview process consisting of the District's EEO representative, Mr. Green, Mr. McLaughlin and Mr. Jamerson. Interviews took place between April and June, 1996, and Stephen Kling was among those interviewed. During the interview process, gross rankings alone was considered to score the candidates for the payroll/systems administrator position. Ms. Zena Stewart came out as number one and Mr. Kling was number two. He indicated that the three payroll positions were targeted for RIF because the Board wanted to upgrade technology and they had an in-house payroll system which was antiquated. They were operating on a out-dated computer system and felt that it would be better to privatize by placing the system with one of the major payroll providers whose sole business is payroll. Eventually, Automatic Data Processing (ADP) was selected. The function of the payroll/systems administrator combined the responsibilities of the three positions held by petitioners and also included added responsibilities in the area of computer knowledge and skills. He indicated that the payroll clerks performed responsibilities that required typing; however, none of the payroll clerks ever performed as his secretary.

Mr. Green indicated that his personal relationship with Ms. Foster was congenial. He would come in and they would speak in the morning and they would speak on other occasions. He snapped at her only on one occasion about three years ago and he apologized. He had asked Ms. Foster to do something and she flared up. There was a meeting with the union president about this incident. He never found anything wrong with her performance. He also had a congenial relationship with Nancy Bernard. He had no ill feelings toward any of them. There were never any harsh words between them. Ms. Bernard would sometimes ask to leave to get her children and he permitted her to do so. There was never any personality conflict. He also had a congenial relationship with Stephen Kling. There were no ill feelings, no adverse reactions and they would talk about work. They never had any personality conflicts.

On cross-examination, Mr. Green indicated the current staffing of the office is that he has an accountant, a secretary to the accountant, the new position filled by Zena Stewart and two substitute individuals serving as accounts payable clerks. They started about mid-June 1996 until early March 1997. Jackie Cohen was brought in a month after the RIF. She was a substitute

person to do filing and accounts payable and she was asked to do some payroll work. Loretta Person, his personal secretary, started in January 1997. Prior to that time she was a part-time secretary to the chief accountant. The secretary to the chief accountant resigned and she was brought in.

Mr. Green testified that he never wrote up any of the three petitioners. He also indicated that the administration "cabinet" was involved in the RIF process and he was not involved, did not discuss the RIFs, never lobbied one way or the other and never spoke to cabinet members about the RIF. He indicated he does not remember Mr. Kling and Ms. Bernard decorating Ms. Foster's desk for her birthday. He knows that Ms. Bernard would occasionally receive flowers and he would ask her what they were for. He admitted that he brought Christmas presents into the office for others, but he has wished them a Merry Christmas. He indicated that after the RIF on their last day of work, payroll needed to be re-run but all three petitioners got up and left because they had a half-day off. They left at 12 noon while in the process of getting out the payroll. He admitted that he approved their absences that day at 12 noon.

Geraldyn O. Foster was called as a rebuttal witness by petitioners and she testified that she is Superintendent of Willingboro Public Schools and is the Chief School Administrator. She has worked with the Board from August 19, 1993 to the present. Dr. Foster testified that the school district employees are covered by a disability insurance policy with Washington National. Dr. Foster was out on disability from late 1995 to early 1996. She was not aware of any problem with Washington National processing her claim for disability. She indicated that all of her requests for absences would be handled through the business administrator or the chief accountant. She reported her absences as compensatory days which means that she was paid her full salary. She also had adequate sick days to cover the time. Once her medical reports were submitted to Washington National and it was obvious that the reason for her illness was related to her employment, she signed over the workers compensation checks to the Board of Education. She did not immediately apply for disability.

Dr. Foster indicated that on one occasion during her monthly meeting with Ms. Reynolds who was the Board President, she was asked how her sick time was being charged. She denied any confrontation with the Board President.

Dr. Foster indicated she received the recommendation from Mr. McLaughlin dated June 21, 1996 (P-1). She admitted that she did not forward Mr. McLaughlin's recommendation to the Board. She also denied that the payroll staff's handling of her personal absences and inquires played any part in her not passing on this recommendation to the Board. She had no involvement in the choice of a payroll/systems administrator.

Nancy Bernard was recalled as a witness. Ms. Bernard indicated she received a telephone call from Washington National to verify Dr. Foster's absences in connection with her application for disability. She indicated that she was unsure of the procedure with respect to the reporting of absences of the superintendent and she contacted the Board President. When she typed it in the computer, she could not verify it. Kathleen Foster then contacted Dr. Foster's office and spoke to her secretary and asked if they could have the absence forms for Dr. Foster. She then received the absence forms that Dr. Foster signed. Mr. Green then came in and Ms. Bernard told him about these inquires and that she could not verify the days of absences of Dr. Foster. Mr. Green became upset because he had previously told her not to talk to Washington National or handle the situation. He was not happy and he then left the office by pushing the door pretty hard and went to Dr. Foster's office. Because she was unsure of the procedure with respect to the reporting of absences of the superintendent she contacted Margaret Reynolds, President of the Board and indicated she received an absence form from Dr. Foster with no approval on it and that she did not know who should sign it. Ms. Reynolds indicated that she should be the one to sign the absence form. Mr. Green then returned and directed her to change Dr. Foster's absences from illness to workers' compensation days. After her going to President Reynolds, Mr. Green's relationship with the petitioners changed. He only came in and said good morning and that was it.

Roberta Ryan testified that she is a basic skills secretary and that she was first employed in September 1979. She has also been elected Secretary of the Willingboro Education Association. She testified that after the RIF, the payroll function has operated with more than one employee. There are several substitute employees and temporary employees that have been used. There have been three individuals working in the payroll department since September 1996. These individuals' employment is temporary in nature. One of them has been there at least a year, another was there for close to a year but has been gone for a couple of months and the third was

there from September 1996 through the date of the hearing. They have been working continuously on a daily basis.

Ms. Ryan identified a seniority list that is required to be given by the Board to the Association as a matter of contract (P-14). Included on the seniority list are secretaries and clerks represented by the WEA. The list does not include confidential or non-affiliated employees. This list includes both tenured and non-tenured employees. Ms. Ryan testified with respect to Ethel Hines who is employed in the print shop. She is included in the "Other" categories which means that she was not clerical and she was not secretarial prior to September 1, 1985. Ms. Hines was transferred from graphic arts clerk to clerk typist effective July 1, 1997. The payroll designation "C/T" is a clerk typist for payroll or salary purposes. The designation "Sec" could be a shorthand secretary or an accounts payable clerk who are classified in the secretary category. The last column is the date of hiring to some position within the District. For example, as to Ethel Hines, she held some non-secretarial or non-clerical position from September 1, 1985 until January 16, 1987. At the time Ms. Hines was moved in April 1997, she told Ms. Ryan that she did not take a shorthand test or a typing test. The Board of Education meeting agenda of April 28, 1997, shows this transfer (P-15).

On cross-examination, Ms. Ryan admitted that Dawnya Ruff is no longer an employee of the District because when it was found she had not been tested she was removed. On re-direct, Ms. Ryan indicated that Barbara Crammer was a shorthand secretary placed in an accounting position without testing. However, petitioners were payroll people and were not given the opportunity to go into a like position unless they were tested.

Oscar Jamerson testified that he is currently Acting Personnel Administrator at the Willingboro Board of Education and that he returned to this position on May 29, 1997. He was previously employed from August 1988 to June 1996, as Personnel Administrator.

Mr. Jamerson testified as to his knowledge of procedures related to worker's compensation and use of sick leave. He indicated that what occurs is that it can take anywhere from several days to many months to make a determination whether an employee has a valid worker's compensation claim. As a result, if an employee is being paid sick leave, after the

investigation there is an adjustment in payroll records from sick leave to worker's compensation leave.

Mr. Jamerson testified as to the School District's policy on testing. He indicated that while he is not sure of the exact numbers that an individual must attain in order to pass, the school district has held fast on and insisted that it follow the procedure that an individual must successfully pass a test in order to be moved into a position. He believes that there are some employees, and he does not know when this happened, who are in some lower classification positions that were granted clerk typist positions. However, there have been no exceptions made to the requirement for testing during his tenure. He indicated there has never been any kind of test given for an accounts receivable or payroll clerk position to his knowledge.

Mr. Jamerson identified the seniority list (P-14). This is given to the union once each ear to make sure that the Board's records and that of the union agree. He indicated that the "CT" means that the employee was either tested and approved as being a clerk typist, which also means that they had to have passed the simple course level test as a clerk typist, or they were grandfathered in that position. With respect to Ms. Hines, she either took a test in 1987 and was approved by the Board to go on to a clerk typist position. He then indicated that as to the appointment effective April 28, 1997, she will be a clerk typist at Memorial School and no test was required. If she was going to become a secretary at the high school and she was a clerk typist, a test would have been required.

On cross-examination, Mr. Jamerson was asked if the records with respect to sick leave and worker's compensation injury leave are corrected on the computer. Mr. Jamerson responded that he had no knowledge of the computer and is not involved with the computer. Mr. Jamerson indicated that he could not answer the question whether, to his knowledge, the Board took a position with petitioners that, in order to go from a clerical tenure position to a clerical tenure position, they would have to take a typing test. He indicated that he could tell what he was doing at the time Barbara Crammer was not tested because they did not test for payroll type position. Mr. Jamerson indicated that he believes that at the time of petitioners hiring the substitute clerk typist position required that individual to be tested. Mr. Jamerson denied that Jade Thompson

Frederick was permitted to work for one year in the District without testing. He recalls that she worked as a substitute at first and a teacher's aide and no typing test was required.

LEGAL DISCUSSION AND ANALYSIS

This matter involves claims by three petitioners who have certain tenure rights under the provisions of *N.J.S.A.* 18A:17-2b. and c. which provides that any person holding any secretarial or clerical position or employment under a board of education of any school district, after the expiration of a period of employment of three consecutive calendar years or three consecutive academic years together with employment at the beginning of the next succeeding academic year shall hold his [or her] office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense.

In order to decide this matter, it is necessary to focus on the precise issues identified by the parties and the undersigned prior to the hearing. At the telephone prehearing conference held on October 24, 1996, the attorneys for the respective parties agreed that this proceeding involves petitioners, who are tenured payroll clerks, alleging that respondent Board voted to terminate them in a reduction in force while retaining non-tenured, less senior and/or non-qualified personnel in job titles for which petitioners are fully qualified and to which they claim they are entitled by virtue of their tenure rights. Prehearing Order, Section 1.A.

The Prehearing Order of November 18, 1996, as amended by a letter order of January 29, 1997, indicates that the following issues are to be resolved in this matter:

1. Whether petitioners are entitled to the positions in question currently held by non-tenured personnel?

2. Whether respondent has acted in violation of the tenure rights of petitioners under *N.J.S.A.* 18A:7-2?

3. Whether petitioners are entitled to the remedies of appointments to the disputed positions and reimbursement for any loss of salary and/or emoluments?

4. Whether respondent owes no further duty to petitioners because it has offered other positions to petitioners and they have refused to take steps to demonstrate that they are

qualified to hold these other positions offered by respondent?

5(a). Whether this dispute is controlled by the collective bargaining unit agreement?

(c). What is the legal effect of any arbitrator's decision?

At no point in this proceeding did petitioners contend that the respondent school district does not have the authority to reduce in force the number of employees of the school district for valid budgetary or other reasons. Rather, the contentions of petitioners are that the respondent retained non-tenured, less senior and/or non-qualified personnel in job titles for which petitioners were fully qualified in violation of petitioners' tenure rights.

The seminal and controlling case involving the question of employment rights of tenured secretarial and clerical employees is *Sheridan v. Commissioner of Education*, 1976 *S.L.D.* 995. In that case, the petitioner acquired tenure status in September 1973, pursuant to *N.J.S.A.* 18A:17-2b(2), to a ten-month secretarial position at the high school. In the spring of 1974, petitioner was notified that the Board was eliminating one ten-month secretarial position and that she would not be re-employed for the 1974-1975 school year. At that time, there was in the Board's employ one non-tenured secretary who worked on a twelve-month basis assigned to the Board office. Eventually, the twelve-month secretary retired and petitioner was re-employed commencing September 1, 1974. She then commenced this action claiming that her dismissal on June 30, 1974 and loss of wages from that date until September 1, 1974, were *ultra vires* acts in violation of her tenure rights.

The Commissioner of Education indicated that the Supreme Court's opinion in *Board of Education of the Town of Kearny v. Horan, et al.*, 11 *N.J. Misc.* 751 (Sup. Ct. 1933) is controlling. In that case, the Kearny Board had terminated tenured teachers but retained in its employ numerous non-tenured teachers. The Court relied on *Seidel v. Board of Education of Ventnor City,* 110 *N.J.L.* 31. The *Seidel* case was found to be pertinent because of the parallel between the provisions of tenure for teachers in 1933 and the provisions of tenure for secretaries in 1974. In 1933, teachers were clothed with tenure but no categories of teachers and no seniority statutes or rules had as yet been promulgated. It was stated in *Seidel* that movement for

economy is not to be accomplished by dismissing teachers who are under the protection of the statute providing for indefinite tenure while other teachers not so protected are retained. The Commissioner also observed that petitioner possessed the secretarial skills to serve efficiently in the twelve-month position since she was, in fact, assigned to the Board office in September. Accordingly, the Commissioner determined that the failure to offer the twelve-month position to petitioner was improper and ordered that she be paid the wages and attendant emoluments she would have received. Significantly, the Commissioner went on to state:

> The Commissioner advises this Board and all other local boards of education that in similar disputes, given the continued posture of the law and State Board rules, the entitlement of a tenured secretary to a position held by a non-tenured secretary will be adjudged by the Commissioner to be viable only if the tenured secretary possesses the skills and necessary qualifications to efficiently perform the duties of such secretarial position.

Based upon the foregoing discussion of the law and, in particular, based upon the decision in *Sheridan*, it is clear that the petitioners herein are entitled to be appointed to clerical positions currently held by non-tenured clerical personnel *provided* they possess the skills and necessary qualifications to efficiently perform the duties of such positions.

The essence of respondent's position is that respondent offered to petitioners other positions within the school district held by non-tenured employees and gave to petitioners the opportunity to take steps to demonstrate that they are qualified to hold these other positions, but that petitioners failed and refused to take these steps to demonstrate their qualifications. An examination of the testimony and evidence in this matter is necessary in order to determine if this position is correct.

It was the testimony of all three petitioners that they were previously tested for their typing skills at the time of their original hiring. Each of them concedes that typing is not a specified requirement for the payroll clerk positions they held, but commencing in 1989, typing became an integral part of their duties and responsibilities. Each of them testified that they were required to enter into the computer by typing onto a keyboard various information including reports and other payroll records. Mr. Kling also testified that he prepared correspondence

concerning pensions and other matters, Ms. Foster testified that 70% of her time was spent typing and Ms. Bernard indicated that approximately 75% of her time was spent typing on a typewriter or a computer in performing her duties. Each of the petitioners indicated that Mr. Green, their immediate supervisor and a member of management, worked in close proximity to them and observed them typing. None of the petitioners could provide documentary evidence that they successfully passed the typing test at the time of their hire. There was also testimony which established that the typing tests they took were for substitute clerk typist positions and that the requirement for these positions was less stringent than that required for a permanent clerk typist or a secretarial position.

The testimony of Mr. McLaughlin and the documentary evidence relied upon by respondent was to the effect that the petitioners were notified both verbally and in writing that if they wished to bump to another position, they were required to be tested for the position. Specifically, it is alleged that they were told that if they wished to bump to a secretary 3 position, which is a clerk typist position which requires typing skills, they would be required to take a typing test; if they wished to bump to a secretary 4 position, which is a secretarial position which requires typing and stenography skills, they would be required to take a typing and a stenography test. The confusion concerning whether or not petitioners were ever notified of the requirement that they take a typing test if they wished to bump to a secretary 3 position is the heart of this case.

The testimony of all three petitioners as to this issue was consistent when they each indicated that they advised Mr. McLaughlin that they had previously taken and passed the typing test at the time of their hiring and they did not feel that it was necessary to retake the test. Mr. McLaughlin acknowledged and admitted that each of the petitioners took this position at his meeting with them, and he also acknowledged that he indicated to them that he would look into their personnel records to determine whether any record existed of their taking the typing test. The three petitioners likewise were consistent with their testimony that they were never advised by Mr. McLaughlin or by their union representative, until mid-June 1996, that no record of their having successfully taken the typing test existed in their personnel records.

It is significant as to this issue that none of the three memoranda from Mr. McLaughlin to petitioners, dated May 14, 1996 (P-3), May 22, 1996 (P-4) and May 30, 1996 (P-5), indicate that no record of their prior testing for typing skills was ever found. Indeed, the memoranda are confusing with respect to the testing requirement. The first memorandum of May 14, 1996, does appear to indicate that a typing test is required for a secretary class 3 position. However, Mr. McLaughlin recommended in this memorandum that petitioners take the test as soon as possible without specifying what test should be taken. The subsequent memoranda only speak in terms of taking the shorthand and typing tests to qualify for secretary 4 positions, with no mention being made of the requirement to take a typing test for the secretary 3 positions.

Based on the foregoing, I **FIND** that there was a great deal of confusion whether petitioners were required to take a typing test in order to qualify for existing secretary class 3 or clerk typist positions. Based on the record of testimony and evidence before me, I **FIND** that respondent did not clearly place petitioners on notice that they were obligated and responsible to take a typing test in order to qualify for existing class 3 secretary positions which might be available. On the other hand, it is clear that based upon the three memos sent to petitioners by Mr. McLaughlin, that petitioners were placed on notice that if they desired to bump into secretary class 4 positions, they would be required to take a typing and shorthand test in order to demonstrate their qualifications for such positions. Therefore, I agree with the petitioners that respondent did not give to petitioners adequate notice that their failure to take typing tests would result in the waiver of their tenure rights as to secretary class 3 or clerk typist positions held by non-tenured employees, and I so **FIND.**

It is significant that the testimony of petitioners to the effect that they each did substantial typing as part of their job duties and responsibilities as payroll clerk was not disputed by respondent. Each of them testified to the extensive amount of typing required in their respective positions. They also testified to the high degree of accuracy required because of the nature of information that they were typing. It is also significant that in 1989, when typing became a integral part of the job functions and responsibilities of payroll clerk, no typing test was required of the petitioners in order to determine whether they were qualified to perform these additional typing duties. In addition, a review of the payroll clerk job description (R-3) appears to require

by implication the ability to type and use a computer keyboard. It specifically requires that a payroll clerk input and record information and issue periodic reports as an integral part of the duties of the position. The undisputed testimony of the petitioners was that this required typing skills and computer input. Under these circumstances, I **FIND** that each of the petitioners was qualified for a clerk typist position based on their actual performance of the typing function as an integral part of their job duties and responsibilities as payroll clerks from and after the year 1989. *See, Sheridan, id* at 999.

Much of the testimony and evidence submitted by petitioners in this matter appears to be intended to support a claim that the actions of respondent in subjecting the petitioners to a RIF were made in bad faith and for improper reasons and motives, and that petitioners were subjected to discriminatory and disparate treatment. These claims involved testimony to the effect that petitioners' immediate supervisor, Mr. William A. Green, Jr., dealt with the petitioners in an aloof manner, avoided personal contact with any of the petitioners, and gave to petitioners the feeling that he either disliked or hated them. They assert that their supervisor was likely involved in the decision to RIF their positions, to require that they be tested in order to bump into other available positions, and to otherwise deal with them in a discriminatory and differential manner. The testimony of Mr. Green was to the effect that he had no personal animosity towards the petitioners and that they each did their work well. He indicated that their RIF was based on a decision by the Central Administration and the Board to reorganize the payroll department and to update and modernize the payroll function by privatizing it and by hiring a payroll/systems administrator to administer the payroll function which was to be performed by an outside agency. It was part of this reorganization plan that the funds saved by eliminating the three positions held by petitioners would be utilized to pay for this modernization. In addition, the testimony of Mr. McLaughlin was of the effect that Mr. Green was never consulted with respect to the RIF of petitioners, with respect to the requirement for testing and with respect to the providing of any other positions to petitioners.

Petitioners also attempted to produce testimony to the effect that their treatment by respondent was based upon a conflict between them and Dr. Foster, the Superintendent of Schools. With respect to all of these contentions, I found no basis in the testimony or evidence to support a finding that petitioners were subjected to bad faith or improper motivation in

respondent's dealings with them, were subjected to discrimination or disparate treatment or were otherwise treated improperly based on bad faith, improper motives or ill will.

Petitioners further argue that because respondent has hired nontenured employees to perform the payroll function after the termination of petitioners, that the RIF was a sham. Petitioners rely upon the testimony of Roberta Ryan to the effect that since the RIF, payroll functions have not been handled by the payroll/system administrator and the outside contractor, but that the Board has continuously employed a series of substitute and temporary employees to perform payroll functions. However, as was previously indicated, no assertions of bad faith or improper motivation with respect to the RIF were pled in the petition nor were they asserted at the time of the prehearing conference. In any event, subsequent events and occurrences which take place after a RIF are clearly irrelevant in determining the validity of a RIF. I **FIND** no basis in the record to support petitioners' claim that the RIF was a sham or that it should somehow be set aside.

Petitioners also relied upon the testimony of Mr. Green who indicateded that in establishing the payroll/systems administrator position, respondent took the various functions of each individual payroll clerk, combined them into one job and additionally required an individual who had computer knowledge and skills. Petitioners assert that this shows that the purpose of creating this new position was to eliminate the positions and functions of petitioners. I **FIND** that there is no valid basis for this argument I and place no reliance upon it on reaching the decision in this matter. It is clearly within the authority of a Board of Education to determine the duties and responsibilities to be assigned to individual positions. In this matter, the Board decided to assign the payroll function to a specific position and additionally assigned the responsibility to oversee the payroll function, which is a higher responsibility than that previously assigned to petitioners herein. This is clearly an inherent managerial prerogative and I have no difficulty with respondent taking these steps in this matter.

Petitioners further contend that the decision of the Public Employees Relation Commission (P-13) finding that the payroll/systems administrator is not a confidential position under *N.J.S.A.* 34:13A-5.3 casts doubt on the credibility of the Board's contention as to the true character of the position. However, the determination whether or not this new position is a confidential position is

irrelevant in determining the issues before me. The fact that this newly created position should be included in the bargaining unit has no bearing on the issue whether petitioners' tenure rights have been violated by respondent.

Petitioners further assert that respondent did not uniformly test other employees. However, they pointed to individuals who were holding tenured positions requiring typing and/or stenographic skills who were not retested in order to assume other positions requiring typing and/or stenographic skills. In no case did petitioners establish that there was any employee, tenured or nontenured, who was removed from a position which they did not have typing and/or stenographic skills to a position where these skills were required. The only case in which is this *almost* involved Dawnya Ruff. Respondent's testimony that this was a mistake that was pointed out by the Education Association and was immediately rectified was uncontroverted.

Based upon the foregoing, I hereby make the following findings and reach the following conclusions with respect to the issues set forth in the prehearing order:

1. I **FIND** that respondent owed a duty to petitioners not only to offer other positions to petitioners but also to notify petitioners in a clear and unequivocal manner that they are required to take steps to demonstrate that they are qualified to hold these other positions offered by respondent.

2. I **FIND** that respondent has acted in violation of the tenure rights of petitioners under *N.J.S.A.* 18A:17-2, and

3. I **FIND** that petitioners should be made whole for any loss of salary and/or emoluments resulting from the failure to appoint petitioners to the position to which they were entitled by virtue of their tenure and are entitled to the remedies of appointments to the disputed positions and reimbursement for any loss of salary and emoluments.

4. I **FIND** that this dispute is not controlled by the collective bargaining agreement.

5. I **FIND** that neither any arbitrator's decision nor the decision of the Public Employment Relations Commission on the issue whether the payroll systems administrator is a confidential position has any legal effect in this matter.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that that petitioners shall be placed in clerk typist or class 4 secretarial positions previously held by non-tenured personnel. It is further **ORDERED** that petitioners shall be made whole for any loss of salary and/or emoluments resulting from the failure to appoint petitioners to the position to which they were entitled by virtue of their tenure and they are entitled to the remedies of appointments to the disputed positions and reimbursement for any loss of salary and emoluments. It is further **ORDERED** that any other claims for relief are hereby **DENIED** and **DISMISSED.**

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

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

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

October 23, 1997
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

10/24/97
DATE

D. N. Antanaitis Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lam

APPENDIX

LIST OF WITNESSES

For petitioner:

Stephen M. Kling

Dawnya Ruff

Lisel D. White

Myra Yurchak

Michael McLaughlin

Kathleen R. Foster

Veronica Whelihand

Nancy J. Bernard

James P. McAndrew

Roberta Ryan

For respondent:

William A. Green, Jr.

Geraldyn O. Foster

Oscar Jamerson, Jr.

LIST OF EXHIBITS

For petitioner:

P-1 Michael McLaughlin memo dated June 21, 1996

P-2 Notice of Reduction in Force dated April 30, 1996

P-3 Michael McLaughlin memorandum of May 14, 1996

P-4 Michael McLaughlin memorandum of May 22, 1996

P-5 Michael McLaughlin memorandum of May 30, 1996

P-7 Michael McLaughlin letter of June 25, 1996 to Dawnya Ruff

P-8a Grievance Denial of Michael McLauglin, dated July 9, 1996 as to Nancy Bernard

P-8b Grievance Denial of Michael McLaughlin, dated July 9, 1996, as to Nancy Foster

P-8c Grievance Denial of Michael McLaughlin, dated July 9, 1996, as to Stephen Kling

P-10 Test of Jade C. Thompson-Frederick, dated March 2, 1995

P-11 Test of Carmen Harris, dated October 27, 1987

P-13 Public Employees Relation Commission decision

P-14 Seniority List

P-15 Board of Education Agenda for April 28, 1997

For respondent:

R-1 Position description for secretary

R-2 Position description for clerk-typist

R-3 Position description for payroll clerk

R-4 Position description for payroll/system administrator

R-5 Position description for accounts payable clerk

R-6 Position description for bookkeeper/clerk

OAL DKT. NO. EDU 6762-96
AGENCY DKT. NO. 305-7/96

NANCY J. BERNARD, KATHLEEN R. FOSTER AND STEPHEN M. KLING,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Neither exceptions, nor a request for an extension in which to submit same, were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and 1:1-18.8.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. Accordingly, the initial decision is affirmed for reasons set forth therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 4, 1997
Date of Mailing, December 4, 1997

629-97

629-97

RITA M. ARLEQUIN AND JOYCELYN E. ALSUP,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning teachers sought retroactive additional compensation from the Board for the achievement of their Master's Degrees in May 1989.

ALJ concluded that the petition was untimely filed pursuant to the 90-day rule in that petitioners' cause of action in this matter arose in September 1989 when, with the receipt of their first paychecks for the 1989-90 school year, they knew, or should have known, that the Board had failed to adjust their salaries to reflect their receipt of Master's Degrees.

Commissioner adopted findings and determination in initial decision as his own.

December 8, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 2578-97

AGENCY DKT. NO. 74-3/97

RITA M. ARLEQUIN AND

JOYCELYN E. ALSUP,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF

PERTH AMBOY, MIDDLESEX COUNTY,

Respondent.

Brian Miller Adams, Esq., for petitioners (Dwyer & Canellis, attorneys)

Louis R. Franzese, Esq., for respondent (Sills, Cummis, Zuckerman, Tischman, Epstein & Gross, attorneys)

Record Closed: October 16, 1997 Decided: October 17, 1997

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter arises on respondent Perth Amboy's motion to dismiss, which is hereby **GRANTED.**

Petitioners have been employed by respondent Perth Amboy Board of Education as elementary school teachers since at least September 1, 1985. In May of 1989 petitioners received Master's Degrees. Due to an alleged error, petitioners' salaries were never increased to reflect this achievement until September, 1996, when the salaries were increased. Petitioners aver that they first became aware of the error in October of 1996. In February of 1997 petitioners filed the instant petition seeking retroactive salary adjustments for the 1989-91, 1991-92, 1992-93, 1993-94, 1994-95, and 1995-96 school years.

> Petitions filed with the Commissioner of Education. Petitions must be filed:
>
> no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.
> [*N.J.A.C.* 6:24-1.2(c)]

This limitations period is designed to provide:

> a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between teachers and the administration . . . . The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.
>
> [*Kaprow v. Board of Educ. of Berkeley Tp.*, 131 *N.J.* 572, 582 (1993)]

This 90 day period has been interpreted to begin running as of the date of the school board's wrongful act, and not on the date in which the consequences of the wrongful act are felt by the employee. *Nissman v. Board of Educ.*, 272 *N.J. Super.* 373, 381 (App. Div. 1994). The wrongful act in the instant matter was the respondent's failure to credit petitioners with having achieved their master's degrees. The only remaining inquiry then is whether the petitioners received adequate notice of the respondent's failure.

> "Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. ... Adequate notice under *N.J.A.C.* 6:24-1.2 should accommodate ... concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law [with a violation of their rights]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order 'to enable the proper and efficient administration of the affairs of government.'"
>
> *Kaprow, supra*, at 587 (citations omitted).

This balance has been struck in cases where school boards fail to place teachers on a proper initial salary level by finding that the 90-day period begins to run when the teacher first became aware of the amount of her salary. *O'Donnell v. Hanover Township, et al.*, 97 *N.J.A.R. 2d* (EDU) 364; *Boguszewski v. Scotch Plains-Fanwood Sch. Dist.*, 1986 *S.L.D.* 1717; *Conner v. River Vale Bd. of Ed.*, 1986 *S.L.D.* 335 (Comm'r Feb. 18, 1986), *aff'd* 1986 *S.L.D.* 339 (St. Bd. Oct. 1, 1986); *Spooner v. Palisades Park Bd. of Educ.*, 1986 *S.L.D.* 2175 (Comm'r Aug. 22, 1986), *aff'd* 1987 *S.L.D.* 2730 (St. Bd. Feb. 4, 1987). The 90 day period has also been found to run upon receipt of a first paycheck when the school board failed to credit teachers with an annual increment. *North Plainfield Educ. Ass'n v. Bd. of Educ.*, 96 *N.J.* 587 (1984). "From that paycheck, the teachers knew that they had not received their annual increment and that they had not advanced on the salary scale." *Id.*, at 594.

It is uncertain in *North Plainfield Educ. Ass'n, supra*, whether the teachers there had actual knowledge that they were not awarded their annual increment, or whether they were charged with constructive knowledge. However, it has been found in the education context that a teacher receives adequate notice in the presence of facts about which they knew *or should have known*. *Kaprow, supra*, at 587. Thus, it appears that receipt of a paycheck provides constructive notice that an increment to which a teacher is entitled has been withheld.

In the instant matter, petitioners received notice of respondent's failure to credit them with master's degree salary increment when they received their first paychecks after attaining the advanced degree, sometime in September, 1989. Their petition filed in February, 1996 is therefore grossly out of time. This failure also affects their claims for each subsequent year, as the "time bar of the original action also precludes the dependent action for relief in future years." *North Plainfield Educ. Ass'n, supra*, 96 *N.J.* at 595. Petitioners' petition must therefore be **DISMISSED**.

Respondent's motion to dismiss this matter as time barred by *N.J.A.C.* 6:24-1.2(c) is **GRANTED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 17, 1997
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

10/22/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 23 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 2578-97
AGENCY DKT. NO. 74-3/97

RITA M. ARLEQUIN AND JOYCELYN E. ALSUP,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review, the Commissioner agrees with the conclusion of the Administrative Law Judge that the within Petition of Appeal must be dismissed as untimely filed. Specifically, he determines that petitioners' cause of action in this matter arose in September 1989 when, with the receipt of their first paychecks for the 1989-90 school year, they knew, or should have known, that the Board had failed to adjust their salaries to reflect their receipt of Master's Degrees. (See *Kaprow, supra*; *North Plainfield, supra.)* As such, their Petition of Appeal, filed in March* 1997, must be dismissed as untimely pursuant to the 90-day time limit requirement of *N.J.A.C.* 6:24-1.2(c).

* It is noted that the initial decision erroneously states that the within Petition of Appeal was filed in February 1997. The within record, rather, reflects that the filing date was March 3, 1997.

OAL DKT. NO. EDU 2578-97
AGENCY DKT. NO. 74-3/97

RITA M. ARLEQUIN AND JOYCELYN E. ALSUP,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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OAL DKT. NO. EDU 2578-97
AGENCY DKT. NO. 74-3/97

RITA M. ARLEQUIN AND JOYCELYN E. ALSUP,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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* It is noted that the initial decision erroneously states that the within Petition of Appeal was filed in February 1997. The within record, rather, reflects that the filing date was March 3, 1997.

Accordingly, the initial decision of the OAL is affirmed. The Board's Motion to Dismiss is hereby granted and the within Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 8, 1997
Date of Mailing, December 9, 1997

630-97

630-97

J.H., on behalf of minor, V.H.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent alleged that suspension of minor daughter, V.H., was racially motivated in that V.H. received disparate punishment from that of minor's counterpart in an altercation.

ALJ concluded that petitioner's allegations of racial discrimination were out of time as she sought review of the disciplinary actions six months after the fact, and the Commissioner was without jurisdiction to address the necessity/appropriateness of the child study team referral. ALJ dismissed alleged violations of the Individuals with Disabilities Education Act and noted that petitioner abandoned her request for a hearing.

Commissioner adopted the initial decision as his own. Petition was dismissed.

December 8, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING MOTION TO DISMISS

OAL DKT. NO. EDU 4410-97

AGENCY DKT. NO. 129-4/97

J. H., ON BEHALF OF MINOR,

V.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

J. H., petitioner, pro se

Robert J. Pruchnik, Esq., for respondent (Kenney & Gross, attorneys)

Record Closed: October 22, 1997 Decided: October 23, 1997

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on April 14, 1997, when J.H., parent and natural guardian of V.H., filed a petition of appeal with the Commissioner of Education alleging, inter alia, that the Matawan-Aberdeen Regional School District (hereinafter respondent) had unlawfully

discriminated against V.H. on the basis of race. An answer was filed on behalf of respondent on May 22, 1997 and on May 29, 1997, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F- 1 to -13.

A prehearing conference was conducted on August 26, 1997, at which time a schedule was established for the filing and determination of respondent's motion to dismiss the petition of appeal. Respondent's motion was filed on September 15, 1997. Petitioner's responding papers were due to be filed on or before October 6, 1997. To date, no response has been filed by petitioner. Accordingly, I have closed the record as of October 22, 1997.

FINDINGS OF FACT

The following undisputed facts appear from the petition and respondent's motion papers.

During the 1996-97 school year V.H., whose date of birth is December 17, 1979, was enrolled as a ninth grade student at Matawan Regional High School. On September 25, 26 & 27, 1996, V.H. was disciplined by suspension from school for biting another student, K.K., on the left breast. On October 2, 1996, V.H. was disciplined for failing to arrive at her physical education class on time. She was thereafter disciplined with a five-day suspension from school for open defiance of an administrative directive that she refrain from having any contact with K.K. On October 17, 1996, V.H. received another suspension for again violating the same administrative directive. On October 31, 1996, respondent advised petitioner that V.H. had been referred to the child study team for an initial evaluation. The notice advised, inter alia, "V. has demonstrated a danger to others."

V.H. did not return to school after the conclusion of her last suspension on October 23, 1996, but instead enrolled in an alternative program, Project Open House, described in its own literature as a "short-term crisis intervention program for troubled adolescents and their families." Petitioner did not return a signed consent form to the district for commencement of the child study team evaluation. On January 9, 1997, respondent sent petitioner a second child study team

referral packet with a request that petitioner execute and return the consent form. On January 14, 1997, respondent wrote to petitioner as follows:

> Given the fact that you have yet to provide the School District with written consent to conduct the Child Student Team evaluation of V.H., the School District must insist that V. not be permitted to appear on school grounds until the District has had an opportunity to evaluate her to determine if she should be a classified student and, if so, what the appropriate placement should be. This action must be taken given the violent behavior displayed by V. back in September which has resulted in the victim obtaining a restraining order for a period of 120 days from December 27, 1996, prohibiting any contact between V. and the student she attacked. In order to protect the students of the District as well as V., she will not be permitted on school grounds until the evaluation is completed.
>
> The District has not received the "permission for testing" form sent to you back in October. V's absence from school since that time was voluntary on her part (following the expiration of her suspensions due to the incidents in September and October) and it was assumed she was not going to return to the District given your conversations with Pat Vena of the Guidance Department over the last few weeks.
>
> However, V's return to school this week for the first time since early October, presents the District with a significant safety concern. Therefore, in the event you wish to have V. evaluated, please return the "permission for testing" form immediately. For your convenience, another form is enclosed. Once you have submitted the form, the District will have the legal right to conduct the necessary tests to determine V's current educational needs. During the time period of the testing, V. shall be provided with home instruction.
>
> Therefore, please submit the forms immediately so that an evaluation can be conducted and V. can receive home instruction while the evaluations take place. I regret that these steps need to be taken; however, I must insure that all students and staff in my building are safe. V's previous conduct, without a full evaluation, provided no such assurance.
>
> Thank you for your cooperation and attention to this matter.

The within petition of appeal was filed on April 14, 1997. The petition alleges that respondent's actions disciplining V.H. in October 1996 constituted unlawful discrimination in that V.H., who is Black, was disciplined while K.K., who is Caucasian, was not. The petition further alleges that the referral of V.H. to the child study team was also improperly, racially motivated and that the evaluation was being required without any legitimate, non-discriminatory purpose. Various procedural violations of the IDEA were also alleged.

Following the prehearing conference in the within matter, on August 27, 1997 the undersigned wrote to the parties as follows:

> This will confirm, pursuant to our telephone conference call on August 26, 1997, that respondent's motion to dismiss and supporting papers will be filed on or before September 15, 1997. Petitioner's responding papers will be filed on or before October 6, 1997.
>
> As I indicated to you during our conference call, whether respondent may require the completion of a child study team evaluation as a precondition for readmitting V.H. to class is an issue which must be addressed in a due process hearing pursuant to N.J.A.C. 6:28-2.7. The Commissioner of Education has no jurisdiction to decide this issue under his general authority, pursuant to N.J.S.A. 18A:6-9, to determine controversies and disputes arising under the school laws. If respondent still feels that a child study team evaluation is necessary before V.H. may be readmitted to class, and if Ms. Holmes is still unwilling to consent to the evaluation, one or both of you should immediately request a due process hearing by writing to the Director of the Division of Special Education, Department of Education, P. O. Box 500, Trenton, New Jersey 08625-0500. Because the opening of school is imminent, you may wish to file an application for emergency relief pursuant to N.J.A.C. 1:6A-12.1.
>
> Please notify me promptly if petitioners will be represented by counsel. In the meantime, Ms. Holmes should be sure to serve upon Mr. Pruchnik a copy of anything she files with me or with the Division of Special Education, and Mr.

> Pruchnik will continue to serve Ms. Holmes until and unless counsel enters an appearance.

Respondent's motion to dismiss the petition as untimely filed pursuant to N.J.A.C. 6:24-1.2 was received on September 15, 1997. No response has been filed by petitioner.

APPLICABLE LAW AND DISCUSSION

N.J.A.C. 6:24-1.2(c), the regulation relevant to a determination of respondent's motion, provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

Respondent argues that each of the actions of which petitioner complains took place in October 1996 and accordingly, the petition of appeal filed nearly six months later, is out of time and should be dismissed.

For the following reasons I **CONCLUDE** that respondent's position is correct and respondent's motion should be **GRANTED.**

The ninety-day statute of limitations established in N.J.A.C. 6:24-1.2 has been upheld as a valid exercise of the ruling-making authority of the State Board of Education. Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993). As noted by the Court therein, the limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. A limitations period has two purposes, the Court explained:

. . .

> The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).
>
> > When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell, supra, 62 N.J. at 115, 299 A.2d 394.]

With respect to each of the actions which petitioner alleges to be racially discriminatory, petitioner had notice, i.e., was fully aware of the Board's determination and articulated reasons therefor, in October 1996. Assuming, arguendo, that the child study team referral were an issue over which the Commissioner has jurisdiction in this matter, even the first child study team referral was issued in October and notice of same requesting her cooperation and authorization was sent to petitioner by letter dated October 31, 1996. Allowing three days for receipt after mailing, the latest date on which petitioner could have filed a timely petition of appeal was Monday, February 3, 1997. Although the petition of appeal does not make any mention of the October 31, 1996 child study team referral, it does contain an acknowledgment that petitioner was aware of respondent's demand that petitioner permit the evaluation on January 10, 1997; even if that were the first notice to petitioner, which it clearly was not, the April 14, 1997 petition of appeal would still have been filed out of time. As noted in my August 27, 1997 letter to both parties, however, whether legitimate reasons exist for requiring V.H. to undergo a child study team evaluation is not an issue over which the Commissioner has jurisdiction under N.J.S.A. 18A:6-9. If petitioner did not wish to have V.H. submit to a child study team evaluation, all she had to do was file a request for a due process hearing under N.J.A.C. 6:28-2.7, and the matter of V.H's admission to school pending completion of the child study team evaluation could have been

determined on a motion for emergent relief pursuant to N.J.A.C. 1:6A-12.1. Petitioner has at all times held the key to the school house door if she wished for V.H. to attend; she could have consented to the child study team evaluation, or she could have requested a due process hearing to contest respondent's insistence that the child study team evaluation take place. Because V.H. was sixteen years old as of December 17, 1995, respondent cannot compel her attendance at school. N.J.S.A. 18A:38-25. It would be unreasonable, therefore, to require respondent to incur the expense of a special education hearing to compel a child study team evaluation. V.H. does not have to attend school unless she wishes to do so. Although petitioner's daughter, V.H., has a right to attend the public schools free of charge until she reaches age twenty, she also has a responsibility to comply with reasonable rules and requirements. To challenge the reasonableness of those requirements petitioner is required to file a timely application for dispute resolution in a forum which has jurisdiction to adjudicate the dispute. Although the ninety-day statute of limitations on rare occasions may be relaxed pursuant to N.J.A.C. 6:24-1.15, the facts herein do not present the exceptional circumstances required to permit waiver of timely filing. The three separate disciplinary actions taken by respondent of which petitioner complains all took place in October 1996. The Commissioner would have had jurisdiction to consider whether respondent's actions were unlawful, arbitrary, capricious or unreasonable if petitioner had filed a timely request for review in January or perhaps even February 1997. There is no compelling reason for subjecting the disciplinary actions to review six months after the fact in April 1997, however, and the Commissioner is without jurisdiction to address the necessity/appropriateness of the child study team referral herein.

For all of the foregoing reasons, I **CONCLUDE** that petitioner's allegations of racial discrimination relating to incidents occurring in October 1996 are out of time, and it is therefore **ORDERED** that the petition of appeal in that regard is **DISMISSED WITH PREJUDICE.** The remaining paragraphs of the petition which allege violations of The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1400-1485 are **DISMISSED WITHOUT PREJUDICE.** It is further **ORDERED** that the petition of appeal is **DISMISSED** for the additional reason that petitioner failed to file any response to the motion, and she is therefore deemed to have abandoned her request for a hearing.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 23, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10/24/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT No EDU 4410-97
AGENCY DKT NO 129-4/97

J.H., on behalf of minor, V.H.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the present Petition of Appeal was filed out of time and that no relaxation or waiver of *N.J.A.C.* 6:24-1.2(c) is warranted in this instance for the reasons expressed in the initial decision. The Commissioner further concurs that petitioner's special education claims are outside his jurisdiction and that petitioner has abandoned her request for a hearing.

Accordingly, the Commissioner adopts the initial decision of the OAL and dismisses the instant Petition of Appeal as recommended therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 8, 1997
Date of Mailing, December 9, 1997

633-97

WHASUN LEE, as parent and guardian of V.L. AND ALBERT LEE, individually,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

This matter, which began in 1994, concerned petitioning parents' challenge of Board's residency determination that their children were not entitled to a free public education in Holmdel. Two issues were on remand from the Court and from the State Board: 1) Should the doctrine of "unclean hands" bar the application of "equitable estoppel" from January 1990 to January 1994? (What did Mrs. Lee understand in December 1989 about purchase, ownership and rental of real estate ?) and 2) Should the principles of "equitable estoppel" apply after January 1994?

Having found Mrs. Lee's testimony incredible, the ALJ found that Mrs. Lee knew her boys were not entitled to free education in Holmdel when she sold the first Holmdel house sometime in 1989 since after that sale and for some time thereafter she owned no property in Holmdel and was not a taxpayer in Holmdel. Thus, the ALJ found that Mrs. Lee went into a December 12, 1989 meeting with Dr. Brennan, former superintendent, with "unclean hands" and following the meeting she understood that buying a condo and renting it out was not permitted. Therefore, the ALJ concluded that Mrs. Lee could not claim to Dr. LeGlise, the superintendent since 1993, that she was reasonably relying upon what Dr. Brennan told her. Equitable principles do not preclude the District from collecting tuition for the period from 1990 through 1994 nor bar recovery for tuition from 1994 through 1995. Petitioners were ordered to pay tuition for the time period of December 1989 through January 1994 and for the period from January 1994 through June 1995.

Having reviewed the record of the matter, including transcripts of the hearings, the Commissioner affirmed in part, reversed in part the initial decision. Noting the apparently ongoing misrepresentations offered by Dr. Brennan, the Commissioner was unwilling to ascribe bad faith to Mrs. Lee and, thus, the Commissioner declined to apply the doctrine of unclean hands in order to bar the application of equitable estoppel for the time period January 1990 through January 1994. As to the second issue, however, the Commissioner found that petitioners failed to meet their burden of showing that equitable principles should bar the District from recovering tuition after January 1994 when the Lees were not domiciled in Holmdel. Petitioners were ordered to pay tuition for the time period January 1994 through June 1995.

December 8, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 164-97

(EDU 4176-94 on Remand)

AGENCY DKT. NO. 67-4/94

WHASUN LEE AS PARENT AND GUARDIAN OF V.L. AND ALBERT LEE, INDIVIDUALLY,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,

Respondent.

Howard M. Newman, Esq., for petitioners (Kalac, Newman, Lavender and Campbell, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record Closed: July 25, 1997 Decided: October 21, 1997*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

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* An extension of time for issuing the initial decision was requested and granted pursuant to N.J.S.A. 52:14B-10(c).

This matter commenced on April 11, 1994, when Whasun Lee as parent and guardian of V.L. and Albert Lee, individually (hereinafter petitioners) filed a petition of appeal with the Commissioner of Education contesting the March 23, 1994 determination of the Holmdel Township Board of Education (hereinafter respondent) pursuant to P.L. 1993, Chapter 380, that Albert Lee and V.L., his brother, were not entitled to attend the public schools of the district free of charge. An answer and counterclaim were filed on behalf of respondent on April 18, 1994. On April 27, 1994, petitioners filed an answer to the counterclaim, and on May 2, 1994 the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 to -13. Following a hearing which took place on November 2, 3, and 4, 1994, the undersigned issued an initial decision on March 24, 1995, which was adopted in part and modified in part by the Commissioner of Education on May 11, 1995. The State Board of Education affirmed the decision of the Commissioner on September 6, 1995. Petitioners filed an appeal with the Superior Court, Appellate Division, and on October 9, 1996, the court issued an opinion affirming the State Board's determination that equitable estoppel applied to bar tuition claims for the period between October 1987 and December 1989, as well as the State Board's legal conclusion that N.J.S.A. 18A:38-1(d) did not provide the Lees' children with an entitlement to a free public education in Holmdel from January 1994 to June 1995. The Appellate Division remanded the case to the State Board of Education for consideration of whether equitable estoppel should apply to the period of time from January 1994 to June 1995. They also remanded for further consideration whether "unclean hands" should bar the application of equitable estoppel from January 1990 to January 1994. The court did not retain jurisdiction.

On December 4, 1996, the State Board of Education remanded the matter to the Commissioner of Education for such proceedings as might be required to fulfill the terms of the Appellate Division decision. The State Board also did not retain jurisdiction. On January 10, 1997, the Commissioner of Education re-transmitted the matter to the Office of Administrative Law for the issuance of an initial decision on the issues remanded by the Appellate Division. A supplemental prehearing conference was conducted on February 27, 1997. The prehearing order which was issued as a result thereof set forth the following as the issues for determination on remand:

1. Should the doctrine of "unclean hands" bar the application of "equitable estoppel" from January 1990 to January 1994?

   a. What did Mrs. Lee understand in December 1989 about purchase, ownership and rental of real estate?

2. Should the principles of "equitable estoppel" apply after January 1994?

The hearing on remand was conducted on April 28, 1997. Following that date the record remained open for the receipt of written submissions. A letter memorandum on behalf of respondent was received on July 15, 1997. A written summation on behalf of petitioners was received on July 17, 1997. Respondent replied by letter memorandum received on July 24, 1997. Petitioners' reply summation was received on July 25, 1997, whereupon the record closed.

ADDITIONAL FINDINGS OF FACT

As the Commissioner of Education noted in his May 11, 1995 opinion, the original findings of fact in this matter were made without the benefit of a transcript for the November 2 or the November 4, 1994 testimony. A transcript of the second day of hearing only, November 3, 1994, was provided. During the Appellate Division proceedings the transcripts of the November 2 and November 4 proceedings were produced and the transcripts of all three dates were marked into evidence in the within proceedings on remand. That portion of the Appellate Division opinion which required the within proceedings to address issue number one set forth hereinabove provided as follows:

> Were the ALJ's conclusion that the Lees "were fully aware [as of December 1989] . . . they were no longer entitled to attend the schools in Holmdel free of charge" supported by her findings of facts and the record, we could not quarrel therewith or, more importantly, with the Commissioner's and State Board's acceptance of that conclusion. Eg., Board of Educ. of Englewood Cliffs v. Board of Educ. of Englewood, 257 N.J. Super. 413, 456 (App. Div. 1992), aff'd, 132 N.J. 327, cert. denied, 510 U.S. 991, 114 S. Ct. 547, 126 L. Ed. 2d 449 (1993). We must accept such a determination if it is supported by substantial credible evidence. Breitweiser v. State Operated-School Dist. of Jersey City, 286 N.J. Super. 633, 637 (App. Div.

1996); Capodilupo v. Board of Educ. of West Orange, 218 N.J. Super. 510, 515 (App. Div.), certif. denied, 109 N.J. 514 (1987).

That conclusion, however, is supported by no more than the ALJ's factual finding that on December 12, 1989, after the Lees had sold their first Holmdel property, Dr. Brennan met with Mrs. Lee. According to him, he at that point "clearly articulated . . . his position that [the Lees] had to use the condominium [their new Holmdel property] as a residence in some meaningful fashion" and that "it would be 'proof positive' that they were not living there if he were to find out that the property was rented to someone else."

The difficulty with saddling the Lees with an unclean hands label premised upon this testimony of Dr. Brennan is not our disagreement with the ALJ's acceptance therewith, even though we might question that. Rather, it arises from the ALJ's simultaneous recognition of Mrs. Lee's very different version of that December 12, 1989 meeting.

Simply put, the concept of unclean hands used by the agencies below to preclude equitable estoppel beyond December 1989 was premised upon their conclusion that the Lees were, as of December 1989, disabused by Dr. Brennan of the notion, previously reinforced by him, that merely being taxpayers was sufficient to warrant a free education in the school district. But the doctrine of "unclean hands":

> expresses the principle that a court should not grant equitable relief to one who is a wrongdoer with respect to the subject matter of the suit. It calls for the exercise of just discretion in denying remedies where the suitor is guilty of bad faith, fraud or unconscionable acts in the underlying transaction. However, the doctrine "does not repel all sinners from courts of equity, nor does it apply to every unconscionable act or inequitable conduct" of a complainant. . . the doctrine may be relaxed in the interest of fairness.
> [Murray v. Lawson, 264 N.J. Super. 17, 37 (App. Div. 1993), aff'd as modified, 138 N.J. 206 (1994), cert. denied, ____ U.S. ____, 115 S. Ct. 2264, 132 L. Ed. 2d 269 (1995) (emphasis added and citations omitted).]

Mrs. Lee could not have been a "wrongdoer" if she did not comprehend what Brennan says he told her in December 1989. And there is some support, beyond her own testimony to that effect, to suggest that lack of understanding, as well as her continued reasonable reliance upon what she thought Brennan was telling her. For one thing, it is undisputed that on the day of this conversation, she immediately and without the usual cautionary measures a buyer would take, purchased a condominium in Holmdel and presented the contract to Mr. Brennan a few days later. He accepted it as sufficient to continue the children in the school district, despite the fact that the closing was some months in the future. Moreover,

> subsequently in January 1994 when the new Superintendent, Susan Le Glise, finally made clear to Mrs. Lee that simply owning property and paying property taxes was not enough, she and her sons immediately commenced their residency of the Holmdel property. There is no reason to think that had Mrs. Lee been so clearly told in December 1989, she would not have done the same then.
>
> The difficulty we, thus, have in resolving the issue is that neither the ALJ, the Commissioner of the State Board focused upon Mrs. Lee's understanding of what Mr. Brennan said he expressed on December 12, 1989. Compounding that difficulty is the ALJ's recognition of Brennan's admission that Mrs. Lee may well have "walked away from the conversation thinking that purchase and ownership was enough." If she did, we are hardpressed to agree that the concept of "unclean hands" could fairly be applied to prevent the application of equitable estoppel beyond December 1989.
>
> We are not confident, however, that our exercise of original jurisdiction should be used to resolve this factual issue. We think the matter must be remanded to the State Board for reconsideration of the "unclean hands" concept with respect to the time period of January 1990 to January 1994. More specifically, additional factual findings must be made concerning Mrs. Lee's understanding of the December 12, 1989 meeting. If she did not comprehend that what she had previously been led to believe was sufficient, i.e., property ownership and payment of taxes, in fact was not sufficient, she cannot have "unclean hands." If she did, then the application of that concept would not be inappropriate. (Footnotes omitted)

My finding (and presumably the finding of both the Commissioner and the State Board) that the Lees were fully aware in December 1989 that they were not entitled to attend the public schools of respondent's district free of charge, related specifically to the period of time, however long it was, from the sale of their first house in Holmdel to the purchase of the condominium. After the first home was sold Mrs. Lee had no basis for continuing to send her children to the Holmdel schools. She knew that Dr. Brennan's reason for allowing the boys to return to Holmdel after they had transferred to Colts Neck was her continuing ownership of the house in Holmdel. Mrs. Lee had testified on November 2, 1994, that Dr. Brennan had said to her when she inquired about the possibility of her children returning to the Holmdel schools in 1997:

> A. . . . Of course, first I call. Yeah. Then Dr. Brennan said -- he say still you have -- you have a home then no problem. Yeah. That's -- . . .
>
> Q. He said, you have a home

> A. Yes, sir
>
> Q. . . . In Colt -- in Holmdel?
>
> A. Holmdel. Yeah. He said, you didn't sell? Yes, I didn't sell. Still -- just a home there is no problem. . . . (J-1 in evidence, page 36)
>
> . . .
>
> A. Yeah. He said is still -- still you have to own your house. I said, yes. You didn't sell. Yes, I didn't sell. Then oh, then no problem. You could come regi -- register then. . . .
>
> . . .
>
> THE WITNESS: Yes. Also I in front, too -- as long as you the taxpayer, you has a home, own something in this town, this is no problem. Especially later on he make him to buy to the condo also. Then he said --
>
> THE COURT: Don't get into that yet. (J-1 in evidence, pp. 39-40)

However, at the April 28, 1997 hearing on remand when asked by the undersigned whether she thought it was still okay to send her boys to school in Holmdel after she sold the first house in Holmdel, there was the following testimony and colloquy:*

> MR. NEWMAN: Now we're having a mix of --

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* At the April 28, 1997 hearing Mrs. Lee testified in Korean, her native language, through a translator, Mr. Taeyon Lee (no relation). Although at the time I swore-in Mr. Lee as the translator I cautioned him that he was required to translate word-for-word everything which was said by each participant in these proceedings, unfortunately, as most translators do, he frequently lapsed into telling us what Mrs. Lee had said in his own words, e.g., "She was looking for a property to purchase," when he should have translated Mrs. Lee's statement, "I was looking for a property to purchase." This use of "she" is sometimes confusing. In addition, there were places during the testimony where it was apparent that Mr. Lee did not translate everything which was said, including, on one occasion, something he said to Mrs. Lee in Korean. (April 28, 1997 Transcript, p. 70, lines 19 to p. 71, line 10). Accordingly, permitting the use of a translator regrettably did not have the desired effect of producing a clearer record.

THE COURT: I hear some English. Yes, Let's hear what she said in Korean.

THE WITNESS: School for the children in Holmdel, it never entered my mind when I sold the house in Holmdel.

THE COURT: You have to tell me everything she said, Mr. Lee. Now, I heard a lot of conversation there and some of it was from you. So you have to tell me everything she said and everything you said.

THE WITNESS: At the time I thought that whenever I move and I could send my children to any place. And the fact that it's -- I sold the house. It not enter into my mind in relation to the children going to school since I though that I could send my children to any place I lived or wherever. Wherever my children wanted to. My children -- children they liked the new house at Colt Neck. And they cried and they wanted to continue living in Holmdel. There was their friends and the school there. And Dr. Brennan is the one who actually helped me in deciding that -- to purchase the property so children could go to school.

BY THE COURT:

Q. Now I'm confused as to time. When you say purchase the property so that the children could go to school are you talking about January of 1990, when you say purchase the property so that the children could go to school? That was January of 1990.

A. I don't exactly -- I can't -- what exactly does it mean.

Q. Say that again.

A. What exactly is the catch on here. I do not quite understand --

Q. Well, I'm having trouble understanding you even through the interpreter. When you say Dr. Brennan helped you purchase something so that the children could continue to go to school what are you talking about, what purchase?

A. (In English) Own something, property, and a taxpayer.

Q. All right. I understood that. Why don't you just talk to me. We'll let you have a little break. I heard her say own something. When -- when did Dr. Brennan first tell you that?

> A. I cannot remember exactly, but it was in the fall. It's in the beginning of school time.
>
> Q. What year?
>
> A. (In English) Same year, '89.
>
> Q. He never told you before that that you had to be a taxpayer and own something?
>
> MR. NEWMAN: Judge, I'm going to continue. I'd like to make an inquiry as to -- if I might -- respectfully to the Court how much longer the Court will seek this line of questioning?
>
> THE COURT: Until I get an answer, Mr. Newman. (April 28, 1997 T70-14 to 72-16)

. . .

She finally testified that the first time Dr. Brennan told her she had to own property and be a taxpayer was the fall of 1989 when she sold the first house. I **FIND** Mrs. Lee's testimony in this regard incredible. Nothing Dr. Brennan ever said to Mrs. Lee could reasonably have caused her to believe that she could send her children to school wherever her children wanted to go. Mrs. Lee's testimony on November 2, 1994 reflected her understanding of Dr. Brennan's reasoning for permitting the boys to return to the district, i.e., the Lee's still owned their house in Holmdel. The fact that she withdrew the boys from respondent's district and enrolled the boys in the Colts Neck school system when she first moved there in 1987, and when the boys clearly did not wish to leave the Holmdel schools, also reflects that she did not believe she could send them wherever she wanted to regardless of where she lived. I **FIND** that when she sold the first Holmdel house sometime during 1989, at that point she knew that the boys were not entitled to continue to attend the Holmdel schools free of charge. After she sold the first house and for some period of time thereafter, she owned no property in Holmdel and was not a taxpayer in Holmdel. Nevertheless, as I have previously articulated, she did not remove her students from the district and she did not call Dr. Brennan for advice. She waited to see what, if anything, would happen and only when she received a call and a letter from the district in December 1989 advising that the children could no longer attend, did she seek Dr. Brennan's advice and purchase another piece of

property in Holmdel. My statement that Mrs. Lee was "fully aware" that her sons were no longer entitled to attend school in Holmdel free of charge had nothing to do with Dr. Brennan's advice at the December 12, 1989 meeting. Mrs. Lee went into that meeting with "unclean hands." Dr. Brennan did tell her at that meeting or perhaps in a telephone conversation before the meeting that she had to purchase something else immediately. I also found as a fact based upon the testimony heard at the November 1994 hearing, however, that Dr. Brennan told her not to rent the condominium because that would be proof positive that she was not living there. Mrs. Lee denies that Dr. Brennan ever said that to her. Mrs. Chu denies having heard Dr. Brennan say that. Mrs. Chu was not a credible witness in this regard either, however. Mrs. Chu repeatedly testified that she could not remember a good portion of the conversation which took place on that day. She acknowledged that conversation took place between Dr. Brennan and Mrs. Lee in her presence, but she claims that she did not hear most of the conversation, and she also testified that, at the time in question, she had a hearing problem for which she has since had an operation. Although the Appellate Division has questioned my findings that Dr. Brennan advised Mrs. Chu and Mrs. Lee that the property could not be rented out, citing, inter alia, "the ALJ's recognition of Brennan's admission that Mrs. Lee may well have 'walked away from the conversation thinking that purchase and ownership was enough.'" The words, "may well have," were not Dr. Brennan's words, nor were they mine. Those are the Appellate Division's words, and in my opinion, they are not supported by the record. What Dr. Brennan actually said in this regard appears in exhibit J-3 in evidence in a number of different places:

> . . . I do recall at that meeting telling Mrs. L -- and this is the one thing I am absolutely sure -- as sure as I can be that Mrs. L understood. That proof positive that they were not living in Holmdel would be if they rented that place out to somebody else. And I remember saying the same thing to Mrs. Chu, and saying, Mrs. Chu -- or whatever her name was -- you have -- seem to have a real understanding of this. And you need to convey this to Mrs. L about things work in this Country. And that if that -- if -- if I ever find out that that property is rented to somebody else, that will be proof positive that you are not in any way living there. (Page 22).
>
> . . .
>
> . . . But I believe Mrs. L understood and I know Mrs. Chu understood when I said proof positive that they were not living in

Holmdel would be if that condominium were to be rented to a tenant. (Page 48).

. . .

. . . Q. So it's your testimony that Mrs. L could have understood from your conversation that owning a home and being a taxpayer would be sufficient for her sons to attend Holmdel School System?

A. That Mrs. L could have understood that?

Q. Yes.

A. That's possible.

Q. Okay. Is it probable?

A. I thou -- no. I thought Mrs. Chu did a good job -- and I'm not sure all of the -- all of the communication between Mrs. Chu and Mrs. L was in English.

. . .

Q. . . . Okay. Now, it's your testimony though that it's conceivable Mrs. L walked away with the understanding that owning a home, owning real estate in Holmdel and being a taxpayer sufficed?

A. That's conceivable. (P. 71 to 72)

. . .

A. . . . I think I said, the one thing that would establish beyond a shadow of a doubt that you're not living there is if you rent this. I think I did say condo. And if you rent this then that's proof positive that you're not living there.

Q. And Mrs. Chu was there when you said that?

A. Yes. And I -- and I said that to Mrs. Chu. Mrs. Chu, you obviously have great facility with real estate. And I expect you to advise Mrs. L on how things work in this Country and to tell her that if I find out this place is being rented, then that is proof positive that you are no way living in Holmdel.

Q. And there's no doubt in your mind that Mrs. Chu understood what you said. Is that right?

A. There is absolutely no doubt in my mind that Mrs. Chu understood that. She seemed to have a -- a great knowledge of real estate.

Q. But you told Mr. Kalac that there was some question that Mrs. L understood it. You think she did, but you can't be positive.

A. Of all the things -- of all the things I think Mrs. L understood or didn't understand, I think she understood that very well. Just something about the exchange in the office that day I thought Mrs. L understood that totally. But I -- but they were speaking I think at -- at times in the language other than English.

Q. Did you make any effort after this conversation to see whether the condo was rented?

A. None.

Q. And you know that there had been testimony in these proceedings that it was, in fact, rented almost for the entire time up until January of 1993. Is that right?. . . I'm sorry. Up -- up until January of 1994.

A. Mr. Barger told me that the place was rented almost from the beginning.

. . .

Q. . . . And was that the first time you knew it had been rented?

A. That's the first time I knew. Up 'till that time I thought -- well, okay, my procedures didn't pick this up. But after all, how many times is somebody going to buy a house and leave it vacant just to attend the Holmdel schools? It wasn't until Mr. Barger let me know yesterday that he knew it had been rented. I was very disappointed. I was very upset. . . . (pp. 95-96)

Stating that it was "possible" or "conceivable" that Mrs. Lee walked away from the meeting thinking that ownership and payment of taxes was sufficient is very different from concluding that she "probably" or "may well have" misunderstood. Anything is possible; it is not probable, however, that Mrs. Lee failed to understand Dr. Brennan's warning not to rent the property.

If Mrs. Lee had simply purchased the condo and refrained from renting it out, I would have concluded that she was, as the Appellate Division has said, reasonably relying on what she thought Dr. Brennan was telling her. Dr. Brennan did not provide any specifics of his advice to her that she had to use the condo in "some meaningful way." I have found that he made that statement, but without any further explanation from him, what reasonable persons might conclude from such a statement could differ. However, there can be no misunderstanding "don't rent it out."

Moreover, whether Mrs. Lee understood the concept of "domicile" when Dr. Le Glise explained it to her is not determinative of her right to a free public education for her children in Holmdel from January 1994 to June 1995. Everyone is presumed to know the law, whether she has actual knowledge or not. Matter of Kovalsky, 195 N.J. Super. 91 (App. Div. 1984). The Lees had no legal right to send their children to the Holmdel schools free of charge after some time in 1987 when they moved their domicile to Colts Neck. After that time and continuing to the present, the Lees have been domiciled in Colts Neck. This includes the period of time Mrs. Lee and the boys occupied the Holmdel condominium.* The only reason the Lees do not owe tuition for the period 1987 through 1989 is an equitable one, i.e., because Dr. Brennan misled them to believe that they were entitled, because they had not sold their first home, to continue to attend free of charge. They reasonably relied upon this misrepresentation. Because Dr. Brennan advised Mrs. Lee not to rent out the condominium, and I am convinced she understood that instruction, and because notwithstanding the Lees rented out the condominium almost immediately and continuing until January 1994 when Dr. Le Glise advised them of the requirements of domicile, the equities do not weigh in favor of the Lees. Mrs. Lee cannot claim that she was reasonably relying upon what Dr. Brennan told her. She was trying to have it both ways -- free tuition and rental monies to defray the cost of purchasing and owning the condo. I **CONCLUDE** that equitable principles do not preclude the district from collecting tuition for the period 1990 through 1994. Nor do I see how equitable principles could possibly apply to bar recovery for tuition from 1994 through 1995. Dr. Le Glise made no misrepresentations to petitioners. If the

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* Petitioners' post hearing brief inaccurately states that I found Mrs. Lee and the boys were domiciled in Holmdel from January 1994 to June 1995. My finding with respect to that time period was that Mrs. Lee and the boys were temporarily residing in the Holmdel condominium.

Lees did not understand the law at that point, it was not because of anything the district's superintendent said or did. The Lees were not domiciled in Holmdel after January 1994, but rather they resided temporarily therein. The fact that the Lees "gave up the rental of their Holmdel condominium in December 1993" and were terribly inconvenienced by "the task of establishing and maintaining a temporary residence" as the result of their good faith misunderstanding of what Dr. Le Glise said concerning "domicile" was not in any way the fault of Dr. Le Glise. How can the respondent be equitably estopped when the Lees ignorance of the law after January 1994 was not in any way induced by respondent? I **CONCLUDE** that equitable principles do not apply one way or the other after January 1994. Dr. Le Glise dispensed no misinformation upon which petitioners could reasonably rely.

One additional, incidental issue raised repeatedly throughout these proceedings by counsel for petitioners needs to be addressed. Petitioners made an application at the commencement of the April 28, 1997, supplemental hearing to preclude the testimony of any witness other than Mrs.. Lee. The basis for this motion was the following discussion in the Appellate Division opinion:

> The difficulty with saddling the Lees with an unclean hands label premised upon this testimony of Dr. Brennan is not our disagreement with the ALJ's acceptance therewith, even though we might question that. Rather, it arises from the ALJ's simultaneous recognition of Mrs. Lee's very different version of that December 12, 1989 meeting. 97 N.J.A.R. 2d (EDU) 77, 79
>
> . . .
>
> More specifically, additional factual findings must be made concerning Mrs. Lee's understanding of the December 12, 1989 meeting. If she did not comprehend that what she had previously been led to believe was sufficient, i.e., property ownership and payment of taxes, in fact was not sufficient, she cannot have "unclean hands." If she did, then the application of that concept would not be inappropriate. 97 N.J.A.R. 2d (EDU) 77, 80

Counsel for petitioners argued that the only way for the undersigned to ascertain what Mrs. Lee understood is by and through the testimony and cross-examination of Mrs. Lee and no one else.

He argued that the introduction of testimony of any other witness would be irrelevant and prejudicial; particularly because of Mrs. Lee's difficulty with the English language, it would be impossible to know what influence the comments and actions of other people may have had on her understandings.

If counsel's argument in this regard held any merit whatsoever, there would have been no need for any additional testimony from anyone. Mrs. Lee could simply have submitted a certification stating that she did not understand that she was not permitted to rent out the condominium and that would have resolved the issue. When knowledge or state of mind is an issue, rarely can the issue be resolved solely on the direct testimony of the individual concerned. The self-serving nature of that individual's testimony is apparent, and personal interest is always a factor to be weighed in judging credibility. Accordingly, although the testimony of Mrs. Lee is certainly relevant on the issue of what she understood about ownership, paying taxes and rental of her real estate at the time she purchased the condo and almost immediately rented it out, a person's knowledge may be inferred from other circumstantial evidence which is usually more probative on the issue. Conduct may be illustrative of state of mind or knowledge. External circumstances, calculated by their occurrence to bring about the state of mind in question, are available to show the probability that knowledge subsequently ensued, and prior knowledge or subsequent knowledge may indicate its existence at the time in question. Wigmore on Evidence, Vol. III, Chapter 11, p. 47-48, sec. 244. I have found as a fact Dr. Brennan said to Mrs. Lee, in Mrs. Chu's presence, that she had to use the condominium in some meaningful way and that it would be proof positive that she was not so using it if she rented it out. Mrs. Lee's English language difficulty manifested itself throughout the hearing with a heavy accent which makes it difficult for others to understand her. I saw little evidence that she had difficulty understanding others when they spoke to her in English. If Mrs. Chu had testified that she explained to Mrs. Lee at or after the meeting that she should not rent out the condo, that would also have been relevant evidence of Mrs. Lee's knowledge. Of course, Mrs. Chu did not so testify, but the following testimony she did give on that issue when I asked her the question directly was so evasive and unresponsive as to permit the conclusion that she did have such a conversation with Mrs. Lee wherein she advised Mrs. Lee that she should not rent the condo.

Q. . . . Did you think there was anything wrong with helping Mrs. L. rent the property?

A. I cannot help anyone if they don't let me to help them.

Yeah. I can't do --

Q. Well, I understand that. Did you say anything to Mrs. L. like, hey, you shouldn't be renting this property?

A. I don't -- she's not my student and she's not my family member.

Q. Did you say that to her?

A. You know, it's not really my -- my -- my -- my -- my job.

Q. I know it isn't your job. Did you do it?

A. She came by and we have people need a place. And she say fine. That happened.

Q. I want to know if you, Mrs. Chu, ever said to Mrs. L., you really shouldn't rent this out.

A. I -- I don't know. Some time along the line, you know -- it's her decision.

Q. Right. Did you give her any advice about that?

A. It's her decision. I gave her advice before not to move to Colts Neck, to stay in Holmdel if her kids like to live in Holmdel.

Q. Um-hum.

A. So and she tell me Colts Neck it's a better place to live. You know, they are higher caliber. So I -- I don't know. I --

. . .

Q. . . . And you still haven't answered my question whether you said to her that you better not rent this out.

A. I -- I don't remember. I -- we have a meeting five, ten times or seven, eight times. And most of time I'm busy in and out. She kind of to catch me. Oh, I catch you here and then I catch you there. And then -- and my job is a Realtor. They need to buy a house they

> buy from me. They -- they need -- you know, that's -- that's how I made my office.
>
> Q. I know. But you say you were her friend, too. Right?
>
> A. She has lots of friend.
>
> Q. Right.
>
> A. Yes.
>
> Q. Yes, You're her friend.
>
> A. I don't know. Because a lot of times she -- I got my license. I would like to go to list her property. She say she have other realtor friend to list her Rambling Brook property. So she have lots of friends. Okay. (April 28, 1997 Transcript, 37-23 to 40-2)

If Mrs. Chu had not told Mrs. Lee that she should not rent out the condo, Mrs. Chu's answer to my question could have been a simple "no." As counsel for respondent has pointed out in his post-hearing written submission, Mrs. Chu's own guilty knowledge is revealed in her response to Mr. Newman's question, "You wouldn't have participated in renting this condominium for Mrs. L if you thought Dr. Brennan didn't want you to do that, would you?"*

> He never got a straight answer to his question, although he probably assumed that Mrs. Chu would say "no" or "of course not". She didn't. She danced around the question and talked about having coffee in the office with Mrs. Lee. Mr. Newman asked the question again and Mrs. Chu's answer the second time was "it's just happen". Mrs. Chu and Mrs. Lee obviously participated in this rental arrangement for their mutual benefit, Mrs. Chu receiving a commission and Mrs. Lee receiving a free education for her sons as well as rental income, and they couldn't care less what Dr. Brennan

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* In her testimony at the first hearing, Mrs. Lee placed the responsibility for initiating the rentals on Mrs. Chu. (J-1, p. 51 "She knows what to do. Then I -- she said this kind of situation she what to do. . ." and J-1, p. 86 "She had to -- her own self that she said this is empty anyhow. We going to put it to the -- the people. Then I say whatever she -- she -- she knows everything. She said okay. Fine.") Attempting to shift the responsibility for renting out the property to Mrs. Chu also implies guilty knowledge on Mrs. Lee's part that she ought not to be ignoring Dr. Brennan's warning.

> had told them. (Post-hearing letter memorandum on behalf of respondent, dated July 14, 1997, page 2.)

Petitioners' argument that the only way to ascertain what Mrs. Lee understood was to ask her is without merit. Extrinsic evidence is always admissible to establish knowledge and state of mind - Wigmore on Evidence, Volume IA, p. 1854, Chapter 9, sec. 190 - and to attack credibility. Rules of Evidence, R. 607. The Appellate Division opinion points to circumstantial evidence from which to draw inferences concerning Mrs. Lee's understanding. Although one inference which could be drawn from the fact that she immediately rented out the property was that Mrs. Lee did not understand what Dr. Brennan had said, another inference, and the one I draw from all of the circumstances, is that Mrs. Lee saw Dr. Brennan as an ally (See, e.g., testimony at J-1, p. 41, lines 11-13: "Just that Dr. Brennan is a great educator. He understand what I -- my situation. I never any problem with him"). And Mrs. Lee did not expect that Dr. Brennan would check up further to see if she was using the condo herself or renting it out. The fact that she and the boys promptly moved into the condo after her conversation with Dr. Le Glise does not necessarily prove that she would have done so after her conversation with Dr. Brennan. I **CONCLUDE** that her actions following Dr. Le Glise's advice reflected her very different relationship with Dr. Le Glise and her consequent expectations concerning what further actions Dr. Le Glise would take. Accordingly, I **CONCLUDE** that receiving additional testimony concerning the circumstances before the December 12, 1989 meeting, during the December 12, 1989 meeting, and after the meeting, was entirely appropriate for the purposes of ascertaining what Mrs. Lee understood following the meeting about her rights and responsibilities in connection with ownership of property and attendance at the Holmdel schools free of charge. I remain convinced that Dr. Brennan told both Mrs. Lee and Mrs. Chu that the property could not be rented out, that Mrs. Lee (and also Mrs. Chu) understood what Dr. Brennan had said to them in this regard and nevertheless proceeded to rent the condominium for their own purposes, Mrs. Lee for the rental income and Mrs. Chu for the commissions which she received for locating tenants. My recommendation to the Commissioner of Education concerning payment of tuition for the time period December 1989 through January 1994 therefore remains unchanged. Petitioners are hereby **ORDERED** to pay tuition for that period. Since there are no equitable principles which would apply to prevent respondent from collecting tuition for the period January 1994 through June 1995, based upon the

State Board of Education's decision, dated September 6, 1995, petitioner's are also **ORDERED** pay tuition for that period.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, P. O. Box 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct 21, 1997
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

10/22/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 23 1997
DATE

Barbara A Harner
OFFICE OF ADMINISTRATIVE LAW

cc

EXHIBITS IN EVIDENCE

Joint:

J-1 Hearing transcript from November 2, 1994

J-2 Hearing transcript from November 3, 1994

J-3 Hearing transcript from November 4, 1994

WITNESSES

For petitioners:

Whasun Lee, through translator Taeyon Lee

For respondent:

Julia Chu

OAL DKT. NOS. EDU 164-97 and EDU 4176-94 (ON REMAND)
AGENCY DKT. NO. 67-4/94

WHASUN LEE, as parent and guardian of V.L. AND ALBERT LEE, individually,	
PETITIONERS,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	DECISION ON REMAND
RESPONDENT.	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record of this matter, including the transcripts of the hearings conducted on November 2, 3 and 4, 1994,[1] as well as the transcripts from the hearing conducted on remand at the OAL on April 28, 1997, the Commissioner determines to affirm in part, and to reverse in part, the initial decision of the Administrative Law Judge (ALJ). In so determining, the Commissioner finds that, notwithstanding petitioners' arguments to the contrary, the ALJ did not use "***this opportunity to circumvent the Appellate [Division's] findings ***" (Petitioners' Exceptions at p. 2) and did not abuse her discretion by

[1] It is noted that the Commissioner rendered his initial determination in this matter without the benefit of the transcripts from the hearings conducted on November 2 and November 4, 1994. These days included the crucial testimony of Superintendent LeGlise, Mrs. Lee and Dr. Brennan.

permitting the testimony of witnesses other than Mrs. Lee in order to determine the issues on remand.

The Commissioner initially notes that the issues on remand are (1) whether the doctrine of unclean hands should bar the application of equitable estoppel from January 1990 to January 1994;[2] and (2) whether the principles of equitable estoppel should apply after January 1994. (Initial Decision on Remand at p. 3) The Board bears the burden of proof with respect to the first issue, and petitioners carry the burden of proof with respect to the second issue. (Transcript for April 28, 1997 at p. 4) Thus, where petitioners argue that the Board "offered no proof on this [second] issue whatsoever," (Petitioners' Exceptions at p. 11) the Commissioner observes that it was without an obligation to do so.

The Commissioner finds that the record does not support the conclusion that the Board has proven, by a preponderance of the evidence, that the doctrine of unclean hands must bar the application of the principles of equitable estoppel in this matter from January 1990 until January 1994. As the Appellate Division noted, the doctrine of unclean hands

> expresses the principle that a court should not grant equitable relief *to one who is a wrongdoer* with respect to the subject matter of the suit. It calls for the exercise of just discretion in denying remedies where the suitor is guilty of bad faith, fraud or unconscionable acts in the underlying transaction. However, *the doctrine "does not repel all sinners from courts of equity, nor does it apply to every unconscientious act or inequitable conduct"* of a complaint . . . the doctrine may be relaxed in the interest of fairness. (emphasis in text) (*Lee v. Holmdel Township Board of Education*, Appellate Division, 97 *N.J.A.R.* 2d (EDU) 77, 79, citing *Murray v. Lawson*, 264 *N.J. Super.* 17, 37 (App. Div. 1993), aff'd as modified, 138 *N.J.* 206 (1994), *cert.* denied, __ *U.S.* __, 115 *S.Ct.* 2264)

It is further recognized that

[2] In so examining, the sub-issue is what Mrs. Lee understood in December 1989 about purchase, ownership and rental of real estate.

> the "doctrines of unclean hands and estoppel . . . are somewhat akin. . . . They are flexible in their application, turning largely on circumstances involved in the . . . 'total situation.' . . . They may turn, too, upon the relative innocence or culpability of the plaintiff and defendant, for the law may aid the one who is comparatively the more innocent." *** (*O'Keefe v. Snyder*, 83 *N.J.* 478, 517, citing *Untermann v. Untermann*, 43 *N.J. Super.* 106 at 109 (App. Div. 1956)

The Appellate Division quite succinctly instructed that "Mrs. Lee could not have been a 'wrongdoer' if she did not comprehend what Brennan says he told her***." (*Lee v. Holmdel Township Board of Education*, Appellate Division, 97 *N.J.A.R.* 77, 79) The remaining question, however is whether Mrs. Lee *could be* "***disabused by Dr. Brennan of the notion, previously reinforced by him, that merely being taxpayers was sufficient to warrant a free education in the school district," (*id.*) when there is no conclusive evidence on the record that Dr. Brennan gave her the accurate information to correct the misunderstanding. As to the meeting on December 12, 1989, Dr. Brennan testified as follows:

> Q: What happened at that meeting?
>
> A: We had a discussion of what it meant to send your kids to the Holmdel schools and what you would have to do. And I said that -- I told Mrs. L. and Mrs. Chu -- if that was her name -- what our procedures were; that I'd be checking the tax records. And that we'd be checking the transportation. And that it wasn't enough just to be landlord or even just to have a place, you had to be living there.
>
> And there were a number of people in Holmdel who had more than one house and they were living here or because of

business or -- or family problem arrangements. I do recall at that meeting telling Mrs. L. -- and this is the one thing I am absolutely sure -- as sure as I can be that Mrs. L. understood. That proof positive that they were not living in Holmdel would be if they rented that place out to somebody else.

And I remember saying the same thing to Mrs. Chu, and saying, Mrs. Chu -- or whatever her name was -- you have -- seem to have a real understanding of this. And you need to convey this to Mrs. L. about [how] things work in this country. And that if that -- if -- if I ever find out that that property is rented to somebody else, that will be proof positive that you are not in any way living there.

Q: As a result of that meeting did Mrs. L. do something?

A: Did she do something?

Q: Did she come back the same day or next day?

A: I don't recall.*** But I remember her coming back with a contract of sale or a closing document. ***

Q: Do you recall what [the] contract was for? What type of a dwelling?

A: I don't.

Q: Could it have been a condominium?

A: It could have.

Q: You don't know?

A: I don't --I don't think it said condo on it. I think it just had an address. But it looked like a valid contract of sale. And I asked the secretary, put this in the jog file and --

Q: What is a jog file?

A: A jog file was just something that the secretary kept that a month later she would take out to make sure we would check the tax records.

Q: And when you checked the tax records, what did you find?

A: The Ls. were living in Holmdel. At least they had that place in Holmdel. (Transcript, November 4, 1994 at pp. 22, 23)

It is evident from Dr. Brennan's testimony that he did not, during the relevant time periods, possess an accurate understanding of the relevant law. On cross-examination, Dr. Brennan concedes the same:

Q: I would like to direct your attention to your concept of domicile back in 1987, 1988.

A: Um-hum.

Q: I believe you testified in your deposition that you knew a lot more about domicile after this litigation began than you did back then.

Y: Yes.***

Q: Was it your testimony in the deposition that you were under the impression people could have two domiciles?

A: Two homes is what I thought.

Q: And if they had two homes they could have their choice of what District they would want to attend?

A: I really thought they had to be living in the -- in the Holmdel house to --- in some real way -- to attend the schools.

Q: Doctor, I'm referring you to page 66 of your deposition, August 9th, 1994.

A: Okay.

Q: Question, line two: In order for them to attend on a legal basis you had to establish which one was their domicile as the officer in charge of the residence attendance requirements. Is that correct?

You answered: I was of the opinion that there could be two homes, two houses, in which people spend some time and really live in both those places.

The next question was: And if that was your understanding then you were of the opinion there could really be two domiciliaries. Isn't that correct? Which is what you testified to earlier.

And your answer: That people could be living in one house and another. But I do recall telling Mrs. L. it's important that she vote at [the] Holmdel house and get your mail sent to the Holmdel house. But yes, I thought there was a possibility that you could spend time in more than one home and be legally domiciled in Holmdel.

A: That's correct.

Q: So you were of the opinion that the Ls owning the home in Holmdel -- which they've testified to as 23 Rambling Brook -- would satisfy as a domicile even though they owned a place in Colts Necks and spent time in both places. Is that correct?

A: Not just owning the place, but spending time there and living there in some sense.

Q: In some sense.

A: Yes. (Transcript, November 4, 1994 at pp. 43, 44)

Although the latter excerpt may have concerned the period of time in which the Lees still owned their house at 23 Rambling Brook Drive, Holmdel, after having purchased their home in Colts Neck, it nonetheless clearly demonstrates that Dr. Brennan did not appreciate the distinction between a residence and a domicile, and the legal entitlement to a free public education which flows *only* from the latter status.[3] *N.J.S.A.* 18A:38-1a. Accordingly, the Commissioner is unwilling to ascribe, bad faith, wrongdoing or fraudulent conduct to Mrs. Lee, in that such a label

[3] The Commissioner notes that this finding is not inconsistent with the ALJ's finding, and his affirmance of same, in the earlier decision that Dr. Brennan's testimony was internally consistent and that "he never wavered from his version of the conversation." (*Lee v. Holmdel Township Board of Education*, 95 *N.J.A.R.* 2d (EDU) 215, 217)

would presuppose that Mrs. Lee knew what the correct course of action would be.[4] Although the Commissioner wholly affirms the ALJ's observation that "[e]veryone is presumed to know the law, whether she has actual knowledge or not" (Initial Decision on Remand at p. 12, citation omitted), under these peculiar circumstances, considering the affirmative and apparently ongoing misrepresentations offered by Dr. Brennan, and further observing that

> [i]t is undisputed that the responsible Holmdel school officials were aware of the Lees' move to Colts Neck; *** that the Lees at no point made any effort to hide their Colts Neck residence, and that school bills and other notices were sent to the Colts Neck address, (*Lee v. Holmdel Township Board of Education*, Appellate Division, 97 *N.J.A.R.* 2d (EDU) 77, 78),

the Commissioner declines to apply the doctrine of unclean hands in order to bar the application of equitable estoppel for the time period January 1990 through January 1994.

In so determining, the Commissioner has not rejected the ALJ's finding, following both the initial hearing and the hearing on remand, that upon selling their house at 23 Rambling Brook Drive in the fall of 1989, petitioners "***were fully aware that even under Dr. Brennan's flexible concepts, they were no longer entitled to attend the schools in Holmdel free of charge." (*Lee v. Holmdel Township Board of Education*, 95 *N.J.A.R.* 2d (EDU) 215, 219; see also, Initial Decision on Remand at pp. 5, 8) As the ALJ observes, Mrs. Lee did not contact the district upon sale of the Holmdel house and remove the children from the Board's school system, but, rather, waited until the Board sent a letter advising the Lees that the boys could no longer attend the Holmdel schools. (*Id.*) Although there is no copy of this letter on the record, *Lee*, *supra,* 95 *N.J.A.R.* 2d (EDU) 215, 216, and there is no indication in the record of the exact date

[4] Indeed, had Mrs. Lee immediately followed Dr. Brennan's direction after the December 1989 meeting and occupied the Holmdel house "in some meaningful way," but, still maintained the home in Colts Neck, as, in fact, she did after January 1994, she *still* would not have been entitled to send her children to the Holmdel schools since the Lees *still* would not have been domiciled in Holmdel.

of the sale of the home at 23 Rambling Brook Drive, (*id.* at 221, footnote 1), the Initial Decision on remand indicates that the house was sold sometime in the fall and petitioner "received a call and a letter from the district in December 1989 advising that the children could no longer attend" school in the District. (Initial Decision on Remand at p. 8) Thus, there was a period of two or three months at most where Mrs. Lee might have removed her sons from the district or otherwise contacted the school to inquire about their continued attendance. Additionally, there was virtually no delay between the time petitioner was notified by the District that the children were ineligible to attend, and the time she came in to see Dr. Brennan and proceeded to act upon what she believed to be his instructions. Given this narrow time frame, as well as the dearth of documentation evidencing the degree to which the district clearly and correctly communicated its policies and expectations on residency, domicile and school attendance, and further cognizant of the Board's burden on this issue, the Commissioner, mindful of the "total situation" and flexible nature of equitable principles, (see *O'Keefe, supra)*, cannot find that petitioner's inaction pursuant to the sale of the Holmdel house must preclude the application of equitable estoppel for the time period January 1990 through January 1994.

As to the second issue, however, the Commissioner finds that petitioners have failed to meet their burden of showing that equitable principles should bar the District from recovering tuition after January 1994, a period in time where it has been determined that the Lees were *not* domiciled in Holmdel, but in Colts Neck, notwithstanding their temporary occupation of the condominium in Holmdel, and were not entitled to a free education under *N.J.S.A.* 18A:38-1d. As the ALJ aptly noted,

> How can the respondent be equitably estopped when the Lees' ignorance of the law after January 1994 was not in any way

> induced by respondent? *** Dr. LeGlise dispensed no misinformation upon which petitioners could reasonably rely.
> (Initial Decision on Remand at p. 13)

Indeed, Dr. LeGlise provided uncontradicted testimony that she met with petitioners and specifically explained to them the meaning of the term "domicile," and the significance of same with respect to the entitlement to a free education. (Transcript, November 2, 1994 at pp. 25, 26) Thus, there is simply no evidence on the record to support a finding that the doctrine of equitable estoppel should be applied after January 1994.

Accordingly, the initial decision of the ALJ is reversed with respect to the first issue, as set forth herein, and affirmed with respect to the second issue, as set forth in the initial decision and amplified herein. The Commissioner, therefore, directs that petitioners are responsible for tuition to respondent for the time period January 1994 through June 1995.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 8, 1997
Date of Mailing, December 8, 1997

634-97

634-97

BETSY ROACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 12, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1017-97
AGENCY DKT. NO. 105-3/96

BETSY ROACH,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE/MAPLEWOOD,
Respondent.

Richard J. Kaplow, Esq., for petitioner

Joanne L. Butler, Esq., for respondent,
(Schenck, Price, Smith & King, attorneys)

Record Closed: October 23, 1997 Decided: October 23, 1997

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

Statement of Facts

This matter was transmitted to the Office of Administrative Law (OAL) on January 6, 1997, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

OCT 23, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Oct. 28, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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RICHARD J. KAPLOW, P.A.
53 Elm Street
Westfield, New Jersey 07090
(908)232-8787
Attorney for Petitioner Betsey Roach

BETSEY ROACH,	:	**BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY**
Petitioner,	:	Agency Docket No. 105-3/96
vs.	:	
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD,	:	**SETTLEMENT AGREEMENT**
Respondent.	:	

THIS MATTER having come before the Commissioner of Education upon the filing of a petition on March 7, 1996, and the parties having engaged in settlement negotiations, and the Commissioner of Education having extended the time in which the Board of Education must answer the Petition in light of said negotiations, and the parties, having resolved the outstanding issues of this controversy, herein stipulate as follows:

1. Pursuant to Board Resolution dated December 18, 1995, Petitioner received retroactive salary in the amount of $38,897.00.

2. By virtue of this settlement, Petitioner will receive an additional payment of retroactive salary in the amount of

$10,000.00. The total amount of retroactive salary, in addition to salary received by Petitioner as salary for performance of her duties in the Half-time Media Aide/Delivery position, represents the entire amount of salary compensation which Petitioner would have received had she been employed in the 10-month position of Technology Instructional Aide - Elementary School from September 1, 1993.

3. The Respondent Board of Education of the School District of South Orange and Maplewood hereby formally acknowledges the acquisition by Petitioner of tenure in a clerical position pursuant to N.J.S.A. 18A:17-2(b), in accordance with the Decision of Administrative Law Judge Ken R. Springer dated August 21, 1995, and affirmed by the Commissioner of Education in a Decision dated November 6, 1995.

4. In the event that the Respondent hereafter creates a new 12-month Technology Aide and/or Library Media Aide position within the District, the parties agree that Petitioner shall have and receive an absolute preference with regard to said newly created 12-month position. Petitioner specifically acknowledges and agrees that she shall not assert entitlement to a preference with regard to the one 12-month Technology Aide High School position which is in existence as of the date of this settlement.

5. This settlement agreement disposes of all claims raised by Petitioner in the matter entitled Betsey Roach vs. South Orange/Maplewood Board of Education, OAL Docket No. EDU-1017-97.

6. This settlement agreement is subject to ratification by the Respondent Board of Education.

7. In consideration of the foregoing, Petitioner withdraws the March 7, 1996 Petition before the Commissioner of Education, Betsey Roach v. Board of Education of the Township of South Orange/Maplewood School District, Essex County, Agency Docket No. 105-3/96 and OAL Docket No. EDU-1017-97.

BETSEY ROACH
Petitioner

Betsey D. Roach

Dated: 9-9-97

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE/ MAPLEWOOD SCHOOL DISTRICT
Respondent

Leo M. Goodwin

By:

Dated: July 21, 1997

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NEW JERSEY
PUBLIC BOARD MEETING
July 14, 1997

HAND CARRIED

RESOLUTION 849J

FOR ACTION

SUBJECT: SETTLEMENT AGREEMENT

BE IT RESOLVED THAT the Board of Education agrees to enter into a settlement agreement with Betsey Roach. The Board President is authorized to execute the settlement agreement and the Deputy Superintendent is authorized to make payment of the agreed upon retroactive salary of $10,000.

MOTION made by Mr. Latz, seconded by Mr. Robinson, to approve Resolution 849J.

ROLL CALL: Motion 849J passed; 9 yes, 0 no.

I, Richard Rosenberg, Secretary of the South Orange-Maplewood Board of Education, hereby certify that the foregoing resolution was adopted at a duly convened meeting of the Board of Education on July 14, 1997 by the roll call vote set forth above and remains in full force and effect.

Richard Rosenberg, Board Secretary

OAL DKT. NO. EDU 1017-97
AGENCY DKT. NO. 105-3/96

BETSY ROACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

DECEMBER 12, 1997
DATE OF MAILING DECEMBER 12, 1997

637-97

DOVER EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY AND NORTHWEST COVENANT MEDICAL CENTER/DOVER GENERAL HOSPITAL COMPANY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Association contended that the Board's decision to provide nursing services through a contract with a private vendor was unlawful and improper. Board alleged that once one or more school nurses were employed directly by it, it was free to contract out for the provision of *additional* nursing services.

ALJ found that applicable statutory language greatly restricts a board's freedom to contract out and seems clearly to require that all school nurses be employed directly by the Board except in very narrow areas -- where there exists an original contract or agreement entered into prior to February 27, 1957, or any renewal or modification thereof. Thus, the ALJ concluded that the determination by the Board to contract out school nursing services for the 1996-97 and the 1997-98 school years to Northwest Covenant was *ultra vires*. ALJ ordered the contracts declared null and void.

In light of recent *Old Bridge Twp. Ed. Assoc.* decision, Commissioner modified the findings and conclusion of the ALJ. Commissioner noted that a district must employ a sufficient number of school nurses to ensure the adequate provision of the duties specifically reserved for certified school nurses. However, there is nothing to prevent a board from duly determining for reasons of economy or efficiency that other nursing services would be provided by health professionals who hold the requisite license from, and are supervised in accordance with requirements of, the Board of Nursing pursuant to *N.J.S.A.* 45:11-23 *et seq.* Commissioner found it is clear that *school* nurses must be employees of the district; however, nothing in the controlling statute would act to preclude a board from contracting for the services of *noncertificated* nurses, performing duties consistent with the dictates of *Old Bridge*. The Board was directed to review its assignments to determine whether the duties performed by the noncertificated nurses employed by contract conflict with duties specifically reserved for certificated nurses and to adjust its staffing as necessary.

DECEMBER 12, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11164-96

AGENCY DKT. NO. 388-9/96

DOVER EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY, AND NORTHWEST COVENANT MEDICAL CENTER/DOVER GENERAL HOSPITAL COMPANY,

Respondents.

Richard A. Friedman, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Lester Aron, Esq. and **Peter Schultz**, Esq., for respondent Board of Education of the Town of Dover,
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Robert C. Iannaccone, Esq., for respondent, Northwest Convenant Medical Center/Dover General Hospital Company

Record Closed: September 15, 1997 Decided: October 24, 1997

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

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on October 23, 1996 following the filing of a petition by the Dover Education Association with the Commissioner wherein it alleged that the Dover Board's determination in June 1996 to contract with a private entity (Northwest Covenant Medical Center) to provide the services of two full-time registered nurses for the 1996-97 school year violated *N.J.S.A.* 18A:40-1 and 40-3.1. Petitioner claimed those statutes required the Board directly to employ school nurses and left it no discretion to contract privately for them. The Board filed an Answer denying the allegations of the petition and took the position that it had the statutory right to take the action it did. Northwest Covenant also filed an Answer denying it had participated in any improper action with respect to its contract with the Dover Board. As the result of a telephone prehearing conference conducted by the undersigned administrative law judge in May 1997 it was agreed the matter could be disposed of by way of cross-motions for summary decision based upon a Joint Stipulation of Facts. Thereafter, the Stipulation, briefs and reply briefs in connection with cross-motions for summary decision were filed.

JOINT STIPULATION OF FACTS

As noted, the facts upon which parties have filed cross-motions for summary decision are set forth in a Joint Stipulation of Facts which, together with pertinent accompanying exhibits, states as follows:

1. Petitioner is the majority representative of all certified non-administrative staff employed by Respondent, Board of Education of the Town of Dover (the "Board")

2. The Board is obligated to provide school nursing services in accordance with *N.J.S.A.* 18A:40-1, *N.J.S.A.* 18A:40-3.1 and *N.J.A.C.* 6:29-1.2.

3. By resolution passed on June 24, 1996, effective September, 1996, the Board resolved to provide school nursing services through a contract with a private nursing service, respondent Northwest

Covenant Medical Center/Dover General Hospital ("Northwest"). (Exhibit J-1).

4. On July 19, 1996, the Board and Northwest entered into a contract for nursing services (the "Agreement") effective for the 1996-97 school year. (Exhibit J-2).

5. In accordance with the terms of the Agreement, the Board agreed to engage Northwest for the provision of two (2) full-time registered nurses to perform nursing services at the Academy Street School, North Dover Elementary School and the Kindergarten Annex. (Exhibit J-2,¶1, Schedule A).

6. A job description for these positions was also made a part of the Agreement and is attached hereto as Exhibit J-2, Schedule B.

7. A job description issued by the Board for the position of School Nurse also exists and is attached hereto as Exhibit J-3.

8. Pursuant to said nursing services Agreement, and by and through Northwest, the Board engaged Virginia Rumbelow and Suzanne E. Herbst to serve as full-time nurses for the Board during the 1996-97 school year.

9. Ms. Rumbelow holds an Education Services Certificate issued by the State Board of Examiners with an endorsement as a school nurse. (Exhibit J-4).

10. Ms. Herbst holds an Emergency Certificate issued by the State Board of Examiners with an endorsement as a school nurse. (Exhibit J-5).

11. The 1996-97 nursing services Agreement expired at the conclusion of the 1996-97 school year.

12. On June 20, 1997, Northwest and the Board entered into a subsequent nursing services Agreement ("Agreement") for the 1997-98 school year. (Exhibit J-6).

13. In addition to the above-described nursing services agreements, the Board also directly employed two (2) tenured, full-time school nurses during the entire 1996-97 school year. As of the date of this Stipulation [July 8, 1997], the Board continues to directly employ two (2) tenured full-time school nurses.

14. On September 6, 1996, a Petition of Appeal was filed by Petitioner with the Commissioner of Education.

15. On or about September 18, 1996, Respondent Northwest filed an answer to the Petition.

16. On or about September 24, 1996, Respondent Board filed an Answer to the Petition.

17. On or about November 1, 1996, the matter was transferred to the Office of Administrative Law as a contested matter.

DISCUSSION

Prior to 1968, the employment of school nurses by boards of education was permissive. However, Laws 1967, Chapter 271, amending *N.J.S.A.* 18:14-56, and presently codified as *N.J.S.A.* 18A:40-1, provided that, "every Board of Education . . . not furnishing nursing services under a contract pursuant to §18A:40-3.1 shall employ one or more school nurses, . . . and the Board shall fix their salaries and terms of office".

N.J.S.A. 18A:40-3.1, cited in the previous section, governed how boards are to secure the services of a school nurse and specifically recognized that the performance of school nursing services in any public school could be continued under an original contract or agreement entered into prior to February 27, 1957, or under any renewal or modification thereof. The statutes essentially have remained unchanged since their enactment. See also, *N.J.A.C.* 6:29-1.2(b).

According to the Dover Board, once one or more school nurses have been employed directly by it; thereafter, it is free to contract out for the provision of additional nursing services if it deems this to be appropriate. Thus, since the Board has maintained the direct employment of two tenured, full-time school nurses during the time periods here in issue, it insists its determination to contract with Northwest is not assailable. For the reasons which follow I disagree.

The interpretation of any statute, " . . . necessarily begins with consideration of its plain language". *Lammers v. Bd. of Ed.*, 134 *N.J.* 264, 267 (1993). Thus, *N.J.S.A.* 18A:40-1 provides that any board not furnishing nursing services under contract pursuant to *N.J.S.A.* 18A:40-3.1 shall employ one or more school nurses and fix their salaries and terms of office. The only exception to such direct employment by a board

is an original contract or agreement entered into prior to February 27, 1957, or any renewal or modification thereof. *N.J.S.A.* 18A:40-3.1 encompasses every person employed as a school nurse in the public schools of this State and establishes only two options under which a board shall provide school nursing services. The first is directly to employ school nurses. The only other option allows a board to continue to provide nursing services under a valid contract or agreement originally entered into on or before February 27, 1957. The Dover Board's interpretation would create an additional exception; namely, that once a single school nurse has been hired, the statute no longer applies and a board then is free to secure school nursing services in any manner it chooses, just as it may do with other classes of employees such as "crisis intervention therapists", see, *Edison Tp. Ed. Ass'n v. Edison Bd. of Ed.*, 94 *N.J.A.R.* 2d (EDU) 301, aff'd 94 *N.J.A.R.* 2d (EDU) 592 (State Board), aff'd. 96 *N.J.A.R.* 2d (EDU) 463 (App. Div.); guidance services, see *Colantoni v. Longhill Bd. of Ed.*, 97 *N.J.A.R.* 2d (EDU)396; and speech correctionists, see, *Impey v. Shrewsburgy Bd. of Ed.*, 142 *N.J.* 388 (1995).

In my view, exceptions to statutes generally are to be strictly construed and there is a presumption that a statute applies to all cases not specifically excepted. *See, e.g., State v. Reid*, 34 *N.J.* 554 (1961); *Young v. Schering Corp.*, 141 *N.J.* 16 (1995). Where, as here, a statute expressly enumerates a narrow exception, the exception should not be enlarged, nor additional exceptions carved out without a clear expression of legislative intent. Application of these principles to the particular statutes involved in this case support the position taken by petitioner that except in very limited circumstances all school nurses providing services in the public schools must be employed directly by the local board.

In further support of this conclusion I also would point to the provisions of Laws 1991, Chapter 226, *N.J.S.A.* 18A:40-25, which expanded the scope of a local board's responsibility for providing access to health care services for all school age children, even those attending non-public school. There, the Legislature expressly permitted a Board to contract for the provision of school nurse services by persons who were not

directly employed by the Board. *N.J.S.A.* 18A:40-28; *see also*, *N.J.A.C.* 6:29-8.2(a)1. No similar such express exception exists in the statutes involved in the case before me.

Although, as noted, the Dover Board relies upon a number of cases which upheld decisions by boards to "contract out" for certain services, all are distinguishable. Although in those cases the contracts were upheld, generally as a matter of "managerial prerogative", they were limited to situations where the action did not conflict with specific school laws. *See, Impey v. Bd. of Ed. of Shrewsbury, supra; Edison Twp., supra,* and cases cited therein. The decision in *Hunterdon Central High School Association v. Hunterdon Central High School Board of Ed.*, 1988 *S.L.D.* 2468, aff'd *Sup. Ct.,* (App. Div.) Dkt. No. A-5036-87T2, June 28, 1989; nor in *Englewood Teachers' Association v. Englewood Board of Ed.*, 94 *N.J.A.R.* 2d (EDU) 172, aff'd State Board of Education, 94 *N.J.A.R.* 2d (EDU) 423, do not support a contrary conclusion since both involved custodial services and an entirely different statute. Indeed, a recent decision not cited by the parties lends additional support to the petitioner's position. Thus, in *Vincenzo v. Board. of Educ. of the Twp. of Bedminister*, 97 *N.J.A.R.* 2d (EDU) 356, the Commissioner affirmed an ALJ's decision that the termination of a tenured member of the core Child Study Team (school social worker) and the reallocation of some of her duties to an outside contractor violated regulations which required that such team members must be employed directly by the school district and the board had no discretion to engage an outside contractor to perform their duties.

In short, none of the cases relied upon by the Dover Board involve statutory language comparable to the language of the statutes involved in this case which, as noted, greatly restrict a board's freedom to contract out and seem clearly to require that all school nurses be employed directly by the board, except in the very narrow areas mentioned. Any further exceptions are for the Legislature to enact.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth above, I **CONCLUDE** that the determination by the Dover Board of Education to contract out school nursing services for the 1996-97 and the 1997-98 school years to Northwest Covenant was *ultra vires* its statutory and regulatory authority. Thus, I **ORDER** those contracts be declared null and void. [1]

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

[1] In light of my decision it is not necessary to address the subsidiary issue involving Ms. Herbst's "emergency" certification. See Joint Stipulation, para. 10.

500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 24, 1997
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

Oct. 28, 1997
DATE

D. W. Gintasmaitis Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 3 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

\mvh

OAL DKT. NO. EDU 11164-96
AGENCY DKT. NO. 388-9/96

DOVER EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY AND NORTHWEST COVENANT MEDICAL CENTER/DOVER GENERAL HOSPITAL COMPANY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions were timely submitted by the respondent, Town of Dover Board of Education, which recast and reiterate many of the arguments presented in papers previously considered by the Administrative Law Judge (ALJ). Petitioner's exceptions were also filed in accordance with *N.J.A.C.* 1:1-18.4. Each of the aforesaid submissions were duly considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record, and in view of recent developments in related case law, the Commissioner is constrained to modify the findings and conclusion of the ALJ that the determination of the Board to contract out nursing services, for the 1996-97 and 1997-88 school years, to an outside contractor is violative of *N.J.S.A.* 18A:40-1 and *N.J.S.A.* 18A:40-3.1 and the interpreting regulation promulgated thereto, *N.J.A.C.* 6:29-1.2(b). Initially, the Commissioner observes that the education laws clearly require each school district to employ at least one school nurse, who must be appropriately certified by the State Board of Examiners and who is considered a teaching staff member for purposes of salary, tenure and evaluation and to perform duties expressly reserved to school nurses. *N.J.S.A.* 18A:40-1, 18A:40-3.1. Further, in light of the Commissioner's recent decision in *Old Bridge Township*

Education Association et al. v. Board of Education of the Township of Old Bridge, Middlesex County, Decision No. 621-97, decided November 26, 1997, it is now settled that the District must employ a sufficient number of school nurses to ensure the adequate provision of the duties specifically reserved for certified school nurses. *(Id.* at p. 14). However, the Commissioner also ruled therein that,

> ***where education law is silent on the provision of specific nursing services and support functions related to them, and such services do not otherwise require educational certification, there is nothing to prevent a board of education from duly determining, for reasons of economy or efficiency, that these nursing services will be provided by health professionals who hold the requisite license from, and are supervised in accordance with the requirements of, the Board of Nursing pursuant to *N.J.S.A.* 45:11-23 *et. seq. (Id.)*

Additionally, so long as noncertificated nurses do not perform nursing functions requiring a certificate except as delegated by the school nurse, and so long as professionals practicing under authority of a license are supervised in accordance with any conditions specified by the terms of that license, there is nothing to prevent duly qualified persons from assisting certificated school nurses in the performance of duties reserved by law to such nurses.

The present matter raises the issue as to whether a school board may subcontract for nursing services with a private agency such as respondent Northwest Covenant Medical Center. For the reasons stated by the ALJ, it is clear that *school* nurses must be employees of the district. However, nothing in the controlling statute would act to preclude a board from contracting for the services of *noncertificated* nurses, performing duties consistent with the dictates of *Old Bridge, supra.* It has been held in numerous cases that boards of education may subcontract positions and services which would otherwise be assumed by board employees. See *Impey v. Board of Education of the Borough of Shrewsbury,* 142 *N.J.* 388 (1995); *Vincenzino v. Bedminster Board of Education*, 97 *N.J.A.R.* 2d (EDU) 356; *Colantoni v. Long Hill Township Board of Education,* 97 *N.J.A.R.* 2d (EDU) 326. Such cases are based on a recognition that "[t]he decision to contract for services is generally a matter of managerial prerogative and is only limited where such action conflicts with specific rights established under the school law." *Edison Township Education Association v. Edison Township Board of Education*, 94 *N.J.A.R.* 2d

(EDU) 301, 303. Because subcontracting for nursing services, other than *school* nursing services as set forth in *Old Bridge*, does not violate the applicable statutes or regulations, the Board acted in conformance with its authority at *N.J.S.A.* 18A:11-1 (authorizes boards of education to perform all acts and do all things, consistent with law and State Board rules, necessary for proper conduct, equipment and maintenance of the public schools). See, also, *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (App. Div. 1960) (a board's actions are presumed valid).

Accordingly, for the reasons expressed herein, the recommended decision of the OAL is modified to the extent set forth above. Consistent with the decision herein, the Board is directed to review its assignments to determine whether the duties performed by the non-certificated nurses employed by contract conflict with duties specifically reserved for certificated nurses and to adjust its staffing as necessary.

COMMISSIONER OF EDUCATION

DECEMBER 12, 1997
DATE OF MAILING DECEMBER 12, 1997

637-97

EDU #11164-96
C # 637-97
SB # 3-98

DOVER EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,

RESPONDENT-RESPONDENT,

AND

NORTHWEST COVENANT MEDICAL CENTER/DOVER GENERAL HOSPITAL COMPANY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 12, 1997

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Town of Dover, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq. and Peter Schultz, Esq., of Counsel)

For the Respondent-Respondent Northwest Covenant Medical Center/Dover General Hospital, Mary Joan Sugrue, Esq.

This case centered on a single question: whether, or to what extent, the applicable statutes conferred the authority on a district board of education to contract with a private entity for nursing services.

July 5, 2000

As stipulated by the parties, the Board of Education of the Town of Dover (hereinafter "Board") sought to meet its obligations under N.J.S.A. 18A:40-1 and 40-3.1 during the 1996-97 school year through a combination of the direct employment of two certified school nurses and by contracting with Northwest Covenant Medical Center/Dover General Hospital ("NCMC"). Pursuant to that agreement, NCMC provided two full-time registered nurses to perform nursing services mirroring those provided by the school nurses employed by the district.

The ALJ concluded that the contracts at issue were ultra vires because the Board did not have the authority to contract for these services. The ALJ's conclusion was grounded in the language of those two statutes, which he construed strictly, presuming that they applied to all cases that were not specifically excepted from such application.

The Commissioner modified the ALJ's conclusions. Stressing that it was now settled that the district must employ a sufficient number of school nurses to "ensure the adequate provision of the duties specifically reserved for certified school nurses," the Commissioner reasoned that contracting was permitted "so long as noncertificated nurses do not perform nursing functions requiring a certificate except as delegated by the school nurse and so long as professionals practicing under authority of a license are supervised in accordance with any conditions specified by the terms of that license...." Commissioner's Decision, slip op. at 10. On this basis, the Commissioner concluded that the Board had acted consistently with the general authority conferred on it by N.J.S.A. 18A:11-1, but he directed the Board to "review its assignments to determine whether the duties performed by the noncertificated nurses employed by contract

conflict with duties specifically reserved for certificated nurses and to adjust its staffing as necessary." Id. at 11.

Petitioner, the Dover Education Association, filed the instant appeal to the State Board.

On April 19, 2000, our Legal Committee issued a report in which it recommended reversing the decision of the Commissioner. The Legal Committee concluded that, under the statutory scheme, a district board retained the managerial prerogative to contract with a private entity for nursing services to supplement school nursing services provided under the statutory mandate, but could not supplant the provision of nursing services that would otherwise be provided by certified school nurses employed by the district. The Committee found that, in this instance, the contract nurses were supplanting the services that would ordinarily be provided by school nurses employed by the district by providing exactly the same services that those nurses would provide, in violation of the pertinent statutes.

In exceptions filed in response to that Report, the Board maintained that any violations of the school laws had been rendered moot by virtue of the fact that its contracts for registered nurses had terminated on July 1, 1999 and that it had entered into no further contracts for such services. The Board pointed out, in addition, that N.J.S.A. 18A:40-3.3, which was enacted in 1999, precluded it from placing any uncertified nurse in a school building without the immediate physical supervision of a certified school nurse.[1]

[1] N.J.S.A. 18A:40-3.3 provides in pertinent part that:

> ....A school district may supplement the services provided by the certified school nurse with non-certified nurses, provided that the

After a careful review of the record in light of the exceptions filed, we agree with the Board that this matter has been rendered moot. In so concluding, we stress that the only relief sought by the petition in this case was a declaration that the contracts with NCMC were invalid under the statutes in effect during the relevant time period. We therefore dismiss the appeal in this matter.

Attorney exceptions are noted.

Arnold G. Hyndman abstained.

July 5, 2000

Date of mailing JUL 07 2000

non-certified nurse is assigned to the same school building or school complex as the certified school nurse.

639-97

639-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JERRY GRANATO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WOODBRIDGE, MIDDLESEX COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct against respondent custodian for allegedly engaging in physical labor while out of work on sick leave.

ALJ dismissed tenure charges finding that there was not sufficient evidence to warrant the conclusions that respondent was committing fraud against the system or that removal of tenure was necessary. ALJ ordered respondent returned to his position with compensation.

Commissioner adopted findings and determination in initial decision as his own.

DECEMBER 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00032-97
AGENCY DKT. NO. 579-12/96

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,
Petitioner,

v.

JERRY GRANATO,
Respondent.

Carl J. Palmisano, Esq., for petitioner (Palmisano and Goodman, attorneys)

Randi Doner April, Esq., for respondent (Balk, Oxfeld, Mandell and Cohen, attorneys)

Record Closed: October 8, 1997 Decided: October 29, 1997

BEFORE **JEFF S. MASIN**, ALJ:

The Board of Education of Woodbridge Township filed a Certification with the Commissioner of the Department of Education seeking the removal of tenure status from Jerry Granato, a tenured janitor. The Commissioner referred the contested case to the Office of Administrative Law ("OAL") for hearing on January 6, 1997. A prehearing conference was held on February 24. Hearings were scheduled for May, but were adjourned due to the illness of Mr. Granato's counsel. Additional hearing dates scheduled for June and August were adjourned due to efforts to resolve the case and/or the unavailability of Mr. Granato's attorney. A hearing was held on October 8, 1997, and the record closed following the completion of testimony and closing comments by counsel.

The Board alleges that Mr. Granato, who was out of work on sick leave in the latter part of September and the month of October, 1996, was observed engaging in physical labor which was inconsistent with his claim that he could not perform his responsibilities. More specifically, the Board at hearing presented a surveillance videotape showing Mr. Granato climb into the open body of a pickup truck, shovel dirt and exit the truck, "jumping" out of it while holding the body with his hands. This event occurred on October 16, and on that date Mr. Granato was admittedly out of work on an approved sick leave based upon a series of notes from a physician which had excused him from work since September 25. The most recent note was dated October 14, and it was to cover until October 17, on which date Mr. Granato was to see the physician again. The Board charges that Mr. Granato engaged in conduct unbecoming a public employee.

The evidence presented at the hearing consisted of a surveillance videotape, the Board only relying upon that portion of the videotape which shows Mr. Granato during a period of time from 10:02 to 10:20 A.M. (not including all of the 18 minutes of actual time encompassed therein) on October 16, and Mr. Granato presenting his own testimony and that of several witnesses. The videotape does show that Mr. Granato was present at the premises of Bartel Landscaping t/a Woodbridge Power Equipment and Landscape Supply on October 16. He is observed entering the truck's cargo area, and within a period of about one and on-half minutes he shovels dirt 26 times from the rear towards the front of the truck in rather rapid succession. During this time he appears to turn his head towards someone standing at the rear of the truck and that gentlemen at one point makes a motion with his hand in which he holds his hand up and moves his fingers towards himself in a gesture seemingly saying to the man in the truck, "come here," or something similar. After this approximately one and one-half minutes of shoveling, Mr. Granato grabs the edge of the truck and "vaults" out to the ground. The other man has now taken the shovel, entered the truck and he shovels more of the contents. Mr. Granato is also observed helping to stretch a tarp, stretching his body as he does so. This is the extent of the surveillance videotape which the Board believes portrays conduct unbecoming a public employee.

Richard K. Nalasco testified that he is the man observed at the truck with Mr. Granato. He identified himself as the manager of the Landscaping Supply company and explained that Mr. Granato's father was a customer. The respondent sometimes came in to the store with his father.

On October 16, Nalasco loaded a yard of topsoil into the Granato vehicle and was to also load some mulch. He explained that the general policy of the storeowner was that customers were responsible for "cleaning up" or "trimming" a customer's vehicle. Therefore, Nalasco "hardly ever" does so, and as the intention in this situation was to load the mulch in the back end of the Granato truck, it would normally be Granato's job to move the soil to the front. However, Granato said that he had hurt his back, that it hurt him a lot and that he could not continue. He did not directly ask Nalasco to take over. Since the company is fairly new, Nalasco felt that it was a good idea to try to help out customers. Thus, he gestured to Granato to give him the shovel and he did enter the truck bed and shovel dirt.

Questioned about his knowledge of whether Granato was actually hurt, Mr. Nalasco pointed out the way that Granato shoveled, standing fairly straight up and without bending over or bending his legs, and contended that this was an "improper" way to shovel, which to him was indicative of a person with a bad back or other such injury. (He did not mention that it appears that Granato may have been using the inside wall of the truck to brace himself as he shoveled.)

As of October 16, Nalasco did not know where Granato worked, or that he was out on sick leave.

Phillip A. Sarno, now with Unieco Service Co., was formerly a supervisor of janitors for the Woodbridge Board. Mr. Granato was one of the janitors whom he supervised. He related that Granato was injured on a Friday when he was cutting the grass at the Woodbridge Middle School and the mower struck an exposed tree root, jamming his back. Granato was sent to a doctor at the Hadley Medical Center where Board employees were normally treated. He at first was told by the doctor that he could do his job, but a few days later, Granato complained that he was having trouble when he had to stretch, such as when he had to clean the chalk boards. He recalled that Granato received a note from the doctor which said that he could perform light duty, but the witness explained that there really was no such thing as far as a janitor's duties were concerned.

Jerry Granato testified that he started at Woodbridge in 1989 or 1990. He explained that on October 16, he was picking up the dirt and mulch load for his father, who was landscaping the

front of the father's home. The dirt in the back had to be moved up to the front, but after six or seven passes with the shovel, Granato was advising Nalasco that he could not continue. Nalasco said that the mulch could go on to the top of a tarp in the back. Granato jumped out of the truck, holding on to the side. The landing hurt him.

According to the witness, on "many" occasions he told the doctor who was advising that he stay out of work that he could work, but the doctor told him that he had to wait for an MRI test. Granato was told by the therapist to do stretching exercises, not to stay still, to try to do things, but not to overdo. He insisted that the videotape represented the only occasion during his sick leave on which he shoveled dirt. He was finally diagnosed with two herniated disks and arthritis. He was released to return to work in early November and was suspended from work the same day as a result of the pending charges.

DISCUSSION

The evidence in this case is very limited. We have a videotape, actually, while that videotape shows surveillance of the respondent on three days in October, the Board only asserts that it demonstrates any relevant and purportedly revealing conduct during the eighteen minutes from 10:02 to 10:20 on October 16. We have the testimony of Messrs. Granato, Nalasco and Sarno. We have a series of doctors' notes. These reveal that Mr. Granato first received a note from a doctor on September 20, which placed him on light duty with "no lifting or bending," restrictions which Mr. Sarno explained were not feasible for janitors. The next note, from September 25, excuses Mr. Granato from work till September 30, thereafter the notes continue to excuse him for an ongoing and continuous period of three or four days. He is referred on the 3rd of October for an MRI of the spine. As noted, the note for the October 14 visit excuses him until a follow-up visit on the 17th, and on the 17th he is again excused till the 23rd. On November 6, he is told that he can return to work, again with a restriction against lifting.

The doctor's notes tell us nothing as to the conversations between doctor and patient, tell us nothing about whether he did or did not say he could work and whether the doctor held him back until the MRI was performed and evaluated. Thus the notes provide only the barest information as to the outcome, but not the contents and context of the visits themselves.

At first glance the video of Mr. Granato is startling, when the fact is considered that at that same time he was out of work on sick leave for a bad back. However, the testimony of Messrs. Granato and Nalasco puts the event in context, and Nalasco's obviously spur of the moment gesture and Granato's turn toward him while shoveling, plus Nalasco's observations as to the manner in which Granato was shoveling, all lend substantial credence to Granato's story. He may have foolishly attempted to do a physical activity for which he was not yet ready, but in the absence of *any* other incidents of even questionable conduct during the surveillance, I cannot find that the small vignette on the videotape is sufficient to warrant any conclusion that he was cheating, that he was lying to anyone about his condition, that he was shirking work, that he was committing any fraud against the system. If he was, then the proofs are simply lacking to allow punishment, especially the removal of tenure.

For the reasons set forth, the tenure charge is **DISMISSED**. Mr. Granato shall be made whole for his losses in wages and benefits, and if he is otherwise fit for duty, he shall be returned to work in his former position with any appropriate salary and benefits adjustments. An affidavit of lost wages and benefits shall be served on counsel for the Board as soon as possible and not later than 30 days from the date of this initial decision.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 29, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 3 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Job Description, Board of Education, Woodbridge Township, Janitor title, dated 9/95

P-2 Board of Education, Woodbridge Township, Regulation #4240-3 Early Return to Work, dated 4/93

P-3 VHS tape recording matter of Jerry Granato, surveillance of 10/5/96, 10/16/96 & 10/24/96

FOR THE RESPONDENT:

R-1(a) Two doctor's notes for Jerry Granato, dated 9/20/96 and 9/25/96

R-1(b) Doctor's note for Jerry Granato, dated 9/30/96

R-1(c) Doctor's note for Jerry Granato, dated 10/3/96

R-1(d) Doctor's note for Jerry Granato, dated 10/9/96

R-1(e) Two doctor's notes for Jerry Granato, dated 10/17/96 and 10/14/96

R-1(f) Doctor's note for Jerry Granato, dated 10/24/96

R-1(g) Two doctor's notes for Jerry Granato, dated 11/5/96 and 11/13/96

OAL DKT. NO. EDU 00032-97
AGENCY DKT. NO. 579-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF JERRY GRANATO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF WOODBRIDGE, MIDDLESEX COUNTY.	:	
	:	

The record of this matter, including a videotape, and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that respondent's actions, as proven, do not constitute unbecoming conduct for the reasons expressed therein. In so ruling, the Commissioner is satisfied that the ALJ considered all testimony and weighed its content according to the credibility of the witnesses and the consistency of testimony with evidence presented. Thus, he finds no basis to challenge the ALJ's determinations and resultant conclusions dismissing the charges against respondent. *In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987).

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein and this matter is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 15, 1997
DATE OF MAILING DECEMBER 15, 1997

640-97

640-97

WEST NEW YORK EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

DECEMBER 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7613-95

AGENCY DKT. NO. 219-6/95

WEST NEW YORK EDUCATION ASSOCIATION,

Petitioner,

v.

WEST NEW YORK BOARD OF EDUCATION,

Respondent.

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett, attorneys)

Allan C. Roth, Esq., for respondent

Record Closed: October 28, 1997 Decided: October 29, 1997

BEFORE **MARYLOUISE LUCCHI-McCLOUD**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 21, 1995 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a stipulation indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

10/29/97
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

NOV. 3, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 5 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ED... LAW

OCT 28 1 19 PM '97

THE LAW OFFICES OF
ALLAN C. ROTH
271 GREENFIELD ROAD
BRIDGEWATER, NEW JERSEY 08807
Telephone: (908) 704-8798
ATTORNEY FOR WEST NEW YORK BOARD OF EDUCATION
Our File No. W-6300

WEST NEW YORK EDUCATION ASSOCIATION,

Petitioner,

v.

WEST NEW YORK BOARD OF EDUCATION,

Respondent.

DEPARTMENT OF EDUCATION

Docket No. EDUOT 7613-95N

AGENCY REF. NO. 219-6/96S

STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, the West New York Board of Education (Board) and the West New York Education Association, hereto that the above captioned matter be and is hereby settled upon the following terms and conditions:

1. The Board will act in all due diligence to complete repairs to all inoperable Heating Ventilation and Air Conditioning (HVAC) units in the District by September 5, 1996.

2. The Board will change the air filters every three months durin the course of the school year starting with the first week prior to the start of the school year in September and ending June 30 that school year.

3. The parties agree to the checklist regarding the maintenance of the HVAC units attached as Exhibit A.

4. Exhibit A will be maintained in the office of the Head Custodian in each building. The Head Custodian will make Exhibit A available to the Association building representative on three (3) school days notice.

5. If the Association determines that a filter has not been replaced pursuant to this Agreement, then the Association is to notify the building principal. If the Association does not obtain relief within five (5) school days, then the Association is to file a grievance on the grievance form agree upon under the then current collective bargaining agreement.

6. If an individual teaching staff member determines that an individual HVAC unit is failing to operate properly, said staff member is to notify the building principal in writing on the customary work order form utilized by the District. Said form will be located in the office of the building principal.

7. The building principal, upon receipt of the complaint form will counter-sign the form and forward the customary work order form to the Business Administrator within two (2) school days.

8. The Business Administrator must contact the Board appointed agent for repairs to the HVAC system within four (4) schools days of receipt of the work order form.

9. If within ten (10) school days from the date of notification by the teaching staff member that the HVAC unit is non-functional, the teaching staff member will notify the building principal.

10. The building principal must notify the Business Administrator within one (1) day that the HVAC unit is non-functioning and that a work order has been forwarded to the Business Administrator.

11. The Business Administrator is to notify the Superintendent of Schools and the Board Trustees who are members of the Building and Grounds Committee of the Board within one (1) school day of notice by the building principal that the HVAC unit has been non-functioning for eleven (11) school days.

12. The Association shall not request any other relief with respect to this matter, other than that provided for by this Stipulation of Settlement.

13. The Association shall not institute any appeal or any other action with respect to this matter.

14. The Association has read the above stipulation and conferred with counsel and hereby agrees to abide by the terms of this settlement agreement.

15. This settlement agreement is not intended to establish preceder in any future matters.

Date: 10/8/97

Janet Passante, President
West New York Board
of Education

Date: 10/9/97

Allan C. Roth, Esq.
West New York Board
of Education

Date: 10-20-97

Dennis DeSocio, Past President
West New York Education

Date: 10-20-97

Cathy Bodtman, President
West New York Education
Association

Date: 10-24-97

Michael Barrett, Esq.
West New York Education
Association

OAL DKT. NO. EDU 7613-95
AGENCY DKT. NO. 219-6/95

WEST NEW YORK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

DECMEBER 15, 1997
DATE OF MAILING DECEMBER 15, 1997

641-97

DANIEL GREENE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE BOARD OF EXAMINERS, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner challenged State Board of Examiners actions denying his application for two teaching certificates based on his allegedly providing false information in a comparable application to the Board of Education of the City of New York.

ALJ dismissed the petition, finding it to be out of time as it was filed well beyond the 90-day limitation period stated in regulation.

Commissioner adopted findings and determination in initial decision as his own.

DECEMBER 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSING PETITION

OAL DKT. NO. EDU 01343-97

AGENCY DKT. NO. 593-12/96

DANIEL GREENE

Petitioner,

v.

STATE BOARD OF EXAMINERS, NEW JERSEY
STATE DEPARTMENT OF EDUCATION

Respondent.

Daniel Greene, *pro se*

Arlene Goldfus Lutz, Deputy Attorney General, for respondent
(Peter Verniero, Attorney General of New Jersey, attorney)

Record Closed: September 22, 1997 Decided: October 28, 1997

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner is challenging the determination of Respondent State Board of Examiners to deny his application for two teaching certificates based on the information they had before them which demonstrated that he had provided false information to the Board of Education of the City of New York in connection with a comparable application.

The matter was transmitted to the Office of Administrative Law (OAL) by the Department of Education on January 17, 1997. A hearing was scheduled for August 27, 1997; however, Respondent filed a motion for summary decision. A telephone conference was held with the parties by the undersigned during which Petitioner was given an opportunity to respond to the Respondent's application. Petitioner failed to file a response.

A review of the file discloses that the application was considered at the June 20, 1997, meeting of the State Board of Examiners, at which time the Board decided to block the issuance of a certificate to the Petitioner. By letter dated August 9, 1997, Petitioner was notified of the Board's determination and of his right of appeal pursuant to *N.J.S.A.* 18A:6-9 and *N.J.A.C.* 6:24-1 *et seq.* His appeal was filed on December 17, 1996.

The statute provides that the Commissioner has jurisdiction to hear and determine all controversies which arise under the school laws, with certain exceptions, not relevant here. *N.J.S.A.* 18A:6-9. The regulation provides that, in order to initiate a contested case for the Commissioner's determination, a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of an action which is the subject of the requested contested case hearing. *N.J.A.C.* 6:24-1.2.

In this case, the notice of the action which is the subject of the requested contested case hearing is dated August 9, 1996. The petition requesting a hearing on the issue was received in the Department of Education, Bureau of Controversies and Disputes on December 17, 1996, well beyond the 90 day limitation period stated in the regulation. It is, therefore, barred as being out of time.

ORDER

Accordingly, it is hereby **ORDERED** that this petition be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 28, 1997
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

Nov. 3, 1997
DATE

D. N. Catanzaro Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 5 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1343-97
AGENCY DKT. NO. 593-12/96

DANIEL GREENE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE BOARD OF EXAMINERS, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that the Petition of Appeal was filed out of time and that no relaxation or waiver of *N.J.A.C.* 6:24-1.2(c) is warranted in this instance.

Accordingly, for the reasons expressed therein, the Commissioner adopts the initial decision of the OAL that the instant Petition of Appeal be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 15, 1997
DATE OF MAILING DECEMBER 15, 1997

642-97

642-97

L.L., JR., AND S. L., on behalf of minor child, L.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, BERGEN COUNTY, *ET AL.*,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

DECEMBER 15, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO.: EDU 7301-97
AGENCY DKT. NO. 206-6/97

L.L. JR. and S.L. on behalf of Minor L.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS,

Respondent.

Mary Ann Stokes, Esq., for petitioner
(Cohn Lifland Pearlman Herrmann & Knopf, LLP, attorneys)

Sharon Handrock Moore, Esq., for respondent

Record Closed October 17, 1997 Decided: October 28, 1997

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

This matter was transmitted to the Office of Administrative Law (OAL) on July 21, 1997, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached six documents.

Having reviewed the contents of the attached six documents, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached six documents meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

10-28-97
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

Nov. 3, 1997
DATE

D. M. Cortanzaitis/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 5 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 7301-97
AGENCY DKT. NO. 206-6/97

L.L., JR., AND S. L., on behalf of minor child, L.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, BERGEN COUNTY, *ET AL.*,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Notwithstanding that this matter is categorized by the initial decision as a settlement reviewable by me, pursuant to *N.J.A.C.* 1:1-19.1, the record reveals that, for purposes of this forum, it is actually a Withdrawal, pursuant to *N.J.A.C.* 1:1-19.2, as a consequence of a settlement accepted in United States District Court for the District of New Jersey. Consequently, the matter is no longer deemed to be a contested case before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 15, 1997
DATE OF MAILING DECEMBER 15, 1997

643-97

643-97

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM MISSONELLIE,	:	
NEW JERSEY STATE DEPARTMENT	:	COMMISSIONER OF EDUCATION
OF HUMAN SERVICES.	:	DECISION
	:	

DECEMBER 16, 1997

PETER VERNIERO
Attorney General of New Jersey
Attorney for Department of Human Services
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Jennifer Meyer-Mahoney
Deputy Attorney General
(609) 777-3060

OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 11981-95n

WILLIAM MISSONELIE,)

Appellant)

)

v.)

)

JUVENILE JUSTICE COMMISSION

Respondent)

SETTLEMENT AGREEMENT

This matter having been scheduled for hearing before the Honorable Irene Jones, A.L.J. on October 23, 1997, and the parties having come to an amicable resolution of the matter. The parties hereby agree to settle this matter in accordance with the following terms:

1. The appellant will withdraw the appeal of the Final Notice of Disciplinary Action dated June 23, 1995 and the

Department agrees to modify the discipline contained therein from removal to a 6 day suspension. The remaining time to be designated approved leave of absence without pay.

2. Appellant will receive 3 months back pay as a result of this settlement.

3. The parties hereto stipulate that this agreement shall fully dispose of all issues between them with regard to this disciplinary matter.

4. The appellant shall not receive any back pay, counsel fees, costs, or any other monetary relief as a result of this settlement other than that specified in paragraph 2 above.

5. The personnel file for the appellant shall be amended to reflect the provisions of this settlement.

6. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

7. Both Parties agree to waive the right to file exceptions and cross exceptions.

8. This agreement will only become effective when it is approved by the Commissioner of the Department of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

9. Neither party admits liability in reaching this settlement.

Authorization has been given by the Juvenile Justice Commission to agree to this settlement, the parties have read this

settlement agreement and freely and voluntarily agree to its provisions.

Dated: 10-23-97

Appellant

Dated: 10-23-97

Appellant's Representative

Dated: 10-23-97

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY

By:
Jennifer Meyer-Mahoney
Deputy Attorney General

CERTIFICATION

I, William Missonelie, hereby certify that I have been represented in this matter by James Cooney, Esq., that my representative has reviewed the foregoing Settlement Agreement with me and that I fully understand the meaning and terms of this Agreement.

William Missonelie
Appellant

DATED: 10-23-97

OAL DKT. NO. EDU 11981-95N
AGENCY DKT. NO. 409-10/95

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM MISSONELLIE,	:	
NEW JERSEY STATE DEPARTMENT	:	COMMISSIONER OF EDUCATION
OF HUMAN SERVICES.	:	DECISION
	:	

The record of proceedings at the Office of Administrative Law (OAL) and joint stipulation of settlement rendered by the OAL have been reviewed.*

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

* It is noted that it was not the Commissioner of Education who consented to the settlement terms herein so as to render applicable the provisions of *N.J.A.C.* 1:1-19.1(d).

DECEMBER 16, 1997
DATE OF MAILING DECEMBER 16, 1997

644-97

644-97

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND TED KLAUBE,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

DECEMBER 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7886-96

AGENCY DKT. NO. 254-7/96

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND TED KLAUBE

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

Respondent.

Victor P. Mullica, Esq., for petitioners (Mullica & Mullica, attorneys)

Keith J. Roberts, Esq., for respondent (Giblin & Giblin, attorneys)

Record Closed: November 5, 1997 Decided: November 12, 1997

BEFORE **MARIE P. SIMONELLI,** ALJ:

On August 12, 1996, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15

and *N.J.S.A.* 52:14F-1 to -13. At a telephone prehearing conference held on January 27, 1997, hearing dates were scheduled on September 22, 23 and 24, 1997 at the OAL in Newark, New Jersey.

On September 19, 1997, the parties advised the undersigned that the matter had been resolved. On November 5, 1997, the parties submitted the attached Stipulation of Settlement indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov 12, 1997
DATE

MARIE P. SIMONELLI, ALJ

Receipt Acknowledged:

11/14/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADM. LAW
Nov 5 3 30 PM '97

MULLICA & MULLICA
800 Summit Avenue
P.O. Box 8095
Union City, New Jersey 07087
(201) 867-6594
Attorneys for Petitioners

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DOCKET NO. EDUOR 07886-96N
AGENCY REFERENCE NO. 254-7/96

NORTH BERGEN FEDERATION OF TEACHERS LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AN UNINCORPORATED LABOR ORGANIZATION AND TED KLAUBE, Petitioners, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, a Body Corporate and Politic, Respondent.	CIVIL ACTION STIPULATION OF SETTLEMENT

The Petitioners, North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO, an Unincorporated Labor Organization, and Ted Klaube, and the Respondent, Board of Education of the Township of North Bergen, a Body Corporate and Politic, have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between the Petitioners and Respondent.

3a

1. The Petitioners withdraw their duly Verified Petition filed on or about June 31, 1996 with the Commissioner of Education.

2. The Petitioner, Ted Klaube, further agrees to release and give up any and all claims and rights which he may have against the Board of Education of the Township of North Bergen, a Body Corporate and Politic, the Respondent, arising from its, via a resolution, abolishing five teaching positions in the Industrial Arts/Technology Department, which includes a position held by Ted Klaube, which resulted in his termination of employment effective June 30, 1995.

3. The Petitioner, Ted Klaube, will be paid forthwith a total of $4,932.50 representing four weeks pay on the 18th step for the school year 1995-1996 for releasing his claims and entering into this settlement. Petitioners shall not seek any further relief as evidenced by the aforementioned Verified Petition that he filed with the Commissioner of Education.

4. This agreement has been approved by the North Bergen Board of Education on .

5. This agreement will become effective when it is approved by the Offices of Administrative Law and the

Commissioner of Education. Any disapproval shall not interfere with the rights of the Petitioners or Respondent to pursue this matter further.

Dated:

For Petitioners
Mullica & Mullica, Esqs.

By: _____
Victor P. Mullica

Dated: 10/13/97

_____
Ted Klaube, Petitioner

Dated: 10/8/97

Attest:

_____
Jack Duffy, Secretary
Board of Education of
Township of North Bergen

For Respondent
Giblin & Giblin, Esqs.

By: _____
Keith Roberts

Dated:

Board of Education of Township of North Bergen

_____
President

Dated:

OAL DKT. NO. EDU 7886-96
AGENCY DKT. NO. 254-7/96

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND TED KLAUBE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

DECEMBER 17, 1997
DATE OF MAILING DECEMBER 17, 1997

645-97

645-97

WILMA RILEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 986-97

AGENCY DKT. NO. 601-12/96

WILMA RILEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

Respondent.

Barbara E. Riefberg, Esq., for the petitioner (Baron & Riefberg, attorneys)

Carol A. Cannerelli, Esq., for the respondent (Montgomery, McCracken, Walker and Rhoads, attorneys)

Record Closed: October 30, 1997 Decided: November 7, 1997

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

This matter concerns the assertion of the petitioner, Wilma Riley, that the respondent, the Board of Education of the Borough of Glassboro, Gloucester County, failed to pay her full salary without loss of sick time for an injury sustained in the course of her employment, pursuant to N.J.S.A. 18A:30-2.1. The petitioner requested a hearing and the matter was transmitted to the

Office of Administrative Law on February 26, 1997, for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A telephone prehearing conference was scheduled for September 22, 1997. Prior to the conference, the parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement, and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

November 7, 1997
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI ALJ

Receipt Acknowledged:

Nov. 12, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1997
DATE

Barbara A Hamel
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE

This Confidential Settlement Agreement and Release ("Release") is made this 30th day of September, 1997, by and between Wilma Riley ("Petitioner") and the Glassboro Board of Education ("Respondent" or "GBOE").

WHEREAS, Petitioner filed a Petition against GBOE in the Office of the Commissioner of Education of the State of New Jersey (Docket No. 601-12/96) which case was transferred to the Office of Administrative Law (Docket No. EDUCT 00986-97S), alleging entitlement to salary from October 10, 1996 through March 17, 1997 pursuant to *N.J.S.A.* 18A:30-2.1 (hereinafter "the Wage Litigation");

WHEREAS, Petitioner also filed a Complaint against GBOE in the Workers' Compensation Court (Docket No. C.P. 96-043308) seeking temporary total disability benefits and permanent partial disability benefits pursuant to *N.J.S.A.* 34:15-1, *et seq.* (hereinafter "the Workers' Compensation Action"); and

WHEREAS, the parties wish to avoid the burden and expense of continued litigation and wish to settle all of their respective obligations in accordance with the provisions of this Agreement, as more fully provided hereinafter;

NOW, THEREFORE, intending to be legally bound and in consideration of the mutual promises contained herein, it is hereby AGREED as follows:

1. **Settlement.** In consideration for Petitioner dismissing the Wage Litigation with prejudice and dismissing, with prejudice, that portion of her Workers' Compensation Action

which seeks temporary total disability benefits for the period of time from October 10, 1996 through March 17, 1997, GBOE agrees to pay the sum of $2,575.46 to the Petitioner in two separate payments as follows: $820.13 to be paid by GBOE and $1,755.33 to be paid by the workers' compensation provider.

2. Petitioner acknowledges that she has been fully compensated for all lost wages.

3. Petitioner acknowledges that, prior to making payment to plaintiff, GBOE will deduct from the $820.13, which is its responsibility to pay to Petitioner, any taxes or other withholdings owed by her. The payment of $1,755.33 being made by the Workers' Compensation Carrier is not subject to taxes.

4. The sufficiency of the aforementioned consideration is hereby acknowledged by Petitioner.

5. **Scope Of Agreement**. Petitioner agrees to release all of the claims against GBOE set forth in the Wage Litigation, and that portion of the Workers' Compensation Action seeking temporary total disability benefits for the period of time from October 10, 1996 through March 17, 1997, which Petitioner had, now has, or which her representatives, heirs, administrators, executors, or any of them hereafter can, shall, or may have for or by reason of any cause, matter, or thing whatsoever from the beginning of the world to the date of these presents.

6. It is understood and agreed that this Release does not affect the claims of Petitioner presently pending in the

Worker's Compensation Court concerning an award to Petitioner of permanent partial disability benefits only.

7. Petitioner and her counsel further agree to waive any claim they have or may have against GBOE for all fees arising out of the bringing, handling or settlement of this Wage Litigation and the Workers' Compensation Action.

8. **General Release.** In consideration of the aforementioned payment of $2,575.46, Petitioner, her agents, representatives, heirs, administrators, executors, successors, and assigns release and discharge GBOE, its successors, affiliates, related entities, benefit plans, officers, insurers, agents, employees and former employees, from all claims, liabilities, demands and causes of action, known or unknown, fixed or contingent, which Petitioner may have or claim to have against them arising out of the same series of events, occurrences, transactions or documents including, but not limited to, all claims setting forth, or which could have been set forth, in the Wage Litigation or Petitioner's claim for temporary total disability benefits in the Workers' Compensation Action.

9. **Nonadmission of Liability.** It is understood and agreed that this Release represents a compromise and settlement of a disputed claim and that the consideration paid is not to be construed as an admission of liability on the part of the parties hereby released and that GBOE does continue to deny liability and intends merely to avoid litigation and does buy its peace.

10. **Nonadmissibility of Agreement**. This Release is entered into based solely upon the unique facts and circumstances of this matter and the terms and conditions of this Release may not be construed as an admission of liability, or the establishment of a policy or practice of the GBOE, nor may this Settlement Agreement and Release or the terms herein be used by Petitioner or any other person or entity for any purpose whatsoever to establish a precedent, policy, or practice of GBOE.

11. **Dismissal of Actions**. After execution of this Release and payment by GBOE of $2,575.46, Petitioner agrees to promptly arrange to dismiss, with prejudice: (1) the Wage Litigation filed before the Commissioner of Education/Office of Administrative Law and (2) that portion of her Workers' Compensation Action which seeks temporary total disability benefits for the period of time from October 10, 1996 through March 17, 1997. The effective date of this Release shall be the date on which the Stipulation of Dismissal with prejudice has been filed in the Wage Litigation or the date on which the Order Approving Settlement has been entered dismissing that portion of the Workers' Compensation Action seeking payment of temporary total disability benefits for the period of time from October 10, 1996 through March 17, 1997, whichever is later.

The payment of $2,575.46 shall be held in escrow by Petitioner's attorney, Barbara E. Riefberg, Esquire, until such time that the Stipulation of Dismissal with prejudice has been

filed with the Commissioner of Education and the Order Approving Settlement has been entered dismissing that portion of the Workers' Compensation Action seeking temporary total disability benefits for the period October 10, 1996 through March 17, 1997.

12. **Confidentiality**. Plaintiff and GBOE each further agree, represent and warrant that neither they nor any of their respective agents, servants, affiliates, officers, employees or former employees, representatives, attorneys, assigns, insurers, representatives, heirs, administrators, executors, and/or successors shall publicize or disclose, directly or indirectly, to any third party or entity the terms and conditions (or negotiations relating to same) of the resolution of the Litigation that are part of the subject matter of this Release (a) except to the extent required by law, and/or (b) except as may be necessary to effect compliance with the terms hereof.

13. **Acknowledgment and Approval**. This Release shall be executed and delivered in the State of New Jersey and shall be governed by and construed in accordance with the laws of the State of New Jersey.

14. Petitioner agrees that she has had a reasonable time to deliberate concerning the terms of this Release and that she has consulted with her counsel concerning this Release.

15. The undersigned hereby declare that the terms of this Release have been completely read and fully understood and voluntarily accepted for the purpose of making a full and final

compromise, adjustment and settlement of any and all claims, disputed or otherwise, and for the purpose of precluding forever any further or additional claims arising out of the same series of events, occurrences, transactions and/or documents, with the exception of the Petitioner's claim presently pending before the Worker's Compensation Court regarding Petitioner's Permanent Disability award. The undersigned warrant that no promise, inducement or agreement not herein expressed has been made to them, that this Release contains the entire Agreement between the paries hereto, and that the terms of this Release are contractual and not a mere recital.

IN WITNESS WHEREOF, and intending to be legally bound, Wilma Riley, Petitioner and Nicholas A. Mitcho, Superintendent of Glassboro Public Schools, the authorized agent for GBOE, have executed this Release as of the day and year written below.

Wilma Riley

Sworn to and subscribed
before me this 30th day
of SEPTEMBER , 1997.

Lucille M. Baselice
Notary Public

LUCILLE M. BASELICE
A Notary Public of New Jersey
My Commission Expires August 2, 2000

GLASSBORO BOARD OF EDUCATION

By: Nicholas A. Mitcho

Nicholas A. Mitcho
Superintendent of
Glassboro Public Schools

Sworn to and subscribed
before me this 24th day
of September, 1997.

Ellen M. Lydon
Notary Public

ELLEN M. LYDON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Nov. 27, 2000

OAL DKT. NO. EDU 986-97
AGENCY DKT. NO. 601-12/96

WILMA RILEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

DECEMBER 17, 1997
DATE OF MAILING DECEMBER 17, 1997

646-97

646-97

ELMIDE MELEANCE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, Teacher of the Handicapped, alleged the Board violated her tenure rights when it did not renew her contract and it did not accord her the salary and benefits to which she was entitled under her contract from September 1992 to the present. In September 1997, by order granting partial summary decision, those portions of the petition seeking back pay and adjustment to leave time for September 1992 to November 1992 were dismissed as time barred by the 90-day limit in *N.J.A.C.* 6:24-1.2.

ALJ found that since petitioner did not become a naturalized citizen of the United States until January 8, 1997, she was not in compliance with the requirement in *N.J.S.A.* 18A:28-3 that no teaching staff member shall acquire tenure unless he or she is a citizen. Thus, petitioner did not have tenure in the position of teacher during the time frame referenced in the petition and the Board did not violate her tenure rights. The Board's motion for summary decision was granted; petition was dismissed.

Commissioner adopted findings and determination in initial decision as his own.

DECEMBER 17, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

OAL DKT. NO. EDU 11547-96
AGENCY DKT. NO. 474-10/96

ELMIDE MELEANCE,
Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

Roger A. McDonald, Esq., for petitioner

Jeffrey A. Bennett, Esq., and **Nicholas Celso, III**, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record closed: October 28,1997 Decided: November 7, 1997

BEFORE **RICHARD McGILL**, ALJ:

The Board of Education of the City of Orange (respondent) seeks by way of motion for summary decision a determination that Elmide Meleance (petitioner) did not have tenure in the position of teacher during the time frames referenced in her petition, which was filed in October 1996. As relief, respondent requests dismissal of the petition.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on October 8, 1996, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under *N.J.S.A.* 18A:6-9. Respondent filed an answer on November 12, 1996, and the matter was transmitted to the Office of Administrative Law on November 20, 1996, for determination as a contested case.

The issues were set forth in the prehearing order dated February 6, 1997, as follows: (1) whether petitioner has achieved tenure in the position of teacher, (2) whether respondent violated petitioner's tenure rights, (3) whether petitioner received the salary and benefits to which she was entitled under her contract for the period from September 1992 to the present, (4) whether the petition should be dismissed based upon any of the affirmative defenses set forth in respondent's answer, and (5) if petitioner's allegations have merit, whether the relief requested in the petition should be granted. The parties stipulated that the non-renewal of petitioner's contract is no longer an issue since a new contract was given to petitioner for the 1996-97 school year.

Respondent filed a motion for summary decision on June 2, 1997, contending that petitioner's salary and benefit claims are time barred by the ninety-day limit in *N.J.A.C.* 6:24-1.2, that the Commissioner of Education lacks subject matter jurisdiction over petitioner's claims, and that petitioner's claim is without merit because she was not hired as a regular teacher until December 1, 1992. Petitioner opposed the motion.

By Order Granting Partial Summary Decision dated September 12, 1997, respondent's motion to dismiss was granted with respect to those portions of the petition seeking back pay and adjustment to leave time for, or stemming from, the period from September through November 1992. The reason for the dismissal was that the petition was time barred by the ninety-day limit set forth in *N.J.A.C.* 6:24-1.2(c). The issues related to tenure were not resolved by that determination.

On September 29, 1997, respondent filed a second motion for summary decision. This motion seeks a determination that petitioner did not have tenure as a teacher and requests dismissal of the balance of the petition. Petitioner did not file a response to this motion.

MOTION FOR SUMMARY DECISION

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.*4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.* at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, this circumstance should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995).

Compliance with precise conditions set forth by statute is necessary to achieve tenure. *Picogna v. Board of Educ. of Tp. of Cherry Hill*, 143 *N.J.* 391, 400 (1996). Respondent maintains that during the time frame referenced in the petition, petitioner was not in compliance with a requirement in *N.J.S.A.* 18A:28-3, which states as follows: "No teaching staff member shall acquire tenure unless he is, or until he shall become, a citizen of the United States."

Respondent submitted a certificate of naturalization, which indicates that petitioner became a naturalized citizen of the United States on January 8, 1997. Petitioner presented no evidence to the contrary, and in fact, petitioner states in the petition that she holds a non-citizen certificate as a teacher of the handicapped. Thus, the materials presented by the parties establish that petitioner was not a citizen of the United States during the time frame referenced in the petition. Therefore, I **CONCLUDE** that petitioner did not have tenure in the position of teacher during the time frame referenced in the petition and that under the

circumstances, there could be no violation of tenure rights. It follows that the petition in this matter should be dismissed.

Accordingly, it is **ORDERED** that:

1. Respondent's motion for summary decision is granted.

2. The petition in this matter is dismissed.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 7, 1997
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

Nov. 12, 1997
DATE

D.M. Cantenacutis/sr
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 13 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 11547-96
AGENCY DKT. NO. 474-10/96

ELMIDE MELEANCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the portion of the within petition, filed in October 1996, which seeks back pay and leave time adjustment based on the period from September 1992 to November 1992 is time barred by *N.J.A.C.* 6:24-1.2(c), and was, therefore, appropriately dismissed by the ALJ's granting of Partial Summary Decision on September 12, 1997. Furthermore, in that it is undisputed that petitioner was not a United States citizen until January 8, 1997 and, consequently, had not satisfied the statutory requirements necessary to acquire tenure, pursuant to *N.J.S.A.* 18A:28-3, prior to that date, the Commissioner also agrees with the ALJ that there could have been no violation of her tenure rights during the time period covered by this petition.

Accordingly, the initial decision of the OAL is adopted for the reasons expressed therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 17, 1997
DATE OF MAILING DECEMBER 17, 1997

647-97

MARK D. BOYLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Tenured guidance counselor alleged the Board violated his tenure and seniority rights by assigning him to a teaching position while appointing another to a position which included counseling services.

ALJ concluded petitioner was not entitled to placement in the position of Coordinator during the 1996-97 school year, that he did not prove by a preponderance of credible evidence that he was entitled to placement in such position during the subsequent year, or to the subsequent *per diem* summer employment. ALJ dismissed petition.

Commissioner affirmed determination of ALJ and dismissed petition.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11549-96

AGENCY DKT. NO. 505-10/96

MARK D. BOYLE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,

Respondent.

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

Robert J. Merryman, Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: September 10, 1997 Decided: October 27, 1997

BEFORE **DIANA C. SUKOVICH**, ALJ:

PROCEDURAL HISTORY

On October 23, 1996, Mark D. Boyle (Boyle or petitioner) filed a petition with the State Department of Education (DOE), seeking relief from the Board of Education of the City of Bayonne (Board or respondent) in Hudson County (County). Respondent filed an answer on November 12, 1996. The DOE transmitted the matter to the Office of

Administrative Law on November 20, 1996 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A telephone conference was conducted on February 25, 1997. A hearing was scheduled for September 8, 1997. The Board subsequently filed a motion for summary decision. Petitioner filed a reply thereto; and respondent, a response thereto. The record was closed on September 10, 1997, the date of the last communications regarding the matter. The September 8, 1997 hearing was adjourned.

NATURE OF THE CASE

Petitioner is a tenured individual who has been employed by the Board for a number of years. He has held positions as both a teacher and guidance counselor. He was employed in the latter position during the 1995/96 school year. As a result of a reduction in force (RIF), petitioner was assigned to a position as an English teacher for the 1996/97 school year. During the latter school year, the position of Special Education Transition Coordinator (Coordinator) became vacant. Larry Steinman (Steinman), a tenured employee of respondent, was appointed to that position. Petitioner was reinstated to the position of guidance counselor for the 1997/98 school year.

In his petition, Boyle claims that he had tenure and seniority rights to the Coordinator position, over Steinman. The Board disputed petitioner's substantive arguments in its answer. In its motion for summary decision, respondent argued that petitioner's claim is moot because even if he prevails, relief cannot be granted to him. Boyle argues that the matter still constitutes a justiciable controversy because a remedy is available to him if he prevails. He argues, more specifically, that guidance counselors, in general, and he, specifically, have routinely been offered summer employment by the Board and that he would have been entitled to such, during the summer of 1997, if he had held the position of guidance counselor during the prior school year.

FINDINGS OF FACT

A motion for summary decision may be granted if the papers and any discovery demonstrate that no genuine issue exists regarding any material fact and that the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). Based upon a review of the pleadings and the motion papers, I **FIND** that the following facts are not in dispute.

Petitioner was initially employed by the Board as a teacher and gained tenure in that capacity. Petitioner was employed by respondent as a guidance counselor for the school years from 1985/86 through 1995/96 and gained tenure in that capacity.

As a result of a RIF, the guidance counselor position held by Boyle was eliminated for the 1996/97 school year, and petitioner was assigned to a position as an English teacher. He was employed as an English teacher for the entire 1996/97 school year. He received the same salary and benefits as he would have received if he were employed in the position of guidance counselor.

The position of Coordinator became vacant for the 1996/97 school year because of a promotion of the individual who had previously held the position. At a meeting held on July 30, 1996, the Board appointed Steinman to the position of Coordinator. The responsibilities of that position included providing counseling services for certain classified students. Steinman, a tenured employee of the Board, had less seniority as a guidance counselor than did Boyle. Pursuant to the applicable job description, the individual employed in the position of Coordinator was required to hold both guidance counselor and special education endorsements. Boyle did not have a special education endorsement.

By memorandum dated November 18, 1996 to respondent's superintendent, the Acting County Superintendent approved a Board request to utilize the Coordinator title

for the 1996/97 school year, with the required endorsement, as an unrecognized title. The memorandum advised that the individual employed in such title would accrue seniority upon the attainment of tenure under the "legal title" (Certification of Richard J. Malinowski, dated July 8, 1997, Ex. R-1). The pertinent endorsement set forth in the memorandum was that of teacher/special education. The referenced "Legal Title" was that of "Teacher." (*Ibid.*) Respondent's Director of Special Services/Director of Student Personnel Supervisors is the immediate supervisor of the individual holding the position of Coordinator.

Boyle was reinstated to the position of guidance counselor, effective September 1, 1997, pursuant to a resolution approved by the Board on May 28, 1997.

The Board has given a number of its employees opportunities to perform *per diem* work during summer periods. By memorandum dated January 24, 1997 to the Board Superintendent, as well as other individuals, respondent's Director of Student Personnel Services requested that counselors be asked to work "at the applicable *per diem* rate during the summer of 1997." The specified tasks pertained to adjustments of students' schedules for the 1997/98 school year and computation of class rankings, in order to avoid "unnecessary difficulty and confusion," and to ensure a "smooth, efficient, and productive start to the school year for all students" by not having the "clerical counseling work" performed in September 1997 (Petitioner's certification, dated July 16, 1997, Ex. A).

Steinman was employed on a *per diem* basis at Bayonne High School during the summer of 1997, in the area of special education. More specifically, he worked on the preparation of a Special Education Master Schedule. Steinman was chosen to perform such work based upon his qualifications as evidenced by the fact that he held both a supervisor certificate and certification as a special education teacher. The duties performed by Steinman during the summer of 1997 were previously performed by the Board's former supervisor of special education.

For the 1985/86 through 1995/96 school years, when offered, *per diem* summer work was offered to all guidance counselors. Petitioner was employed performing *per diem* guidance duties during the pertinent summers during those years, except for one or two years when no guidance counselors were offered summer employment.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9 (Supp. 1997).

A "[T]eaching staff member" is a staff member who holds an office, position, or employment requiring that he/she hold a valid certificate. *Id.* at §1-1. The services of teaching staff members serving in any school district of any board of education shall be under tenure, and such individual shall not be dismissed nor reduced in compensation, except for inefficiency, incapacity, unbecoming conduct or other just cause. *Id.* at § 28-5. However, a local board of education can reduce the number of teaching staff members whenever, in the board's judgment, it is advisable to abolish such positions for reasons of economy; any such RIF shall be made on the basis of seniority. *Id.* at § 10.

Boyle does not argue that the RIF which resulted in the abolishment of the guidance position which he then held was implemented in a manner contrary to his seniority rights. As discussed hereinabove, petitioner asserts that he was entitled to be appointed to the Coordinator position which subsequently became vacant and, that if he were appointed to such position, he would have been entitled to subsequent *per diem* summer employment.

The threshold issue raised in the motion papers is whether Boyle's claims are moot. A controversy is justiciable in cases where "the litigants' concern with the subject

matter evidence(s) a sufficient stake and real adverseness. " *In re Boardwalk Regency Corp. Casino License,* 90 *N.J.* 361, 368 (1982) (*Boardwalk Regency*).

A tenured individual has the ultimate burden, when contesting an action by a board of education, of demonstrating that his/her seniority rights were violated and he/she suffered harm so as to entitle him/her to redress. *James Parker and Joseph Pelligrino v. Bd. of Ed. of the Matawan-Aberdeen Regional School Dist.,* 1990 *S.L.D.* 1778. A prevailing individual contesting local board action is entitled to appointment to an available position, back pay and other economic emoluments of employment, including appropriate pension fund adjustments. *Mueller v. Hunterdon Central Regional H.S. Dist. Bd. of Ed.,* 93 *N.J.A.R. 2d.* (Vol. 4A) 419 (Dep't of Ed.).

Petitioner had, as respondent argues, no tenure, seniority rights or entitlement pertinent to summer employment. A local board has discretion in hiring summer school teachers. "[S]ummer school employment in New Jersey is considered temporary, part-time employment and as such is not within the intendment of the protections afforded by *N.J.S.A.* 18A:28-5, 18A:28-6, 18A:28-13 or *N.J.A.C.* 6:3-1.10, *Doran v. E. Brunswick Bd. of Ed.,* 92 *N.J.A.R. 2d.* (EDU) 389, 390, (citations omitted).

Boyle therefore did not have entitlement to summer employment even if he had remained in the position of guidance counselor. In light of that fact, and the fact that his salary and, inferentially, other emoluments of employment, did not change when he was assigned to the position of English teacher, he has not demonstrated that he is entitled to monetary and related relief if he were to prevail on the substantive issues. In addition, in light of the fact that seniority pertinent to the Coordinator title was in the title of teacher, petitioner has also not demonstrated that he lost any seniority.

The relief which petitioner initially requested included an order that respondent "... assign to the petitioner any counseling responsibilities assigned less senior employees ..." (Petition, p. 2). It is not clear from the motion papers whether there are any positions in the title of Coordinator for the current school year, nor whether

petitioner seeks placement in such a position. To the extent that petitioner may seek such relief, the current matter is not moot. *See, Boardwalk Regency, supra.* For reasons of administrative efficiency, I am persuaded that this issue should be addressed in the current matter. *See, N.J.A.C.* 1:1-1.3(a).

A teaching staff member cannot acquire tenure in any position if he/she does not hold the appropriate certificate for such position. *N.J.S.A.* 18A:28-4. Applicable regulations provide for three types of regular certificates: instructional, administrative, and educational services. *N.J.A.C.* 6:11-2.3. *Ellicott v. Bd. of Educ.*, 251 *N.J. Super.* 342 (App. Div. 1991) (*Ellicott*). Teaching staff members holding educational services and/or instructional certificates are authorized and qualified to serve in assignments and positions for which they hold the requisite endorsements. A teaching staff member asserting a tenure right under a certification must still qualify for a particular position by obtaining the pertinent endorsement. *Ellicott, supra.*

Boyle did not have a right to the Coordinator position at the time in question, in relation to Steinman, and petitioner has not demonstrated that he has a right to any Coordinator position with the Board currently in existence, because he does not have the required endorsement. I am therefore persuaded that Boyle's petition should be dismissed, with prejudice.

CONCLUSIONS

I **CONCLUDE** that petitioner was not entitled to placement in the position of Coordinator during the 1996/97 school year, that he has not proven, by a preponderance of the credible evidence, that he was entitled to placement in such position during the subsequent school year, and that he is not entitled to relief.

ORDER

It is hereby **ORDERED** that the petition filed by Mark D. Boyle with the Department of Education on October 23, 1996 be and is hereby **DISMISSED WITH PREJUDICE**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER**

OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 27, 1997
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 13 1997
DATE

Barbara A Kerner
OFFICE OF ADMINISTRATIVE LAW

njf/md

OAL DKT. NO. EDU 11549-96
AGENCY DKT. NO. 505-10/96

MARK D. BOYLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto, as well as the Board's cross-exceptions, were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner excepts to the Administrative Law Judge's (ALJ) dismissal of the instant matter where there remains, as he contends, a justiciable issue which the ALJ decided without the benefit of argument. Petitioner clarifies that he did *not* seek the position of Special Education Transition Coordinator, as stated in the initial decision, but rather sought appointment to any guidance counseling responsibilities that had been assigned to Steinman, the holder of the Coordinator's position, whom petitioner argues has less seniority. Petitioner further contends that

> ***there was still a justiciable issue because if he was entitled to the counseling responsibilities performed by the Coordinator, he was also entitled to the counseling assignment performed by Steinman during the 1997 summer. Therefore, the matter was not moot because there was a monetary remedy available to him. (Petitioner's Exceptions at p. 3)

In that the only issue raised and briefed by the parties before the OAL was the issue of mootness, petitioner objects to the ALJ's concluding that he was not entitled to the *per diem* summer counseling assignment, without benefit of any argument on that point.

In reply, the Board maintains that petitioner was not entitled to perform the summer work in question, since it is undisputed that Steinman worked in the area of special education and, further, that petitioner had no tenure right, seniority right or other entitlement to said summer employment. (Board's Reply at p. 2) Moreover, the Board asserts that, since petitioner holds no special education endorsement, he did not have any right to the position of Special Education Transition Coordinator. Finally, the Board warrants, as argued before the ALJ, that the current matter is moot, in that petitioner "has failed to establish or even allege any harm that he suffered as a result of a claimed violation of his tenure or seniority rights." (*Id.* at p. 4)

Upon careful and independent review of the record in this matter, the Commissioner initially observes that the specific relief requested by petitioner was not, as noted by Board and the ALJ, appointment to the position of Special Education Transition Coordinator, but rather, *inter alia*, assignment to petitioner of "***any counseling responsibilities assigned to less senior employees," (Petition of Appeal at p. 2) and further recognizes that petitioner specifically disputes the ALJ's finding that "***Steinman was employed on a *per diem* basis at Bayonne High School during the summer of 1997, *in the area of special education*," (Petitioner's Exceptions at p. 2, citing to initial decision at p. 4, emphasis added). However, even granting petitioner's contentions, the Commissioner must still find that the ALJ properly decided this matter notwithstanding that briefing had occurred only on the issue of mootness.

As correctly noted by the ALJ, petitioner suffered no loss of salary or emolument, and it is well established that there is no legal entitlement to summer employment as a matter of tenure and seniority right, notwithstanding that a district's past practice may generally have been to offer such employment to persons in certain types of positions. Under these circumstances, the Commissioner cannot find that there would be any useful purpose served in continuing proceedings in this matter, particularly where petitioner, in arguments on exception, brings forward no authority to counter the ALJ's discussion, so as to suggest to the Commissioner that petitioner's right to hearing was compromised by the ALJ's having brought this matter to closure without benefit of additional proceedings.

Accordingly, the initial decision of the Office of Administrative Law, dismissing the petition of appeal, is affirmed for the reasons expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 15, 1997
DATE OF MAILING DECEMBER 15, 1997

648-97

C #648-97L
SB #102-97

IN THE MATTER OF THE DISTRIBUTION :

OF ASSETS AND LIABILITIES UPON :

DISSOLUTION OF THE UNION COUNTY : STATE BOARD OF EDUCATION

REGIONAL HIGH SCHOOL DISTRICT : DECISION

NO. 1, UNION COUNTY. :

Decided by the Commissioner of Education, December 18, 1997

For the Petitioner-Appellant Kenilworth Board of Education, James P. Granello, Esq.

For the Petitioner-Appellant Kenilworth Borough, Thomas A. Vitale, Esq.

For the Respondent-Respondent Board of Education of Berkeley Heights, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Springfield, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Respondents-Respondents Garwood Borough and Board of Education of Garwood, DeCotiis, Fitzpatrick & Gluck (Agnes I. Rymer, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Clark, Kenny, Gross & McDonough (Douglas J. Kovats, Esq., of Counsel)

For the Respondent-Respondent Dr. Francis Lobman, Union County Superintendent of Schools, Michelle L. Miller, Deputy Attorney General (Peter Verniero, Attorney General of New Jersey)

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

April 1, 1998

Date of mailing APR 03 1998

648-97

C # 648-97L
SB # 102-97
APP. DIV. #A-4553-97T5

IN THE MATTER OF THE DISTRIBUTION :
OF ASSETS AND LIABILITIES UPON :
DISSOLUTION OF THE UNION COUNTY : STATE BOARD OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT : DECISION ON REMAND
NO. 1, UNION COUNTY. :

Decided by the Commissioner of Education, December 18, 1997

Decided by the State Board of Education, April 1, 1998

Remanded by the Appellate Division, April 15, 1999

For the Petitioner-Appellant Kenilworth Board of Education, James P. Granello, Esq.

For the Petitioner-Appellant Kenilworth Borough, Thomas A. Vitale, Esq.

For the Respondent-Respondent Board of Education of Berkeley Heights, McCarter & English (Steven B. Hoskins, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Springfield, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Respondents-Respondents Garwood Borough and Board of Education of Garwood, DeCotiis, Fitzpatrick & Gluck (J.S. Lee Cohen, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Clark, Kenny, Gross & McDonough (Douglas J. Kovats, Esq., of Counsel)

July 7, 1999

For the Respondent-Respondent Dr. Francis Lobman, Union County Superintendent of Schools, Michelle L. Miller, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

Pursuant to a decision by the Appellate Division on April 15, 1999 remanding a portion of the Kenilworth Board's claim for further proceedings, we remand this matter to the Commissioner of Education for such proceedings as may be necessary to fulfill the terms of the Court's directive. We do not retain jurisdiction.

July 7, 1999

Date of mailing _____

649-97

649-97

IN THE MATTER OF THE TENURE	:	
HEARING OF JAYSON H. BURG,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

SYNOPSIS

District certified tenure charges against respondent education media specialist for corporal punishment, insubordination and other acts constituting unbecoming conduct.

In light of the record and testimony of witnesses, the ALJ found that there was no adequate basis to conclude that respondent should be terminated. ALJ, however, did find that due to respondent's inappropriate and insensitive comments his behavior warranted a penalty of two months' suspension without pay.

Commissioner affirmed in part, reversed in part the ALJ's decision. While the Commissioner generally concurred with the ALJ's findings and conclusions, he determined that Charge one "a," asserting that respondent twice used a racially derogatory epithet, should be sustained with modification, rather than rejected as determined by the ALJ. Commissioner found more than sufficient corroboration among witnesses to sustain finding that respondent used a racial slur on the day in question. Thus, the Commissioner modified the penalty to include in addition to the two months' suspension without pay, the loss of the 120 days' salary withheld following certification of the within tenure charges.

DECEMBER 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 3291-97

JAYSON H. BURG,

Appellant,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Eugene G. Liss, Esq., appeared for petitioner

Gregory G. Johnson, Esq., appeared for respondent

Record Closed: September 22, 1997 Decided: October 30, 1997

BEFORE: **JEFFREY A. GERSON**, ALJ

On or about February 11, 1997, the Newark Public Schools certified tenure charges against Jayson H. Burg. a tenured educational media specialist who is mainly responsible for the school library. The tenure charges were received by the Division of Controversies and Disputes on February 14, 1997 and forwarded to the Office of Administrative Law on March 11, 1997.

After the initial scheduling of the matter was adjourned the hearings were finally conducted on May 13, 15, and July 31, 1997. The record closed on September 22, 1997 after submission of briefs from both sides.

STATEMENT OF CHARGES

Four charges were filed against Jayson Burg:

Charge One - conduct unbecoming

On or about November 18, 1996, the respondent was assigned to the Hawkins Street School as an educational media specialist.

On or about November 19, 1996, while assigned to teach students in Room 308, the respondent engaged in the following inappropriate disrespectful and unprofessional conduct constituting conduct unbecoming a teacher:

a. twice respondent used a racial derogatory slur, "nigger", referring to pupil C.F., and/or other pupil;

b. the respondent called pupils "fools" and "jerks" in a disrespectful and demeaning manner;

c. respondent made insensitive remarks to pupils regarding homelessness and the prospects of living on the street;

d. respondent maintained his dress in an inappropriate manner, exposing his underwear (boxer shorts). The respondent stated he wore his pants like "Boys In The Hood";

e. on November 18, 1996, respondent failed to report the above incidents to the building principal or vice-principal, in an attempt to conceal his actions. The respondent's conduct constitutes conduct unbecoming.

Charge Two - Corporal Punishment

On or about November 19, 1996, respondent committed acts of corporal punishment with the intent to discipline, harm, injure, punish, intimidate or otherwise embarrass the pupils under his charge:

a. Respondent grabbed pupil A.R. and ordered her to stand in class facing a bulletin board, as punishment for talking in class. The respondent had A.R. stand in class for more than 10 minutes.

b. The respondent slammed his bag on pupil T.H.'s desk, hitting her arm with the intent of hurting her, in retaliation and as a disciplinary measure. The respondent's conduct constitutes corporal punishment.

c. The respondent, in a fit of rage, recklessly threw a chair and/or desk at pupil A.R. narrowly missing her person.

Charge Three - Conduct Unbecoming A Staff Member

On or about September 30, 1996, the respondent, while assigned to the Eighteenth Avenue School, committed the following inappropriate acts:

a. Requested the home telephone number of Valerie Conaway, parent, without cause and then offered his home telephone number;

b. Respondent, while reprimanding a pupil for touching his tape recorder stated do not touch the tape recorder because the pupil's "mother could not pay for it."

Charge Four - Conduct Unbecoming A Staff Member

On or about September 15, 1995, the respondent, while assigned to the Harriet Tubman School, deliberately removed a mail package addressed to the principal, from the main office and opened it, without authorization or approval. The respondent's conduct violated school policy and the law.

Charge Four was dismissed at the end of the School District's case based on the fact that on September 15, 1995, a memo to Mr. Burg from Delores Ollie, Principal of Harriet Tubman School, clearly and unquestionably characterized his conduct with respect to an incident which took place on September 14, 1995 as unacceptable and that the memo itself was a reprimand which contained a warning that any future incident would result in disciplinary hearing.

Since the memo is titled "Reprimand for Unethical Conduct" there is no doubt that though this incident could be taken into account for purposes of determining penalty, it could not rise once again to a current tenure charge since a teacher cannot twice be penalized for the same conduct.

The remaining charges will be discussed individually. The inappropriate conduct alleged in Charge One, paragraph a, b, c and d all arose at the time of Mr. Burg's first contact

with a fourth grade class at Hawkins Street School. At 9:45 a.m., he was scheduled to teach a class to Ms. Ponsoda's students. Ms. Ponsoda was absent that day and Ms. Pugh was her substitute.

Mr. Burg's conduct in the fourth grade class between 9:45 and 10:35 a.m. gave rise to Charges One and Two certified to the Commissioner of Education.

The charge that Mr. Burg used the racially derogatory slur "nigger" twice is the charge of paramount concern. Several of the students in the fourth grade class alleged that Mr. Burg used the derogatory slur. None of the children alleged that he used it twice as indicated in the certified charges but, surely that is not of major consequence since once would be enough.

The testimony of 9, 10, and 11 year olds must be closely scrutinized. Children of tender years can have their judgment influenced by many more factors than might influence the testimony of an adult witness. Peer pressure, fear, desire for acceptance, and the desire to satisfy an adult's wishes could all adversely affect a youngster's testimony.

Eleven of the approximately eighteen students in the fourth grade class that day testified at the hearing.

J.B., a ten year old, testified that Mr. Burg used the word "nigger". J.B. was then questioned as follows:

Question: When Mr. Burg used the "N" word, what was happening?
Answer: Everybody said we are not "N" word.

Question: Why did he used that? What had been said to him before he said that?
Answer: I don't remember.

Question: And he said it to C.H.?
Answer: I guess so.

Question: You don't remember?
Answer: I don't remember.

Question: Did he use it once? Twice? Three times?
Answer: I think it was once.

Interestingly enough, J.B. in her written statement, said that Mr. Burg used the "F" word. It is obvious from her statement that careted in front of the "F" word is the word "almost" which according to J.B. was put in there by Ms. Pugh. Ms. Pugh denied careting in the word "almost."

E.R. also testified that Mr. Burg used the word "nigger." In response to the question of when Mr. Burg used the "N" word during the class, E.R. said: "in the middle." E. R. then answered the following questions:

Question: Did he use it in a sentence?
Answer: No.

Question: He just said the word?
Answer: Yes.

Question: And did he say it to somebody specific?
Answer: No. He stand right in front of the class.

Question: And just said that word?
Answer: Yes.

A.A. also testified that Mr. Burg used the "N" word. The following is A.A.'s testimony with respect to that issue:

Question: Now did he say the "N" word in class?
Answer Yes.

Question: All right. And would you tell us what you mean by "N" word?
Answer: I forgot.

Question: Okay, you don't remember? Okay, now do you remember where you were sitting at in class?
Answer: I think in the middle row.

Question: Okay. All right. And do you know where Mr. Burg was standing when he said the "N" word?
Answer: I think, in the front of the class.

Question: And after he said the "N" word do you know what your reaction was?
Answer: No.

Question: Okay, after he said the "N" word do you know what happened?
Answer: No.

Question: Okay. Do you know why Mr. Burg said the "N" word in class?
Answer: "Inaudible."

In another series of questions, A.A. responded as follows:

Question: Did Mr. Burg use the "N" word in a sentence?
Answer: Yes.

Question: Do you remember what the sentence was?
Answer: No.

Question: Do you know what it was about?
Answer: No.

Question: When he said the "N" word, did he say it to somebody specifically?
Answer: No.

Question: He just stood in front of the class and said the "N" word?
Answer: Yes.

Question: Did he say something before it?
Answer: I don't know.

Question: Did he say something after it?
Answer: Yes.

Question: What did he say after it?
Answer: That we were going to be living in the street when we grow up.

D.R.'s testimony on this issue was as follows:

Question: Would you tell me again what happened when Mr. Burg used the word "nigger."

Answer: When he was talking, he was like whoever didn't raise their hand is going to be on the street, and that's when C.H. is like, how you going to say that? and then he's like quiet you be quiet, you "black nigger" and then we got - - we're going to tell the principal on you. He's like go ahead, I ain't scared of the principal.

M.R. wrote in his statement that Mr. Burg called the class the "N" word. The following is his court testimony:

Question: And then there is another word, the "N" word. What's that word, can you just say it for the court?
Answer: Nigger.

Question: Now did he say that in class?
Answer: Yes.

Question: And when he used that word where were you?
Answer: I was in the - - he called me - - called me and C.H. "niggers."

Question: M.R. went on to testify that:
Now, the questions - - you responded that Mr. - - you said here that Mr. Burg referred to your mother as a "whore"?

Answer: Yes.

Question: And did he refer to any of the other children's parents in the school by that name?
Answer: Well, maybe two.

Question: And., did someone tell you what to write in your letter?
Answer: No.

Question: This is what you wanted to write? Was there some reason you didn't write anything about him calling your mother a "whore."?
Answer: No.

E.P. also testified that Mr. Burg used the "N" word and responded to questions as follows:

Question: Did he say anything else when he said the "N" word?
Answer: No.

Question: You don't remember?
Answer: No.

Question: Do you know why he used the "N" word in class?
Answer: No.

Question: Did you hear him say the "N" word?
Answer: Yes.

Question: Who did he say it to?
Answer: I don't know, he was just saying it in the back, someone in the back.

Question: So, he was talking to one person when he said that?
Answer: Maybe two, I don't know - - someone from the back.

Two of the children who testified, C.H. and T.H., said nothing about Mr. Burg having called the class or anyone in the class the "N" word. Of note, however, is that it was C.H. who several of the children identified as the target of Mr. Burg's alleged slur. But, C.H. said nothing about it.

A thorough reading of the testimony of all the students who appeared at the hearing disclosed discrepancies in their testimony that cannot be dismissed as normal for children of this age. There were inconsistencies with respect to whether or not Ms. Pugh was in the class at the time Mr. Burg used the derogatory slur, there were discrepancies with respect to how many of the students actually prepared written statements and there were discrepancies as to when those statements were actually prepared.

What did come across from the testimony of the children was that the class was in a serious state of disruption during the time Mr. Burg was present. I have little doubt that several members of the class were more than moderately disruptive and others were simply uncooperative. Though the class size that day was approximately 18 students only seven written statements were submitted. The absence of the other statements is cause for concern in that it may very well have been that the remaining students made no reference to Mr. Burg's alleged use of the derogatory slur.

It is the petitioner's obligation to prove the charges against Mr. Burg by a preponderance of the competent and credible evidence. *School District of Paterson v. Eddie Lee Harrell, 186 S.L.D. 356, 358. In re Phillips, 117 N.J. 567, 575 (1990).* I cannot conclude by a preponderance of the credible evidence that Mr. Burg uttered the derogatory slur of which he is accused. A further review of the testimony offered cast great doubt on the accuracy not only on the remaining four charges, but also this one.

Paragraph (b) of Charge One which alleges that Mr. Burg called the students "fools" and "jerks" in a disrespectful and demeaning manner appears to be an inability on the part of the students to understand Mr. Burg's intended lesson. Both paragraphs (b) and (c) make reference to a lesson plan and poem that Mr. Burg intended to use as a lesson in anticipation

of the coming Thanksgiving holiday. The "fools" and "jerks" comments was part and parcel of a short poem that Mr. Burg apparently thought would be a good object lesson for the students. The poem went as follows:

"You think you're smart,
You think you're cool.
But, when you fail in school,
who is truly the fool."

During the excitement of an undisciplined, uncooperative, rowdy class, it is easy to understand how this particular poem, whether it be deemed appropriate or inappropriate, could be misinterpreted by the students to be aimed at them in a derogatory manner. The same is true of Mr. Burg's proposed lesson plan on Thanksgiving which in part referred to homelessness. Once again, I cannot comment on the appropriateness of the lesson plan though apparently Mr. Burg had used it on several occasions, quite successfully, I can only say that the general rowdiness of the class could very well have resulted in certain highly sensitive words being unduly highlighted by the inability of Mr. Burg to place them in an appropriate context due to what sounds like overwhelming disciplinary difficulty. Taking highly sensitive individual words out of the context in which they were delivered could very well end up with an allegation that the use of those words were disrespectful and insensitive. Having Mr. Burg's lesson plan at hand, in addition to the testimony of several of the students, one who specifically recalled the poem though not verbatim, but quite close in concept, leads to the conclusion that it was not disrespectful or insensitive remarks that Mr. Burg made that caused the problem but rather the absence by the pupils of any recognizable contexts in which to analyze the lesson.

Paragraph D of Charge One alleges that Mr. Burg maintained his dress in an inappropriate manner exposing his underwear and that he stated that he wore his pants low down on his waist because that was the way "The Boys In The Hood" wore them. From the testimony of the students and that of Ms. Pugh, I am convinced that when Mr. Burg entered

the fourth grade class where Ms. Pugh was the substitute, his clothes were disheveled with his shirttail hanging out of his pants and his pants were hanging loosely below his waist. When one of the children inquired of Mr. Burg why he had his pants in such a manner, he jokingly responded that, "that's the way The Boys In The Hood are wearing them." Though these may not be the exact words, they are close enough for me to determine that the statement was either an attempt at humor by Mr. Burg or possibly an attempt to ingratiate himself to the class.

Ms. Pugh's testimony on this count is critical because she was present when the incident occurred. The following is her testimony:

Question: Do you recall any students - - students making comments or remarks to Mr. Burg at that time?
Answer: Yes I do.

Question: And will you tell the Judge what happened?
Answer One of the students asked why his pants were hanging down.

Question: Okay, and what was the name of the student?
Answer: A.R.

Question: Okay. And, do you recall what Mr. Burg's response was?
Answer: He said that he was dressing like "The Boys In The Hood", that's the way they dress.

Question: Did you see him walk in?
Answer: Yes I did.

Question: What did he look like?
Answer: He had a sweater thrown over his shoulders, shirt and he had on khaki pants.

Question: Stand up sir. What's the difference between the way he was dressed on November 19 and the way he is dressed today?
Answer: His pants were hanging down.

Question: On November 19?
Answer: Yes.

Question: How far down?
Answer: They were down to the point where - - I did not notice it until the student asked him why his pants hanging down - - and I look and I saw his pants were hanging down. They were hanging down below - - they weren't where they're now. They weren't - - it wasn't neatly - - his belt wasn't up on his waist. They were hanging low. And when she said that, I looked and I noticed that his pants - - he was like out of sort when he walked in.

Question: His shirt out of his pants? Shirt tail?
Answer: I believe that it was. I'm not very sure because of the fact that it's been so long. But I do know that when I did look at him I felt - - looked at him, I felt that he was inappropriately dressed. I - - he wasn't neatly dressed, as a - - I felt a professional should be dressed.

Later on in the testimony, Ms. Pugh is asked:

Question: Now when Mr. Burg made the statement that he was dressing like "Boys In The Hood", do you recall the reaction of the class?
Answer: "The Boys In The Hood". I think that they felt like it was funny. I didn't feel like it was funny.

This testimony is illuminating. There is no testimony from Ms. Pugh that Mr. Burg's underwear was showing. She does confirm that when he entered the class his dress was a bit disheveled, but it seemed that she was more offended by his "Hood" comment than she was by his dress. If, in fact, the class thought his comment was funny at the time he made it - - it strikes me as a bit strange that when it came time to write their statements this comment became one of several focus complaints. From the testimony of the children there is little doubt that Mr. Burg's pants were hanging lower than they should have been and that his shirt was out of his pants, but it is highly unlikely and, in fact, specifically refuted by several of the students and Ms. Pugh that his underwear were showing. It can quite convincingly be argued that the comment of Mr. Burg about "The Boys In The Hood" was inappropriate but did not become so until Ms. Pugh inferred that it was.

Complicating this matter even more and consequently touching on the general credibility of all those involved is the fact that the point at which the statements were written remains a mystery. Despite the insistence by several of the adult witnesses that the statements were written prior to the lunch period, one of the statements clearly makes reference to what occurred at lunch, throwing the theory that the statements were written prior to lunch into jeopardy. Further difficulty is confronted when an observation of one of the statements clearly shows a correction, undoubtedly made by an adult, that being the insertion

of the word "almost" prior to the reference to the "F" word. But all adult witnesses who testified at the hearing denied making any corrections to the students' statements. In fact, though one of the students indicated that it was Ms. Pugh who made the correction, she specifically denies even reading the statements before turning them over to the principal's office.

Mr. Burg confirmed that the disciplinary difficulties that he had in the classroom that day were rather pronounced. He did, in fact, request that several students appear for detention, a request he made of Ms. Pugh after the class which she confirmed. It was the very existence of these pending detentions that Mr. Burg inferred led to the students complaining to the principal's office and to Ms. Pugh. This version of events is to some extent corroborated by Ms. Worthington's incident report dated November 20, 1996, and marked P-1 for identification, which indicates "that at approximately 12:30 p.m. on Tuesday, November 19, 1996, C.F., fourth grade student, was sent to the main office by Ms. Pugh, substitute teacher." In reviewing the student's testimony and the testimony of Ms. Pugh, a factfinder could conclude that somewhere between 10:30 and 12:30 C.F. went to the principal's office. This would not be significant under normal circumstances except for the fact that it is Mr. Burg's contention that the allegations pending against him with respect to what occurred in the classroom during that second period were concocted by the students to avoid further punishment. If, in fact, Ms. Worthington's incident report is accurate, that means C.F. was with Ms. Pugh and his classmates for approximately two hours prior to appearing at the principal's office. If the students' statements were written shortly after the conclusion of the class at 10:30, how is it possible that one of the statements clearly made reference to the lunch period when several students attempted to avoid the detention which had been levied by Mr. Burg?

What can be concluded from a review of all the testimony is that Mr. Burg's first day with Ms. Ponsoda's class was extraordinarily unsuccessful. I know not what mystical imaginations overcome students when they are confronted with substitutes but the

circumstances here were clearly intensified by the students having to deal with what they thought was two substitutes. Since this was not the first class that Mr. Burg had taught on November 19, 1996, it was surprising that there was no witnesses produced from his first class, which ended only five minutes before he entered Ms. Ponsoda's classroom. Surely if his dress was as dishelved in that class as it apparently was in Ms. Ponsoda's class, a witness could have been produced to confirm so. According to Mr. Burg, his lesson plan, the same one he intended to use in Ms. Ponsoda's class, was quite successful in period one. Since this was not brought into dispute, it is hard to see how it can be argued that the content of the lesson was inappropriate.

CORPORAL PUNISHMENT

There are three allegations in the second charge of corporal punishment alleged in the complaint. The first is that Mr. Burg grabbed A.R. and ordered her to stand in class facing a bulletin board as punishment. A.R. supposedly stood in class for more than ten minutes. There is little, if anything, in the record to substantiate this charge. Though there was some testimony that A.R. was asked to stand because of what amounted to incessant talking there was no corroboration of A.R.'s testimony that she stood in class for approximately ten minutes. According to several of the other students, A.R.'s conduct was unacceptable and though she may have been standing in class, surely for a period shorter than ten minutes as alleged, she was standing with Mr. Burg who at the time he was disciplining her.

The second charge that Mr. Burg slammed his bag on pupil T.H.'s desk hitting her arm with the intent of hurting her in retaliation and as a disciplinary measure is completely unsupported and a gross exaggeration of the factual circumstances presented by the witnesses. There was absolutely no testimony that Mr. Burg intended to hurt T.H., nor was there any testimony that he slammed his bag on her desk. What apparently happened was that he placed a bag on her desk as he was leaving but had forgotten some other item which

he went to retrieve. The bag either tipped over or the top folded over touching T.H.'s arm. The allegations with respect to this charge are so grossly exaggerated that one has to question the school district's motivation for including it as one of the tenure charges. The same is true for paragraph c. which alleges that Mr. Burg in a fit of rage recklessly threw a chair and/or desk at pupil A.R. narrowly missing her person. There was absolutely no testimony to substantiate this most serious allegation. Once again, its inclusion as one of the tenure charges makes one wonder how much puffery was incorporated into the other charges.

All of the allegations under Charge 2, Corporal Punishment, are **dismissed** as baseless.

CONDUCT UNBECOMING A STAFF MEMBER

Paragraph A under this charge alleging Mr. Burg requested the home telephone number of Valerie Conaway and then offered his own telephone number is a conundrum.

On or about September 30, 1996, Ms. Conaway presented herself to Mr. Burg while he was working in the library. She introduced herself and indicated that she was a member of the library improvement committee as well as the past president of the PTA. After some short discussion concerning library matters, Mr. Burg apparently asked for Ms. Conaway's phone number. According to Ms. Conaway, this was inappropriate. There was, however, no testimony to indicate why it was inappropriate. The following is the exact testimony offered by Ms. Conaway with respect to this issue:

> Question: Now, can you just tell us what transpired during your, I guess, when you first met Mr. Burg?
>
> Answer: When I first met him? I went to the library. I forget what day of the week it was and I introduced my self to Mr. Burg, informing him that I was the chairperson of the library assistance committee, and I told him that we would be working together, myself and along with some other parents. And, I also told him that I was a former PTA president of 18th Avenue.

Question: Approximately what time of the day did this occur?

Answer: It's in the morning, I guess, anywhere between 9 - 10 o'clock, I think.

Question: And did he make any statements to you?

Answer: Yes he did. I remember shaking hands and he asked me how to spell my last name and he also asked me for my - - oh, when I told him we would be working together, he said fine and then he asked for my home phone number. I wanted to know why he felt it necessary to have my home phone number. We would be working in the same building and I mean I was - - I just didn't feel it was necessary, and I thought that was kind of strange. He offered me his home phone number, but of course, I didn't want it. I had no need - - you know, there is no need for me to have it.

That was the sum total of Ms. Conaway's testimony with respect to a tenure charge that has been filed against Mr. Burg. There was absolutely nothing offered beside this testimony with respect to this issue. He asked for Ms. Conaway's phone number, she did not give it to him. She, for some unknown reason, characterized the asking for her phone number as strange and somehow, in some way, this gets characterized as conduct unbecoming and becomes a certified tenure charge. I am at a loss to understand how this brief conversation Mr. Burg had with Ms. Conaway could end up in a tenure charge.

Count B of Charge Three alleges that Mr. Burg reprimanded a three year old pupil for touching his tape recorder telling the pupil "your mother could not pay for it." The basis for this incident was the testimony of Ms. Conaway. At some unknown time, days after her meeting with Mr. Burg at the library, she happened to have made a casual observation of a prekindergarten class. Mr. Burg confirms to some extent this incident. According to Mr. Burg, after the youngster touched the tape recorder he said: "Please don't touch the tape recorder. If you break it, it may not be - - your mother may not be able to replace it. I know that its hard for all of us to replace something that is damaged."

This testimony, like much of Mr. Burg's testimony, was sanitized for court presentation. I was unimpressed with Mr. Burg as a witness though I will not go as far as to say that his testimony was incredible. I do believe the testimony of Ms. Conaway with respect to the tape recorder and the prekindergarten class and I do agree that Mr. Burg's comment was insensitive and inappropriate.

I do, as a matter of fact, find that to be the most prominent problem displayed by Mr. Burg. Though for the most part his testimony was credible, there was a pervasive element of insincerity to all of it. Some of his explanations for his own verbiage was so trite and hackneyed, they actually approached what I would characterize as distasteful.

The only explanation for of some of the charges lodged against Mr. Burg is that there was some degree of hysteria that struck the school simply as a result of the allegations made against Mr. Burg. I have absolutely no doubt that whatever did actually occur in Ms. Ponsoda's class on November 19, 1996 was severely exaggerated in the retelling by these 8, 9, and 10 year olds. When, as some of the testimony indicated, the news and TV media expressed some interest, the Board must have felt some compunction to act swiftly and harshly.

Since I have already concluded that the Board has failed to establish by a preponderance of credible evidence that Mr. Burg used the "N" word in Ms. Ponsoda's class there remains no adequate basis to conclude that Mr. Burg should be terminated.

There is, however, an adequate basis to find that the inappropriate and insensitive comment he made, specifically his reference to dressing like "The Boys In The Hood" and the statement to a three year old that his mother could not afford to replace the tape recorder, exhibits a serious lack of sensitivity and concern for the feelings of his students.

Sensitivity training is clearly warranted as well as some penalty to ensure that Mr. Burg improves his future performance.

Having sustained a portion of Charge One (Insensitive Remarks) and paragraph B of Charge Three (Inappropriate Reprimand of a three year old), **I FIND** that the appropriate penalty in this matter should be a two month suspension without pay.

ORDER

It is **ORDERED** that Jason Burg be suspended for two months without pay.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

OCT 30 97
DATE

JEFFREY A. GERSON, ALJ

Nov. 3, 1997
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 5 1997
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 3291-97
AGENCY DKT. NO. 61-2/97

IN THE MATTER OF THE TENURE	:	
HEARING OF JAYSON H. BURG,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. The District's and respondent's exception arguments, along with respondent's reply, were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Having conducted his own careful and independent review of the entire record in this matter, which included transcripts from the three days of hearings at the OAL, as well as each of the arguments advanced by the parties regarding the initial decision, the Commissioner determines to affirm in part, and reverse in part, the initial decision of the Administrative Law Judge (ALJ). While in all other respects the Commissioner concurs with the ALJ's findings and conclusions, he determines that Charge One "a," asserting that respondent twice used a racially derogatory epithet referring to pupil C.F. and/or other pupils in the class, should be sustained, with modification.

The Commissioner finds that, notwithstanding the variances in testimony among the students regarding respondent's use of the racial slur, that "there is more than sufficient corroboration among the witnesses to sustain a finding" that the respondent, in fact, used the word in some manner on the day in question. See *In the Matter of the Tenure Hearing of Millicent Smith*, 93 *N.J.A.R.* 2d (EDU) 729, 739. The Commissioner finds it noteworthy that, of the eleven children who testified, nine reported that respondent used the word, albeit in varying contexts. Moreover, as the District noted in its exceptions, "[w]hen the substitute teacher, Ms. Pugh, returned to class to resume her duties, the class told her what had transpired." (District's Exceptions at p. 2) In response to direct questioning from the ALJ, Ms. Pugh averred:

> THE WITNESS: They were saying that they were -- that Mr. Burg said that they were going to be homeless and that they weren't going to be anything. And he called them nigger. And one of the young -- one of the students, M.R., was saying yes, Ms. Pugh. He called me a nigger and I'm a Puerto Rican. I'm not a nigger.
>
> And I knew -- I felt that the child was telling the truth, because he was very insulted because he didn't feel like he was a nigger, because I know that he associated that with the color of skin. And he was Puerto Rican, so he didn't consider himself that word.
>
> THE COURT: Who was the first student who told you that Mr. Burg called him a nigger?
>
> THE WITNESS: Well, I really can't say because they all were saying it at one time. But I know that A. and T. were saying how he was calling them that nigger and everything.
>
> And then M. -- and I was saying, well, because I couldn't -- I didn't believe that he would call them that.*** M.R., he made the statement that he called me that word. And I told him I'm not. I'm a Puerto Rican, like that.
>
> So then I knew that something was not right here.
>
> THE COURT: So up --
>
> THE WITNESS: I felt.

THE COURT: -- until that time that M. said that to you, you didn't believe it either?

THE WITNESS: I believe that they were saying -- yes. I believed them. I believe that they were upset about being -- saying that they would never be anything, because that's what C. was crying about. He was saying that he would be --

THE COURT: But did you --

THE WITNESS: -- something.

THE COURT: -- believe that he had called them a nigger, prior to M.R. saying that yeah. He was upset because he wasn't.

WITNESS: Well, I believe what they said. It's just that it was so far fetched, that I -- I guess, maybe I didn't want to believe that someone would say that to a bunch of -- a class full of children. That would be so insensitive.

But then when he said that, that kind of sealed it for me.

*** (Transcript July 31, 1997 at 138-140)

While the ALJ fairly reasons that respondent's use of the words "fools" and "jerks," as well his "homeless" remark, were given the "rowdiness of the class," apparently unduly highlighted by his inability to place them in any appropriate context, (Initial Decision at p. 9), the Commissioner finds that a preponderance of the evidence supports the conclusion that respondent *did*, as well, use the word "nigger" in the classroom so as to immediately offend the children. In that the number of times respondent used the word, and to whom the slur was directed, is neither ascertainable nor necessarily relevant, under these circumstances, the Commissioner correspondingly sustains the essence of Charge One "a."

Accordingly, the Commissioner adopts the initial decision of the ALJ in part, and reverses in part, to the extent noted above.[1] In order to impress upon respondent the seriousness

[1] The Commissioner notes that the initial decision contains the following errors with respect to students' names: page six refers to the testimony of student D.R., rather than to A.R., and page seven refers to the testimony of student C.H. rather than C.F. Additionally, the testimony recounted on pages 10 and 11 of the initial decision apparently

of his conduct and his substantial need for greater control and sensitivity in dealing with students, the Commissioner hereby directs that respondent forfeit, in addition to the two month's salary recommended by the ALJ, the 120 days' salary withheld following certification of the within tenure charges.[2] In so determining, the Commissioner also notes that, although he is without the authority to compel respondent to attend training classes designed to address and prevent insensitive conduct in the classroom, the District may elect to do so, within the confines of respondent's tenure and contractual rights.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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reflects numerous edits, as said testimony is inconsistent with testimony contained in the actual transcript. Accordingly, the Commissioner herein notes that, at all times, he relied on the testimony in the transcripts themselves, rather than on the initial decision's recitation of the testimony.

[2] It is also noted that, notwithstanding the resumption of respondent's salary upon the terms herein stated, respondent has no entitlement to receive a salary amount that includes an award of an increment during his suspension following the Board's certification of tenure charges. See *In the Matter of the Tenure Hearing of Anthony Castaldo*, decided by the State Board, 1986 *S.L.D.* 3026.

DECEMBER 18, 1997
DATE OF MAILING DECEMBER 18, 1997

649-97

EDU #3291-97
C # 649-97
SB # 4-98

IN THE MATTER OF THE TENURE :
HEARING OF JASON H. BURG, STATE- : STATE BOARD OF EDUCATION
OPERATED SCHOOL DISTRICT OF THE : DECISION
CITY OF NEWARK, ESSEX COUNTY. :

Decided by the Commissioner of Education, December 18, 1997

For the Petitioner-Respondent, Gregory G. Johnson, Esq.

For the Respondent-Appellant, Eugene G. Liss, Esq.

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. We agree with the Commissioner that the State-operated District has demonstrated that respondent used a racial slur in his class, and find that such conduct alone justifies the penalty imposed by the Commissioner.

June 3, 1998

Date of mailing JUN 05 1998

650-97

650-97

IN THE MATTER OF THE TENURE :

HEARING OF VINCENT MARTONE, :

STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF JERSEY CITY, : DECISION

HUDSON COUNTY. :

_____:

SYNOPSIS

District certified tenure charges against respondent supervisor of mathematics for alleged unbecoming conduct due to his distribution of a portion of the 1995 Early Warning Test (EWT) knowing that it was a secure test, copies of which were not to be possessed or distributed by or to any school personnel.

ALJ found that the District proved by more than a preponderance of evidence that respondent knowingly participated in and furthered a breach of security of the EWT of 1995 by possessing and distributing it, thus, constituting unbecoming conduct. Moreover, in light of the cost to the State in reconstituting the exam and respondent's complete lack of candor and remorse, ALJ found respondent's conduct warranted a serious penalty. ALJ ordered respondent terminated from his position.

Citing *Redcay*, *In re Tordo*, and others, the Commissioner adopted the findings and determination in the initial decision. Commissioner ordered respondent dismissed from his tenured position and the matter transmitted to the State Board of Examiners for further appropriate action.

DECEMBER 18, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.: EDU 11167-96

VINCENT MARTONE,

Appellant,

v.

STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY,

Respondent.

Louis Bucceri, Esq., for appellant
(Bucceri & Pincus, attorneys)

Ken Iwama, Assistant General Counsel, State Operated School District of Jersey City, for respondent

Record Closed: October 5, 1997 Decided: October 30, 1997

BEFORE: **JEFFREY A. GERSON**, ALJ

STATEMENT OF CASE

Vincent Martone was a supervisor of mathematics in the Jersey City School District. Certified tenure charges of unbecoming and unprofessional conduct were filed against Mr. Martone on or about September 16, 1996. The essence of the charge against Mr. Martone was that he distributed a portion of the 1995 Early Warning Test (EWT) knowing that it was a secure test, copies of which were not to be possessed or distributed by or to any school personnel.

Mr. Martone was suspended without pay on September 17, 1996. A petition of appeal was filed on his behalf on September 18, 1996 and the matter was transmitted to the Office of Administrative Law.

The hearing was conducted on July 21 and 22, 1997. Upon completion of the hearing, a briefing schedule was established. The record closed on October 5, 1997, upon receipt of initial briefs and replies thereto.

BACKGROUND

Veronica Orsi, the project manager of the high school proficiency test of the New Jersey State Department of Education, Bureau of Assessment, has been in charge of test security since 1989. Ms. Orsi testified that the EWT is a statewide test administered in March of each year to all New Jersey public school eighth graders. According to Ms. Orsi, the EWT is used to monitor school districts in order to ensure that curriculum and instructional programs meet the educational needs of students. It is also used as a means of identifying which students are in need of more instruction. It serves as a major instrument in placing students in high school programs.

The EWT was first administered in 1991 and until 1994 was only secure prior to the administration of the test. In 1991, 1992, and 1993, after the test was administered it could be used as a tool to determine what instructional materials would benefit the students and also could be used as practice exams.

Beginning in March 1994, the exam became secure permanently. That meant that after the exam was administered, all of the test booklets would have to be returned to the contractor and that school districts would not be allowed to retain any of the exams. Ms. Orsi went on to emphasize that no staff member of any school district, up to and including the district superintendent, could retain a copy of the EWT.

A breach of security, for example the illicit retention of an exam, could very well jeopardize the following years exam. It might also lead to unreliable, distorted results for pupils who had access to it. Also, unnecessary expenses for costs incurred by the State to prepare a new exam would also accrue.

Katherine Coyle, who is presently the executive assistant to the Superintendent of the Jersey City public schools was, prior to her most recent appointment, the principal of Public School #27 for seven years. As principal, she was responsible for the security procedures surrounding the EWT.

According to Ms. Coyle, prior to the 1994 EWT exam, she attended several meetings with principals and supervisors at which the new security procedures for the EWT were discussed. Several memos were sent by the State Department to the district superintendent which, according to Ms. Coyle, the superintendent would disseminate to all district administrators and supervisors. In addition, Ms. Coyle testified that she received several copies of District Operating Procedure No. 2.002 (hereinafter SOP) which she testified was distributed to all assistant superintendents,

principals, associate superintendents, directors and all supervisors, including Mr. Martone.

According to Ms. Coyle, there was no doubt in her mind that prior to the 1995 EWT, Mr. Martone was aware that he was not allowed to be in possession of or disseminate the exam.

Dr. Lopez-Diaz, the associate superintendent of curriculum and instruction for the Jersey City Public Schools, corroborated that SOP #2.022 would have been distributed to Mr. Martone. There was no doubt in her mind that she discussed the SOP with her staff at a supervisor's meeting which she held two times a month. In addition, Dr. Lopez-Diaz testified that she received a letter dated April 19, 1995 from Ellen Schechter, a letter that specifically stated that commencing with the 1994 EWT, the test could not be reproduced nor used in any manner. The letter went on to warn that any violation could result in revocation of ones professional license. Dr. Lopez-Diaz testified that upon receiving the letter she immediately circulated it to her entire staff, including Mr. Martone. The second letter, dated January 11, 1994 from Thomas Rubino, indicated that with the start of the 1994 EWT the test booklets would have to be returned after the test was administrated and could not be used for any other purposes. Dr. Lopez-Diaz testified that she disseminated Mr. Rubino's letter to all concerned, including Mr. Martone.

There was no doubt in Dr. Lopez-Diaz's mind that Mr. Martone knew that the 1995 EWT was permanently secured.

Joan McNutt, an Assistant Supervisor of Staff Development, testified that she received the mathematics portion of the 1995 Early Warning Test from Mr. Martone in April 1995, one month after the test was administered.

Mr. Martone contended that he was not aware that the 1995 EWT was a secure exam which could not be withheld or distributed after the administration of the exam. He was under the impression that the 1995 EWT was no different with respect to security policy than the policy that was in existence for the 1991, 1992 and 1993 exams. He contended that with respect to the notices, memorandum, and meetings that were conducted with respect to the new security requirements for the 1994 and 1995 EWT exams that he either did not receive them, did not read them, or did not recall anything being said about them.

ISSUE

The only issue to be resolved in this matter is whether or not Mr. Martone knew at the time that he received the mathematics portion of the 1995 Early Warning Test that it was a secure test, possession and distribution of which was strictly prohibited.

DISCUSSION

The facts leading to Mr. Martone's coming into possession of the mathematics portion of the EWT of 1995 are not in dispute.

On the day the exam was given, Mr. Martone contends he received a telephone call from either a teacher or a teacher's aide indicating that the students in her class were crying because the mathematics portion of the exam was too difficult. According to Martone, he requested that the person with whom he was having this conversation obtain for him a copy of the exam and sent it to him. He alleged that he received it in the inter-office mail two or three days later. After reviewing the exam, he filed it with the other exams he had in his possession.

In April 1995, Mr. Martone disclosed to Ms. McNutt that he had a copy of the 1995 math exam which he subsequently allowed her to make additional copies of supposedly to assist her in preparing curriculum.

Ms. McNutt distributed the exam to several teachers, one of whom, who knew the exam was a secure exam, notified her principal. Her principal, Ms. Coyle, confronted Mr. Martone, who, according to Ms. Coyle, was quite surprised to find out that Ms. McNutt had distributed the exam. Nonetheless, this triggered an investigation which eventually led to Mr. Martone being questioned. The first time he was questioned, he unequivocally denied giving the exam to Ms. McNutt. Subsequent attempts to question him resulted in Mr. Martone cloaking himself in the Fifth Amendment. Though there was no criminal charges pending at the time, Mr. Martone, upon advice of counsel, avoided answering any further questions by invoking his privilege against self incrimination.

It is clear however, that Mr. Martone had possession of the 1995 EWT and did, in fact, give it to Ms. McNutt.

The essence of Mr. Martone's defense to this matter is that he either did not receive any of the memos sent concerning the new security for the 1994 EWT, or if he did receive them, he failed to read them. He does not recall them ever being discussed at any meetings and apparently never had any discussion with any of the other supervisors or teachers concerning security. According to Mr. Martone, he simply did not know that the exam was a secure one and that by possessing a copy of the math portion of the 1995 EWT he was in violation of that security. Surprisingly, that was not his stance at the time of his first interview with the State when he simply denied that he had ever seen or been in possession of the 1995 EWT.

His explanation of how he actually received the math portion of the 1995 EWT dispels any possible doubt that could have momentarily existed with respect to Mr. Martone's credibility. How could he possibly not recall the name of a teacher or teacher's aide who called him on the day of the 1995 EWT to advise him that the class was crying because of the difficulty of the test? The last shred of Mr. Martones credibility was absolutely destroyed when he himself destroyed the 1995 EWT exam that he had in his possession. Mr. Martone's incredible explanation of his obvious misdeeds accompanied by his convenient inability to recall some absolutely crucial aspects of the factual surroundings of this entire episode leads inexorably to the conclusion that Mr. Martone simply cannot be believed.

The State Operated School District of Jersey City has proven by more than a preponderance of the evidence that Mr. Martone knowingly participated in and furthered a breach of security of the EWT test of 1995. His actions in possessing and distributing the secured test was clearly an act of unprofessional conduct as well as conduct unbecoming a professional teaching staff member.

PENALTY

On one prior occasion, Mr. Martone had been disciplined for teaching at Essex County College in derogation of his contract with the Jersey City School District. His penalty at that time was a letter of reprimand. His conduct on this occasion, which I find to be significantly more serious than that for which he had previously been reprimanded, is somewhat similar in that it reflects directly on Mr. Martone's character. A review of his past performance indicates that Mr. Martone was a good teacher. Good teachers, especially Math and Science teachers are not easy to come by. Mr. Martone's distribution of the 1995 EWT exam in combination with his "stonewalling" of the investigatory body examining his conduct pinpoint a rather significant weakness of character in Mr. Martone's makeup. Though Mr. Martone's action does not appear to be malicious, the costs to the State in reconstituting the exam were significant though there was no apparent financial benefit that accrued to Mr. Martone. Though I do not believe that he had any specific intent to inflict harm on his students, though that very well may have been the end result, his complete lack of candor in combination with his complete lack of remorse is a rather blatant example of unprofessional, unbecoming conduct. Mr. Martone's conduct warrants a serious penalty.

ORDER

It is **ORDERED** that Vincent Martone be and is hereby **terminated**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

OCT 30 97
DATE

JEFFREY A. GERSON, ALJ

Nov. 3, 1997
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 5 1997
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

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

The record of this matter, including transcripts of the hearing, and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Initially, respondent sets forth several arguments to rebut the factual findings of the Administrative Law Judge (ALJ) with regard to respondent's knowledge of test security procedures and his intent in handing over the test by referring the Commissioner to specific testimony presented at hearing. (Exceptions at pp. 1-5) Respondent then excepts to the recommended penalty of removal. Respondent cites to several cases wherein the Commissioner has determined that such penalty is not warranted, arguing that there is no basis for an automatic termination if the circumstances do not warrant it, but, rather, any penalty imposed must be carefully crafted to the specific claims proven. (*Id.* at p. 5) Respondent offers an alternate penalty, which would preserve his teaching career but end his supervisory career "for his admitted failure to maintain his knowledge of the requirements surrounding EWT test security." (*Id.* at p. 8) These sanctions include respondent's payment of $7,603 in restitution to the District, forfeiture of his administrative certificate and all endorsements thereon, as well as the tenure and seniority rights accrued under his administrative certificate and endorsements. (*Id.*) He contends that, "these punishments are sufficiently drastic to match the damage unwittingly done by him." (Exceptions at p. 9)

In reply, petitioner reviews the testimony and evidence in rebuttal to respondent's arguments and urges adoption of the ALJ's initial decision as correct. (Reply Exceptions at

pp. 4-14) Petitioner then avers that it proved, by more than a preponderance of evidence, that respondent received, retained and distributed the mathematics portion of the 1995 EWT. (*Id.* at p. 14) Lastly, petitioner submits, with regard to penalty, "that there is nothing which could mitigate the egregious actions [of respondent]" and that "[h]is attempt at fashioning his own punishment *** is much too little, much too late." (*Id.* at p. 17)

Upon a careful and independent review, the Commissioner concurs with the findings and conclusions of the ALJ that respondent's actions constitute unbecoming conduct. Further, the Commissioner concurs with the ALJ that the tenure charges, as proven, are sufficient to warrant respondent's termination from employment, pursuant to *N.J.S.A.* 18A:6-10 and 11.

Although the ALJ's findings herein turn, to a great extent, on the credibility of witnesses and the weighing of evidence, the Commissioner is satisfied, based on the record as a whole, that the ALJ appropriately measured conflicts, inconsistencies, and the plausibility of content in deciding which testimony to credit, and the proper weight to assign thereto, in reaching the factual findings and conclusions herein. It is noted that credibility determinations of the finder of fact, who observed the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them. See *In re Morrison*, 216 *N.J. Super.* 143 (App Div 1987).

As to the appropriateness of the recommended penalty, the Commissioner holds that breaches in statewide test security were a matter of utmost concern and will be dealt with severely. As stated by Assistant Commissioner, Division of Academic Programs and Standards, in a two-page letter dated April 19, 1995:

> ***the reproduction of secure test items *** is strictly prohibited.** *Individuals who violate this prohibition risk personal sanction which could include suspension or revocation of their professional license.* (Boldface *sic)* (emphasis supplied) (Exhibit P-7 in Evidence)

The position of this agency is both clear and unequivocally communicated to school districts and staff throughout the state. Breaches of test security will not be tolerated. Therefore, the Commissioner finds that a single incident of this nature is "sufficiently flagrant" to warrant an employee's dismissal, notwithstanding where, as here, respondent has had a long career with an apparently unblemished record. *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943); aff'd 131 *N.J.L.* 326 (*E.&A.* 1944). Further, while the Commissioner finds that respondent's behavior, as related by the ALJ in the initial decision, is particularly unbecoming

for a supervisor, it cannot be countenanced for *any* teaching professional. The Commissioner has stated that "[b]eing a teacher requires *** a consistently intense dedication to civility and respect***." *In the Matter of the Tenure Hearing of Robert H. Beam*, 1973 *S.L.D.* 157, 163. Further, teachers "***must exhibit a high degree of exemplary behavior." *In re Tyler*, 13 *N.J.A.R.* 297, 308 (1991). This is so in that

> [t]eachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils.*** *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97, 98.*

Therefore, the Commissioner finds that, in view of all the facts, respondent's proposed penalty wherein he would abandon his supervisor's position in favor of a teaching position, would not be appropriate. Rather, in order to adequately impress upon respondent, and others, the extreme seriousness of his infraction and the Commissioner's concern about the poor judgment displayed during the incidents leading to the instant tenure charges, the Commissioner finds that loss of tenure is fully warranted in this instance. Therefore, the Commissioner adopts the recommended penalty of the ALJ and further finds this matter should be forwarded to the State Board of Examiners for such action it may deem appropriate with regard to respondent's certificates.

Accordingly, for the reasons expressed therein, the Commissioner affirms the initial decision of the OAL and hereby orders that respondent be dismissed from his position as tenured teacher with the State-operated School District of Jersey City as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 18, 1997
DATE OF MAILING DECEMBER 18, 1997

650-97

EDU #11167-96
C # 650-97
SB # 5-98

IN THE MATTER OF THE TENURE :

HEARING OF VINCENT MARTONE, :

STATE-OPERATED SCHOOL DISTRICT :

OF THE CITY OF JERSEY CITY, :

HUDSON COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, December 18, 1997

For the Petitioner-Respondent, Ken Iwama, Esq.

For the Respondent-Appellant, Bucceri & Pincus (Louis P. Bucceri, Esq., of Counsel)

The decision of the Commissioner of Education dismissing respondent from his tenured employment as a result of unbecoming conduct is affirmed substantially for the reasons expressed therein. On the basis of our own review, we agree with the credibility determinations of the Administrative Law Judge. We stress in that regard that respondent misled State investigators when he was first questioned about whether he had kept a copy of the 1995 Early Warning Test and had given a copy to another staff member. School personnel had previously been notified that they were not permitted to possess or distribute copies of that test. The record also indicates that during the course of that investigation, respondent destroyed a copy of the test he had in his possession.

May 6, 1998

Date of mailing MAY 08 1998

652-97

652-97 B

BOARD OF EDUCATION OF THE CITY OF WILDWOOD,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF COMMISSIONERS OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Board appealed General Fund tax levy reductions in the amount of $537,038 made by governing body following voter rejection of proposed budget on April 15, 1997.

Upon review of the appeal herein to determine whether Board demonstrated that restoration of specific line item reductions was necessary in order to provide a thorough and efficient system of education in the district, Commissioner determined to restore $210,637. However, in view of the fact that additional surplus sufficient to cover this amount is available to the District, the Commissioner let stand the General Fund tax levy of $5,693,033, as certified by the City for 1997-98 school purposes.

Commissioner permitted Board to exclude its additional State appropriation from consideration herein because of the demonstrated need for the repairs for which the appropriation was expressly made. However, Commissioner further stipulated that any amount of this money not used for the stated purpose is to be appropriated in the 1998-99 budget for tax relief.

DECEMBER 19, 1997

BOARD OF EDUCATION OF THE CITY OF WILDWOOD,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF COMMISSIONERS OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

For the Board of Education, Bruce M. Gorman, Esq.

For the Board of Commissioners of the City of Wildwood, Marcus H. Karavan, Esq.

PROCEDURAL HISTORY

This matter was opened before the Commissioner of Education on June 13, 1997, through the filing of a Petition of Appeal by the Board of Education of the City of Wildwood (Board), seeking restoration of reductions to the school budget made by the Board of Commissioners of the City of Wildwood (City) pursuant to *N.J.S.A.* 18A:22-37 following defeat of the budget at the annual school election on April 15, 1997.

At that election, the voters rejected a public question proposing a General Fund tax levy of $6,230,071 for the 1997-98 school year. On May 16, 1997, following consultation with the Board as required by law, the Borough adopted a resolution determining to certify a General Fund tax levy of $5,693,033 as sufficient to provide for a thorough and efficient system of education (T&E) in the district. This amount represented a reduction of $537,038 from the tax levy proposed by the Board, and was effectuated through cuts in 29 line items, for the reasons given in the schedule attached to the implementing resolution.

The amounts in dispute in this appeal are thus as follows:

Tax Levy Proposed by Board		Tax Levy Certified by City	
General Fund	$ 6,230,071	General Fund	$ 5,693,033
Amount of Reduction by City		**Amount of Reduction in Dispute**	
General Fund	$537,038	General Fund	$537,038

An answer to the Board's petition was filed by the City on July 1, 1997. The Board's Position Statement was filed on July 21, 1997 and the City's position statement was submitted on July 22, 1997. On August 4, 1997, the Board filed a response to the City's position statement, and on August 12, 1997, it filed a summation. On August 26, 1997, the City filed its summation statement.[1]

In addition, as the parties had been advised by letter from the Assistant Commissioner dated April 16, 1997, distributed through the County Superintendent to boards and municipalities experiencing budget defeats and again in conjunction with proceedings herein, as part of the record of the within appeal, the Commissioner took official notice of the Board's revised budget and its June 30 financial report to be filed by August 1 pursuant to *N.J.S.A.* 18A:17-10, as well as applicable portions of the School Report Card and the Comparative Spending Guide. That same notice further provided that official notice would be taken of the annual audit for purposes of verifying surplus information given in the June 30 report and any prior year data relied upon by the Commissioner in making his determinations.

Finally, the record of this matter shows that the Board was notified by letter dated July 11, 1997 from the Assistant Commissioner of the Division of Finance that it had received a supplemental appropriation in the amount of $500,000 in the State Appropriations Act for the fiscal year ending June 30, 1998. The Board was informed how to record said aid in accordance with GAAP principles, and that it was required to take action to revise its 1997-98 budget. The

[1] It is noted that, although the date on the face of the document is August 11, 1997, it was not received by the Department of Education until August 26, 1997.

Board was further informed that the additional school aid would be considered when the instant appeal was decided.[2]

Consistent with the above, upon receipt of the City's summation on August 26, 1997, the record of the within appeal was closed and the matter proceeded to determination.

STANDARD OF REVIEW

In rendering judgment relative to budgetary appeals, the Commissioner notes that the Constitution of the State of New Jersey requires the Legislature to provide for a thorough and efficient system of education (T&E). The Legislature by way of statutory scheme has delegated the responsibility for providing such T&E to local boards of education. Additionally, the Legislature pursuant to *N.J.S.A.* 18A:6-9, 22-14, 22-17 and 22-37 has authorized the Commissioner of Education to review and decide appeals by boards of education seeking restoration of budgetary reductions imposed by local governing bodies. In reviewing such appeals, the Commissioner's standard has historically been whether a district board of education has demonstrated that the amount by which a specific line-item reduction imposed by the governing body is necessary for the provision of T&E. Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94 (1966) and Board of Education of Deptford Township v. Mayor and Council of Deptford Township, 116 N.J. 305 (1989). However, on December 20, 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), wherein a prescribed level of expenditure range was established as sufficient for provision of T&E. Therein, appeal of General Fund budget amounts in excess of that range, following voter defeat and municipal reduction, was expressly restricted to grounds of negative impact on the stability of the district given the need for long-term planning and budgeting, while appeal of General Fund budget amounts within that range could also be based on necessity for T&E. Additionally, the Act provided for standards of efficiency to be established by the Commissioner, setting forth the appropriate cost of the various

[2] In its reply position statement filed on August 4, 1997, the Board contends that monies it "***may receive from the State are desperately needed to repair the roof of the high school. The problems with the roof have been outlined in {Disputed line item Number 29, *supra*]. *** The fact that respondent has consistently fought efforts to effectuate these needed repairs by campaigning against Bond Referendum after Bond Referendum only highlights the necessity of using the $500,000.000 grant to fix the roof." (Board's Reply Statement at p. 26)

programs, services, activities and materials necessary to achieve T&E. (P.L. 1996, c. 138; *N.J.S.A.* 18A:7F-1 et seq.)

In the present instance, the Board proposed a General Fund budget *within* the T&E range established for the district pursuant to CEIFA. Accordingly, appeal of reductions may be made either on grounds that restoration of such reductions is necessary for T&E, in accordance with established standards of efficiency, or on grounds that the reductions negatively impact upon the stability of the district.

Mindful, then, of the standard to be applied, the Commissioner makes specific determinations as set forth below.

COMMISSIONER'S DETERMINATION

Disputed Line-Item Number 1

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2540	11-140-100-101	Gr. 9-12 Sal. of Teachers (Athletic Trainer)	$1,570,672	$51,555

The Board contends that physical education and athletics are considered an integral part of a thorough and efficient system of education. Elimination of the athletic trainer will, according to the Board, significantly threaten the health and safety of the students participating in the athletic program. The Board refers to *N.J.A.C.* 6:29-3.4, which requires student athletes to be medically cleared for participation in athletics. The Board reasons that the athletic trainer is a necessary part of the process of protecting the health of student athletes, in that the trainer treats injuries for all school athletes, provides whirlpool treatment and supervises training machines. Further, the trainer spends in excess of 1,100 hours per year attending athletic events. The Board argues that, for many students, treatment by the trainer is the only rehabilitation they will receive. In this regard, the Board finds that, to deny the poverty-level students in the district of the basic medical protection that students in wealthier districts enjoy is

discriminatory. Thus, the Board concludes that elimination of this position will place student athletes at risk. The Board also argues that athletes may avoid the risk by ceasing to participate in athletic programs, thereby receiving less than T&E.

The City contends that the trainer position is not essential, and does not affect T&E. The City asserts that the trainer does not affect classroom education, nor the physical education program of the district. Moreover, the City argues that removal of this position does not affect any of the interscholastic activities. This position, the City concludes, is a luxury and not a necessity. Thus, elimination of the athletic trainer position will not, the City avers, harm any of the district's children, nor will it preclude T&E.

Upon review, the Commissioner finds that, while athletic programs may indeed be an integral part of T&E, the district is spending well above the amount established as efficient pursuant to CEIFA for extracurricular/co-curricular activities, and, further, has not demonstrated the necessity for restoration of this specific position in order to provide a T&E level of extra- and co-curricular activity. Accordingly, the reduction of $51,555 is sustained.

Disputed Line-Item Number 2

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2680	11-190-100-610	General Supplies	$133,500	$3,500

This line item, the Board points out, is not only for copying supplies, as targeted for reduction by the City, but for pencils, workbooks, manila folders, general stationary supplies, chalk, magic markers and other supplies used in the actual teaching process. The Board asserts that the City's assumption that the use of computers will correspond in a reduction in copying charges is faulty. Rather, the Board contends, the use of computers results in an increase in copying costs. The Board asserts that computers generate a great deal of paper, in that computer

printouts are generally copied. Teachers copy hand-outs for students, the Board notes, and students copy projects they have created on the computer. The clerical staff copies correspondence and reports. The business office copies financial records. The Board reasons that these activities relate to providing T&E.

The City notes that the expenditures in 1995-96 from this account were $125,608. The 1996-97 revised appropriation was $160,630, and the 1997-98 proposed appropriation is $133,500. The City argues that its reduction of $3,500 is minor, and will not affect T&E, and that the reduction may be easily accomplished.

Upon review, the Commissioner finds that the Board is spending within the level of efficiency established pursuant to CEIFA for supplies, and has budgeted less for this year than in the prior year. Moreover, the City has not provided a specific demonstration of the manner in which costs could be reduced to the degree required by its action. Accordingly, the reduction of $3,500 is restored.

Disputed Line-Item Number 3

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2670	11-190-100-500	Other Purchased Services (Travel Expenses)	$6,700	$3,000

The Board argues that, pursuant to its collective bargaining agreement with the Wildwood Education Association, it is obligated to pay for travel expenses when it authorizes teaching staff members to attend workshops and seminars. The Board asserts that much of the training in this regard is mandated, and the Commissioner has stated that teacher education is a State priority. With the cuts proposed by the City, the Board contends that the ability of teachers to improve their skills and thereby provide a better education to students will be eliminated. In such event, the Board finds that T&E will suffer.

The City asserts that this reduction will not affect T&E. It notes that the 1995-96 expenditures for this account totaled $6,636; the 1996-97 revised appropriation was $9,150 and the 1997-98 proposed appropriation is $6,700. The City finds that this is an "out of classroom reduction" (City's Position Statement at p. 6) and it will not, therefore, affect the education provided in the district.

Upon review, the Commissioner finds that the Board's budgeted amount is less than its prior year allocation, and equal to its FY 96 expenditures in this area. In light of the importance of professional development for T&E, as recognized in the efficiency standards established pursuant to CEIFA, and in view of the lack of specificity in the reasoning for the City's reduction, the Commissioner determines to restore the $3,000 reduced from this account.

Disputed Line-Item Number 4

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2640	11-190-100-106	Other Sal. for Instruct. (Aides)	$55,830	$10,000

The district employs ten aides which it deems absolutely necessary, and which the City proposes to cut and replace with volunteers. The Board notes the aides are used for a variety of purposes, such as helping teachers with overcrowded classrooms, assisting in the instruction of the developmentally disabled and performing functions which do not require a fully certified teacher.

The Board points out that one of the aides works at the high school, providing one-on-one training with a student afflicted with Down's Syndrome, and handling a group of marginally retarded students. A volunteer, the Board reasons, would not be qualified to fill this position. The alternative, according to the Board, is to send these students out of the district at much greater cost. The remaining nine aides work at the elementary school: three as full-time

special education aides, two as part-time kindergarten aides, three part-time first-grade aides and one as a full-time library aide. The Board notes that, with the exceptions of the library aide, all aides have direct pupil contact and are intimately involved with providing T&E. Moreover, the Board notes that aides must have qualifications beyond those of a volunteer. It argues that the City's observation that aides are not certified is inaccurate; an aide in Wildwood must have at least a substitute's certificate and must be approved by the County Superintendent of Schools. The Board further notes that, of the $55,830 in this line item, $46,217 is paid for by Demonstrably Effective Program Aid. It reasons that aides are utilized to assist in functions which would otherwise have to be performed by teachers, so that a reduction in aides will necessarily mean the addition of more teachers. It is more economical, the Board concludes, to maintain the aides.

The City argues that a $10,000 reduction for salaries for non-certified education officials does not affect T&E. It notes that aides can be replaced by volunteers, and further asserts that, at present, the aides are not certified.

Upon review, the Commissioner notes that the Board's spending for aides is well within the scope of efficiency established pursuant to CEIFA, and that the City's suggestion that paraprofessionals, who must meet established qualification standards and be approved by the county superintendent, be replaced by volunteers is simply not feasible. Accordingly, the Commissioner restores the reduction of $10,000.

Disputed Line-Item Number 5

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2700	11-190-100-800	Other Objects	$97,529	$5,000

The Board notes that the City's reduction in this line item pertains to copying charges; said charges are the usage fee paid to the copier company. For the reasons set forth in Disputed Line Item Number 2, *supra*, the Board expects that its copier will be used more often, and usage will increase. The Board asserts that the items copied by the district either impact directly upon T&E, or upon the administrative stability of the district. The copying charge is a usage fee imposed by the manufacturer. The Board reasons that it can only reduce its expenditures by reducing the services offered to students.

The City contends that this reduction will not affect T&E, and will not impede the educational program in the district. It notes the 1997-98 proposed appropriation, and finds that, even with the reduction, a significant sum remains for the Board's use.

Upon review, the Commissioner finds that the Board is spending within the level of efficiency established pursuant to CEIFA for supplies, and has budgeted substantially less for this year than in the prior two years. Moreover, the City has not provided a specific demonstration of the manner in which costs could be reduced to the degree required by its action. Accordingly, the reduction of $5,000 is restored.

Disputed Line-Item Number 6

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6110	11-402-100-600	Supplies and Materials (Athletics)	$47,500	$20,000

The Board urges that the athletic program is an essential part of T&E, as outlined *infra*, in Disputed Line-Item Number 16. The Board notes that its original budget request for this line item was over $70,000, and that $47,500 represents the absolute minimum required for it to operate the athletic program. The Board further observes that the City's suggestion, *infra*, that trainer's supplies may be eliminated, is premised upon its elimination of the trainer, as addressed

above. Yet, the Board reasons, that even if the trainer is eliminated the supplies will remain necessary, as there will continue to be injured students. As for the reduction in coaches' salaries, the Board argues that their salaries are already so low that now its staff members go to other districts to take coaching positions. Additionally, coaching salaries are a negotiable item; the Board will have to re-open the collective agreement and negotiate with the teacher's association to accommodate this reduction. The Board further points out that it will be limited in its ability to achieve such a reduction, in that the City has also eliminated the Board's labor negotiator, as set forth in Disputed Line-Item Number 13, *infra*.

The Board questions the City's suggestion to reduce miscellaneous expenses, in that it does not provide an indication of what specific expenses are disposable. The Board herein provides a list of the expenses included in this line item and notes that none of the expenditures for a particular sport is large. Rather, the Board observes that its district provides 23 teams in 11 sports for students in grades 5-12. Participation in these activities helps produce a well-rounded student. Reducing this line item by $20,000 will cripple the athletic programs and lead to the demise of most of the sports identified on the Board's list. Further, the reduction will infringe upon the guaranteed right of each student to T&E.

The City avers that the reduction may be absorbed by reducing trainer supplies, miscellaneous expenses and coaches' salaries, none of which affects classroom activities. The reduction, the City argues, coincides with the reduction in Line Item 2540, the athletic trainer's salary. The reduction does not affect T&E, according to the City.

Upon review, the Commissioner finds that, as noted above, the Board is spending well above efficiency levels established by CEIFA for extra- and co-curricular activities, and that it can, given the size of this account and the elimination of the trainer position above, absorb a

reduction of $3,500 without negative impact on the district's ability to provide T&E. Accordingly, the Commissioner restores $16,500 of the City's reduction, and sustains $3,500.

Disputed Line-Item Number 7

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6490	11-000-218-104	Salaries of Other Prof. Staff	$199,245	$52,000

The Board notes that it has the composition of an inner city urban district, in that approximately 25% of the student population is African American and approximately 24% of the students are Hispanic. Moreover, the population is abnormally transient. The Board argues that it cannot absorb the loss of a guidance counselor's position without seriously affecting T&E. It notes the duties of a guidance counselor are varied,[3] and the loss of one of its four guidance staff[4] will adversely affect the ability of the students to receive proper counseling regarding course selection, career goals and college admissions, matters which are integral to T&E. The Board additionally attaches a Guidance report for the 1996-97 school year which shows that the elementary counselor currently serves over 500 students, a counselor-student ratio which is not acceptable. Further reductions in the guidance staff would diminish guidance services to a level which would render it impossible, asserts the Board, to offer T&E.

The City contends that the reduction of one counselor's position will not affect T&E. It notes that sufficient funds remain in this line item to maintain its program with the remaining guidance professionals in the district. The City further contends that elimination of

[3] The Board lists the following functions of guidance counselors: handling college applications and all other aspects of college admission; scheduling the course load for each student in conjunction with his/her career goals; creating an overall schedule for the school system; meeting with and counseling students with failing grades; counseling students for misbehavior; interfacing with DYFS; assisting and integrating new students in the system; coordinating problems students with the Child Study Team; and structuring the State-mandated Approved Counseling Services Plan.

[4] The director of guidance, two high school counselors and one elementary counselor.

one guidance position does not affect classroom activities, and the needs of the students will be met by the remaining staff.

Upon review, the Commissioner finds that the Board is spending significantly above the range of efficiency established for guidance services pursuant to CEIFA, and that it should be able to provide a sufficient level of services with one less staff member as proposed by the City. Accordingly, the Commissioner sustains the reduction of $52,000.

Disputed Line-Item Number 8

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6550	11-000-218-600	Supplies and Materials (Misc. Supp./Student Support Services)	$13,500	$5,500

The Board notes that this line-item comprises office supplies used by the administrative staff, including, but not limited to, teaching and computer supplies which are not used by the students. Of the $5,500 reduction, $3,500 is from this category. The Board contends that without these supplies, the clerical staff will be unable to function, which will, in turn, eliminate such items as report cards, attendance records, personnel records, student records, teacher lesson plans and the like. These items, asserts the Board, are essential to the functioning of the district. The remaining $2,000 reduction will eliminate expenditures for the State-mandated standardized testing, including, but not limited to, Metropolitan Achievement Tests. The Board avers that, by virtue of the State mandate, these tests are clearly necessary to prove T&E.

The City argues that this reduction will not affect T&E. It observes that the proposed 1997-98 appropriation was $13,500, nearly double the amount in last year's budget ($7,816). Even with the reduction, the City asserts, the Board will be left with $8,000 in this line

item, an increase from the 1996-97 revised appropriation. The City finds that the Board's prior year's expenses indicate that it has over-budgeted for this line item, and the adjusted number comports with the prior year's expenditures. The City further argues that the Board must contain costs in this area.

Upon review, the Commissioner finds that the Board is spending within the level of efficiency established pursuant to CEIFA for supplies, notwithstanding that this account has increased over last year's appropriation. Moreover, the City has not provided a specific demonstration of the manner in which costs could be reduced to the degree required by its action. Accordingly, the reduction of $5,500 is restored.

Disputed Line-Item Number 9

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6560	11-000-218-800	Other Objects (Misc. Supp./ Student Supp. Svcs.)	$8,000	$4,000

The Board warrants that the monies in this line item have been budgeted to provide computer equipment and servicing for same. The Board explains that it entered into a lease agreement for 60 computers to be used to teach computer science to all students in both the high school and the elementary school; the line-item increase from the prior year is a direct result of the acquisition of the computers. The computers require equipment and servicing, including, but not limited to, software, wiring, connectors, boards, network maintenance, and general upkeep. All the computers are used for classroom instruction. The Board affirms that, if this line item is reduced, it will be unable to operate this program. Given the great importance of computers in the modern world, the Board contends that they are essential to T&E, and they cannot be cut from the budget, and argues that the Commissioner has previously determined that computers are essential to the provision of T&E.

The City, again, notes that this reduction will not affect T&E. It has reviewed the 1995-96 expenses ($7,149) in comparison to 1996-97, and finds that the 1997-98 expenses may be reduced, as the reduction will still permit the district an increase over the 1996-97 amount of $3,427.

Upon review, the Commissioner finds that the Board is spending within the level of efficiency established pursuant to CEIFA for supplies, notwithstanding that this account has increased over last year's appropriation. Moreover, the City has not provided a specific demonstration of the manner in which costs could be reduced to the degree required by its action. Accordingly, the reduction of $4,000 is restored.

Disputed Line-Item Number 10

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6580	11-000-219-104	Salaries of Other Prof. Staff ((Sal./Child Study Team)	$232,255	$48,544

The Board argues that the City's proposal to eliminate one member of the Child Study Team (CST) is impossible, as a matter of law. The Board cites *N.J.A.C.* 6:28-1.1(f), which requires that each local board maintain a CST, and references *N.J.A.C.* 6:28-3.1(b) with respect to the required composition of that team.[5] The Board notes that it presently maintains a CST comprised of 4.5 staff members: a CST administrator, one psychologist, one social worker, one full-time learning disabilities teacher and one part-time disabilities teacher. The Board further appends a copy of the New Jersey State Department of Education Office of Special Education Programs District Staff Management Ratio for the period 1980 through 1995. The Board argues

[5] The regulation requires that the CST consist of a school psychologist, a learning disabilities teacher/consultant and a school social worker. *N.J.A.C.* 6:28-3.1(b)

that Wildwood compares to the State averages for *total student enrollment* in the following manner:

- Ratio Between School Psychologist and Students
  State Average - 1:1,187
  Wildwood -1:1,025

- Ratio Between School Social Worker and Students
  State Average - 1:1,063
  Wildwood - 1:1,025

- Ratio Between Learning Disabilities Teacher/Consultant and Students
  State Average - 1:1,051
  Wildwood - 1:1,025

The Board asserts that these numbers suggest that it meets the State median for the ratios for school psychologist and for school social workers, when total enrollment is considered. And, the Board notes, it would appear that Wildwood is overstaffed by one-half Learning Disabilities Teacher/Consultant. However, the Board reasons that the numbers change when the ratios consider only classified students, which is the student population with which the CST works. Compared to the State average, the ratio of *classified students* to members of the CST is as follows:

- Ratio Between School Psychologist and Students
  State Average - 1:147
  Wildwood - 1:213

- Ratio Between School Social Worker and Students
  State Average - 1:132
  Wildwood - 1:213

- Ratio Between Learning Disabilities Teacher/Consultant and Students
  State Average - 1:130
  Wildwood - 1.5:213 (or 1:142)

Thus, the Board concludes that it is appropriately staffed with regard to the learning disabilities teacher/consultant and is understaffed by some 50% with regard to the psychologist and social

worker. The Board argues that it will be unable to provide proper services, as required by law, if one employee is eliminated.

The City argues that this reduction will not affect T&E, in that it will not affect classroom activities. The City contends that there are sufficient CST professionals remaining in the district to assure the needs of the students are met and to advance the intended program. The City finds that the quality of the program will not be affected by the reduction.

Upon review, the Commissioner finds that the district can provide adequate CST services to its student population through the core child study team required pursuant to *N.J.A.C.* 6:28-3.1(b), without the additional need for a CST administrator. Accordingly, the reduction of $48,544 is sustained.

Disputed Line-Item Number 11

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6890	11-000-222-800	Other Objects (School Library Books)	$14,600	$3,100

The Board argues that access to newspapers and periodicals which offer more than a local perspective are essential to providing T&E.

The City, after review, finds that this reduction, which affects the purchase of periodicals and newspapers, will not affect the qualify of the educational program, and is a nonessential item. The City argues that the remaining funds are sufficient, noting that in the prior year, $5,513 was budgeted and only $2,872 was spent.

Upon review, the Commissioner finds that the Board is spending within the level of efficiency established pursuant to CEIFA for supplies, notwithstanding that this account has increased over last year's appropriation. Moreover, the City has not provided a specific

demonstration of the manner in which costs could be reduced to the degree required by its action. Accordingly, the reduction of $3,100 is restored.

Disputed Line-Item Number 12

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6910	11-000-230-100	Salaries/Undistr. Exp./ General Admin.)	$282,107	$5,531

The Board notes that $5,031 of the reduction is attributed to substitutes for the superintendent's office. It observes that the superintendent's office staff consists of one person: the superintendent's secretary. The Board office, prior to 1996, consisted of three people: the assistant board secretary and two computer operator/bookkeepers. The assistant Board secretary, however, was "riffed" as a result of last year's budget defeat. Thus, the substitute pay is essential. In that two people now perform the work of three, the Board administrator must have the ability to bring in additional help, the Board argues, at peak times of the year, e.g., during the budget process, the auditing process and the year-end close down. Additionally, the Board avers that the clerical employees are entitled to vacation and sick time; there are no additional personnel to substitute for someone who takes vacation or uses sick leave. The persons in these offices ensure that teachers are paid, there will be money for textbooks and other items which are essential to T&E.

The Board further notes that $500 of this reduction is for the treasurer's salary. The treasurer is the chief financial officer of the Board. The Board asserts that since this person is controlled by the City, if the City can convince him to take less money, so much the better.

The City finds that this reduction, substitute pay for the superintendent's office, will not affect T&E in the district. The City contends that the Board can reallocate existing

personnel services and eliminate this expense entirely. The City argues that this reduction will produce a more efficient and thorough educational program in the district.

Upon review, the Commissioner notes that the Board spends well above the level of efficiency established by CEIFA for clerical salaries, and that the Board should be able to make adequate provisions for sick and vacation coverage without the need for additional staff. Accordingly, the reduction of $5,531 is sustained.

Disputed Line-Item Number 13

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6920	11-000-230-331	Legal Services	$57,786	$13,186

With respect to the City's suggestion, *infra*, that bond counsel and labor counsel be eliminated, the Board argues that labor relations have become a specialty and it is in everyone's best interest that the cheapest possible contract be negotiated with employees. As to the bond counsel, the Board notes that it is the position of many major lending institutions not to accept a legal opinion from an ordinary attorney but, rather, to require a letter written by bond counsel. The City's position, the Board asserts, is short-sighted. If a bad contract is negotiated, more money will be spent, and the budget will increase. The Board further directs attention to its arguments with respect to Disputed Line-Item Number 29, *infra*.

The City finds that the Board can reduce its legal fees by the above-stated amount without affecting T&E. The City notes that the Board solicitor's salary is $19,600, with $25,000 allocated for additional legal services, $2,500 for legal services related to bonding, and $10,686 for legal services involved with negotiations. The City argues that the school solicitor can do the negotiations and bond work within the salary parameters, not unlike the City's own solicitor.

Upon review, the Commissioner finds that, in light of his determination on the use of additional state funds as noted below, there is no longer a need for an appropriation for separate bond counsel in this year's budget. In other respects, however, the Board's allocation for legal expenses is appropriate for its circumstances. Accordingly, $2,500 of the reduction is sustained, and $10,686 is restored.

Disputed Line-Item Number 14

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6950	11-000-230-530	Communications/Telephone	$25,150	$3,150

The Board argues that the telephone is a necessity of modern society. It must use the phone to communicate with the Department of Education in Trenton, the county superintendent in Cape May Court House, the police department, the fire department and other persons and entities necessary to maintain the health and safety of the children, as well as for providing T&E. Additionally, the Board indicates that it is in the process of installing ISDN lines for distance learning and use of the Internet. There is a growing need for more of these lines, and as the system grows, so will the cost of telephone use. Use of these modern methods, affirms the Board, is essential to T&E. The Board further notes that for the 1996-97 school year, for the period July 1 through April 30 (10 months), the Board spent $22,000. The Board questions how it can attain a lower phone bill than it expended in 1996-97, in an age of escalating prices. The Board further indicates that the Commissioner has held that "'***technical education is essential to a thorough and efficient educational system to prepare students to function effectively in this age of advancing technology.'" (Board's Reply at p. 15, citing *Board of Education of the Township of Mansfield v. Township Committee of the Township of Mansfield,* Commissioner's Decision February 10, 1995.)

The City determined that this reduction could be effectuated without affecting T&E. In 1995-96, while the budget for this line item was $22,000, the actual expenditure was $20,773. The City notes that, after review, it is its position that the budget should be reduced to the amounts of the 1996-97 budget allocation.

Upon review, the Commissioner finds that notwithstanding that the Board's level of overall expenditure for telephone/communication expenses may have increased from 1995-96 levels, the June 30 Board secretary's report for 1996-97 reveals that $27,000 was appropriated to this account and only $14,976 was expended, with no encumbrances remaining, leaving a balance of $12,023. Accordingly, the City's reduction of $3,150, which brings the Board's 1997-98 allocation to $22,000, a level sufficiently above prior-year expenditures to allow for growth in service needs and price increases, is sustained.

Disputed Line-Item Number 15

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6960	11-000-230-590	Other Purchased Services	$53,950	$6,600

The Board initially points out that the City seeks reductions in two areas: expenses of the Board of Education ($4,000) and in the appropriation for Special Election for Bond ($2,600). In the former area, the Board asserts that monies are used to purchase supplies for the business administrator's office, including, but not limited to, office supplies, diskettes, postage, computer supplies and copier supplies. Additionally, the business administrator's convention, which he is required to attend under the terms of his contract, costs approximately $300. The Board warrants that, without these supplies, the Board office cannot function; there will be no monies to pay teachers, to pay for text books, computers and all other items utilized to

provide T&E. In this regard, the Board underscores its arguments set forth in Disputed Line Item Number 12, *supra*.

The Board further points out that the budget for the 1997-98 school year was $14,000, which is not only reasonable, but in line with past expenditures. It further points out that the City concedes that the reduction should only equal the total amount expended during the prior year and, on that basis, there should be no reduction. The Board has budgeted only $14,700, or more than $1,200 less than what was expended during 1996-97. The Board finds that it will be impossible to provide T&E without these essential financial underpinnings, particularly in light of sharply diminished surplus.

As for the $2,600 reduction to Special Election for Bond, the Board refers to its arguments for Disputed Line Item number 29, *infra*, and Disputed Line Item Number 13, *supra*. It adds that the City "is bound and determined that no referendum is approved authorizing the necessary repairs to the Wildwood High School." (Board's Position Statement at p. 13) Yet, the Board asserts, the leaky roof, inadequate fire system and aged and defective electrical system threaten the safety of the students and, therefore, the ability of the school to provide T&E. The Board also notes that, in the 81-year-old high school building, water is leaking throughout the roof tiles and into the third floor classrooms.

The City argues that the $6,600 reduction may be effectuated without impacting T&E. The City further asserts that the $2,600 reduction could automatically be made, as the Board has publicly declared that the bond issue for the roof will not proceed. In addition, the City has determined that the Board secretary's office can reduce expenses by $4,000. Such a reduction, the City claims, would only reduce the total amount appropriated to make it equal to

the previous year's budget allotment. Moreover, the City notes that both of these allocations are for non-classroom activities.

Upon review, the Commissioner finds that, in light of his determination on the use of additional state funds as noted below, there is no longer a need for an appropriation for a special bond election in this year's budget. In other respects, however, the Board's allocation for supplies and related Board expenses is within established efficiency expectations. Accordingly, $2,600 of the reduction is sustained, and $4,000 is restored.

Disputed Line-Item Number 16

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7010	11-000-240-103	Sal. of Principals/Asst. Princ.	$211,869	$51,300

With respect to the proposed elimination of the position of athletic director (AD), the Board refers to *N.J.S.A.* 18A:26-2.1, which requires that directors of athletics possess a supervisory certificate issued by the State Board of Examiners. The Board continues, arguing that, for it to maintain its athletic program, it must have a properly certified AD. In support of its contention that the athletic program is an essential element of T&E, the Board refers to *N.J.S.A.* 8A:35-5, which requires each district to maintain a mandatory course of study in physical education, and to *N.J.A.C.* 6:29-3.2(c) which requires local boards to provide, by regular appropriations, suitable and adequate equipment for carrying out the program for physical education activities. Moreover, the Board notes that the AD performs a variety of functions which cannot be adequately handled by anyone else. Those functions are identified as: overseeing all physical education and interscholastic programs; scheduling and arranging transportation; supervising and recommending the hiring and firing of coaches; arranging for State-required medical examinations; structuring the program for each sport; ordering

inventories; maintaining and storing sporting equipment; and managing the athletic budget. The Board further notes that, notwithstanding the unusual hours which the AD must keep, as well as the fact that he works 12 months per year, he is compensated at a lower salary than some teachers in the district.

The Board further argues that the AD in its district must contend with three unique problems. First, as an inner city urban district, it does not own facilities for outdoor sports. Thus, the AD has the added burden of locating sites for many athletic events, and arranging the necessary transportation. Second, few faculty members in the Board's small district volunteer for coaching positions. Thus, the AD must recruit coaches from outside the staff. Such coaches frequently require close supervision. Third, the financial stability of the district is substantially dependent upon tuition from its sending districts, and parents are increasingly opting to send their children to districts other than the Board's. The Board posits that one of the significant attractions which it has to offer is a solid athletic program. Thus, the AD bears the burden of presenting a strong program, a burden which is essential to the survival of the district.

The City argues that the position of athletic director may be eliminated without affecting the district's ability to provide T&E. The reduction, the City notes, coincides with and supplements the reductions as noted in other areas of the athletic department, *supra*.

Upon review, the Commissioner finds that the administrative and supervisory level staffing of the district is such that a separate athletic director position is not necessary for provision of T&E. Such duties as are found necessary to maintain an efficient level of extra- and co-curricular activity can be assigned to other appropriately certificated staff. Accordingly, the reduction of $51,300 is sustained.

Disputed Line-Item Number 17

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7030	11-000-240-590	Sal. of Sect'l and Clerical	$207,456	$650,343

The Board notes that the City intends to eliminate a secretary in the high school office and a secretary in the elementary school office, yet offers no rationale for these cuts. The Board further argues that the City eliminated one secretarial position from the budget in 1995-96, and one secretarial position from the budget in 1996-97. As a result, the Board consolidated the high school office and the guidance office staff. The office now contains six secretaries to serve the principal, the vice principal and the guidance department, which the Board contends, is "bare bone staffing." (Board's Position Statement at p. 18) There is no latitude for vacations, sick leave and pregnancy; there is virtually no money for substitute salaries. The Board further provides a list, which is not recounted herein, of the duties of the high school principal's secretary, the vice principal's secretary, the secretaries for the guidance office and the elementary school. The Board reasons that if such secretarial functions are not performed, the school does not operate, as a competent clerical staff is the backbone of the organization

The City has determined that a reduction in the amount of $50,343 will not affect the district's ability to offer T&E. Specifically, upon its review, the City finds that the Board may eliminate two secretarial positions, in that sufficient personnel is available to cover these positions. The City further contends that this reduction constitutes a non-classroom cut which would not affect the quality of the district's educational program.

Upon review, the Commissioner finds that the Board spends well above levels of efficiency established pursuant to CEIFA for clerical salaries, and that the present staff configuration can be reduced by two persons and still meet the T&E needs of the district.

However, the amount of reduction necessary to effectuate this change must be lowered to $35,579, in that the two salaries eliminated must be presumed to be the least senior and, hence, the two lowest listed in the employee salary schedule submitted with the Petition of Appeal. Accordingly, $35,579 of the City's reduction is sustained and $14,764 is restored.

Disputed Line-Item Number 18

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7100	11-000-260-100	Sal./Operation and Maint.	$415,277	$78,529

The elimination of two custodial positions, as suggested by the City, *infra*, is not feasible, according to the Board. The Board notes that in 1995-96, respondent cut one custodian from its budget, and it has been short staffed ever since. The Board further provides that the high school is a three-story building constructed in 1916, containing 84,481 square feet; it is currently "manned" by five custodians. These custodians are each already expected to clean 16,900 square feet, some 50% more than the standards set by Service Master, Inc., the company which has serviced the Board for a number of years. Similarly, the custodians are currently asked to clean in the elementary schools nearly 3,000 square feet more than recommended. Moreover, the Board asserts it is necessary to hire substitutes and have the existing staff work overtime to make up for its understaffing. The Board concludes that it cannot afford to lose another custodian, nor to eliminate the substitute and overtime pay.

As for the supervising custodian which the City seeks to eliminate, *infra*, the Board insists that the custodians must be supervised. The supervising custodian must make decisions and be responsible for the buildings; deal with tradespeople, contractors and architects; be the contact person for the school's administrative staff; take control during emergencies; allocate work and check to see if the work is completed. Working in a dirty school, the Board

reasons, is not conducive to efficient education; it may impair the health of students which impacts on absenteeism.

The City has determined two custodial positions may be eliminated without affecting the Board's ability to provide T&E. Specifically, the City proposes to eliminate one supervisory position at the high school ($46,000) and one district position ($20,263). Additionally, the City finds that the appropriation for overtime pay in this line is excessive. Thus, the City insists that the Board should reduce such overtime costs and improve the efficiency of the department.

Upon review, the Commissioner finds that, notwithstanding that the Board spends above levels of efficiency established pursuant to CEIFA for operations and maintenance, the Commissioner cannot ignore that the maintenance needs of older buildings are, in fact, greater, and that the Board's current staffing pattern is appropriate to its needs. The Commissioner also finds, however, that such staff should be sufficient for these needs without extensive payment of overtime. Accordingly, $12,266 of the City's reduction is sustained and $66,263 is restored.

Disputed Line-Item Number 19

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7120	11-000-260-420	Cleaning, Repair and Maint.	$142,950	$1,500

Responding to the City's proposal to eliminate these funds, the Board clarifies that the funds are not for regular trash pick-up, but rather for disposal of bulk trash which the Board effectuates twice or three times annually. The Board explains that, on these occasions, it is necessary to rent a dumpster. The trash is taken to the Cape May Municipal Utilities Authority landfill, where the Board pays the tipping fee to dump the materials in the landfill. The $1,500 is

for the rental of the dumpster and the tipping fee. The trash and debris cannot be left to accumulate at school, lest they become a health hazard.

The City argues that this reduction in the amount allocated for trash pick up will not affect the Board's ability to offer T&E. It notes that the City is responsible for the trash pick up, and these monies are not necessary.

Upon review, the Commissioner finds that the City's provision of trash pick-up services should eliminate the need for additional services. Accordingly, the City's reduction of $1,500 is sustained, contingent upon the City's agreement to provide pick up of bulk trash on a basis sufficient to prevent health and safety hazards on school property.

Disputed Line-Item Number 20

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7170	11-000-260-610	Custodial Supplies	$31,000	$8,500

The Board argues that the Wildwood High School, an 81-year-old building, contains 47 classrooms, 12 bathrooms and assorted offices, locker rooms and a cafeteria. The Glenwood Avenue School contains 26 classrooms, 6 bathrooms, a number of offices and a kitchen. These rooms generate trash and must be swept daily; each must be disinfected. The Board, by way of illustration, notes that in the 1995-96 school year, it expended $29,075 on custodial supplies; in 1996-97, it expended $32,280 on custodial supplies.[6] Thus, the proposed appropriation, according to the Board, is not unrealistic. The Board avers that the health and safety of the children are at stake.

[6] The Board notes that it is "mystified at Respondent's claim that the prior year's budget was $10, 000." (Board's Reply Statement at p. 19) In fact, the Board clarifies, the prior year's budget was $32,950, and the final expenditure was $35,279.

The City, upon review, argues that the Board has more than doubled its allocation in this line item from the prior year. The prior year's budget was $10,000; the proposed budget was $28,500. Thus, the City argues that the custodial department can reduce its utilization of supplies without adversely affecting the Board's ability to offer T&E.

Upon review, the Commissioner finds that, notwithstanding that the Board spends above levels of efficiency established pursuant to CEIFA for operations and maintenance, the Commissioner cannot ignore that the maintenance needs of older buildings are, in fact, greater. Additionally, the Commissioner has confirmed that the Board's prior year expenditures in this area are consistent with proposed expenditures, and are not, as claimed by the City, significantly lower. Accordingly, the reduction of $8,500 is restored.

Disputed Line-Item Number 21

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7180	11-000-260-620	Energy (Heat and Electricity)	$264,218	$15,000

The Board notes that it has budgeted $190,575 for electricity for 1997-98. In 1995-96, it spent $176,546 on electricity and in 1996-97, it spent $178,397. The increase, the Board posits, is attributed to adding air-conditioning in significant parts of the buildings. Further, the Board states that, having acquired 60 computers, the air-conditioning will be necessary to provide the proper acclimatization. The Board further contends that the City's reduction is based solely on the Board's prior usage, and does not consider the anticipated increase in electricity which results from the acquisition of computers.

As for the City's reduction for gas usage, the Board notes that gas is primarily used to heat the school, to heat hot water at both schools and to heat the stoves at the high school

cafeteria. The Board affirms that it spent $61,505 on gas in 1996-97, despite the fact that the winter was unusually warm. Thus, its current budget of $71,643 is not unreasonable.

The City finds that these reductions will not impair the Board's ability to offer T&E. With respect to electricity, the City argues that the prior year's actual expenditure was $173,476. The proposed budget for 1997-98 was $190,575. Thus, the City finds that this nearly 10% increase is unnecessary. Additionally, the City notes that the Board's prior year appropriation for gas was $67,489. The actual expenditure was $62,320.31. The City reasons that it appears that the costs for the current year are commensurate with those of the prior year. Thus, the proposed figure of $71,643, is according to the City, excessive.

Upon review, the Commissioner finds that, notwithstanding that the Board is spending at an efficiency level above that established pursuant to CEIFA, the Board has budgeted for amounts consistent with its actual past experience, with a reasonable increase to accommodate the new energy needs associated with its acquisition of computers. Accordingly, the reduction of $15,000 is restored.

Disputed Line-Item Number 22

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7270	11-000-270-512	Contracted Services Transportation	$42,000	$10,000

With respect to the two reductions in this line item, athletic transportation costs ($5,000) and computer transportation costs ($5,000) the Board argues that the net effect of removing athletic transportation from the budget is to eliminate athletics. Athletic transportation, according to the Board, is a fixed cost set by contract bid pursuant to the Public School Contracts Law. As a result of the bid, the Board pays $22.50 per hour for this transportation; it does not use its own buses, since it does not own buses. The Board further notes that it is a member of the

Cape-Atlantic League, which includes schools not only in the named counties, but in Cumberland County, as well. It is not uncommon for students to travel to Atlantic and Cumberland Counties to compete. The average transportation cost of an away game is $90, avers the Board. Thus, the $5,000 reduction in athletic transportation will eliminate approximately 56 away games. If away games are eliminated, the Board reasons, then 56 home games will be similarly eliminated, since, under NJSIAA Rules, it is necessary to play a home and away series. The Board concludes that this reduction will effectively eliminate a substantial portion of the athletic program, which is an integral part of T&E.

As for the City's proposal to reduce costs for computer transportation, the Board notes that the Glenwood Elementary School is "hopelessly overcrowded." (Board's Position Statement at p. 28) As such, grades 5 and 6 occupy space at the high school. However, in order to use the 30 computers (of the total of 60 which have been acquired) the 5th and 6th grade students must be transported to the Greenwood School. In this regard, the Board pays a busing service of $50 per day to bus the 5th and 6th graders to and from the Greenwood School; the total cost is $9,000 per year.[7] To reduce this amount by $5,000, argues the Board, will effectively cut off the 5th and 6th graders from use of the computers. Since the Board urges that the ability to use and understand computers is a necessity of the modern world, the failure to provide such training will deprive the 5th and 6th graders of T&E.

The City has determined that a $10,000 reduction in this line item will not affect the Board's ability to offer T&E. The City notes that, "[f]rom the current year to the budget year the athletic transportation budget increased from $15,500 to $23,000." (City's Position Statement at p. 16) The City finds that such a significant increase is not warranted, particularly

[7] The Board notes in its reply statement that the City's observation, *infra*, that the $9,000 will be used to purchase a computer system is erroneous. (Board's Reply Statement at p. 21)

in light of other budget reductions to the athletic program. Moreover, the City argues that this is also a non-classroom reduction. The City further states, "In addition, the petitioner has included within the proposed overall budget for this department the purchase of a computer costing $9,000.00. At this time, in light of the budget cuts a computer system, which is not necessary, can not occur." *(Id.)*

Upon review, the Commissioner finds that the Board has budgeted appropriately for transportation needs which serve as an integral part of its T&E program, and that reductions to a transportation account cannot be made on the basis of alleged inappropriate expenditures in other areas. Accordingly, the reduction of $10,000 is restored.

Disputed Line-Item Number 23

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7430	11-000-290-330	Purchased Prof. Services	$27,500	$2,500

The Board's explanation for the increase in this item is that it contracts out its computer programming for the District's central computer network to a service company, and the annual contract has been increased from $22,500 to $25,000 for 1997-98. The Board requires these services if the computers are to operate.

The City finds that a reduction in this line item will not affect the district's ability to provide T&E. It notes that the budget appropriated for the prior year was $25,000; the actual expenditures were $23,323.37. The City further observes that the budget appropriated for the current year was also $25,000. Thus, after reviewing the pertinent information, the City concludes that $2,500 of the proposed increase was unnecessary. The City again notes that this is a non-classroom reduction which will not affect the quality of the Board's educational program.

Upon review, the Commissioner finds that this line has historically included no costs over and above the computer service contract, which the Board acknowledges to be $25,000; neither does the Board offer any rationale for additional funds. Accordingly, the reduction of $2,500 is sustained.

Disputed Line-Item Number 24

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
7550	11-000-310-930	Transfers to Cover Deficit	$53,500	$12,000

The Board observes that that this line item contains the cafeteria deficit account; while the cafeteria is supposed to break even, it does not. The Board argues that it is mandated to provide a food service program for its students. Several years ago, the Board continues, it privatized its cafeteria services. Although the change was economical for the district, the cafeteria continues to lose money. This loss, the Board posits, is a direct result of the clash between State regulation and general teenage resistance to nutritious food. By regulation, the Board affirms that it must serve a Class A meal, a hot lunch complete with meat, potatoes and vegetables. Students, however, do not buy the Class A meal but, rather, choose to buy a la carte at a cheaper price. Moreover, the brief 20-25 minute lunch periods encourage students to an a la carte sandwich rather than an expensive Class A meal.

The Board further notes that, effective March 1997, the State has reduced the amount of reimbursement to be received by the cafeteria, and there has been a steady decline in the availability of government commodities. The Board notes that the deficit generally runs between $45,000 and $55,000; the projected amount of $53,500 is realistic.

The City notes that, in the prior year, the budget for this line item was $50,000; the actual expenditures were $42,581.58. In 1995-96, the amount budgeted also exceeded the

actual expenditures significantly, Thus, the City reasons that the Board's operating history demonstrates that it has overbudgeted for this account.

Upon review, the Commissioner finds that the Board appears to regularly anticipate that its cafeteria service will run a substantial deficit, and that it has generously overbudgeted this account in prior years. For example, the June 30 Board secretary's report for 1996-97 reveals that of $50,355 appropriated, only $29,434 was actually expended and $1,875 was encumbered. Clearly, the Board can absorb the reduction made by the City; further, the Commissioner cannot condone the running of a cafeteria program that is in continual deficit. Accordingly, the reduction of $12,000 is sustained and the Board is directed to take such steps as are necessary to operate its cafeteria service on a break-even basis.

Disputed Line-Item Number 25

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2621	11-150-100-101	Salaries of Teachers (Home Instruction)	$72,500	$7,500

The Board argues that homebound instruction is required for any pupil with disabilities and any pupil determined by the school physician to need confinement at his/her residence for at least a two-week period of time, as per *N.J.A.C.* 6:28-4.1 and 4.5. To deprive such students of homebound instruction may be depriving them completely of an education. Moreover, the Board argues that, as an inner city school, it contains an inordinate number of poverty level and/or minority children. As a result, the Board avers, the probability of increased homebound instruction is substantial. Wildwood High School, according to the Board, has an extremely high pregnancy rate and the presence of nationally known gangs creates significant discipline problems. While there is no way to accurately predict what the level of need will be,

the Board argues that costs for homebound instructions generally range between $60,000 and $70,000. Thus, it reasons that its proposed budget of $72,000 is realistic.

The City finds that this reduction will not affect the Board's ability to offer T&E. The City maintains that the Board's operating history of this program indicates that prior budgets are sufficient.

Upon review, the Commissioner finds that actual experience supports the Board's contention that costs have ranged between $60,000 and $70,000; however, it is not necessary to assume the highest end of this spectrum based on one year's experience, and the amount remaining after the City's reduction, $65,000 should be sufficient for anticipated needs, with any additional costs covered by surplus. Accordingly, the reduction of $7,500 is sustained.

Disputed Line-Item Number 26

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2680	11-000-291-270	Health Benefits	$851,369	$53,350

The Board asserts that the figures used by the City are arbitrary, and, instead, appends a worksheet depicting the actual cost of health benefits, as well as FICA/Medicare and Unemployment payments, as reduced by the City, *infra*. The Board reasons that its actual costs for the eight targeted employees amounts to $50,915, rather than $64,000, or $8,000 per employee, as indicated by the City. Thus, the Board asserts that $13,085 should be restored immediately.

The City, addressing only the reduction to the health benefits line item, contends that the reduction corresponds with the reductions in staff, as noted, *supra*. It further argues that this reduction will not affect the Board's ability to offer T&E.

Upon review, the Commissioner determines, based on the information provided in the Board's worksheet and the reductions to staff made above, to sustain $29,854 and restore $23,496.

Disputed Line-Item Number 27

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2620	11-000-291-220	Social Security Contributions	$99,499	$9,800

The Board's arguments for this line item are contained in Disputed Line-Item Number 26.

The City determines that a reduction in the amount of $9,800 in this line item will not affect the Board's ability to offer T&E, nor affect its stability. The reduction, asserts the City, is solely the result of the reductions in staff which are addressed above in detail.

Upon review, the Commissioner determines, based on the information provided in the Board's worksheet and the reductions to staff made above, to sustain $2,734 and restore $7,066.

Disputed Line-Item Number 28

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
2660	11-000-290-250	Unemployment Comp.	$25,000	$850

The Board's arguments for this line item are contained in Disputed Line-Item Number 26.

The City determines that a reduction in the amount of $850 in this line item will not affect the Board's ability to offer T&E, nor affect its stability. The reduction, asserts the City, is solely the result of the reductions in staff which are addressed above in detail.

Upon review, the Commissioner finds that the Board's worksheets establish a total unemployment contribution cost of $781 for the eight positions proposed for elimination by the City. In that the Commissioner has sustained reductions for only six of these positions, the Commissioner finds that the unemployment account must be adjusted concomitantly. Accordingly, the Commissioner sustains $588 of the City's reduction, representing the average cost of one person's benefits times six, and restores the balance of $262.

Disputed Line-Item Number 29

Line No.	Account No.	Description	Amount Budgeted	Amount Cut
6910	11-000-230-100	Salaries/Support Services (General Admin.)	$282,107	$1,200

The Board, in reference to the City's proposal to eliminate $1,200 from this line item for the special bond election, contends that twice in the last six months the voters have rejected a bond to fix the leaking roof at the high school building. Both times, the Board notes, the defeat was substantially a result of the Mayor's opposition. However, the Board maintains that the roof still leaks,[8] the electrical system needs upgrading, asbestos must be removed, the fire alarm system at Greenwood must be upgraded and the auditorium lighting in the high school must also be upgraded. The Board reasons that each of these needs affects the health and safety of the student population. Unless alternate funding is found, the Board contends, "***it may well be necessary to once again go to a referendum on these issues. In such event, the monies cut by Respondent will be necessary." (Board's position statement at p. 10)

[8] In its reply position statement filed on August 4, 1997, the Board asserts, "The fact remains that the roof to Wildwood High School is in desperate shape. Leaks in the roof cause rain to come into the building in the Gymnasium, the Auditorium, and the Third floor generally. Classroom ceiling tiles are waterlogged and the asbestos above them is becoming friable. During bad rainstorms, water literally cascades down the Gymnasium walls. If remedial action is not taken shortly, the deterioration will exacerbate to the point where the building cannot be occupied." (Board's reply statement at pp. 24, 25)

The City determines that a reduction in the amount of $1,200 in this line item will not affect the Board's ability to offer T&E, nor affect its stability. The City notes that this amount was allocated by the Board for a special election school bond. However, the City argues that, since the Board has publicly declared that it was not proceeding with the bond issue for the roof, the amount is unnecessary.

In view of the Commissioner's determination on the use of additional State funds as noted below so as to obviate the need for a special election, the Commissioner sustains the reduction of $1,200.

APPLICATION OF ADDITIONAL APPROPRIATION

In its reply position statement filed on August 4, 1997, the Board contends that monies it "***may receive from the State are desperately needed to repair the roof of the high school. The problems with the roof have been outlined in [Disputed Line-Item Number 29, *supra*]. *** The fact that respondent has consistently fought efforts to effectuate these needed repairs by campaigning against Bond Referendum after Bond Referendum only highlights the necessity of using the $500,000.00 grant to fix the roof." (Board's Reply Statement at p. 26)

In its summation, the City counters that the Board chose not to proceed with the bond issue to repair the roof. As a result, the City contends that the Board should be required to apply part of the grant money to the proposed budget. (City's Summation, at p. 2)

Upon review, the Commissioner finds that the Board has amply established the need for repairs to the high school roof, as well as its history of inability to obtain the necessary funds through bond referenda. Accordingly, the Commissioner finds that the special appropriation made by the Legislature to the district for this purpose should not be used to offset any reductions made herein.

APPLICATION OF SURPLUS

In its advertised annual school district budget statement, the Board projected an unreserved surplus of $268,015.

The Board's annual financial report filed pursuant to N.J.S.A. 18A:17-10 (June 30 Board secretary's report) reveals an actual undesignated unreserved surplus of $482,632, while the final audited surplus not designated for 1997-98 expenditures is revealed as $509,306. The Board's auditor identified $221,197 of this amount as excess surplus and $288,109 as undesignated unreserved surplus. However, based upon a calculation of 3 percent of the Board's General Fund budget, the appropriate amount of undesignated unreserved surplus to be maintained by the Board is $268,916. Therefore, a total of $240,390 ($509,306 - $268,916), not $221,197, is available to fund restorations.

SUMMARY

In summary, the Commissioner directs restoration or sustaining of the City's line-item reductions to appropriations as set forth below.

Line Item	Description	Sustained	Restored
2540	Sal. of Teachers/Athletic Trainer	$ 51,555	$ -0-
2680	General Supplies	-0-	3,500
2670	Other Purchased Services (Travel)	-0-	3,000
2640	Other Sal. for Instruction (Aides)	-0-	10,000
2700	Other Objects	-0-	5,000
6110	Supplies and Materials (Athletics)	3,500	16,500
6490	Sal. of Other Prof. Staff (Guidance)	52,000	-0-
6550	Supplies and Materials	-0-	5,500

Line Item	Description	Sustained	Restored
6560	Other Objects	$ -0-	$ 4,000
6580	Sal. of Other Prof. Staff (Child Study)	48,544	-0-
6890	Other Objects (Library)	-0-	3,100
6910	Undistributed Expenditures	5,531	-0-
6920	Legal Services	2,500	10,686
6950	Communications/Telephone	3,150	-0-
6960	Judgments Against. Sch. District	2,600	4,000
	(Bd. Sec. Expense; Special Election Bond)		
7010	Sal. Principal/Asst. Principal	51,300	-0-
7030	Sal. of Secretarial and Clerical	35,579	14,764
7100	Salaries (Custodial)	12,266	66,263
7120	Cleaning/Repair/Service	1,500	-0-
7120	General Supplies	-0-	8,500
7180	Energy	-0-	15,000
7270	Contr. Svcs. (Other than Home/School)	-0-	10,000
	(Athletic and Computer Transportation)		
7430	Purchased Prof. Services	2,500	-0-
7550	Transfers to Cover Deficit	12,000	-0-
2621	Special Education Salaries	7,500	-0-
2680	Health Benefits	29,854	23,496
2620	Social Security	2,734	7,066
2660	Unemployment	588	262
6910	Expenses - Board of Education (Special Election)	1,200	-0-
Total Line-Item Determinations:		$326,401	$210,637

General Fund Tax Levy Certified by Governing Body:	$ 5,693,033
Restoration of Reductions:	210,637
Amount of Restoration Funded by Surplus:	(210,637)
Amount of Restoration Funded by Additional State Appropriation:	-0-
Total General Fund Tax Levy for 1997-98:	$ 5,693,033

Accordingly, the Cape May County Board of Taxation is directed to let stand, as certified by the Board of Commissioners, the tax levy of $5,693,033 for General Fund purposes of the Board of Education of the City of Wildwood for the 1997-98 school year.

Additionally, the Board of Education is directed to reserve $29,753 ($240,390 surplus available less $210,637 appropriated for restorations herein) as excess surplus to be appropriated in the 1998-99 budget for tax relief purposes.

Finally, the Board is reminded that it has been permitted to exclude its additional State appropriation from consideration herein, as noted above, solely because of the demonstrated need for the repairs for which the appropriation was expressly made. Therefore, any portion of the supplemental State appropriation not used for the designated purpose shall be reserved, in addition to the amount set forth above, as excess surplus to be appropriated in the 1998-99 budget for purposes of tax relief.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 19, 1997
DATE OF MAILING DECEMBER 19, 1997

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RICHARD CHAMBERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

DECEMBER 19, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 8498-97
AGENCY DKT. NO. 299-8/97 A

RICHARD CHAMBERS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE,
Respondent.

Richard Chambers, petitioner, *pro se*

James L. Jackson, Esq., for respondent

Record Closed: November 20, 1997 Decided: November 21 , 1997

BEFORE **JEFF S. MASIN**, ALJ:

This is the latest chapter in an ongoing dispute between Mr. Chambers, a tenured music teacher in the Pleasantville School District, and the Pleasantville Board of Education ("Board"). Previous decisions of the Office of Administrative Law ("OAL") and the Commissioner and the State Board of Education ("State Board") have been reported at 95 *N.J.A.R.2d* (EDU) 292 and 96 *N.J.A.R.2d* (EDU) 447. The issues all concern the Board's actions *vis a vis* Mr. Chambers arising out of the Board's concern as to his mental health and his capacity to serve as a teacher in the District. This latest episode arises as a result of a transfer to OAL of a petition deemed by the Commissioner to request emergent relief. In addition, Mr. Chambers had filed a request for a declaratory judgment which the Commissioner declined to act upon. *See* Letter from Leo Klagholz, Commissioner, to Mr. Chambers, dated September 22, 1997.

The Petition for Appeal was first filed on August 14, 1997. In it, among other matters, Mr. Chambers refers to a letter dated August 28, 1996, from James L. Jackson, Esq., attorney for the Board, in which Mr. Chambers was advised that the Board had determined that during "the period of ineligibility for further service, declared by the Board on August 6, 1996, you shall not receive any salary, compensation or sick leave." The Board had acted under authority of *N.J.S.A.* 18A:16-2 and 16-4, and after lengthy proceedings reported in the two cited decisions, the Board had obtained a report from a psychiatrist which indicated that Mr. Chambers was suffering from a mental abnormality and was therefore "ineligible." In his August 14 Petition, Mr. Chambers, who has long contended that the Board had acted improperly in regard to the entire matter, specifically requested all back pay including increments, extracurricular pay and monetary damages, including a number of claims such as intentional infliction of emotional harm, punitive damages for willful disregard of the rights of a tenured teacher, harassment, etc. In a Reply to Respondent's Response to Petition, dated September 22, 1997, Mr. Chambers requested back pay, extracurricular activities, pension reimbursement, interest and reinstatement of his teaching position, "immediately by way of summary judgement." On October 6, 1997, Deborah Antanaitis, Director of the Bureau of Controversies and Disputes, wrote to Mr. Chambers advising that the matter was being considered as a request for emergent relief and would be transmitted to the OAL. Oral argument on the motion was held on November 7, 1997, and the parties were then permitted to file briefs regarding any additional authorities which they might discover. Mr. Jackson's brief was received on November 14 and Mr. Chamber's was received on November 19. The record regarding the emergent relief petition was closed on November 20.

While Mr. Chambers raises many, many objections to the procedures used in prior years in regard to the Board's attempt to determine his eligibility pursuant to its authority under *N.J.S.A.* 18A:16-2 and -4, the sole issue appropriately considered in this emergent relief application is whether the petitioner has established that some action or inaction of the Board is likely to cause him immediate and irreparable harm and whether if such is the case, it is reasonably likely that he will succeed on the merits of his claim that the Board's conduct has violated his rights. Additionally, the emergent relief which he seeks to prevent that harm must be limited in scope to only such measures as are reasonably necessary to avoid the immediate and irreparable harm and the material facts relevant to the issue must not be in dispute. *Crowe v. De Gioia*, 90 *N.J.* 126 (1982). The immediate and irreparable harm which Mr. Chambers appears to allege is that the

Board is not paying him and is preventing him from working as a tenured teacher in the school system. The immediate relief he seeks for that would be an order to immediately reinstate his pay and possibly also an order to immediately reinstate him to active teaching status. Any *final* determination as to the present state of his mental health and whether he is now eligible to teach is not appropriately determined upon a motion for emergent relief, which is a proceeding occurring on a sudden and immediate basis without the proper time allowed for full development of the relevant discovery materials, including interrogatories, document exchange, expert reports, etc. Such final determinations must await the scheduling of a plenary hearing at a later date, preceded by a reasonable schedule for necessary discovery.

As for Mr. Chambers' request for emergent relief, some background should be stated. This is drawn for the prior decisions. The Board determined on February 22, 1994, that Mr. Chambers was exhibiting evidence of a significant possibility of harmful deviation from normal mental and/or emotional health and resolved that he be required to undergo a psychiatric and a physical examination. He was suspended from his teaching duties with pay pending the outcome of the examinations, by separate resolution also adopted on February 22. After a lengthy litigation regarding the selection of the examining psychiatrist, Mr. Chambers was examined by Geetha Kumar, M.D., a psychiatrist. Dr. Kumar issued a report based upon two examinations held on April 30, and June 4, 1996. She diagnosed an Adjustment Disorder with Mixed Emotional Features, and a Paranoid Personality Trait, and she recommended an in-depth psychological testing, including Projective Testing and Personality Inventory. in order to assess underlying emotional issues and coping styles which she found interfered with his functioning. Additionally, she recommended individual therapy and reevaluation in six to nine months after treatment "to assess his capacity to return to his employment." According to Mr. Jackson's August 9, 1996, letter it was this report that prompted the Board to declare Mr. Chambers ineligible for further service as a teaching staff member until "proof of recovery satisfactory to the Board is furnished." The letter advising of the suspension of pay followed on August 28, 1996.

There is evidence that Mr. Chambers was involved in therapy in late 1996 and up to at least May 22, 1997. The documents filed in this matter indicate that when attempts were made to have Dr. Kumar perform the recommended re-evaluation in the Spring of 1997, she advised that she had other commitments and could not do so. Mr. Rogovoy, formerly counsel for Mr.

Chambers, wrote to Mr. Jackson on May 7, 1997, advising of this and seeking for the Board to choose a new psychiatrist to perform the re-evaluation. He wrote Jackson again on June 6. An August 12, 1997, letter to Mr. Rogovoy advised that the Board had chosen a Philadelphia physician to perform the evaluation. As of the date of the emergent hearing, I do not believe that this examination has taken place.

Mr. Chambers has many ongoing objections to the entire course of events which led to the present situation, but as best as I can determine, his particular claim as to the emergent relief application is that the Board is not authorized to suspend his pay unless it either brings charges before the Commissioner seeking to remove or otherwise affect his tenure, or where an indictment has been returned against him, neither of which events has occurred here. The Board has not filed any tenure charge, and he complains that the Board never notified the Commissioner that it had suspended his pay, which he claims violates his rights. The Board replies that it acted properly in accordance with its discretionary rights under *N.J.S.A.* 18A:16-4, and notes that this application comes too late, as it is well beyond 90 days since it notified Mr. Chambers that his salary was suspended.

Without considering the timeliness issue, an examination of the law governing the right of a school board to suspend pay when any employee, whether or not tenured, is ineligible to serve as a member of the teaching staff due to a determination of a mental abnormality resulting from an examination conducted pursuant to *N.J.S.A.* 18A:16-2., reveals that the the Commissioner of Education has strongly suggested that a Board is acting well within its rights. In *Middletown Township Board of Education v. Robert Leo*, 1990 *S.L.D.* 436, the Board brought tenure charges against Mr. Leo due to evidence of psychiatric disorders. When the evidence established that the psychiatric problem was not likely to be cured in a reasonable time, if at all, the Commissioner upheld the Board determination to terminate the tenured teacher. The Commissioner had originally remanded the matter for a determination as to whether the originally diagnosed psychiatric condition was a long-term problem, or one which appeared susceptible to probable cure sufficient to allow a return to teaching duties. In his Remand Decision, the Commissioner noted that the School Board objected "strenuously" to the remand and the attendent costs to the taxpayers.he He noted that the Board could have brought the matter to a more speedy conclusion

if it had followed the procedures for the psychiatric examination, which he found was "clearly warranted by respondent's deviant behavior." The Commissioner then states:

> (P)resuming that the outcome of the exam would have been as it was in these proceedings, respondent's removal from the classroom could have been achieved by invoking a prohibition against continued service pending recovery under N.J.S.A. 18A:16-1 *(where the cost of any absence could, at the Board's discretion, have accrued to respondent rather than the district)* or ordering a disability retirement under *N.J.S.A.* 18A:66-39. (Emphasis supplied.)

Based upon the Commissioner's comments in *Middletown Township Board v. Leo,* while dicta unnecessary to decide that case, it seems quite likely that the Commissioner would hold in the present matter that it was entirely within the discretion of the Board to suspend Mr. Chambers' pay when it learned the results of Dr. Kumar's examinations, thus allowing the "cost of any absence" from work during the period of Mr. Chambers' treatment to "accrue" to Mr. Chambers rather than to the Board. Since in order for Mr. Chambers to obtain an emergency order for the Board to pay him back pay accruing since the suspension of his pay or to obtain an emergency order for the Board to immediately resume his pay it would be necessary for me to determine that it was likely that Mr. Chambers would prevail after a plenary hearing on his claim that the Board's suspension of his pay in August, 1996 was in violation of applicable law, the Commissioner's comments in *Leo* are highly significant. It seems quite doubtful that the Commissioner, or the State Board, would find that the Board, faced as it was with the Kumar report, was not authorized to suspend pay for this ineligible tenured teacher. Therefore, Mr. Chambers has failed to meet the test for emergent relief regarding the suspension of his pay.

In regards to Mr. Chambers' request for emergent relief ordering the Board to reinstate him to his teaching duties, which of course would also necessitate that he be returned to the payroll, in the absence of any psychiatric report which even arguably suggests that Mr. Chambers has recovered from the mental abnormalities diagnosed by Dr. Kumar, such relief is unwarranted. While the record seems to indicate that Mr. Chambers did receive treatment, an evaluation must be done to see if he has recovered. If he has, the Board may well have to return him to active status. That determination must await the results of medical evaluation. Emergent relief cannot be granted on this record.

Finally, in his petition Mr. Chambers sought relief "immediately by summary judgment." As I explained to him at the hearing, immediate relief connotes emergency relief, and the rules provide a procedure for consideration of emergency relief as has been done here. Summary judgment, which in the context of administrative litigation is known as "summary decision," is a different procedure, outlined at *N.J.A.C.* 1:1-12.5. It is never considered in the hurried fashion of emergency relief. Generally, a motion for summary decision is determined only after the parties have had a chance to engage in complete discovery. Technical rules for determining such a motion, which are discussed in *Judson v. People's Bank and Trust Co. of Westfield,* 17 *N.J.* 67 (1954) and *Brill v. Guardian Life Insurance Company,* 142 *N.J.* 520 (1995), are not applicable to an application for emergent relief, which as noted, is governed by standards generally discussed in *Crowe v. De Gioia,* 90 *N.J.* 132-133.

The application for emergency relief is **DENIED**. The matter will be continued on the docket pending plenary hearing. The parties are urged to cooperate in order that Mr. Chambers can be examined by the designated psychiatrist, if this has not already been accomplished. As I advised Mr. Chambers, I will have this matter assigned to another judge for plenary hearing.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

November 21, 1997
DATE

JEFF S. MASIN, ALJ

OAL DKT. NO. EDU 8498-97
AGENCY DKT. NO. 299-8/97A

RICHARD CHAMBERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter and initial order of the Office of Administrative Law (OAL) have been reviewed.* Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner raises numerous objections, but essentially renews his contention that the Board's action to suspend him, without pay, subsequent to *N.J.S.A.* 18A:16-2 *et seq.*, constituted a violation of his tenure rights. Petitioner cites to *Slater v. Board of Education of Ramapo-Indian Hills*, 237 *N.J. Super.* 424, 426 (App. Div. 1989) which provides that

> ***a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. IN ALL OTHER CIRCUMSTANCES, A SUSPENSION MUST BE WITH PAY. (Petitioner's Exceptions at p. 5, citing to *Slater* at 426)

Inasmuch as the Board did not bring tenure charges against petitioner, and petitioner was not indicted, he contends that the Administrative Law Judge's (ALJ) "sole responsibility" was to determine whether his tenure rights were, in fact, violated. (Petitioner's Exceptions at p. 3)

* It is noted that the record included the audio cassette tapes of the emergent hearing conducted at the OAL.

Further, petitioner identifies the harm which he has suffered as a result of the Board's failure to continue his salary, asserting that the Board "***ruined [his] career maliciously creating irreparable harm to his credit and reputation." (*Id.* at p. 4)

Finally, once again, petitioner argues that his motion for summary judgment has not been addressed. He avers, "Petitioner did not motion for oral argument. Petitioner motioned for a hearing regarding the issues in Agency Dkt. No. 299-8/97[A] and SUMMARY JUDGEMENT [sic], which, to this date, has been ignored." (*Id.* at p. 2)

The Board contends that, as to the likelihood of petitioner succeeding on his claim, that

> *N.J.S.A.* 18A:16-8 contemplates that an employee found ineligible for service [subsequent to a psychiatric exam which shows evidence of deviation from normal, physical or mental health] is not actually employed by the board during the period of ineligibility, using language such as "reemployment" of tenured employees upon satisfactory recovery. The statute also tolls the acquisition of additional years of tenure during the period of ineligibility. To interpret the language of *N.J.S.A.* 18A:16-4 to require that a board must file tenure charges before it can withhold salary from a tenured employee found ineligible for service would render most of the language of that statute superfluous and meaningless. There would be no need to include language in *N.J.S.A.* 18A:16-4 which says a board *may* grant sick leave with compensation to a tenured employee, if there is an obligation to file tenure charges before withholding salary. The requirement of filing tenure charges is not mentioned in, or contemplated by, the statute. It should also be noted that *N.J.S.A.* 18A:16-4 and *N.J.S.A.* 18A:28-5 were passed at the same time in L. 1967, c. 271. (Board's Post-hearing Brief at p. 6; emphasis in text)

Upon careful review of this matter, the Commissioner initially underscores the ALJ's instruction to petitioner, both in the initial decision and in the course of the emergent hearing at OAL, that

> ***the sole issue appropriately considered in this emergent relief application is whether petitioner has established that some action or inaction of the Board is likely to cause him immediate and irreparable harm and whether if such is the case, it is reasonably likely that he will succeed on the merits of his claim that the Board's conduct has violated his rights. (Initial Decision at p. 2)

Thus, the purpose of the emergent hearing, contrary to petitioner's contention, was *not* to determine whether his tenure rights were violated, as that is the question to be decided when the merits of petitioner's claim are considered in subsequent proceedings. The Commissioner is, therefore, satisfied that the ALJ carefully weighed this matter in light of the pertinent standard of review, *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) and concurs that, even assuming *arguendo* that petitioner's claims are timely, he has failed to demonstrate that he is entitled to emergent relief. The Commissioner adds that the remedies petitioner seeks, reinstatement of position and reinstatement of salary and attendant emoluments, do not, in the absence of such relief, constitute irreparable harm. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." *Crowe, supra*, at 132, 133.

Moreover, in view of the parties' divergent interpretations of the pertinent statutes, the Commissioner cannot find that petitioner has established that the legal right underlying his claim is settled, or that he is likely to succeed on the merits of his claim. *Crowe* at 133.

Accordingly, petitioner's application for emergent relief is denied for the reasons expressed in the recommended order. The matter shall proceed to hearing on the merits, with due regard to petitioner's request for summary judgment. Additionally, the Commissioner notes that he will not object to accelerated proceedings, if all parties consent and the ALJ finds good cause, pursuant to *N.J.A.C.* 1:1-9.4.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 19, 1997
DATE OF MAILING DECEMBER 19, 1997

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RICHARD CHAMBERS, :

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY, : DECISION

RESPONDENT-RESPONDENT. :

Decided by the Commissioner of Education, December 19, 1997

For the Petitioner-Appellant, Richard Chambers, pro se

For the Respondent-Respondent, James L. Jackson, Esq.

Inasmuch as we agree with the Commissioner of Education that petitioner's application for emergent relief fails to meet the standards that would entitle him to such relief under Crowe v. De Gioia, 90 N.J. 126 (1982), we deny his request. In so doing, we reiterate that N.J.S.A. 18A:16-4 provides that if the result of a psychiatric examination "indicates mental abnormality...the employee shall be ineligible for further service until proof of recovery, satisfactory to the [district] board, is furnished...." There is no indication in the papers before us that petitioner has provided the Pleasantville Board with such proof.

Petitioner's request for oral argument is denied as not necessary for a fair determination of this matter. N.J.A.C. 6:2-3.2.

April 1, 1998

Date of mailing APR 0 3 1998

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IN THE MATTER OF THE TENURE HEARING	:	
OF JOHN WILSON, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF SOUTH BRUNSWICK,	:	DECISION
MIDDLESEX COUNTY.	:	

SYNOPSIS

Board certified tenure charges of unbecoming conduct against custodian for excessive absenteeism.

ALJ found that since the Board acted within 15 days of the date upon which respondent received the tenure charges, the Board violated N.J.A.C. 6:24-5.1. Thus, the ALJ found that the tenure charges were improperly approved and had to be dismissed without prejudice to the Board's right to reconsider them following proper compliance with the applicable statute and regulations. ALJ dismissed the charges and ordered respondent restored to his employment with compensation.

Commissioner adopted in part and reversed in part the conclusions of the ALJ and remanded the matter to OAL for a hearing on the tenure charges. Commissioner will not automatically dismiss tenure charges on procedural grounds and has declined to do so where the defect at issue did not prejudice a respondent's rights or represent an egregious and unwarranted disregard of tenure proceeding law. Under the particular circumstances herein, the Commissioner could not conclude that the procedural defect which occurred was of this type as respondent made no claim that he intended or attempted to answer the tenure charges on January 13, 1997 but was prevented from doing so by action of the Board or other circumstances.

DECEMBER 22, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2457-97
AGENCY DKT. NO. 16-1/97

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,
Petitioner,
v.
JOHN WILSON,
Respondent.

John E. Collins, Esq., for petitioner (Carroll and Weiss, attorneys)

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

Record Closed: October 10, 1997 Decided: November 5, 1997

BEFORE **JEFF S. MASIN**, ALJ:

The Board of Education of South Brunswick, acting pursuant to *N.J.S.A.* 18A:6-11, certified tenure charges against its employee, John Wilson. The Board originally advised Mr. Wilson of the charges by means of a Statement of Tenure Charges and Certified Statement of Evidence which was served upon Mr. Wilson on December 27, 1996, together with a memorandum advising Mr. Wilson that the Board would receive the documents at its meeting scheduled for 7 P.M. on January 13, 1997. The memo also informed Mr. Wilson that ". . . you have fifteen days from receipt of this letter to submit a written response to the charges to be presented to the Board of Education on January 13, 1997." Any such response would then be presented to the Board along with the charges so that the Board could consider whether or not to certify the charges to the Commissioner.

The certified statement served upon Mr. Wilson did not include with it the documentary evidence referred to therein as Exhibits A through P. Counsel for the Board therefore had these mailed to Mr. Wilson on December 27. The earliest that these would have been received by Mr. Wilson would have been on December 28, 1996.

As indicated in the memo accompanying the Statement of Charges, the Board did consider them at its January 13 meeting. As of that time, Mr. Wilson had filed no response with the Board. The Board voted to certify charges of unbecoming conduct or other just cause to the Commissioner, who, after receiving an answer from counsel for Mr. Wilson, transferred the matter as a contested case to the Office of Administrative Law ("OAL"), pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Mr. Wilson has moved to dismiss the tenure charges, arguing that the Board failed to accord him the required 15 days within which to respond to the Board prior to its consideration of the charges. The Board denies that it violated any procedural or substantive requirements and urges that the matter be considered upon the merits of the charge of unbecoming conduct or other just cause for removal of Mr. Wilson's tenured status.

N.J.S.A. 18A:6-11 provides that charges against a tenured employee

> shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the Board shall . . . vote . . . .

and if it determines that the charges are such as to warrant dismissal or reduction in salary, certify them to the Commissioner of Education for a hearing pursuant to *N.J.S.A.* 18A:6-16.

N.J.A.C. 6:24-5.1 (b) provides that

> In all instances of the filing and certification of tenure charges, other than for reasons of inefficiency, the following procedures and timelines shall be observed:
>
> . . .
>
> 3. The affected tenured employee shall have an opportunity to submit to the district board of education a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within 15 days of receipt of the tenure charges.
>
> 4. Upon receipt of respondent's written statement of evidence under oath, or upon expiration of the allotted 15 day time period, the district board of education shall determine by a majority vote of its full membership within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction of salary. (See *N.J.S.A.* 18A:6-11.)

Mr. Wilson contends that the Board failed to allow him the required 15 days before it considered the charges. Assuming for the purposes of this motion that he was served on December 28, a Saturday, with the documents referenced in the Statement of Charges and inadvertently not included with the statement when it was served on December 27, he notes that the 15th day thereafter would be Sunday, January 12, 1997. Since this was a Sunday, he contends that the operative 15th day is Monday, January 13, relying upon *N.J.A.C.* 1:1-1.4, which provides that in

> computing any period of time fixed by rule or judicial order, the day of the act or event from which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or legal holiday. . . .

Since the Board considered the charges and voted during the evening of Monday, January 13, the 15th day according to the calculation made based upon Sunday, December 29 as the first day and Sunday, January 12 as the last, therefore Monday, January 13, as the last of the 15 days, the Board failed to wait until the "*expiration of the allotted 15-day time period*" required by *N.J.A.C.* 6:24-5.1 and its actions of that Monday are therefore invalid.

The Board responds that the rules of the OAL are to be liberally construed to achieve just results and avoid unjustifiable expense and delay and that therefore, despite the fact that "(A)t first glance, a literal reading of *N.J.A.C.* 1:1-1.4 would appear to support Respondent's position," application of *N.J.A.C.* 1:1-1.3(a), which states the "liberal construction" concept, should defeat the respondent's position, avoiding a ruling that would "frustrate the goals of fairness and the elimination of unjustifiable expense. As Mr. Wilson does not contend that he attempted to file or to submit any statement of position either prior to, at the time of or at any time after the Board met on the evening of the 13th even up until midnight of the 14th, or even the next day, he cannot complain, as he suffered no prejudice even if the Board acted several hours before the end of the 13th. Further, the 15th day could be read to mean the 15th *business* day, which ended at 6:00 P.M. when the district business office closed. The Board also argues that the requirement under the regulation is to provide time within which the respondent may "file," which means to have the statement actually received at the district offices on the 15th day, which must therefore mean that it must arrive at the office when it is open for business, here up until the 6 P.M. closing.

Finally, counsel for the Board contends that *N.J.A.C.* 1:1-1.4 is not applicable to this matter, and that it does not control the calculation of the 15-day period required by *N.J.A.C.* 6:24-5.1(b), because the action challenged was taken by a local board in a matter not then under the auspices of the OAL.

DISCUSSION

The respondent offers several theories for avoiding the fact that it considered the charges against Mr. Wilson on the 15th day in clear violation of the regulation which incorporates the prior ruling of the Commissioner in *In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, Essex County*, 1977 *S.L.D.* 451. These theories are without merit. The liberal interpretation which is generally given to the Uniform Rules of Administrative Procedure, which govern proceedings in the OAL and lay out general rules for various procedural aspects of administrative practice and litigation, has no relevance to the interpretation of regulations adopted by agencies addressing matters within their special competence and jurisdiction. Here the agency regulation provides that 15 days must elapse before

the Board may consider the charges. The regulation governs the process by which substantive charges are moved forward toward the Commissioner for hearings at OAL or are determined by local boards to be sufficiently without merit or without sufficient weight to merit such serious action. The regulation is meant to assure that a respondent to charges placed before the board has a sufficient opportunity to respond before the board considers what to do. The Uniform Procedural Rule which addresses how one is to understand the calculation of time periods by which certain actions are to be taken is clearly relevant to the determination of what the applicable 15 day period is, but the concept of liberal application of the rules is a general concept which is to be applied on a case-by-case basis as necessary to further the ends of justice. In connection with a mandate such as the regulation here involved, where the effect of interpreting *N.J.A.C.* 1:1-1.4 as the Board advocates would be to require that the 15th and last day for filing fall upon a Sunday, a "liberal" application which would in effect deny the charged party the ability to file on a weekday would be completely inappropriate. The clear intent of a rule of interpretation which provides for extending the deadline by which some action required by any rule or order to the next business day after a Saturday, Sunday or legal holiday which would otherwise be the final day for the required action is to accommodate the required time frame to the generally applicable work week for most government offices and to recognize that the conduct of business on these weekend and holidays is not generally the practice. It may also have its historical roots in recognition of the more subdued state of secular "business" in times when the historic strictures of the Sabbath were more generally observed. Whatever the reasons for the rule, it is well recognized. Here, the school board acted prematurely. It considered the Wilson charges on the *de jure* 15th day, in violation of the settled rule. It does no good to suggest that the rule be read to mean that the 15th day ends when the Board's business office closes, for the rule requires the expiration of 15 days, not some more limited part of the 15th day. As for the respondent's argument that the 15-day rule is a "local procedural requirement," it is in fact nothing of the sort, but is instead a state mandated requirement imposed upon every school board.

The appropriate way in which to determine how to understand the calculation of mandated time periods within which action must be taken is to look at the statutory and court or regulatory standards which address this question. There is no merit to counsel's suggestion that as the matter of taking action on the charges was before the local board on January 13, 1997, and not

before the OAL, that *N.J.A.C.* 1:1-1.4 should not be used as an interpretive guide. In fact, its use is wholly proper.

The Board acted within 15 days of the date upon which Mr. Wilson received the tenure charges. This was a violation of *N.J.A.C.* 6:24-5.1. As such the tenure charges were improperly approved and they must therefore be dismissed without prejudice to the Board's right to reconsider them following proper compliance with the applicable statute and regulations.

The tenure charges are **DISMISSED.** Mr. Wilson shall be restored to his employment and shall be made whole for all lost wages and benefits. He shall file an affidavit as to theses losses with counsel for the Board within 30 days of the date of this initial decision.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 5, 1997
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

11/7/97
DATE

DAA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 10 1997
DATE

Barbara A Hamm
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

Certification of Jeffrey Scott dated September 26, 1996, with attachments; Certification of John E. Collins dated September 29, 1997, with attachments; Certification of Determination of Jeffrey Scott, notarized on January 14, 1997

FOR THE RESPONDENT:

Exhibit A	December 27, 1996, memo from Jeffrey Scott to John Wilson Re: Notice of receipt of tenure charges and notice of Board meeting
Exhibit B	December 27, 1996, letter from John E. Collins to John Wilson Re: Tenure Charges
Exhibit C	Proof of Service of mailing signed by Donna M. Buchanan, Secretary

IN THE MATTER OF THE TENURE HEARING	:	
OF JOHN WILSON, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF SOUTH BRUNSWICK,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the Board and by respondent in conformance with *N.J.A.C.* 1:1-18.4.

The Board and petitioner essentially recast and reiterate arguments advanced before the Administrative Law Judge (ALJ) and summarized in the initial decision, concerning the interpretation of the procedural requirement set forth at *N.J.S.A.* 18A:6-11, as interpreted through *N.J.A.C.* 6:24-5.1.

Upon careful and independent review, the Commissioner is constrained to adopt in part and reverse in part the conclusions of the ALJ and remand this matter to the OAL for a hearing on the tenure charges. In reaching this determination, the Commissioner initially concurs with the ALJ that respondent's answer was due on January 13, 1997 in that rule *N.J.A.C.* 1:1-1.4 states:

> In computing any period of time fixed by rule or judicial order, the day of the act or event from which the designated period begins to run is not to be included. *The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or legal holiday.**** (emphasis added)

As the ALJ correctly notes, this Uniform Administrative Procedural Rule, which "***addresses how one is to understand the calculation of time periods by which certain actions are to be taken is clearly relevant to the determination of what the applicable 15 day period is***" and is routinely applied and well recognized by this agency in computing time frames for contested

cases. (Initial Decision at p. 5) Thus, the Commissioner concurs that the use of *N.J.A.C.* 1:1-1.4 for computation of time in the present matter is wholly proper.[1]

Moreover, the Commissioner concurs that *N.J.A.C.* 6:24-5.1 supports a finding that a board of education should wait the expiration of 15 days before taking action to certify tenure charges and that failure to do so, in most circumstances, is a fatal defect. See *In the Matter of the Tenure Hearing of Carol Beam, School District of the Township of Mantua,* 93 *N.J.A.R.* 2d (EDU) 320. Regulation provides a respondent with:

> ***an opportunity to submit to the district board of education a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within 15 days of receipt of the tenure charges. *N.J.A.C.* 6:24-5.1(b)3.

However, it is also well-established that the Commissioner will not automatically dismiss tenure charges on procedural grounds and has declined to do so where the defect at issue did not, under the particular circumstances, prejudice a respondent's rights or represent an egregious and unwarranted disregard of tenure proceeding law. *In the Matter of the Tenure Hearing of James Andrews, School District of the City of Newark, Essex County,* 1991 *S.L.D.* 1297; *In the Matter of the Tenure Hearing of Thomas L. Puryear, School District of the City of Newark, Essex County*, 1977 *S.L.D.* 934; *In the Matter of the Tenure Hearing of Eddie Lee Harrell, School District of the City of Paterson, Passaic County,* decided August 30, 1985.

Under the totality of the circumstances presented herein, the Commissioner cannot conclude that the procedural defect which occurred was of this type. Respondent has made no claim, either heretofore or in these proceedings, that he intended or attempted to answer the tenure charges on January 13, 1997, but was prevented from doing so by action of the Board or other circumstances. Further, the record shows that petitioner was notified of the date that the Board was to consider the charges against him when he was served with the charges via hand-delivery and that no objection to that was raised. Without any such claim or indication, respondent cannot credibly assert that his rights were prejudiced by the Board's having acted at a meeting held on the evening of the day his response was due. Moreover, the Commissioner finds

[1] Such rule, however, does not support respondent's argument that he had a right to place his statement of position in the U.S. mail on Monday, January 13, 1997, nor does the wording of *N.J.A.C.* 6:24-5.1(b)3 which envisions a respondent's submission to be filed *within* 15 days of receipt of the tenure charges.

that no good purpose would be served by forcing the Board to initiate *de novo* proceedings, solely to remedy the Board's failure to have waited for an answer until midnight on the 15th day following certification of charges. Rather, this would result in unjustifiable expense and delay to the Board, and could further accord respondent a second opportunity to exercise a right he made no attempt to invoke within the time provided by law.

Accordingly, in view of the specific circumstances herein, the initial decision of the OAL dismissing the tenure charges against respondent is affirmed in part and reversed in part, and the instant matter is remanded for a hearing on the charges as certified.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 22, 1997
DATE OF MAILING DECEMBER 22, 1997

654-97

EDU #2457-97
C # 654-97
SB # 1-98

IN THE MATTER OF THE TENURE :
HEARING OF JOHN WILSON, SCHOOL : STATE BOARD OF EDUCATION
DISTRICT OF SOUTH BRUNSWICK, : DECISION ON MOTION
MIDDLESEX COUNTY. :

Decided by the Commissioner of Education, December 22, 1997

For the Petitioner-Respondent, Carroll & Weiss (John E. Collins, Esq., of Counsel)

For the Respondent-Appellant, Klausner & Hunter (David L Rosenberg, Esq., of Counsel)

Respondent alleged that the South Brunswick Board had failed to wait until expiration of the allotted 15-day period following his receipt of tenure charges filed by the Board to certify those charges to the Commissioner of Education, as required by N.J.A.C. 6:24-5.1(b). The Commissioner concluded that, under the particular circumstances herein–in which the Board had acted to certify the charges on the evening of the fifteenth day and there was no claim by respondent that he had intended or attempted to answer the charges–the procedural defect did not represent such an egregious and unwarranted disregard of the tenure proceeding laws as to require dismissal of the tenure charges. Accordingly, the Commissioner remanded those charges to the Office of Administrative Law for a hearing.

Respondent filed the instant motion to the State Board for leave to appeal an interlocutory decision of the Commissioner.

April 1, 1998

We grant respondent's request for interlocutory review, and, after consideration of the record and the parties' submissions, including the supplemental briefs, we affirm the Commissioner's determination that the procedural defect in this case did not warrant dismissal of the tenure charges. In so doing, we reject respondent's contention that the Commissioner's decision in In the Matter of the Tenure Hearing of William Wenisch, decided by the Commissioner, January 15, 1998, appeal pending, State Board Docket #15-98, alters that result.

In Wenisch, the district board acted to certify tenure charges to the Commissioner on the twelfth day following receipt of those charges by the respondent therein. Since an appeal from the Commissioner's decision in that case is currently pending before us, we do not address the merits of that decision. However, it is evident that the particular facts in the matter now before us differ significantly from the facts in Wenisch. Here, the Board acted on the evening of the fifteenth day following respondent's receipt of the charges. Moreover, as pointed out by the Commissioner, respondent does not allege that he had attempted or intended to answer the charges but had been prevented from doing so by the Board's action or by any other circumstances. Under these particular facts, we agree with the Commissioner that the procedural defect in this instance was not fatal.

April 1, 1998

Date of mailing APR 0 3 1998

655-97

655-97

CAROL ROSBERGER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, tenured elementary teacher, alleged the Board withheld her employment and adjustment increments for the 1994-95 school year in an arbitrary, capricious and unreasonable manner.

ALJ found that petitioner's unsatisfactory performance was supported by the record. ALJ concluded that petitioner failed to establish by a preponderance of credible evidence that the Board's action withholding her increment was improper. Petition was dismissed.

Commissioner adopted findings and conclusions in initial decision as his own.

DECEMBER 23, 1997

OAL DKT. NO. EDU 8076-94
AGENCY DKT. NO. 301-7/94

CAROL ROSBERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record in this matter, the Commissioner affirms the initial decision of the OAL in that he concurs with the Administrative Law Judge that petitioner failed to meet her burden of establishing, by a preponderance of the credible evidence, that the Board's withholding of her increment was arbitrary, capricious, unreasonable, or based on improper motives. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (App. Div. 1960)

Accordingly, the recommended initial decision is adopted as the final decision in this matter for the reasons clearly stated therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 23, 1997
DATE OF MAILING DECEMBER 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8076-94

AGENCY DKT. NO. 301-7/94

CAROL ROSBERGER,

Petitioner

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SUMMIT, UNION COUNTY,

Respondent.

James M. Weinberg, Esq., for petitioner
(Weinberg and Weinberg, attorneys)

Brenda C. Liss, Esq., for the respondent
(McCarter and English, attorneys)

Record Closed: October 2, 1997 Decided: November 14, 1997

BEFORE **IRENE JONES**, ALJ:

Petitioner, Carol Rosberger, contends that the respondent, the Board of Education of the City of Summit improperly withheld her employment and adjustment increments for the 1994-95 school year. Petitioner alleges that the respondent's actions were based on reasons which are false in fact and otherwise arbitrary, capricious and without good cause. An Answer denying the allegations was filed by the respondent with the Commissioner of Education who transmitted the matter on August

19, 1994 to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A prehearing conference was conducted and a prehearing order was issued on January 20, 1995. Hearings were held on May 3, 4; and 23 and July 19, 1995. At the hearing the petitioner testified on her own behalf. The respondent presented two witnesses in support of its case. The parties were directed to submit written summations. Upon the request of the petitioner, the time for the submission of briefs did not commence until receipt of the transcripts of the recorded hearings. The parties failed to file briefs and thus numerous calls were made by the undersigned to the petitioner's counsel with respect to the status of the briefs. Counsel indicated that they had not received the transcripts. On August 5, 1997 a status conference was held and the parties were directed to file briefs on September 30, 1997. On October 2, 1997 the respondent filed its brief. The petitioner did not file a brief on otherwise contact this tribunal.

FINDINGS OF FACT

Based on the testimony and documentary evidence, I **FIND** the following **FACTS**:

1. Petitioner is a tenured elementary teacher in the Summit public schools. At the time of the hearing, she had been employed in this capacity for 25 years. For 17 years, petitioner was assigned to Jefferson School, which serves kindergarten through fifth grade Her immediate supervisor and primary evaluator was Principal Janice P. Shay.

2. During the school year 1993-94, Petitioner was part of a three-teacher team teaching fourth and fifth grade pupils. She had no homeroom of her own, but taught mathematics, science, social studies and writing as part of the team.

3. During 1992-93 school year, petitioner was part of a team teaching third and fourth graders, also with no homeroom.

4. During 1991-92 school year petitioner taught basic skills, providing remedial help to small groups of pupils who were pulled out of their regular classes for 30 minutes at a time.

5. During 1990-91 petitioner taught third grade, with a homeroom of 14 students.

6. During 1989-90 she taught fifth grade.

7. Evaluations of Petitioner's performance were conducted during the year in question and seven previous years. P-1; P-10; P-13; P-14; P-15; P-16; P-17; P-21. Each of the evaluations provides information that addresses: performance areas of strength, performance areas needing improvement, a professional improvement plan and a summary of available indicators of pupil progress. The evaluation also includes a check-off "rating scale" summarizing the assessment of performance in the categories of instructional competencies, schoolwide and systemwide effectiveness, and professional growth. These categories are taken from the Summit school district's job description for the position of teacher. (Exhibit R-3). Further, the evaluation is consistent with the provisions of *N.J.A.C.* 6:3-4.3(f).

8. The petitioner's evaluations noted concerns about her interactions with children and her need to work on "positive feeling tone" in the classroom. In 1990-91, petitioner was transferred to small-group basic skills in order to address this deficiency.

9. In 1991-92, petitioner's performance was mixed and inconsistent and thus she was transferred back to a regular classroom in 1992-93. Petitioner was also found to need improvement in the areas of planning and organization for each

lesson. Moreover, instructional skills and classroom management skills needed improvement. (P-17).

10. Petitioner's performance during 1993-94 was rated unsatisfactory in the category of instructional competencies. (P-1)

11. On April 22, 1994, Michael G. Knowlton Superintendent of Schools informed the petitioner that he would recommend to the Board that her salary increment be withheld. (P-3).

12. On May 18, 1994, the Board Secretary informed the petitioner that the Board had voted on May 16, 1994 to approve the Superintendent's recommendation. Further, the Board's action were based on petitioner 1993-94 evaluation, specifically the section marked "Performance Areas Needing Improving." (R-6.)

SUMMARY OF THE TESTIMONY

Petitioner testified that she is a certified elementary education teacher. During her tenure with the respondent, she has taught the second, third, fourth and 5th grades. In 1978, she was assigned to Jefferson School where Dr. Janice Shay (Shay) is the Principal. From 1978 to the present, Shay has performed annual evaluations of her teaching performance. In 1985, petitioner attended a one week workshop sponsored by the school district on "Leadership in Learning" (L & L) an instructional guide. (P-20). The guide contains teaching techniques and is also used as an evaluation tool to assess a teacher's classroom performance. The concept of "feeling tone" was introduced in L & L as a method to motivate students. Prior to 1985, petitioner states that she used other methods to motivate her students. Indeed, petitioner asserts that there are many ways to motivate students. Petitioner concedes that from 1983 to 1994 her evaluations all spoke to need for her to address her "feeling tone".

Further, petitioner does not dispute that Shay conducted observation of in her classroom performance on numerous occasions. These observations resulted in written reports. (P-4 - P-8). The reports reflect her difficulties in areas of classroom management, planning and class control.

Petitioner asserts that in the 1993-94 school year, Shay failed to monitor her performance. This was contrary to her 1992-93 professional improvement plan which called for Shay to conduct weekly observations and conferences with her.

Petitioner testified at length that she had always received consistently good ratings in instructional competencies and in professional growth. Petitioner believes that there is a personality conflict between her and Dr. Shay.

Dr. Janice P. Shay (Shay) testified that she has been employed by the Board for 20 years, 17 years as Principal of Jefferson School. She holds a doctorate degree in educational administration, a masters degree in guidance and counseling, and a

bachelors degree in psychology/biology/education. (R-2). She is certified as a teacher, principal/supervisor, director of pupil personnel services and school administrator.

Shay recounted in detail, petitioner's inability to manage control and display certain instructional competencies in her classroom. Petitioner displayed deficiencies in planning skills, instructional skills, classroom management skills and human relations. Shay also testified about her classroom observations of the petitioner's classroom performance. At the December 15 observation, the petitioner's lesson was too long and the students became restless. Further, no lesson plan was presented. Petitioner also failed to present the objective of the lesson.

During the March 21 observation, Petitioner's performance in the areas of classroom management, instructional skills and human relations with students was so poor that Dr. Shay decided to return the very next day for another unannounced observation. Petitioner used many positive interventions to maintain students' attention, but there were 35 interruptions in the course of the one-hour lesson. (R-5). Petitioner was in control of the classroom during part of the lesson, but not all. When the petitioner would lose control of the class, her voice became strident and impatient, her facial expression turned to a frown. (P-6). Dr. Shay concluded that such an expression, is "debilitating to the learning process," as it causes the children to be uncomfortable and distracted.

During the March 29th observation, the classroom atmosphere was tense. Petitioner made certain positive statements but overall the tone was not positive. Children were talking, distracted and some two were off-task. By the end of the lesson, petitioner was using an unpleasant tone of voice, repeating attention-getters three or four times in a row. Petitioner's demeanor indicated impatience and was unprofessional.

During the post-observation conference on April 7, Shay recommended to the petitioner that she should plan her lesson, and meet with her and the district science supervisor to get help. (P-5).

In the April evaluation, Dr. Shay's identified schoolwide and systemwide effectiveness as a performance area of strength. However, on the basis of all seven of her observations and many shorter visits to the classroom, Shay concluded that the petitioner's performance in the area of instructional competencies not only needed improvement, but was simply unsatisfactory. Petitioner's human relations with students, was still an issue and he performance remained mixed and inconsistent. In the areas of planning and organization, instructional skills and classroom management skills, petitioner still needed improvement in skills which usually are acquired early in a teacher's career. In sum, petitioner was twenty-four years into her career, and was having fundamental problems with her classroom. Dr. Shay acknowledged that Petitioner's lesson presentation and behavior management had improved, but these improvements were offset by inconsistency in planning, organization and presentation and by negative "feeling tone".

Dr. Michael G. Knowlton, Superintendent of Schools, testified that he had discussed petitioner's performance with Dr. Shay at length and had reviewed petitioner's prior years' evaluations. He also had visited petitioner's classroom. On the basis of all this information, Knowlton concluded that a increment withholding was warranted. He agreed that in the vital areas of classroom organization and management and relationships with students, petitioner's performance was not up to the standard expected of a teacher with 24 years' experience.

DISCUSSION AND CONCLUSION

The sole issue in this matter is whether the Board's action in withholding the petitioner's 1994-95 increment was violative of *N.J.S.A.* 18A:29-14. The statute provides in its pertinent part that:

> Any Board of Education may hold, for inefficiency or other good cause, the employment increment or the adjustment increment, or both, of any member in any year by recording roll call majority vote.

It is well established that the legislature has vested the decision to withhold salary increments in local Boards of Education. This is so because the decision to deny an increment is a managerial one. Thus, the Board's determination will not be set aside unless there is a finding that its action was arbitrary, without rationale basis or induced by improper motives. *Bernards Tp., Bd. of Ed. v. Bernards Tp. Educ. Ass'n.*, 79 *N.J.* 311 (1979); *Board of Educ. v. Educ. Ass'n.*, 270 *N.J. Super* 444 (App. Div. 1994); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super* 288, 294-96 (App. Div. 1960). Furthermore, it is the petitioner who bears the burden of proof to demonstrate by a preponderance of the credible evidence that the Board's action was arbitrary and capricious.

As noted by the respondent, a teacher's salary increment is not an entitlement; it is a "reward for meritorious service". *Probst v Haddonfield Bd. of Ed.*, 127 *N.J.* 518 (1992). *N.J.S.A.* 18A:29-14 authorizes boards of education to withhold a teacher's increment for "inefficiency or other good cause." Pursuant to this provision, a board may withhold the increment of any teacher who, in its view, has not performed well during the previous year. *Probst*, 127 *N.J.* at 526. The board's action to withhold a salary increment may not be upset unless it is arbitrary, capricious, unreasonable or induced by improper motives. *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960). Thus, the scope of review is limited to a determination of whether the underlying facts herein were as those who made the evaluation claimed, and whether it was reasonable for those evaluators to conclude as they did, upon those facts, that the increment withholding was warranted, "bearing in mind that they are the experts." Id. At 297. The party challenging the board's action has the burden of proof on each of these questions.

I **FIND** that the petitioner has failed to prove that the Board's action was based on reasons which were false in fact.

I further **FIND** that the instructional competencies in which petitioner was found to be deficient are well supported by the record.

Accordingly, I **CONCLUDE** that petitioner failed to establish by a preponderance of the credible evidence that the action of the Summit Board of Education that withheld her employment adjustment for the 1994-95 school year was arbitrary, capricious, or based on improper motive. Therefore, the petition of appeal is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/14/97
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

11/18/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

WITNESSES:

For Petitioner:

Carol Rosberger

For Respondent

Dr. Shay

Dr. Knowlton

EXHIBIT LIST

In Evidence

P-1 Annual Performance report dated May 27, 1994.

P-2 Rebuttal Summary dated June 22, 1993

P-3 Letter dated April 22, 1994

P-4 Letter dated May 2, 1994

P-5 Letter dated April 11, 1994

P-6 Classroom Observation of March 21, 1994

P-7 Classroom Observation of December 15, 1993

P- Policy Statement Summit BOE dated January 21, 1992 and July 19. 1984

P-10 Annual Performance Report April 1984

P-13 Annual Performance Evaluation 4/18/87

P-14 Annual Performance Evaluation 4/88

P-15 Annual Performance Evaluation 3/89

P-16 Annual Performance Evaluation 4/90

P-17 Annual Performance Evaluation1991-92

P-20 Leadership in Learning Handbook

P-21 Annual Performance Report 1992-93

R-1 Memo to Carol Rosberger from Jan Shay

R-2 Resume of Janice P. Shay

R-3 Position Analysis

R-4 Summit Classrom Observation Forum

R-5 A crip note of March 21, 1994 observation consisting of 10 sides

R-6 Letter dated May 18, 1994 to Carol Rosberger from Harold Kessler

656-97

656-97

BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 23, 1997

AGENCY DKT. NO. 362-9/97

BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner: Ronald J. Ianoale, Esq. (McManimon & Scotland, L.L.C.)

For Respondent: Peter P. Kalac, Esq. (Kalac, Newman, Lavender & Campbell)

The Board of Education of the Township of Plumsted having applied, pursuant to *N.J.S.A.* 18A:38-13, to the Commissioner of Education for a change of designation of the receiving district for high school pupils, heretofore designated to attend the Allentown High School in respondent's district, to attend a high school to be established in petitioner's proposed K-12 district; and

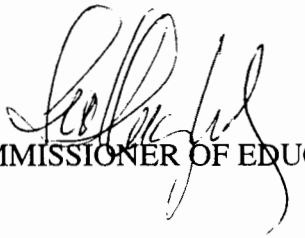
The Board of Education of the Upper Freehold Regional High School District having joined with petitioner in requesting a termination of the sending-receiving relationship between itself and petitioner; and

Petitioner having conducted a feasibility study in accordance with *N.J.S.A.* 18A:38-13, said study having established to the Commissioner's satisfaction that the withdrawal of the Plumsted Township students from the Allentown High School would cause no substantial negative impact on the educational program of Allentown High School or on the quality of education received by the pupils in each of the districts; and

The feasibility study having further established to the Commissioner's satisfaction that there will be no substantial negative impact on the financial conditions of petitioner and respondent; and

The feasibility study having further established to the Commissioner's satisfaction that said withdrawal will have no substantial impact on the racial composition of either the proposed high school or the Allentown High School; now therefore

IT IS ORDERED, on this 23rd day of December 1997, that, pursuant to *N.J.S.A.* 18A:38-13, the application of the Board of Education of the Township of Plumsted for severance of its sending-receiving relationship with the Upper Freehold Regional School District is approved, said severance not to take effect, however, until such time as, in the view of the districts' respective County Superintendents, the Board is actually able to provide programs and facilities for its high school students as anticipated in the feasibility study.



COMMISSIONER OF EDUCATION

DECEMBER 23, 1997
DATE OF MAILING DECEMBER 23, 1997

657-97

IN THE MATTER OF THE TENURE HEARING	:	
OF DR. J. KENT HOLLINGSWORTH, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF BOGOTA,	:	DECISION
BERGEN COUNTY.	:	
	:	

DECEMBER 23, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11548-96

AGENCY DKT. NO. 511-10/96

IN THE MATTER OF THE TENURE HEARING OF DR. J. KENT HOLLINGSWORTH, BOGOTA BOARD OF EDUCATION, BERGEN COUNTY.

Lane J. Biviano, Esq., for Bogota Board of Education

Harold N. Springstead, Esq., for Dr. J. Kent Hollingsworth
(Springstead & Maurice, attorneys)

Record Closed: October 27, 1997 Decided: November 6, 1997

BEFORE **RICHARD McGILL**, ALJ:

The Bogota Board of Education filed charges with the Commissioner of Education against Dr. J. Kent Hollingsworth (respondent), whom it employs as a school psychologist. The action taken against respondent was a suspension without pay for a

period of three days. The matter was transmitted to the Office of Administrative Law on November 20, 1996, for determination as a contested case.

Prior to hearing, the parties agreed to a settlement which in essence provides that the matter will be treated as a minor disciplinary action subject to binding arbitration as opposed to a tenure proceeding. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement disposes of the matter pending before the Commissioner of Education.

Therefore, I **CONCLUDE** that the agreement meets the requirements *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is further **ORDERED** that the proceedings in this matter be concluded.

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

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

Nov. 6, 1997
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

Nov. 12, 1997
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 13 1997
DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

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LANE J. BIVIANO, ESQ.
ATTORNEY AT LAW
8 Station Square
P.O. Box 4
Rutherford, NJ 07070
Telephone: (201) 933-8080
Attorney for Petitioner,
Bogota Board of Education
Our File No. 1717.25A

BOGOTA BOARD OF EDUCATION Petitioner, v. DR. J. KENT HOLLINGSWORTH Respondent.	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW: OAL DOCKET NO. EDUTH-11548-96N AGENCY REF. NO. 511-10/96 STIPULATION OF SETTLEMENT

Whereas Petitioner filed tenure charges against Dr. J. Kent Hollingsworth with the New Jersey Commissioner of Education; and

Whereas, the parties have agreed to transfer the matter to Arbitration.

NOW, THEREFORE, in consideration of mutual covenants herein contained, it is hereby stipulated and agreed to by and between the parties, Bogota Board of Education ("Petitioner") and Dr. J. Kent Hollingsworth ("Respondent") hereto, that the above-captioned matter be and is hereby settled upon the following terms and conditions:

1. Pursuant to N.J.S.A. 34:13A-22, minor disciplinary matters may be subject to binding arbitration.

2. The parties have agreed to transfer this matter from the Department of Education to binding arbitration through AAA or other means agreeable to the parties e.g.PERC.

3. The issue before the arbitrator is limited to whether the charges filed by the Petitioner against Respondent should be sustained;

4. In the event said charges are sustained the arbitrator shall decide whether the penalty is appropriate or adequate.

5. Any other substantive or procedural issues which may or could have been brought by the either party with regard to the above captioned matter have been withdrawn and/or waived by the respective parties.

6. This Agreement shall be construed, governed by, and interpreted in accordance with the laws of the State of New Jersey.

7. In the event that the charges referred to herein are not sustained, then any reference to these charges shall be expunged from the personnel file of Respondent and the three day's pay previously withheld from Respondent shall be restored to Respondent.

8. The parties hereto represent and acknowledge that they have had the right and opportunity to seek the advice of legal counsel with respect to the interpretation, meaning and legal effect of entering into this Agreement prior to executing same.

9. The Petitioner shall not request other relief with respect to this matter, other than that provided for by this stipulation.

10. The Respondent shall not request other relief with respect to this matter, other than that provided for by this stipulation.

11. This Agreement represents and incorporates the complete and final understanding of the parties. Any amendment and/or modification to this Agreement shall be effective only upon execution of a written Agreement by the parties.

PETITIONER

Dated: 9-15-97

Kathryn C. Van Lyne
Bogota Board of Education

Dated: 9-12-97

Lane J. Biviano
Lane J. Biviano, Esq.
Attorney for Petitioner

RESPONDENT

Dated:

J. Kent Hollingsworth
Dr. J. Kent Hollingsworth

Dated: 1/30/97

Harold N. Springstead
Harold N. Springstead, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 11548-96
AGENCY DKT. NO. 511-10/96

IN THE MATTER OF THE TENURE HEARING	:	
OF DR. J. KENT HOLLINGSWORTH, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF BOGOTA,	:	DECISION
BERGEN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed.

Upon a careful and independent review of the terms of the settlement agreement reached by the parties and approved by the Administrative Law Judge, the Commissioner is compelled to reject such agreement as it is currently structured since it effectively requires his consent to transfer adjudication of a tenure matter to a third party. This result is permitted by neither statute nor regulation. Indeed, as stated in *In re Cardonick*, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 *S.L.D.* 842,

> ***What constitutes grounds for a tenure dismissal is a question of fact and *within the exclusive jurisdiction of the Commissioner of Education, who has the duty to conduct the hearing and render a decision.* ***
> *The Commissioner's exclusive authority to decide these cases necessarily entails the determination of any and all matters pertinent thereto in order to make a complete disposition of the case.* (emphasis added) (*Id.* at 849)

Further, *Cardonick* speaks to the Commissioner's responsibility in reviewing tenure settlements to assure that they are not contrary to public policy, noting that

> "****settlement agreements totally preempting the Commissioner from review and evaluation are against the public policy of this*

State as exemplified in the Tenure Employees Hearing Law." (emphasis added) (*Id.*) See *N.J.S.A.* 18A:6-10 *et seq.*

Therefore, the Commissioner must reject the proposed settlement as presented in the initial decision.

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation under the laws of this State, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action consistent with the discussion above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits in accordance with applicable rules.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 23, 1997
DATE OF MAILING DECEMBER 23, 1997

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(657-97)

IN THE MATTER OF THE TENURE	:	
HEARING OF J. KENT HOLLINGSWORTH,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF BOGOTA, BERGEN COUNTY.	:	DECISION
_____	:	

NOVEMBER 18, 1998

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1086-98
AGENCY DKT. NO. 511-10/96
(Remand of OAL DKT. NO. EDU 11548-96)

IN THE MATTER OF THE TENURE HEARING OF J. KENT HOLLINGSWORTH, BOGOTA BOARD OF EDUCATION, BERGEN COUNTY.

Richard Brovarone, Esq., for Bogota Board of Education

Harold N. Springstead, Esq., for Dr. J. Kent Hollingsworth (Springstead & Maurice, attorneys)

Record Closed: October 13, 1998 Decided: October 20, 1998

BEFORE **RICHARD McGILL,** AL

This matter was remanded to the Office of Administrative Law after the Commissioner of Education rejected a settlement agreement in regard to tenure charges filed by the Bogota Board of Education against Dr. J. Kent Hollingsworth, whom it employs as a school psychologist. In rejecting the prior settlement, the Commissioner specifically did not preclude the possibility of a revision of the settlement terms.

The Office of Administrative Law received the transmittal on remand on January 13, 1998. After several conferences and further negotiations, the parties submitted a Stipulation of Settlement Following Remand. The settlement agreement provides for withdrawal of the tenure charges and the counterclaim and additionally sets for an explanation for this action.

Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Oct. 20, 1998
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

Oct. 23, 1998
DATE

D. M. Ontanales Jr
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 26 1998
DATE

Barbara A Harnek
OFFICE OF ADMINISTRATIVE LAW

pb

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
(201) 487-1414
Attorney for Dr. J. Kent Hollingsworth

IN THE MATTER OF THE TENURE HEARING OF DR. J. KENT HOLLINGSWORTH, BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY

BEFORE THE COMMISSIONER OF EDUCATION

OAL Docket No. EDU 11548-96
Agency Docket No. 511-10/96

STIPULATION OF SETTLEMENT FOLLOWING REMAND

Petitioner, Board of Education of the Borough of Bogota ("Board"), Bergen County, and Respondent, Dr. J. Kent Hollingsworth ("Dr. Hollingsworth"), hereby stipulates as follows:

1. On October 22, 1996, the Board certified tenure charges against Dr. Hollingsworth who is a tenured psychologist and a member of the Child Study Team. There were six separate charges:

(1) Settlement of a litigation matter without the knowledge or authorization of the Board or its authorized agent;

(2) Failure and/or refusal to work with the Board's authorized agent in addressing a litigation matter;

(3) Conduct unbecoming a Public Employee;

(4) Neglect of duties;
(5) Insubordination;

(6) Incompetency.

2. Simultaneously, with the filing of the tenure charges against Dr. Hollingsworth, the Board suspended him for three days, effective October 23, 1996 without pay.

3. Prior to certifying the tenure charges, the Board served Dr. Hollingsworth notice of tenure charges on September 16, 1996 containing 25 paragraphs of allegations signed by Roy J. Corso, Acting Superintendent/Board Secretary, recommending Dr. Hollingsworth be suspended for three working days.

4. Dr. Hollingsworth filed a timely detailed Statement of Evidence and Position responding to each of the allegations that applied to him.

5. Simultaneous with the filing of the charges against Dr. Hollingsworth, the Board also certified charges against Elaine Frost, another member of the Child Study Team who was given a 15 day suspension. In that matter, the Commissioner approved the Board's withdrawal of the tenure charges over the objections of the petitioner, Elaine Frost, who counterclaimed. See Board of Education of the Borough of Bogota v. Elaine Frost, OAL Dkt. No. EDU 11545-96, Agency Dkt. No. 512-10/96. The

Commissioner noted in that decision that "the Board determined that it did not possess sufficient evidence to substantiate respondent's removal from her position or a reduction in her salary, and the Commissioner will not force a Board to prosecute charges under such circumstances." (Dec. pg. 4).

6. On September 15, 1997, the Board and Dr. Hollingsworth entered into a Stipulation of Settlement whereby the matter would be treated as a minor disciplinary dispute pursuant to N.J.S.A. 34:13A-22 and to transfer the matter from the Department of Education to binding arbitration.

7. On October 27, 1997 the Honorable Richard McGill, A.L.J., approved the settlement finding that the agreement met the requirements of N.J.A.C. 1:1-19.1 and ordered that the proceedings be concluded.

8. On December 23, 1997 the Comissioner of Education rejected the settlement agreement as not being in accordance with In re Cardonick, decided by the Commissioner April 7, 1982, affirmed State Board of Education April 6, 1983, 1990 S.L.D. 842.

9. The dispute between the Board, Dr. Hollingsworth and Elaine Frost, centers around the placement of a child by the Child Study Team. With respect to the specific charges against the respondent, the evidence would show:

(1) Charge 1 deals with the settlement of a litigation matter without the

knowledge or authorization of the Board or an authorized agent. Dr. Hollingsworth was not aware of the parents' request for "emergent relief" which was a matter which was considered a "litigation matter". In addition, Dr. Hollingsworth did not participate in a settlement of any litigation but fulfilled his duties as required by the development of the child's IEP which included the determination of placement.

(2) Dr. Hollingsworth was charged with failure and/or refusal to work with the Board's authorized agent in addressing a litigation matter. In that regard, the Dr. Hollingsworth neither refused nor failed to work with the Board's agent (presumably the Board attorney), having received one telephone call from the Board attorney who asked about placement decisions.

(3) Dr. Hollingsworth was charged with conduct unbecoming a public employee but there is no proof that he did anything but fulfill his legal obligations to the best of his ability. Nothing in the 25 paragraph Affidavit supporting the charges refers to any unbecoming conduct.

(4) Dr. Hollingsworth is charged with neglect of duty which is disputed and there is no proof of any such neglect. Nothing in the Affidavit supports any neglect of duty.

(5) Dr. Hollingsworth was charged with insubordination which is specifically denied by him and cannot be substantiated by the Board.

(6) Dr. Hollingsworth is charged with incompetency for which there is no evidence whatsoever. To the contrary, he has received exemplary evaluations for 16 years prior to the charges and has recently been promoted to the Director of Special Services.

10. The parties acknowledge that the terms and conditions of any settlement agreement are subject to review and approval by the Commissioner of Education consistent with the Cardonick standard.

11. The Board wishes to withdraw the tenure charges against the respondent, to restore the three days pay withheld from him and to expunge any reference of the discipline or tenure charges from his personnel file since the Board does not believe it can sustain its burden of proof and the settlement of this litigation under the proposed terms save the District and the public substantial legal fees which would be necessary to proceed with the matter.

12. The settlement of the litigation achieves the goals sought by the Board of Education without cost associated with it and without inpuning the dignity and reputation of the respondent.

13. Upon approval of this agreement by the Commissioner of Education the Board withdraws the above-captioned tenure charges, and the respondent withdraws the counterclaim.

Dated: 10-6, 1998

BY _____
Richard Brovarone, Esq.
Attorney for Petitioner

SPRINGSTEAD & MAURICE
Attorneys for Respondent

Dated: 10/9, 1998

BY _____
Harold N. Springstead, Esq.

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OAL DKT. NOS. EDU 11548-96 and EDU 1086-98 (ON REMAND)
AGENCY DKT. NO. 511-10/96

IN THE MATTER OF THE TENURE	:	
HEARING OF J. KENT HOLLINGSWORTH,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF BOGOTA, BERGEN COUNTY.	:	DECISION
	:	

The record and initial decision in the form of a joint stipulation of settlement rendered by the Office of Administrative Law have been reviewed.

The Commissioner approves the settlement terms as they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 *S.L.D.* 842, 846. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

ACTING COMMISSIONER OF EDUCATION

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

NOVEMBER 18, 1998
DATE OF MAILING NOVEMBER 18, 1998

658-97

658-97

Y.L., on behalf of minor cousin, M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, Y.L., alleged that her cousin, M.A., was wrongfully denied admission to school in violation of *N.J.S.A.* 18A:38-1.

Noting absence of a specific showing of hardship, the ALJ denied petitioner's motion for summary decision and concluded that the Board was entitled to tuition even though custody was attained by Y.L.

Commissioner affirmed in part, reversed in part the initial decision. Commissioner found that prior to November 13, 1995, the date on which custody of M.A. was granted to petitioner, M.A. was not entitled to a free public education in the District, as petitioner did not meet the requirements of N.J.S.A. 18A:38-1b(1). However, once Y.L. became the legal guardian, in the absence of any indication of fraud, M.A.'s domicile follows that of Y.L, making it unnecessary for Commissioner to reach to the question of the sufficiency of evidence offered to demonstrate hardship under the affidavit law. Thus, following date of custody order, M.A. was entitled to a free public education in the District. Petitioner was directed to pay tuition for the period of ineligible attendance at school prior to November 13, 1995.

DECEMBER 24, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENTS MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 1230-96
AGENCY DKT. NO. 450-11/95

Y.L., ON BEHALF OF MINOR COUSIN, M.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Ellen M. Boylan, Esq., for petitioner

Joanne Butler, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: August 11, 1997 Decided: November 7, 1997*

BEFORE **MARYLOUISE LUCCHI-McCLOUD**, ALJ:

This matter arises out of a petition filed on behalf of M.A. by Y.L. on November 27, 1995 requesting a determination that M.A. may attend school in the South Orange-Maplewood School District pursuant to *N.J.S.A.* 18A:38-1. An answer was filed by

respondent on December 27, 1995 and on January 18, 1996, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Cross motions for summary decision were filed by the parties and oral argument took place on August 11, 1997. At that time the record closed. Although the time to issue a decision was 45 days from the date of the record closing, an order of extension for good cause shown was entered extending the period of time for the initial decision until November 10, 1997.

FACTS

The facts in this case are not in dispute and in this posture, in order to grant summary decision for respondent, the facts must be taken in the light most favorable to the nonmoving party, the petitioner.

This case involves a school residency dispute under *N.J.S.A.* 18A:38-1. Petitioner, Y.L., moved from Newark, New Jersey, to Maplewood, New Jersey, on October 1, 1995. On October 3, 1995, Y.L. attempted to enroll M.A. who is the daughter of her cousin in the Maplewood public schools. M.A. has resided with Y.L. since August 1992 and prior to the move had attended the Newark public schools where Y.L. had lived. M.A. is the daughter of J.A. who resides in Irvington, New Jersey. On October 5, 1995, Y.L. submitted a completed affidavit of resident as well as an affidavit of parent/guardian which she herself filled out in support of the application for admission to the South Orange-Maplewood district schools for M.A. At this time the board was not in receipt of any affidavit from the child's father, J.A. At no time was an affidavit of the parent filed with the district directly and it was not until December 11, 1996, after the filing of the petition in this matter, that an affidavit from the father was made available.

Affidavits submitted by Y.L. show that M.A. had lived with her for three years because of problems with M.A.'s stepmother. In response to a question asking to set forth in full in complete detail why neither parent is capable of caring for or providing support of the pupil, and why the pupil will be residing with you, Y.L. responded "she is more comfortable with me."

J.A. remains financially responsible for M.A. and provides funds weekly for M.A.'s food. He also provides medical insurance for the child as well. Y.L. has not previously claimed M.A. as a dependent for income tax purposes and will not be claiming the child as a dependent for the time that she resides with Y.L. J.A. is the one who has and will continue to take M.A. as a dependent for income tax purposes.

Y.L. also supplied to the school board a copy of J.A.'s 1994 U.S. individual income tax return (1040A). On that return in the section in which the filing individual figures the exemptions, he listed M.A. and under the question of how many months the child had lived in his home in 1994. He responded that she had lived in the home for 12 months. This was during the period of time when M.A. is claimed to have been and was in the home of Y.L. It must be noted that the tax return does make provisions for claiming dependents who do not live with the individual filing.

On October 11, 1995 the assistant superintendent of the South Orange - Maplewood School District wrote to Y.L. denying the request for admission of M.A. in the South Orange - Maplewood schools. On October 16, 1995, Y.L. wrote a letter to the Commissioner of Education asking that this decision be overturned. On November 3, 1995 the Director of the Bureau of Controversies and Disputes wrote to Y.L. stating that the letter was insufficient to constitute an appeal and advising on the manner in which a petition of appeal must be filed in accordance with *N.J.S.A.* 6:24-1.2 to 1.4. The petition itself was filed on November 27, 1995.

During the interim, on November 13, 1995, a consent order for custody was entered by the superior court in Essex County granting custody of the child to Y.L. After the filing of the petition, an affidavit was also submitted by J.A. stating that M.A.

does not reside with him because of his wife's mental illness. It states that her unstable condition could cause harm to M.A. He recounts that in 1991, M.A. came from Haiti to live with him in Irvington and that his wife, M.A.'s stepmother, was intensely jealous of M.A. He further states that his wife's behavior deteriorated and that although he has tried to have his wife see a psychiatrist, she refuses. The only medical attention that his wife has received has been from a family doctor who is not a psychiatrist and has diagnosed his wife from suffering from obsessive-compulsive disorder; panic disorder, and schizophrenia. He has prescribed medication but according to J.A., his wife will not take it. A handwritten note from the Lion's Medical Center dated December 14, 1995 indicates that his wife has been under treatment with the physician since December 7, 1992. No further medical documentation has ever been supplied.

J.A. states that he was concerned about the effect of his wife's outbursts on M.A.'s emotional well-being and after an incident between his wife and M.A., he asked Y.L., his cousin if M.A. could live with her. Since August 1992, M.A. has lived with Y.L. in Newark, New Jersey, and subsequently in Irvington, New Jersey.

At all times relevant to this proceeding, the petitioner has been given the opportunity to produce further medical evidence or evidence of any other nature pertinent to the question presented in this case.

For the purpose of this motion for summary decision, these facts are excepted as true.

LEGAL DISCUSSION

Pursuant to *N.J.A.C.* 1:1-12.5, a motion for summary decision may be granted if the papers and supporting affidavits demonstrate that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. A motion for summary decision shall only be entered if the adverse party fails to deliver in establishing facts which constitute a genuine issue of material fact that can only be

determined in the process of an evidentiary hearing. In this case summary decision is appropriate because there are no genuine issues of material fact and the only question turns on the legal application of the statute to the facts in this case.

Respondent argues that the petition in this matter is time barred since the statute, N.J.S.A.18A:38-1 provides that an appeal must take place within 21 days of the action of the Board denying admission to any student applying pursuant to the statute. It also requires the board of education to notify the parent or guardian in writing of their right to contest the decision which was done here by respondent. In response to that, petitioner sent a letter to the Commissioner of Education. That letter was deemed insufficient to act as a petition and a letter was sent to the petitioner explaining how the petition must be filed. As a result, the petition in this case was filed outside of the 21-day limitation period. Respondent argues that as a result, the matter should be dismissed. However, the petition was filed subsequent to the letter being rejected as insufficient for a petition. While timeliness are generally strictly construed, it is clear that within the 21 days Y.L. attempted to appeal. However, the appeal was not perfected. The extension of the time to allow that the petition be filed and be considered by the Commissioner of Education does not prejudice the district and as a result, the petition will not be dismissed as untimely.

Pursuant to *N.J.S.A.* 18A:38-1, public school shall be free to any person who is domiciled within the school district. Although petitioner asserts that the child, M.A., is domiciled in the district and is thus entitled to a free education in the South Orange - Maplewood schools, this is incorrect. M.A. is not domiciled within the district pursuant to *N.J.S.A.* 18A:38-1A. Instead she is living in the home of another who is domiciled within the district. As a result of that, the provisions of *N.J.S.A.* 18A:38-1(b) apply. This provision states under subsection 1 that "any person who is kept in the home of another person domiciled within the school district and is supported by such other person *gratis* as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the

child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship or that the child is not residing with the resident of the district solely for the purpose of receiving a free public education with the district" will be entitled to a free education within the district. The statute provides that the statement shall be accompanied by documentation to support its validity. It further states that if in the judgment of the board of education, the evidence does not support the validity of the claim, the board may deny admission to the child. After such a denial, the mechanism for appealing it is described.

In this case there are two time periods which must be looked at. One must first look at the time of the initial application to the board to determine if the board's actions were reasonable and, as both sides agreed in oral argument, given the nature of this case, subsequent information provided must also be assessed to determine whether or not it is sufficient. At the time of the application, Y.L. filed the affidavit of resident which was required. That affidavit also contained language at the top which stated that if any information was false, the board of education may seek to recover the cost of the education at a cost of $8,079 annually. The affidavit of Y.L. stated that the reason for M.A. living with her was that "she is more comfortable with me." It further stated that M.A.'s father was financially responsible and was providing medical insurance as well as claiming her as a dependent for tax purposes. Y.L. also filed an affidavit of parent/guardian although she was neither the parent nor the guardian. This was dated October 3, 1995. Accepting that this affidavit was filed in good faith and through a mistaken belief that because M.A. was living with her, Y.L. was acting as the "guardian," the information received was essentially that in her own affidavit as a resident. It was not until November 13, 1995 that a consent order for custody was entered in this case. Custody was then granted to Y.L. The mere physical existence of a subsequent custody order is not the determining factor in this case. It is clear that at the time the board made the decision to deny enrollment, the information they had was

insufficient to make a determination that M.A. was living with Y.L. and Y.L. was supporting her gratis and would assume all personal obligations for the child relative to school requirements and that the arrangement was the result of family hardship. At the time of the filing, no properly filled out affidavit from M.A.'s parent was given to the school district. As a result, it was impossible for them to determine whether or not J.A. was capable of supporting or providing care for the child due to a family or economic hardship. Consequently, the original determination of the respondent board of education was appropriate.

Given the fact that this case deals with an on-going situation and the education of the pupil, it is necessary to look beyond the initial application which was correctly denied by the district. In the intervening time an order for custody granting custody to Y.L. has been entered by consent of the parties to that action as well as an affidavit from M.A.'s father, J.A. outlining the reasons for her presence in Y.L.'s home. Counsel for petitioner argues that the reasons given in J.A.'s affidavit of November 25, 1996 show that there is a family hardship, not necessarily an economic one, that causes the child to reside with the resident, Y.L. Although throughout this process, the opportunity existed for petitioner to provide further information on this subject, none was provided either by way of affidavit for the purposes of the cross-motions or to the district for review. No information regarding M.A.'s stepmother's current condition and medical treatment has been proffered nor has a diagnosis by a psychiatrist who is the appropriate individual in the field to make conclusions about the mental stability of M.A.'s stepmother. While one might certainly recognize that stepchildren may have difficulty living with a stepparent, that difficulty, absent specific circumstances showing that the arrangement will cause harm to the child is insufficient to conclude that the situation rises to the level of a family hardship. Conflict is not sufficient absent a specific showing of hardship. Petitioner urges the undersigned to not look behind the consent order for custody. It is clear, however, that this consent order was entered into for the purpose of facilitating M.A.'s attendance in the South Orange - Maplewood school district. This was conceded by the parties at oral argument. The custody arrangement does not arise from any other distinct circumstances. It was not a contested custody arrangement and was entered into only while the question of M.A.'s

schooling was taking place. In fact, to allow the custody order to dictate this matter would be to encourage those who wish to have their children educated in specific districts to consign their children to other individuals and enter into a consent order for custody while maintaining their financial support for the child. That certainly is not what is contemplated by the law.

Petitioner cites *J.B. et al v. Bd. of Educ., Ocean Twp.*, 96 *N.J.A.R.* 2nd. (EDU) 628 for the proposition that family hardship may exist even when a parent is apparently financially capable of caring for the pupil. While that is true, this case is distinguishable from *J.B. supra*. In the cited case the child had threatened to run away from home and had threatened suicide as well as becoming emotional and withdrawn during parental squabbles. In this case there is a diagnosis by a general practitioner of a psychiatric illness on the part of M.A.'s stepmother. Beyond that there is no specific allegation as to the effect of the stepmother's condition on the ability of the child to remain in the household. Although J.A. states that there was a confrontation and that there was disharmony, there was never any indication of an attempt to pursue civil commitment on the basis that the stepmother is dangerous to herself or others, nor is there any evidence that was presented to the board or in the course of the motions to suggest any thing other than speculative harm to the child.

Petitioner takes the position that the board should prove that these things do not exist. The burden in this case as placed by *N.J.S.A.* 18A:38-1 is on the individual rather than the responding school district. As a result, taking the facts in the light most favorable to the petitioner who is the nonmoving party with respect to respondent's summary decision motion, I **CONCLUDE** that as a matter of law, respondent must prevail. In light of this, respondent is entitled to assess tuition pursuant to *N.J.S.A.*

18A:38-1(b) on the basis of 1/180th of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance. Additionally, the petitioner's motion for summary decision is **DENIED**.

ORDER

It is hereby **ORDERED** that petitioner's motion for summary decision be and hereby is **DENIED**.

It is further **ORDERED** that respondent's cross-motion for summary decision be and hereby is **GRANTED.**

It is further **ORDERED** that respondent's counterclaim for tuition is granted pursuant to the calculation located in the statute and based upon the number of days of ineligible attendance of M.A.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

11/7/97
DATE

MARYLOUISE LUCCHI-McCLOUD, ALJ

Receipt Acknowledged:

11/13/97
DATE

D. Contarcuta/p
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 13 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

njf(FV)mxl

OAL DKT. NO. EDU 1230-96
AGENCY DKT. NO. 450-11/95

Y.L., on behalf of minor cousin, M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm in part, and reverse in part, the initial decision of the ALJ, as set forth herein. Initially, the Commissioner finds that the record supports the conclusion that, prior to November 13, 1995, the date on which custody of M.A. was granted to petitioner, M.A. was not entitled to a free public education in respondent's District, as petitioner did not meet the requirements set forth at *N.J.S.A.* 18A:38-1b(1). In so finding, the Commissioner notes that it is unnecessary for him to reach to the question of the sufficiency of evidence offered to demonstrate other factors such as family or economic hardship, where petitioner undisputedly does not meet

the threshold requirement that she "***is supporting the child gratis ***." *N.J.S.A.* 18A:38-1b(1).

However, once Y.L. became the child's legal guardian, the appropriate inquiry for the Board was whether she and M.A. were domiciliaries of the District, pursuant to *N.J.S.A.* 18A:38-1a, an analysis which does not necessarily ascribe significance to financial circumstance. Since the Board does not dispute that Y.L is a domiciliary of Maplewood, and the domicile of a child follows that of the parent or guardian having *legal control* over her, *Mansfield Twp. Board of Education v. State Board of Education*, 101 *N.J.L.* 474, 479, 480 (Sup. Ct. 1925), the Commissioner finds that M.A. was entitled to a free public education in the district once Y.L. acquired legal custody of her.[1] In so finding, the Commissioner notes there is no evidence of fraud on the part of petitioner. *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.* 2d (EDU) 124, 125, aff'd at 554. Moreover, notwithstanding the Board's contentions to the contrary, the Commissioner is not persuaded that petitioner's motives for obtaining custody of M.A. are determinative. Absent any indications of fraud, the order, which does not appear to be a temporary one, should be accepted on its face. *L.A. v. Town of West Orange*, 97 *N.J.A.R.* 2d (EDU) 266, 269, aff'd at 554.[2]

Accordingly, petitioner is hereby directed to pay tuition for M.A., prorated from the date of her first attendance in the District, on or about October 3, 1995, until

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[1]It is noted that the parties do not dispute that Y.L maintains *both* legal and physical custody of M.A. Contrast the situation in *Cranford Twp. Board of Education v. McG.*, 95 *N.J.A.R.* 2d (EDU) 74 (1994).

[2] The Board's reply cites to language found in *L.A., supra.* That is "***the Board reiterates the Commissioner's own language in *L.A., supra*, regarding the ease with which a custody order may fall into the hands of one seeking admission of a child: 'As the Commissioner well knows, these custody orders are easily obtainable.' 97 *N.J.A.R. 2d* 270." (Board's Reply at p. 3) However, the Board has erroneously attributed this language to the Commissioner. The quotation extracted from *L.A.* is actually the Commissioner's *summary of the respondent's arguments* on exception. The quotation is *clearly* preceded by the words, "Respondent states," and is concluded with a citation to the pertinent page of the respondent board's exceptions.

November 12, 1995. After November 13, 1995, however, M.A. is deemed to have been entitled to a free education in the Board's District in accordance with *N.J.S.A.* 18A:38-1a, her admission to continue so long as there is no change in petitioner's circumstances that would alter M.A.'s entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 24, 1997
DATE OF MAILING DECEMBER 24, 1997

659-97

659-97

RITA HIBO AND SUSAN ARILLO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, two part-time employees, alleged the Board violated their tenure rights by abolishing their positions while retaining nontenured individuals in secretarial or clerical positions to which they were entitled.

ALJ found that petitioners accrued tenure in secretarial positions and were qualified to perform the duties assigned to nontenured individuals. Thus, the Board was ordered to reinstate petitioners to secretarial positions with mitigated compensation.

Commissioner concurred with findings and conclusion of the ALJ and ordered petitioners reinstated with their compensation to be offset by their actual earnings and unemployment compensation received during the period, directing the Board to reimburse the New Jersey Department of Labor for the unemployment compensation offset.

DECEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1226-96
AGENCY DKT. NO. 459-11/95

RITA HIBO AND SUSAN ARILLO,
Petitioners,
v.
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT,
Respondent.

Sanford R. Oxfeld, Esq. and **Randi Doner-April**, Esq., for petitioners
(Balk, Oxfeld, Mandell & Cohen, attorneys)

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

Alfred F. Maurice, Esq., for intervenor Cheryl Philower
(Springstead & Maurice, attorneys)

James M. Weinberg, Esq, for intervenor June Dietz
(Weinberg & Weinberg, attorneys)

David L. Rosenberg, Esq., for intervenor Mary Wilson
(Klausner & Hunter, attorneys)

Arnold M. Mellk, Esq., for intervenor Debra Restaino
(Wills, O'Neill & Mellk, attorneys)

Philip Feintuch, Esq. & **Howard Feintuch**, Esq., for intervenor Mary Ann Dailey
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: March 7, 1997 Decided: November 12, 1997

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

Statement of the Case

This is an appeal by two part-time school employees who contend that they have acquired tenure to a "secretarial or clerical position" under *N.J.S.A.* 18A:17-2(b). Petitioners Rita Hibo ("Hibo") and Susan Arillo ("Arillo") performed a variety of duties for respondent school district under the job title of "secretary." They maintain that the Board of Education of the West Essex Regional School District ("Board") violated their tenure rights by abolishing their positions while retaining nontenured individuals in secretarial or clerical positions to which they are entitled.

Respondent, and the intervenors who join with it, raise several defenses: First, they allege that each petitioner served as a temporary "general office worker," which is not a tenure-eligible position protected by statute. Second, they urge that part-time service does not confer tenure status on nonprofessional staff and, in any event, that Arillo did not serve the requisite time period in any one position because her job responsibilities increased during her employment. Third, they claim that neither Hibo nor Arillo possess the qualifications needed for the secretarial positions they seek. Fourth, they argue that secretary and clerk are separately tenurable positions, so that a secretary has no tenure rights as a clerk (and vice versa.) Finally, the Board asserts that petitioners failed in their obligation to mitigate damages.

For the reasons which follow, both Hibo and Arillo accrued tenure in a secretarial position and are qualified to perform the duties assigned to nontenured employees in the district. Since the Board has not met its affirmative burden of proving mitigation, petitioners are entitled to full back pay, offset by any actual earnings.

Procedural History

On November 30, 1995, petitioners filed a verified petition with the Commissioner of Education ("Commissioner") seeking restoration to a secretarial position together with back pay. Respondent filed an answer on January 11, 1996. Subsequently, on January 18, 1996, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL").

At the direction of the OAL, petitioners served notice of the pendency of this matter on nontenured district employees occupying positions subject to their tenure claim. Thereafter, the OAL granted intervenor status to Cheryl Philower, June Dietz, Mary Wilson, Debra Restaino and Mary Ann Dailey. The OAL held hearings on January 29 and February 7, 1997. Upon receipt of post-hearing submissions, the record closed on April 10, 1997.

Findings of Fact

Many of the background facts are undisputed. **I FIND**:

West Essex Regional School District is a secondary-school district comprised of the communities of Essex Fells, Fairfield, North Caldwell and Roseland. In November 1991, the District placed an advertisement in a local newspaper seeking applicants for part-time secretarial positions. Rita Hibo applied for the position after learning of it by word of mouth. Her written application stated that she held a high-school diploma, graduated from the Sherwood School of Business, and had previous experience as a secretary in private industry. She was offered a ten-month position working nineteen hours per week or roughly half-time. By resolution adopted on January 13, 1992, the Board approved Hibo's employment as a "part-time secretary" assigned to the senior-high school library for the remainder of the 1991-92 academic year. When she started her employment, she became a member of the bargaining unit for secretarial

employees and was paid at an hourly rate in accordance with the secretaries' salary guide.

West Essex's job description for "ten-month secretary" enumerates a number of typical secretarial duties, including: opening, sorting and prioritizing all mail; maintaining files; transcribing and typing correspondence; screening telephone calls and taking messages; maintaining such appointment calendars and schedules as may be required; and working directly with students, parents, faculty and administration.[1] Currently, the District uses a more comprehensive job description for "secretary," which specifies various qualifications, including: a high school diploma and secretarial training; knowledge of automated office equipment and computers; strong analytical, secretarial and interpersonal skills; and a minimum of three years' experience. Basically, the current job description contains the same responsibilities as before, but also includes: typing requisitions or purchase orders, as applicable; exercising initiative and independence in the performance of day-to-day duties; and demonstrating concern for good public relations.[2]

As secretary to the school librarian, Hibo took care of incoming mail, typed correspondence on a daily basis, entered information into a computerized database of books and videotapes, collected fines for overdue books and assisted the librarian at the circulation desk. She performed virtually all of the duties on both job descriptions for secretary, except that she did not keep an appointments calendar for the librarian. Although the librarian did much of her own typing, Hibo typed many routine letters, including requests for free materials and correspondence dealing with purchase orders. Hibo was familiar with the MAC operating system and adapted to the Microsoft Works® software used in the library.

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[1]While the record does not show its adoption date, this particular job description appears to have been the one in effect when Hibo and Arillo were hired.

[2]The District also has a specialized job description for "secretary to the librarian." In addition to typing and such other tasks as may be assigned by the school librarian, the duties include: assisting in the inventory of audio-visual equipment and supplies; assisting at the library circulation desk; and filing materials and magazines. Hibo performed all of these duties

During her employment, Hibo was evaluated on the district's own form designated "secretarial evaluation report." Personnel records of the district also identified Hibo as a part-time "secretary." She received glowing reports from her immediate supervisor.. In an initial evaluation dated March 3,1992, school librarian Susan Heiniss rated Hibo as "excellent" in "cooperation with supervisors" and "wonderful" in "attitude toward pupils. Every report over a three-year period gave her the highest possible rating in each performance category. Illustratively, an evaluation on January 11, 1993 described Hibo as "a wonderful secretary, a dedicated employee and an asset to West Essex." A final report on February 10, 1995 commended her for "improving her knowledge and understanding of the library computer and technology" and recommended that she be reappointed for the following year. Several of the secretarial evaluation reports, including the last one, were signed not only by librarian Heiniss, but also by Daniel Borgo in his capacity as board secretary. Later, Borgo claimed that he considered Hibo to be an "aide" or "assistant" rather than a secretary. Nevertheless, on September 1, 1995,. Borgo sent written notice to Hibo that her services as a "secretary with the West Essex School District" would be terminated in sixty days.

Similarly, Susan Arillo answered a newspaper advertisement by the district for a "part-time secretary." She had graduated from an intensive program at the Berkeley Secretarial School and had worked as a secretary for various private employers since 1975. On May 11, 1992, the Board adopted a resolution hiring her as a "part-time secretary" for nineteen hours per week. Like Hibo, Arillo joined the bargaining unit for secretaries and was paid at an hourly rate on the secretary's salary guide. Again, the Board's own personnel records referred to her as a "secretary." Initially, she was assigned to the guidance office, where she typed letters of recommendation for students, compiled grade point averages, sent out student transcripts, did filing and answered telephones. Whenever the full-time secretary for the guidance office was absent, Arillo filled in for her.

Arillo remained in the guidance office until January 1993, when she transferred to the office of attendance and discipline.[3] Her duties in that assignment included checking student attendance, helping prepare attendance and tardiness bulletins, inputting data into the district's AS400 computer system, keeping discipline records, answering telephones and interacting with students and their parents. Beginning in September 1994, Arillo was reassigned to a secretarial position in the vice principal's office. She continued doing comparable work, including entering data into the computer system, typing letters and schedules, preparing the weekly-activities calendar, and answering telephones. Occasionally she took dictation using her stenographic skills. She learned to use Word Perfect® and successfully completed a fourteen-hour introductory course to Windows 3.1®. In one or another of her assignments, Arillo did most of the duties on the district's job descriptions for secretary, other than opening and sorting mail.

Throughout her employment in the district, Arillo received the highest performance ratings on the district's secretarial-evaluation form. Byron Harmony, the district's director of guidance, wrote in his evaluation report that, "By dress, manner, knowledge, skills and attitude, Mrs. Arillo is a top flight professional secretary." Attendance officer Peter Falco agreed that Arillo "is a definite asset" to the school community and mentioned approvingly that she "continues to learn about the AS 400 System." Vice principal Joan Oakley noted that Arillo "assumed her responsibilities here with a positive, professional attitude" and that she "consistently approaches all her tasks with a high level of energy, and concern for accuracy[.]" Recommending her for reappointment, the vice principal commented that Susan Arillo "is an excellent addition to our staff." However, on September 1, 1995 board secretary Borgo gave her sixty days notice of her termination "as a part-time secretary."

[3]Before her transfer, the district first offered Arillo a full-time position as a secretary in the guidance department. Arillo had to turn down this offer because she did not have adequate child care for her young daughter. Instead, the job went to Donna Procopio, one of the nontenured secretaries whom Arillo now seeks to replace.

School superintendent Gary Vitta informed petitioners that the Board voted to eliminate their part-time secretarial positions, effective November 1, 1995, "due to consolidation and efficiency." Although Arillo applied for a full-time secretarial position advertised by the district, the Board never offered her any other job. Mr. Borgo referred her to a posting by the building and grounds department, but the only opening was for a maintenance worker. Meanwhile, Arillo has been actively searching for employment as a secretary in other school districts and with private companies. Since October 31, 1996, Arillo has been working on an "as needed" hourly basis for a law firm. As of February 2, 1997, her wages totaled $2,070. While unemployed, Arillo and Hibo collected unemployment insurance benefits of $4,290 and $4,602 respectively. Hibo applied for a secretarial position at a nearby college, but has still not found another job.

Petitioners assert that they have priority over all nontenured individuals holding secretarial positions in the district. In particular, they name Donna Procopio, who replaced Arillo as secretary in the guidance department on January 4, 1993; June Dietz, who began as secretary to the junior-high school principal and vice principal on August 30, 1993; Cheryl Philower, who started as secretary to the building and maintenance supervisor on September 8, 1993; Mary Ann Dailey, a former library aide who became a full-time secretary to an assistant principal on January 24, 1994; Ellen Smith, hired as secretary to the high-school principal on November 1, 1995; Kathleen Bergen, who started as a regular secretary in June 1996 and later became confidential secretary to the board secretary/school business administrator;[4] and Patricia Mosley, who joined the staff in December 1996 to replace Kathleen Bergen as confidential secretary to the board secretary/school business administrator. Additionally, petitioners allege that they have preference over untenured clerical staff, including Mary Wilson and Deborah Restaino who were hired as photocopy clerks in August and September 1994.[5]

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[4]After petititioners had already instituted this litigation, the Board promulgated a new job description for "secretary to the board secretary/school business administrator" that requires "strong computer skills" including familiarity with "word processing, database, spreadsheet, etc."

[5]West Essex has a separate job description for "copy machine operator," which largely involves "perform[ing] all copying duties for the district on a daily basis."

Despite respondent's insistence that Hibo and Arillo lack the qualifications for a full-time secretarial position, Board's witnesses presented little support for that proposition. Board secretary Borgo emphasized that secretaries responsible for ordering supplies must be acquainted with spreadsheet applications. He also suggested that Cheryl Philower's duties include certain activities that petitioners have never done, such as preparing bid specifications and keeping ledgers of account. However, he acknowledged that Philower herself had no prior secretarial experience and that much of her work involves simply collating information supplied by others. Dr. Gary Vita, superintendent of schools, indicated that he had intended to hire "temporary" help for the library and guidance department, but admitted having no personal knowledge of Hibo's and Arillo's actual duties. While he expressed his opinion that petitioners do not possess the necessary level of expertise, he failed to explain how their duties differed from those of most other secretaries.

I FIND that Hibo and Arillo served as secretaries in the district. Both of them had secretarial training and applied for jobs advertised to be secretarial positions. The Board hired them as secretaries, characterized them as secretaries in personnel records, and evaluated their performance using standards applicable to secretaries. Significantly, the proofs demonstrate that petitioners performed duties commonly associated with secretarial functions, including typing or word processing documents under the supervision of a boss, entering data into a computer, organizing files, greeting visitors, and answering telephones. These are the same types of duties listed on the district's own job description for secretary.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Hibo and Arillo have acquired tenure in a secretarial position and are entitled to preference over nontenured secretaries in the district.

Tenure is a statutory right designed to prevent school boards from abusing their superior bargaining power. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). It protects tenured employees from dismissal for "unfounded, flimsy or political reasons." *Zimmerman v. Newark Bd. of Educ.*, 38 *N.J.* 65. 70-72 (1962), *certif. den.* 371 *U.S.* 956, 83 *S.Ct.* 508, 9 *L.Ed.*2d 502 (1963). *N.J.S.A.* 18A:17-2(b) grants tenure to "[a]ny person holding any secretarial or clerical position" in a school district after "expiration of a period of employment of three consecutive calendar years in the district" or "employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year." Thus, the first inquiry is whether petitioners qualify as district employees holding a "secretarial or clerical position" within the meaning of the statute. As noted, the Board urges that petitioners are "general office workers" not covered by the tenure laws.

Generally, tenure laws should be generously construed to achieve their remedial purpose. *Spiewak*, at 74-75. Since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, "the widest range should be given to the applicability of the law." *Barnes v. Jersey City Bd. of Educ.*, 85 *N.J. Super.* 42, 45 (App. Div. 1964), *certif. den.* 43 *N.J.* 450 (1964). *Accord, Viemeister v. Prospect Bd. of Educ.*, 5 N.J. Super. 215, 218 (App. Div. 1949). Words in a statute should be given their ordinary and popular meaning unless it is evident that they are employed in a technical sense. *State v. Joas*, 34 *N.J.* 179, 187 (1961). WEBSTER'S INTERNATIONAL UNABRIDGED DICTIONARY (3rd ed. 1976) defines "secretary" to mean "one employed to handle correspondence and manage routine and detail work for a superior." Likewise, the DICTIONARY OF OCCUPATIONAL TITLES (4th ed. 1991) published by the United States Department of Labor describes the duties of a secretary in a school setting as encompassing composing correspondence, greeting visitors and directing them to their desired destination, disbursing funds and recording financial transactions. As the Board correctly observes, title alone is not dispositive and actual duties should control over labels. *See Quinlan v. North Bergen Twp. Bd. of Educ.*, 5 *N.J. Super* 215, 218 (App. Div. 1949); *Beaute v. North Arlington Bd.* of Educ., OAL Dkt. No. EDU 0295-80 (July 28, 1981), *adopted* (Comm'r Sept. 14, 1981), *aff'd* (St.

Bd. Feb. 3, 1982). Here the evidence clearly establishes that petitioners performed duties traditionally regarded as secretarial responsibilities, including transcribing correspondence, dealing with the public, answering telephones and handling routine paperwork. Their duties require a degree of skill and knowledge in the use of office equipment and specialized techniques. Unlike paraprofessional assistants such as classroom or lunchroom aides, the scope of their responsibility was not limited to assisting professionals "by relieving them of easy or repetitive tasks which do not require extensive training and experience." *Roach v. South Orange-Maplewood Bd. of Educ.*, 96 *N.J.A.R.* 2d (EDU) 370, 374 (Comm'r Nov. 6, 1995).

Alternatively, the Board argues that petitioners have not served the requisite time period for tenure because they were part-time employees.[6] In *Spiewak*, *supra*, the New Jersey Supreme Court declared that part-time remedial teachers who work the requisite number of years are eligible for tenure protection by operation of law, regardless of the school board's contrary intent. Recognizing the desirability of affording broad managerial discretion to school boards, the Court nonetheless deferred to the legislative policy decision "that the utility of tenure to improving education outweighs any costs in decreased 'flexibility.' " *Spiewak*, 90 *N.J.* at 79. Although the Board attempts to distinguish *Spiewak* on the ground that teachers are required to hold particular endorsements "for which there are very detailed and specific educational and training requirements," that argument cuts more in favor of petitioners than of the respondent. Compared to teachers who must demonstrate expertise in particular fields or subject areas, *see Dennery v. Passaic Cty. Reg. High Sch. Dist. #1,* 131 *N.J.* 626 (1993), secretarial employees are generalists who may be transferred more easily from one assignment to another. Thus, a school board has a better opportunity to evaluate the overall abilities of a part-time secretary during the probationary period than those of

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[6]Further, the Board contends that petitioners did not gain tenure because they were "temporary" employees. Nothing on the record substantiates this claim. The newspaper advertisement did not say that the positions were temporary, the Board resolutions did not mention that the hiring was temporary and petitioners were never told that their jobs would be temporary. Neither petitioner was substituting for an absent employee expected to return to work. *See Sayreville Educ. Ass'n v. Sayreville Bd. of Educ.*, 193 *N.J. Super.* 424 (App. Div. 1984).

a part-time teacher, who may have taught only one narrow subject or at a single grade level. Furthermore, the Board's contention that *Spiewak* is distinguishable because the teachers were hired with grant money as opposed to local funding is without merit. *Spiewak* expressly holds that the source of funding is irrelevant to tenure acquisition. 90 *N.J.* at 81. *See also*, *Lichtman v. Ridgewood Bd. of Educ.*, 93 *N.J.* 362 (1983), where a tenured teacher employed as a part-time librarian was entitled to preference over a non-tenured teacher for appointment as a full-time librarian.

Indeed, the Commissioner has already applied the *Spiewak* rationale to secretarial tenure. In *Sherrill v. Cinnaminson Bd. of Educ.*, OAL Dkt. No. EDU 10107-93 (Nov. 10, 1994), *adopted* (Comm'r Dec. 29, 1994), *aff'd* (St. Bd. June 7, 1995), a part-time tenured secretary claimed entitlement to a full-time secretarial position given to a nontenured secretary. Relying on the *Spiewak* ruling that teaching staff members who work only part-time achieve tenure as full-time teachers, the Commissioner adopted the administrative law judge's conclusion that "there is no logical reason" for treating part-time secretaries any differently. (slip op. at 8). While *Sherrill* includes a detailed analysis of contractual-seniority rights, the outcome turns on the Commissioner's determination that a secretary's statutory entitlement to positions held by nontenured employees "cannot be circumvented by contractual seniority provisions." (slip op at 12).

Even if respondent were willing to concede that part-time service counts toward tenure, the Board still insists that Arillo never achieved tenure because she allegedly served "in a variety of positions over the course of her employment." Its reasoning is flawed, however, by a misunderstanding of the meaning of "position." Secretarial employees, like teaching staff members, achieve tenure in a "position", not in any particular job assignment. *N.J.S.A.* 18A:17-2(b). *Dennery*, 131 *N.J.* at 632-635; *Williams v. Plainfield Bd. of Educ.*, 176 *N.J. Super.* 154 (App. Div. 1980) (transfer of principal's assignment from high school to elementary school does not violate her tenure rights.) *See also, Howley v. Ewing Bd. of Educ.*, 6 *N.J.A.R.* 509, 515-516 (Comm'r Oct. 31, 1982). Although it may be true, as the Board suggests, that Arillo received assignments "of increasing scope and responsibility," her distinguished

performance on the job should not be the basis for denial of tenure. In each of her several job assignments, she served in the role of a secretary and performed a secretarial function. She was never promoted to a higher position for which different or greater qualifications are required. Accordingly, the situation is dissimilar to *Given v. East Windsor Reg. School Dist.*, 1978 *S.L.D.* 43 (Comm'r Jan. 30, 1978) *aff'd* 1978 S.L.D. 46 (St. Bd. June 7, 1978), *aff'd* 1979 S.L.D. 832 (App. Div. May 18, 1979), where a district employee attained tenure in a clerical position, but had not served sufficient time to acquire tenure in a secretarial position. Upholding the Commissioner's decision, the Appellate Division rejected appellant's argument that the duties of clerk and secretary are "essentially the same." 1979 *S.L.D.* at 833. Moreover, the fact that Arillo did not accept the Board's earlier offer of full-time employment does not constitute a break-in-service which might defeat her tenure claim. She continued uninterrupted employment as a part-time secretary and earned tenure after passage of three consecutive academic years and one day.

Tenured school employees asserting priority over nontenured employees must be fully qualified for the positions being sought. *See, e.g., Kearny Bd. of Educ. v. Horan*, 11 *N.J. Misc.* 751, 753, 168 *A.* 132 (Sup. Ct. 1933), clarifying that tenure protection extends only to those positions which the tenured teacher "is qualified to fill." Hibo and Arillo graduated from secretarial school, performed secretarial services for the district and received the highest scores on the Board's own secretarial-evaluation forms. Both of them are familiar with modern office technology and both appear willing to learn any particular software programs that the district chooses to utilize. Proofs fail to show that the duties assigned to other nontenured secretaries were so specialized or unique that petitioners would be incapable of satisfactorily performing them. Therefore, the Board may not terminate tenured secretaries while retaining nontenured individuals as secretaries. *See Bednar v. Westwood Bd. of Educ.*, 221 *N.J. Super.* 239 (App. Div. 1987) (tenured art teacher has priority over nontenured art teacher); *Capodilupo v. W. Orange. Bd. of Educ.*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. den.* 109 *N.J.* 514 (1987) (tenured physical-education teacher has priority over nontenured physical-education teachers). Of course, the Board may exercise its reasonable discretion in

choosing which of the secretarial positions presently occupied by nontenured staff to offer to petitioners.

Since petitioners have priority over all nontenured secretaries, it is unnecessary to reach the additional issue of whether petitioners might also displace clerical staff on the theory that the greater job duties include the lesser. Suffice it to note that positions specifically enumerated in tenure statutes are usually regarded as "separately tenurable" *Nelson v. Old Bridge Bd. of Educ.*, 148 *N.J.* 358 366 (1997) and that the phrase "clerical" position was intended to have a different meaning than "secretarial" position. *Barnes*, 85 *N.J. Super.* at 45. *Accord Hansen v. Maywood Bd. of Educ.*, 1989 *S.L.D.* 2106 (Comm'r 1989), *aff'd on other grounds* 1990 *S.L.D.* 1755 (St. Bd. 1990), *aff'd* Dkt. No. A-4355-89T5 (App. Div. Jan 19, 1991) (unpublished) (treating secretarial position as separately tenuarable from clerical position).

Finally, the Board avers that petitioners are not entitled to back pay due to their alleged failure to make diligent efforts to find comparable employment. Mitigation is an affirmative defense, and the burden of proving the appropriateness of its application rests with the wrongdoer. *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19, 40 (1981). In order to invoke mitigation, there must be available jobs. *Goodman*, at 36. The record shows that Arillo made numerous unsuccessful efforts to find alternate employment as a secretary.[7] Contrary to the respondent's unsupported assertion, the Board never offered her an opportunity for other employment in the district. *Cf. Siegel v. Garfield Bd. of Educ.*, 93 *N.J.A.R.* 2d (EDU) 766 (Comm'r Sept. 10, 1993), *remanded* 94 *N.J.A.R.* (EDU) 2d 319 (St. Bd. April 13, 1994), *decision on remand* OAL Dkt. No. EDU 4130-94 (Feb. 15, 1995) (teacher not required to accept district offer of drastic reduction in pay). Although Hibo did not try as hard to find other work, there is no indication on the record that she would have been any more successful than Arillo in finding comparable work. *Compare West Orange Supplemental Instructors Ass'n v. West Orange Bd. of Educ.*, 92 *N.J.A.R.* 2d (EDU) 287 (Comm'r Jan. 9, 1991), *aff'd in*

[7] On cross examination, Arillo testified that she tried to obtain secretarial employment at the school districts in North Caldwell, Fairfield, West Caldwell-Caldwell, Verona, Cedar Grove and at various private companies.

part and rev'd and remanded in part, 92 *N.J.A.R.* 2d (EDU) 301 (St. Bd. April 1, 1992), *decision on remand* 94 *N.J.A.R.* 2d (EDU) 337 (Comm'r July 21, 1993), *aff'd in part and rev'd in part* 94 *N.J.A.R.* 2d (EDU) 341 (St. Bd. 1994), where mitigation was allowed upon a showing by the school board of suitable job opportunities in neighboring school districts. In the instant case, there is no basis for finding that petitioners could have alleviated their losses by obtaining comparable employment elsewhere.

As a result, mitigation is limited to Arillo's actual earnings of $2,070 and any other actual earnings made by either petitioner since the date of the hearing. *See Goodman*, at 36. While petitioners are not entitled to be compensated twice for unemployment compensation benefits already received, it would constitute unjust enrichment for the Board to retain that sum as an offset against back pay. Instead, the Board must reimburse the New Jersey Department of Labor for the amount of unemployment benefits paid directly to petitioners. *N.J.S.A.* 43:21-5(b). *Dep't of Labor & Industry v. Smalls*, 153 *N.J. Super.* 411 (App. Div. 1977).

Order

It is **ORDERED** that respondent Board reinstate petitioners Arillo and Hibo to a secretarial position.

It is further **ORDERED** that the Board restore full back pay and other benefits to petitioners, subject to an offset of $2,070 for Arillo and for any actual earnings by petitioners since the date of the hearing.

And it is further **ORDERED** that the Board reimburse the New Jersey Department of Labor for unemployment compensation benefits of $4,290 paid to Arillo and $4,602 paid to Hibo.

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

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

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

Nov. 12, 1997
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11/14/97
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1997
DATE

Barbara A. Harned
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Susan Arillo
2. Rita Hibo
3. Dr. Gary Vitta, superintendent of schools, West Essex Regional School District
4. Daniel Anthony Borgo, school business administrator//board secretary, West Essex Regional School District

List of Exhibits

No.	Description
P-1	Copy of Board Secretary's memorandum, dated May 11, 1992
P-2	Copy of secretarial evaluation report for Susan Arillo, dated January 11, 1993
P-3	Copy of secretarial evaluation report for Susan Arillo, dated January 15, 1993
P-4	Copy of secretarial evaluation report for Susan Arillo, dated April 22, 1993
P-5	Copy of memorandum to Susan Arillo from Gary J. Vitta, dated October 11, 1993

P-6 Copy of memorandum to Susan Arillo from Gary J. Vitta, dated October 7, 1994

P-7 Copy of secretarial evaluation report for Susan Arillo, dated March 10, 1994

P-8 Copy of secretarial evaluation report for Susan Arillo, dated February 1, 1995

P-9 Copy of letter to Susan Arillo from Daniel A. Borgo, dated September 1, 1995

P-10 Copy of letter to Susan Arillo from Gary J. Vitta, dated September 12, 1995

P-11 Copy of letter to Dr. Gary Vitta from Susan Arillo, dated April 27, 1996

P-12 Copy of an excerpt of the minutes of the Board of Education of the West Essex Regional School District, dated January 13, 1992

P-13 Copy of secretarial evaluation report for Rita H. Hibo, dated March 2, 1992

P-14 Copy of secretarial evaluation report for Rita Hibo, dated January 11, 1993

P-15 Copy of secretarial evaluation report for Rita Hibo, dated April 2, 1993

P-16 Copy of memorandum to Rita Hibo from Gary J. Vitta, dated October 11, 1993

P-17 Copy of secretarial evaluation report for Rita Hibo, dated January 24, 1994

P-18 Copy of secretarial evaluation report for Rita Hibo, dated April 7, 1994

P-19 Copy of memorandum to Rita Hibo from Gary J. Vitta, dated October 7, 1994

P-20 Copy of secretarial evaluation report for Rita Hibo, dated February 10, 1995

P-21 Copy of letter to Rita Hibo from Daniel A. Borgo, dated September 1, 1995

P-22 Copy of letter to Rita Hibo from Gary J. Vitta, dated September 12, 1995

P-23 Copy of job description for ten-month secretary, undated

P-24 Copy of job description for secretary, undated

P-25 Copy of sign-up list for computer course, dated July 10, 1995

P-26 Copy of certificate for successful completion of computer course issued to Susan Arillo by the West Essex Institute for Excellent Education, dated July 13, 1995

P-27 Copy of help wanted advertisement in The Progress, Caldwell, N.J., published on November 21, 1991

P-28 Copy of help wanted advertisement in The Progress, Caldwell, N.J., published on April 16, 1992

P-29 Copy of posting for secretary to junior high school assistant principal, dated June 27, 1994

R-1 Copy of job description of board secretary/school business administrator, dated September 1996

R-2 Copy of excerpts of the minutes of a meeting of the Board of Education of the West Essex Regional School District, dated September 11, 1995

R-3 Copy of employee termination list, dated September 21, 1995 to September 1, 1996

R-4 Copy of job description for secretary to the librarian, undated

R-5 Copy of agreement between the Board of Education of the West Essex Regional School District and the West Essex Secretaries Association, covering 1991-92, 1992-93 and 1993-94

R-7 Copy of application for secretarial or clerical position by Rita Hibo, dated November 22, 1991

R-8 Copy of application for secretarial or clerical position by Susan Arillo, dated April 21, 1992

R-9 Copy of application for secretarial or clerical position by Ellen Smith, dated October 10, 1995

R-10 Copy of application for secretarial or clerical position by Donna Procopio, dated June 15, 1992

R-11 Copy of secretarial evaluation report for Donna Procopio, dated April 11, 1996

R-12 Copy of recommendation for Mrs. Donna Procopio, dated November 1, 1996

R-13 Copy of application for secretarial or clerical position by June Dietz, dated January 21, 1993

R-14 Copy of application for secretarial or clerical position by Debra Restaino, dated August 10, 1994

R-15 Copy of application for secretarial or clerical position by Mary K. Wilson, dated August 1, 1994

R-16 Copy of application for secretarial or clerical position by Cheryl Ann Philower, dated December 10, 1992

R-17 Copy of secretarial evaluation report for Cheryl Philower, dated February 7, 1995

R-18 Copy of application for secretarial or clerical position by Mary Ann Dailey, dated July 21, 1992

R-19 Copy of resume of Kathleen Bergen, undated

R-20 Copy of job description for ten-month secretary, undated

R-21 Copy of job description for secretary, undated

R-22 Copy of job description for copy machine operator, dated June 1994

R-23 Copy of posting for secretary to the senior high school principal, dated August 29, 1995

R-24 Copy of posting for secretary in the senior high school guidance office, dated November 12, 1996

R-25 Copy of posting for secretary to the school business administrator/board secretary, dated September 18, 1996

R-26 Copy of newspaper advertisement for secretary to the school business administrator/board secretary, with a deadline of October 4, 1996

R-27 Copy of newspaper advertisement for secretary to the board secretary/school business administrator, with a deadline of October 11, 1996

R-28 Copy of job description for secretary to the board secretary/school business administrator, dated September 1996

R-29 Copy of resume of Ellen C. Smith, undated

R-30 Copy of letter of recommendation to Gary Vitta from James A. Corino, dated September 20, 1995

R-31 Copy of resolution of the Board of Education of the West Essex Regional School District, dated January 13, 1992

R-32 Copy of board secretary's memorandum, dated May 11, 1992

R-33 Copy of various resolutions of the Board of Education of West Essex School District, dated June 8, 1992, May 24, 1993, May 9, 1994 and June 12, 1995

R-34 Copy of list of secretarial staff for 1996-1997

R-35 Copy of application for secretarial or clerical position by Patricia Mosley, dated December 30, 1996

OAL DKT. NO. EDU 1226-96
AGENCY DKT. NO. 459-11/95

RITA HIBO AND SUSAN ARILLO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board[1] [2]and petitioners' reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in making his determination in this matter.

Upon his careful and independent review of the record, the Commissioner affirms the findings and conclusion of the Administrative Law Judge, that the within petitioners accrued tenure in secretarial positions and are qualified to perform the duties assigned by the Board to nontenured employees and the Board, therefore, is required to reinstate these petitioners to secretarial positions in the District and restore full back pay and emoluments which they would

[1]The Board's exception submission included audio tapes of the hearing conducted at the OAL on January 29, 1997 and February 7, 1997.

[2]By letters dated December 1, 1997, December 3, 1997 and December 4, 1997, respectively, Intervenors June Dietz, Deborah Restaino and Mary Ann Dailey advised that they joined the exception letter filed by the Board. By letter dated December 8, 1997, Intervenor Cheryl Philower directed the Commissioner's attention to her post-hearing brief submitted to the ALJ in this matter.

have received had the Board not acted improperly in discontinuing their employment. The Commissioner further finds that the Board is entitled to offset petitioners' awards by their actual earnings and the unemployment compensation which they received during this period and it is responsible for reimbursing the New Jersey Department of Labor for the total amount of such unemployment compensation.

Accordingly, the initial decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein. The Board is hereby ordered to reinstate petitioners to secretarial positions in the District and restore their back pay and emoluments less the offsets directed herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

DECEMBER 29, 1997
DATE OF MAILING DECEMBER 29, 1997

659-97

EDU #1226-96
C # 659-97
SB # 8-98

RITA HIBO AND SUSAN ARILLO, ;

PETITIONERS-RESPONDENTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY, : DECISION

RESPONDENT-APPELLANT. :

Decided by the Commissioner of Education, December 29, 1997

For the Petitioners-Respondents, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., and Randi Doner-April, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq., of Counsel)

For the Intervenor Cheryl Philower, Springstead & Maurice (Alfred F. Maurice, Esq., of Counsel)

For the Intervenor June Dietz, Weinberg & Weinberg (James M. Weinberg, Esq., of Counsel)

For the Intervenor Mary Wilson, Klausner & Hunter (David L. Rosenberger, Esq., of Counsel)

For the Intervenor Debra Restaino, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Intervenor Mary Ann Dailey, Feintuch, Porwich & Feintuch (Philip Feintuch, Esq., and Howard Feintuch, Esq., of Counsel)

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

June 3, 1998

Date of mailing JUN 05 1998

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OPINION FILED
AT 509-97

K.B., on behalf of minor child, H.B.,

PETITIONER,

AND

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,

INTERVENOR,

V.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent contested the refusal of her district of residence Board (Rancocas Valley) to provide transportation for her child, H.B., to attend an Academy of Performing Arts in another district. Rancocas Valley alleged it provided a comparable program.

ALJ found that the Rancocas Valley's program consisted of a first year performing arts course followed by subsequent years of independent study. ALJ found that there is no approved vocational program of performing arts or dance at Rancocas Valley and that Rancocas Valley does not have a dance program. Thus, the ALJ found that Rancocas Valley does not offer a program in dance and the performing arts comparable to that offered by the Gloucester County Institute of Technology (GCIT), Academy of the Performing Arts. ALJ concluded petitioner and intervenor were entitled to relief requested, respondent Rancocas Valley was to provide transportation to H.B. for attendance at GCIT.

Commissioner adopted findings and determination in initial decision as his own and directed respondent Rancocas Valley to provide transportation to H.B. for attendance at GCIT. Commissioner reminded respondent that notwithstanding that petitioner only sought transportation costs, respondent was likewise responsible for payment of H.B.'s tuition and, to the extent permitted by law, any imposed nonresident fee.

DECEMBER 29, 1997

661-97

WILLIAM MOLINARI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning custodian contested Board's denial of compensation, pursuant to *N.J.S.A.* 18A:30-2, for absences as a result of his work-related injury.

ALJ concluded that the petition was not filed within 90 days of the date of notification by the Board of its position regarding the treatment of the absences in question, pursuant to *N.J.A.C.* 6:24-1.2(c), and that the 90-day rule should not be relaxed. ALJ granted the Board's motion to dismiss; petition was dismissed.

Commissioner adopted the findings and determination in the initial decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3174-97
AGENCY DKT. NO. 28-1/97

WILLIAM MOLINARI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG,
Respondent.

David B. Friedman, Esq., for petitioner
(Balk, Oxfeld, Mandell & Cohen, attorneys)

Robert M. Tosti, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

ord Closed: September 29, 1997 Decided: November 13, 1997

RE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

am Molinari (Molinari) filed a petition with the State Department of Education anuary 24, 1997, contesting action taken by the Board of Education of the Hopatcong (Board or respondent). Respondent filed an answer on

February 14, 1997. The DOE transmitted the matter to the Office of Administrative Law on March 3, 1997 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

A telephone conference was conducted on June 12, 1997. The Board filed a motion to dismiss on July 2, 1997. After further communications, petitioner filed a reply; and the Board, a response. The record was closed on September 29, 1997, the date of receipt of the last document pertinent to the motion.

NATURE OF THE CASE

Petitioner, a custodian employed by respondent, alleges that he was injured while at work on May 31, 1996. Petitioner subsequently returned to work but has been absent since August 23, 1996. Petitioner contests treatment by the Board of those absences. Molinaro argues, more specifically, that the days on which he has been absent from work subsequent to August 23, 1996 should be treated as absences because of a work-related disability and that he is therefore entitled to full pay pertinent to those days. Respondent disputes Molinaro's substantive allegations and has charged the days in question to respondent's sick leave or accumulated sick leave.

Respondent's motion to dismiss, however, is based on procedural requirements. The Board argues that Molinaro's petition was not timely filed and should therefore be dismissed. Petitioner disputes that claim.

FINDINGS OF FACT

Based upon a review of the papers, I **FIND** the following to be facts.

Molinaro has been employed by the Board as a custodian since 1991. Petitioner asserts that he incurred injuries on May 31, 1996, as a result of an accident which arose out of and in the course of his employment. Petitioner returned to work at some

point, not entirely clear, subsequent to May 31, 1996. Commencing August 23, 1996, petitioner has been absent from work.

By letter dated August 14, 1996 to petitioner, Dr. James F. Clark (Clark), respondent's Assistant Superintendent and Secretary, addressed petitioner's then current employment status with the Board. Clark referenced receipt of a second report from a Dr. Crutchlow, indicating that Molinaro had been cleared for return to work, on light duty, as of July 22, 1996. Clark noted in that respect that the latest examination and work clearance were issued on August 13, 1996, based on an August 12, 1996 evaluation. Clark also addressed an apparent position by Molinari that petitioner was then too ill to return to work:

> The district is aware, however, that you maintain that you are too ill to work based on a note also dated August 12, 1996 from Dr. Leggiero. While the discrepancy in the doctors' opinions is interesting, there is no question that you are no longer qualified for workers compensation. Accordingly, if you maintain that you are too ill to work, your sick leave bank will continue to be charged for any further absences. (Certif. Wayne L. Threlkeld, Exh. A).

By letter dated September 3, 1996, counsel for petitioner advised the Board that:

> Pending an evaluation of Mr. Molinari's physical condition by the workers' compensation doctor who this office uses in workers' compensation matters, Mr. Molinari will not be reporting to work. (Id., Exh. B, p.2).

Dr. Wayne L. Threlkeld, respondent's superintendent, responded by letter dated September 4, 1996, stating, in part:

> Please be advised that we cannot accept this position. Mr. Molinari was released to full duty yesterday, September 3, 1996, following his visit to the Northern New Jersey Orthopedic Specialists . . . Similar releases have also been received from other orthopedists and general practitioners only for Molinari to seek other unauthorized medical care. We expect Mr. Molinari to return to full duty at his regularly scheduled 3:00 p.m., starting time on Thursday, September 5, 1996. Mr. Molinari's failure to return to

work will result in loss of pay for any days taken without proper medical authorization. (*Id.* at p.1).

Petitioner filed a workers' compensation claim petition on or about September 10, 1996 pertinent to the alleged accident which had occurred on May 31, 1996.

At some point during this general time period, the Board changed workers' compensation carriers. In addition, because of an error in the Division of Unemployment (Division), State Department of Labor, it was reported to respondent, in approximately December 1996, that petitioner had applied for unemployment. Apparently, as a result, the Board, in approximately December 1996, sent Molinaro a notification that it considered him to have abandoned his position. During this time period, petitioner first contacted his union regarding the situation. The Board later ascertained that the Division report was sent to the district in error and that petitioner had not filed for unemployment compensation and had not abandoned his position. Petitioner obtained confirmation from the Division that he had not filed for unemployment compensation. He thereafter contacted counsel, and the instant appeal was prepared.

By letter dated January 23, 1997, counsel for petitioner filed a petition with the DOE alleging that the Board had improperly failed to classify the days Molinaro was absent from work subsequent to August 23, 1996 as workers compensation days. The petition requested orders that respondent restore Molinari's accumulated sick days for the days in question and provide full pay for each day for which he received no pay. The petition was received by the DOE on January 24, 1997.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies arising under the school laws. *N.J.S.A.* 18A:6-9 (Supp. 1997).

Whenever an employee of a local board of education is absent from employment because of a personal injury caused by an accident arising out of and in the course of his/her employment, the board shall pay such individual his/her full remuneration for the period of such absence, for up to one calendar year. Such absences shall not be charged to annual sick leave, nor accumulated sick leave. Such remuneration shall be provided for absences during the applicable waiting period and during the period that the employee received, or was eligible to receive, temporary disability benefits. *N.J.S.A.* 18A:30-2.1.

An individual shall file a petition no later than the 90th day from the date of receipt of a notice of a final order, ruling, or other action by a local board of education, individual party, or agency, which is the subject of a requested case hearing. *N.J.A.C.* 6:24-1.2(c). The Commissioner has discretion to relax this requirement. *N.J.A.C.* 6:24-1.15.

Even if an alleged work-related injury is the subject of a workers' compensation petition, a claim pursuant to *N.J.S.A.* 18A:30-2.1 must be filed within 90 days, pursuant to *N.J.A.C.* 6:24-1.2(c). This requirement applies even if the Commissioner exercises his/her discretion to defer the school law claim, pending the outcome of the workers' compensation case. *Medeiros v. School Dist. of Jersey City*, 97 *N.J.A.R. 2d.* (EDU) 276 (*Medeiros*).

Letters from school board personnel to employees can be sufficient to trigger the 90-day time period incorporated in the pertinent regulation. *See, e.g., Medeiros, supra*; *Morris Union Jointure Commission v. Bd. of Ed., Borough of South River*, 92 *N.J.A.R. 2d.* (EDU) 453; *Markulin v. Bd. of Ed., Twp. of Neptune*, 92 *N.J.A.R. 2d.* (EDU) 406. The August 14, 1996 and September 4, 1996 letters from Board personnel to petitioner clearly notified petitioner of the Board's position that Molinari would no longer be qualified for workers' compensation and that if he were absent, the days in question would be deducted from his sick leave time. Molinaro should have filed any claims pursuant to *N.J.S.A.* 18A:30-2.1 within 90 days of the earlier letter. However, the

petition in question was not filed with the DOE within 90 days of either the first nor the later letter.

As the Board argues, petitioner's reliance on December 1996 communications from the Board, related to its mistaken belief, based on information from the Division, that petitioner had filed for unemployment compensation and was no longer working for respondent is not material to the issue at hand. Administrative error by a local board of education does not necessarily toll the applicable 90-day period. *See, Medeiros, supra* at 277. In addition, Molinari asserts in his petition that all days in which he was absent subsequent to August 23, 1996 should have been treated as the result of a work-related injury. Molinari was obligated to file his claims with the DOE within 90 days of the date on which he first became aware that the Board was treating the days in question as sick leave, even if respondent did not send written notification of such to petitioner. *See, North Plainfield Educ. Assn. v. Bd. of Educ.*, *North Plainfield Bor.*, 96 *N.J.* 587 (1984).

The Commissioner has strictly construed the 90-day requirement. Application of the pertinent relaxation rule is infrequent and granted only where there are compelling circumstances. *Medeiros, supra* at 280. Petitioner has not demonstrated that relaxation of the rule, within the circumstances of this case, is appropriate or necessary to prevent an injustice, or for any other reason. For the foregoing reasons, I am therefore persuaded that the Board's motion to dismiss should be granted.

CONCLUSIONS

I **CONCLUDE** that the petition in question was not filed by Molinari with the DOE within 90 days of the date of notification to him by the Board of its position regarding

the treatment of the absences in question, pursuant to *N.J.A.C.* 6:24-1.2(c), and that the 90-day filing requirement reflected in that regulation should not be relaxed, pursuant to *N.J.A.C.* 6:24-1.15. I therefore **CONCLUDE** that respondent's motion to dismiss should be granted and that the petition should be dismissed, with prejudice.

ORDERS

It is hereby **ORDERED** that respondent's motion to dismiss the petition in question be and is hereby **GRANTED** and that the petition filed by Molinari with the DOE on or about January 24, 1997 be and is hereby **DISMISSED**, with prejudice.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 13, 1997
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

11/18/97
DATE

DNA
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 20 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

njf

OAL DKT. NO. EDU 3174-97
AGENCY DKT. NO. 28-1/97

WILLIAM MOLINARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.[1]

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner's claims pursuant to *N.J.S.A.* 18A:30-2.1 are properly dismissed as untimely, and that petitioner provides no cause to relax the 90-day rule pursuant to *N.J.A.C.* 6:24-1.15.

Accordingly, the initial decision of the ALJ is adopted for the reasons expressed therein and the Board's motion to dismiss this matter is hereby granted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] Petitioner's exceptions are a verbatim reiteration of those arguments presented to the ALJ, which, the Commissioner finds, were fully and fairly considered by her, as well.

DECEMBER 29, 1997
DATE OF MAILING DECEMBER 29, 1997

663-97

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Association challenged Board's selection of department chairpersons to serve on School Based Planning Teams (SBPTs).

ALJ concluded that the petition was time barred as petitioner filed more than 180 days after the date on which it received a detailed list of approved 1995-96 SBPT members by school and, further, that there was no merit to petitioner's claims that the Board violated the provisions of *N.J.A.C.* 6:8-9.2(b)2 and 3 as the Board was no longer classified as a "Special Needs District." Petition was dismissed.

Commissioner adopted finding that petition was untimely filed. Petition was dismissed. However, Commissioner concurred with petitioner's position that, as a matter of policy, the requirements of *N.J.A.C.* 6:8-9.2(b) would require full-time classroom teachers to comprise a majority of the SBPTs.

DECEMBER 29, 1997

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6244-96

AGENCY REF. NO. 121-4/96

NEPTUNE TOWNSHIP
EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF NEPTUNE,
MONMOUTH COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner, (Klausner & Hunter, attorneys)

James T. Hundley, Esq., for respondent, (Hundley & Parry, attorneys)

Record Closed: September 29, 1997 Decided: November 5, 1997

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Neptune Education Association (Association) sought a Declaratory Judgment from the Commissioner of Education (Commissioner) to construe the provisions of *N.J.A.C.* 6:8-9.2(b)2. and 3. and declare that the Board of Education of the Township of Neptune (Board) strictly comply with the regulations concerning the establishment of School Based Planning Teams (SBPT); cease and desist from unilaterally designating department chairpersons to satisfy the regulatory requirement of majority classroom teacher representation on the SBPT and, require the Board to pay for lost compensation to personnel adversely affected by its actions.

The Board denies that it violated any of the regulatory provisions alleged and sets forth seven affirmative defenses and requests that the petition be dismissed.

On April 4, 1996, the petitioner filed a Petition for Declaratory Judgment before the Commissioner. The petition alleged that the respondent, a "Special Needs District," as defined by *N.J.S.A.* 18A:7D-3, was in violation of various provisions of Title 6, Chapter 8, Subchapter 9 of the New Jersey Administrative Code which provide for the establishment and composition of mandated SBPT. On May 31, 1996, the Board filed an Answer to the Petition for Declaratory Judgment wherein it denied that it was in violation of the provision of the Title 6 of the New Jersey Administrative Code relating to the establishment or composition of its SBPT.

On June 21, 1996, the Commissioner, by letter advised the parties that he would not consider the matter as one for declaratory ruling, pursuant to his discretionary authority under *N.J.A.C.* 6:24-2.1. The Commissioner further advised the parties that:

> . . . .notwithstanding that Neptune will no longer be classified as a special needs district and, therefore, will no longer be required to meet the provisions of *N.J.A.C.* 6:8-9.2(b)2, this matter will be considered pursuant to *N.J.A.C.* 6:24-1.2., and treated as a Petition of Appeal in that the question of compensation owed petitioner's members, if any, remains a live issue.

> Accordingly, the matter will now be remanded to the Office of Administrative Law for a hearing in accordance with *N.J.A.C.* 6:24-1.10. (Commissioner's letter, June 21, 1996)

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case, pursuant to the Administrative Procedures Act, *N.J.S.A.* 52:14B-1 to -15, and the act creating the OAL, *N.J.S.A.* 52:14F-1 to -13. A prehearing conference was held on September 19, 1996, at which, among other things, the following issues were agreed upon by the parties:

1. Whether the Board violated the provisions of *N.J.A.C.* 6:8-9.2(b)2 regarding the composition of School Board Planning Terms and the compensation related thereto?

2. Whether petitioner's claims are time barred under *N.J.A.C.* 6:24-1.3(c)?

The hearing was held on March 12, 1997, at the Trenton OAL, Mercerville, New Jersey. The parties requested and were granted leave to submit posthearing Briefs of Law. The last submission was received on September 29, 1997, which constitutes the close of the hearing record.

BACKGROUND FACTS

The following background facts are taken from the Board's Statement of Facts, the Association's brief, and the testimony and documents addressed at the hearing. Accordingly, I hereby adopt the following, by reference, as my **FINDINGS OF FACT**.

During the 1995-96 school year, respondent was a "Special Needs District" as defined by *N.J.S.A.* 18A:7D-3. As a special needs district, respondent was required by the provisions of *N.J.A.C.* 6:8-9.1 to annually submit an education improvement for the district. In addition, respondent, in accordance with *N.J.A.C.* 6:8-9.2(a), was required to develop an education improvement plan for each school in the district.

N.J.A.C. 6:8-9.2(b) required that each school in the district establish and maintain a planning team to coordinate the development, implementation and evaluation of the school's education improvement plan. Membership as the school based planning teams, (SBPT), included the principal, teachers and parents. A majority of each SBPT was required to be composed of "classroom teachers." *N.J.A.C.* 6:8-9.2(b)2. The respondent was required to establish fair and reasonable policies and procedures by which teachers shall select their representatives on the SBPT. *N.J.A.C.* 6:8-9.2(b)2.

During the 1995-96 school year, the parties agreed that association members who served as members of SBPT would be compensated for attending SBPT meetings scheduled outside of the regular school hours. Association members would be compensated at rates previously established in the negotiated agreement between the parties. For the 1995-96 school year the hourly rate of compensation was $21.00.

It was agreed between the Association President and the Superintendent of Schools that SBPT positions would be posted in accordance with the terms of the Negotiated Agreement between the Board and the Association. The parties also agreed that representatives of the Association would serve as members of the SBPT at each of the district's seven school sites. There was considerable correspondence between the Association's President and Superintendent concerning the posting for the SBPT positions from October 4, 1995 through January 16, 1996.

Respondent posted open positions on the SBPT for the 1995-96 school year. (P-2) On May 24, 1995, the Board made appointments to its seven SBPT for the 1995-96 school year. A majority of the members appointed to the SBPT at the district's five elementary schools and the middle school were classroom teachers.

On May 24, 1996, the Board appointed sixteen individuals to the High School SBPT for the 1995-96 school year. (P-2) Eight of these individuals, James Whitson, Patricia Mixon, Valerie Butler, Rebecca Ciannello, Donald Smith, Vicki Travis, James Meola and Lorna Bonner were members of the Teachers' Association. Five other individuals appointed to the High School SBPT, Lynn Carhart, Piola Smith, Leonard Cafone, Ed Dever and Michael Mixon, were department chairpersons and members of a separate bargaining unit.

The job description for department chairpersons, which was in effect since 1988, included teaching classes. During the 1955-1996 school year, four of the five department chairpersons assigned to the High School SBPT taught classes for the two periods each day. The fifth department chairperson, Piola Smith-Smith, did not teach class, but performed duties as a guidance counselor.

On June 26, 1996, the respondent appointed eighteen individuals to the High School SBPT for the 1996-1997 school year. (R-5) Eight of these individuals, Mr. Whitson, Ms. Bonner, Miss Ciannello, Mr. Dahrouge, Mr. Meola, Mrs. Mixon, Mr. Pigut and Mr. Smith, were members of the Teachers' Association. Four other individuals, Steve Donley, Vicki Travis, Leonard Cafone and Piola Smith-Smith were department chairpersons. During the 1996-1997 school year, department chairpersons Steve Donley, Vicki Travis and Leonard Cafone taught two classes each day. Piola-Smith-Smith had guidance counselor duties during the 1996-1997 school year. Petitioner asserts that department chairpersons, by definition, are not classroom teachers within the meaning of *N.J.A.C.* 6:8-9.2(b)2.

After the 1995-1996 school year, the Board was no longer classified as a "Special Needs District" and was no longer required to comply with the provisions of *N.J.A.C.* 6:8-9.2(b)2. *See,* Commissioner Klagholz June 21, 1996, letter in this matter.

SUMMARY OF THE LEGAL ARGUMENTS OF THE PARTIES

POINT I

WHETHER OR NOT PETITIONER'S CLAIM IS TIME BARRED, PURSUANT TO *N.J.A.C.* 6:24-1.2(c)?

The Board's Position

In its Third, Fifth and Sixth Alternative Defenses, the Board contends that petitioner's request for relief is time barred under the provisions of *N.J.A.C.* 6:24-1.2(c), which provides that:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The Board argues that its action, which is the subject of this matter, took place on May 24, 1995. On that date, it appointed 16 individuals to the High School SBPT. Eight of the 16 appointees, or one half of the total appointed, were members of the Association. The remaining five appointees were department chairpersons. It asserts that the appointments to the SBPT on May 24, 1995, were made at a public meeting of the Board.

The Board argues that on October 10, 1995, its Superintendent of Schools provided petitioner with "a detailed list of approved 1995-1996 SBPT members by School." (P-2) It observes that the Petition for Declaratory Judgment was filed before the Commissioner on April 4, 1996, 316 days after the Board's May 24, 1995, public meeting where it appointed SBPT members for the 1995-1996 school year. The April 4, 1996, filing was more that 180 days after October 10, 1995, where the Superintendent provided petitioner with the "detailed list of approved 1995-1996 SBPT members by school." (P-2)

The Board argues that the herein petition was filed beyond the 90 days petitioner received notice of the May 24, 1995, Board action and cites *Kaprow v. Board of Ed. of Berkeley Twp.*, 131 *N.J.* 572 (1993). It contends that petitioner's claim is time barred pursuant to *N.J.A.C.* 6:24-1.2(c).

Petitioner's Position

Petitioner contends that the Board's timeliness arguments are misplaced. It asserts that the Board's May 24, 1995, initial appointments to the SBPT did not represent any form of final administrative action regarding the actual composition of the SBPT as of March 19, 1996, the first meeting of the SBPT. It asserts that there was a difference in the composition of the High School SBPT between the May 24, 1995, Board meeting and March 9, 1996. This change in composition was due to the ongoing correspondence between the Superintendent and the Association President, to insure that the composition comported with *N.J.A.C.* 6:8-9.2(b)2.

Petitioner argues that the Superintendent's letter of October 10, 1995, referring, in part, to his argument with the Association President to an additional posting of SBPT positions to correct any problems regarding its composition established that there was no final action or decision regarding its composition. Petitioner contends that composition was established when the High School SBPT actually met on March 19, 1996.

Petitioner also cites *Kaprow, supra.* where the Supreme Court concluded regarding the interpretation and application of *N.J.A.C.* 6:24-1.2(c) as follows:

> A limitations period (referring to *N.J.A.C.* 6:24-1.2(c)) has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims . . . The second purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and stability to human affairs . . . 131 *N.J.* 587. (Citations omitted).

Petitioner argues that it filed its Petition for Declaratory Judgment within two weeks of the establishment of the final composition of the High School SBPT. It contends that it did not act in a dilatory manner and pursued its right of action within a reasonable time. It argues that its claims are not time barred.

CONCLUSIONS

POINT I

Kaprow, supra., is the seminal decision dealing with the State Board's administrative regulation, *N.J.A.C.* 6:24-1.2(c), concerned with the 90 day limitation to file a dispute before the Commissioner, pursuant to School Law. Maurice Kaprow was an assistant superintendent in the employ of the Berkeley Township Board of Education (Berkeley Board). Kaprow acquired a tenure status in the position with the Berkeley Board on October 5, 1979. Kaprow was subject to a reduction in force (RIF) effective June 31, 1991, pursuant to *N.J.S.A.* 18A:28-9. However, the Berkeley Board failed to maintain a preferred eligible list to advise Kaprow of his rights to re-employment in the event the Berkeley Board determined to fill the position of assistant superintendent. The Berkeley Board was required, by law, to maintain such preferred eligible list pursuant to *N.J.S.A.* 18A:28-12.

On February 23, 1988, Kaprow made an informal inquiry of the Berkeley Board's Secretary where he asked whether any positions for which he held tenure rights had been established subsequent to his RIF. On February 23, 1988, the Berkeley Board Secretary wrote to Kaprow on note paper headed, "From the desk of Elaine M. Clay, Board Secretary," advising Kaprow that on September 9, 1986, Robert Ciliento had been appointed Assistant Superintendent of Administrative Services, and that on July 1, 1987, Sheila McGuckin had been appointed Supervisor of Elementary Schools.

On February 28, 1988, Kaprow wrote to the Berkeley Board asserting his right to both of the positions and requested the Board to reinstate him retroactively with full back pay and other benefits pursuant to *N.J.S.A.* 18A:28.12. The Berkeley Board did not reply. On April 25, 1988, Kaprow sent a second letter to the Board stating that he wished to amicably resolve the matter and requested a reply by May 16, 1988.

On June 14, 1988, the Berkeley Board's attorney responded to Kaprow where he acknowledged that two positions had been created and filled. The Board's attorney asserted that

the two positions called for substantially different duties from those Kaprow had performed for the Board. Also, that Robert Ciliento had subsequently been appointed Superintendent of Schools and that no one had been appointed to the position of Assistant Superintendent for Administrative Services. The Board's attorney concluded that Kaprow's RIF rights did not attach and that no basis existed for his reinstatement.

On August 1, 1988, Kaprow filed his verified Petition of Appeal before the Commissioner asserting his claim to the position of Assistant Superintendent of Administrative Services and/or District Supervisor. The matter proceeded through administrative proceedings by the OAL, the Commissioner, the State Board, the Appellate Division of Superior Court to our Supreme Court. The Court held, among other things, that "Kaprow received adequate notice under *N.J.A.C.* 6:24-1.2(c) on February 23, 1988, to trigger the ninety-day limitations period." *Id.* at 588. Thus, it was the Board Secretary's note to Kaprow which commenced the running of the ninety-day rule.

Here, the Board took action on May 24, 1996, at a public meeting to appoint SBPT members for the 1995-1996 school year. Under the *Kaprow* holding, May 24, 1995 "triggered the ninety-day limitations period." *Kaprow* at 588. Notwithstanding any subsequent correspondence between Neptune Superintendent and the Association President, the fact remains that the Board took action on May 24, 1995 and the herein petition was not filed with the Commissioner until April 4, 1996, well beyond the ninety-day limitation period.

I **CONCLUDE,** therefore, that the herein Petition of Appeal was filed out-of-time and beyond the ninety-day period as provided by *N.J.A.C.* 6:24-1.2(c).

I **CONCLUDE** that the instant matter should be dismissed on these grounds.

POINT II

WHETHER OR NOT THE BOARD VIOLATED THE PROVISIONS OF *N.J.A.C.* 6:8-9.2(b)2 and *N.J.A.C.* 6:8-9.2(b)3?

During the period the Board's schools were classified as a "Special Needs District," pursuant to *N.J.S.A.* 18A:7D-3, it was required to comply with regulatory provisions found at *N.J.A.C.* 6:8-9.1 to 9.8, among other regulations. Subchapter 9 of Title 6, Chapter 8 of the regulations is entitled "Educational Improvement Plans in Special Needs Districts," required the Board to ". . . establish and maintain a planning team evaluation of the plan." *N.J.A.C.* 6:8-9.2(b). Sections 2. and 3. thereunder provides as follows:

> 2. Membership on the planning team shall include, but not be limited to, the principal, teachers and parents. A majority of the planning team shall be composed of classroom teachers and 25 percent of the team shall be composed of parents.
>
> 3. The board of education shall establish fair and reasonable policies and procedures by which teachers shall select their representatives and parents shall select their representatives.

Petitioner's Position

Petitioner argues that the majority of the High School SBPT membership was not composed of classroom teachers but rather, only seven of the nineteen appointees were teachers. It asserts that the Board appointed department chairpersons to the SBPT and that these chairpersons are not teachers within the meaning of *N.J.A.C.* 6:8-9.2(b)2. It cites *N.J.A.C.* 6:11-9.3(c), Supervisor, which states, in part that:

> . . . . The supervisor shall be defined as any school officer who is charge with authority and responsibility for the continuing direction and guidance of the work of instructional personnel . . . .

Petitioner contends that the Board's Job Description of Department Chairperson establishes that the goal of these individuals is "To provide assistance to the building principal and vice principal in planning, assessing and evaluating school programs and services." (R-3) Petitioner asserts that the chairperson also observes and evaluates teachers and support staff as assigned by the building principal. In addition, the chairperson prepare written observations and summary evaluations of the job performance of classroom teachers. Petitioner's allege that department chairpersons are not classroom teachers and, therefore, should not have been represented on the SBPT as they were. Petitioner does not object to departmental chairpersons serving as members of the SBPT. It objects that of the nineteen appointees to the High School SBPT, only seven were classroom teachers where there should have been ten teachers appointed.

The Board's Position

The Board observes that neither Title 6 of the Administrative Code or Title 18A of the New Jersey statutes defines the term "classroom teachers." *N.J.S.A.* 18A:1-1 defines "Teaching Staff Members" as a member of the professional staff of any district board of education whose position or employment requires a standard, provisional or emergency certificate issued by the State Board of Examiners. Department chairpersons employed by the Board are included in the definition of "Teaching Staff Member."

It argues that a reasonable interpretation of the term "Classroom Teachers" as used in *N.J.A.C.* 6:8-9.2(b)2 would be teaching staff members who are assigned actual classroom teaching duties. It observes that four of the five department chairpersons who served as High School SBPT in 1995-96 school year and three of the four department chairpersons who served in 1996-1997 would qualify as "classroom teachers" within the meaning of *N.J.A.C.* 6:8-9.2(b)2. By including department chairpersons as "classroom teachers," "classroom teachers" constituted a majority of the High School SBPT in both the 1995-1996 and 1996-1997 school years. The Board also relies upon the letter from Dr. David Pearsall of the New Jersey Department of Education, dated December 12, 1995, approving the inclusion of department heads who teach for the purposes of determining a majority of teachers as members on the SBPT (P-7).

The Board asserts that petitioner has failed to carry its burden to prove that the Board was in violation of *N.J.A.C.* 6:8-9.2(b) 2. and 3. It seeks a dismissal of the instant matter.

CONCLUSIONS

POINT II

The herein record clearly demonstrates that all but one of the departmental chairpersons taught a daily classroom schedule while serving as a member of the SBPT. The one exception was Piola Smith-Smith, a guidance counselor who would not, under ordinary circumstances, be assigned to regular classroom duty.

The term "classroom teacher" is neither defined in statute or administrative code. As the Board observes, *N.J.S.A.* 18A:1-1 defines "Teaching Staff Member," but not "classroom teachers." Petitioner contends that the department chairpersons should not be included in category of "classroom teacher" because the department chairpersons assist the administration of the school. It concedes, however, that Dr. Pearsall viewed department heads who teach as non-administrative professionals and could be included as SBPT members.

By analogy, petitioner's would hold that Lou Boudreau, a member of the National Baseball Hall of Fame, was not a baseball player when he was a player-manager for the Cleveland Indians baseball team. Petitioner's would classify Mr. Boudreau as "management" rather than "player." Or, in the instant matter, "administration" rather than "classroom teacher." The fact of the matter is that Mr. Boudreau excelled in both positions but was considered a "baseball player" for purpose of membership to the Hall of Fame.

I **CONCLUDE** that department chairpersons who teach are to be considered classroom teachers, as interpreted by Dr. David Pearsall of the Department of Education, for the purpose of *N.J.A.C.* 6:8-9.2(b)2. I, therefore, **CONCLUDE** that the Board's action to include teaching department chairpersons as members of its High School SBPT was proper and in accordance with *N.J.A.C.* 6:8-9.2(b)2. I **CONCLUDE** that this charge should be dismissed.

POINT III

WHETHER OR NOT THE BOARD SHOULD PROVIDE COMPENSATION TO THE ASSOCIATION FOR ALLEGED VIOLATIONS OF *N.J.A.C.* 6:8-9.2(b)2?

Petitioner's Position

Petitioner observes, and it is uncontroverted, that the Board compensated all classroom teachers who served on the Board's SBPT, pursuant to the negotiated contractual hourly rate between the Board and the Association for their attendance at meetings beyond the regular school day. Petitioner avers that it is of no moment that it cannot identify particular Association members who should receive compensation if they had applied for and would have been selected to serve on the High School SBPT. It argues that the Board cannot financially benefit by violating *N.J.A.C.* 6:8-9.2(b) 2. when it failed to appoint a sufficient number of classroom teachers to its High School SBPT.

Petitioner argues that in the event this tribunal determines that any measure of damages against the Board to be too speculative to mandate any affirmative relief by way of the remittance of any money to the Association, it contends that the appropriate remedy would be to direct the Board to strictly comply with the terms prescribed in *N.J.A.C.* 6:8-9.2(b)2. and 3. in the future concerning the establishment of the Board's SBPT. It requests, further, that the Board should be directed by this tribunal to cease and desist from unilaterally designating department chairpersons on the Board's SBPT, assuming that the school district will again become a "special needs" district in the future.

The Board's Position

The Board observes that petitioner acknowledge that *N.J.A.C.* 6:8-9.2(b) does not require the Board to pay members of the SBPT who serve. The compensation to Association members arises from the negotiated agreement between the Board and the Association for Association members who attended the SBPT meetings scheduled beyond the regular school hours.

The Board contends that petitioner cannot identify any Association member who applied for the posted High School SBPT position and was not appointed for the 1995-1996 school year. Similarly, petitioner could not identify any Association member for the positions for the 1996-1997 school year who had applied. No individual Association members were made parties to the herein action nor was any evidence presented setting forth an amount of compensation alleged to be owed to Association members or how, if owed, the amounts were to be calculated.

The Board argues that petitioner failed to carry its burden to prove the Board owed compensation to any Association members. It requests that the herein matter be dismissed.

CONCLUSIONS

POINT III

Petitioner cannot cite any authority which would allow or permit the Commissioner to order a board of education to remit payment to an education association for alleged violations of *N.J.A.C.* 6:8-9.2(b)2. and 3. This tribunal is not aware of any statute, rule, regulation or other authority which would permit the Commissioner to order a local board of education to make payments of public monies to a bargaining unit for unnamed individuals and for work not performed. Petitioner's claim for compensation is without merit and, I **CONCLUDE**, should be dismissed.

ORDER

Having carefully considered all of the evidence before me, including the testimony of the parties, the documents in evidence and the briefs of law, I **FIND and CONCLUDE** that the herein matter is time barred, pursuant to the provisions of *N.J.A.C.* 6:24-1.3(C).

I **FURTHER FIND and CONCLUDE** that there is no merit to petitioner's claims that the Board was in violation of the provisions of *N.J.A.C.* 6:8-9.2(b)2. and 3. or, that the Board should compensate the Association in any manner.

Accordingly, it is **ORDERED** that the herein matter be and is hereby **DISMISSED.**

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

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

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5 November 1997
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Nov 12, 1997
DATE

N. N. Contantinos/sc
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 17 1997
DATE

Barbara A Harned
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

FOR PETITIONER:

Lucille Alfano

FOR RESPONDENT:

Michael Lake

DOCUMENTS IN EVIDENCE

FOR PETITIONER:

P-1 Letter, 10/3/95 to Lake from Alfano

P-2 Letter, 10/10/95 to Alfano from Lake with attachment

P-3 Letter, 10/17/95 to Lake from Alfano

P-4 Memorandum, to SBPT members from Alfano, 10/23/95

P-5 Letter, 12/14/95 to Lake from Alfano

P-6 Letter, 12/18/95 to Alfano from Lake

P-7 Letter, 1/2/96 to Alfano from Lake with attachment

P-8 Letter, 1/16/96 to Alfano from Lake

P-9 Letter, 1/16/96 to Alfano from Lake

P-10 Neptune Township School System, Individual School Educational Improvement Plan

FOR RESPONDENT:

R-1 Memorandum, 1/3/96 to Lake from Terrell

R-2 Letter, 2/5/96 to Lake from Wayne J. Oppito, Esq. w/attachment

R-3 Neptune Township Board of Education Job Description Department Chairperson

R-4 Neptune Township Board of Education Job Description Teacher, K-12

R-5 Office of Superintendent, Open Positions for SBPT 4/24/96

R-6 Letter, 12/29/95 to Lake from Michael Maddaluna

R-7 Letter, 6/1/96 to Lake from Michael Maddaluna

R-8 Letter, 12/19/96 to Lake from Michael Maddaluna

R-9 Letter, 1/2/96 to Alfano from Lake w/attachments

OAL DKT. NO. EDU 6244-96
AGENCY DKT. NO. 121-4/96

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's replies, both of which recast and reiterate many of the arguments previously presented to the Administrative Law Judge (ALJ), are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in rendering the within decision.

Upon careful and independent review, the Commissioner agrees with the conclusion of the ALJ that the within Petition of Appeal must be dismissed as untimely filed. Specifically, he determines that petitioner's cause of action in this matter arose on May 24, 1995, when the Board appointed, at a public meeting, the School Based Planning Team (SBPT) members for the 1995-96 school year. However, even assuming *arguendo*, that petitioner's cause of action was triggered on October 10, 1995, when the superintendent provided petitioner

with the detailed list of the approved 1995-96 SBPT members, petitioner's filing on April 4, 1996 would still be beyond the limitations of rule. (*Kaprow*, *supra*; *North Plainfield*, *supra)* No cause for relaxation having been demonstrated, the petition must therefore be held as untimely pursuant to the 90-day time limit requirement of *N.J.A.C.* 6:24-1.2(c).

However, given the importance of the question raised on the merits as a matter of State policy, and given that the ALJ made findings and conclusions on such question, the Commissioner here states his concurrence with *petitioner's* position that *N.J.A.C.* 6:8-9.2(b)2 is to be read as imposing a requirement that *full-time* classroom teachers comprise a majority of the SBPTs. While department supervisors and other similar positions are not precluded from membership on SBPTs, they may not be considered as classroom teachers for purposes of fulfilling the distribution requirement of rule, notwithstanding that their duties may include some classroom teaching.

Accordingly, the within Petition of Appeal is dismissed as untimely filed. [1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

[1] The Commissioner notes that even if this matter were not dismissed as untimely filed but, instead, considered on its merits, he would not have granted the requested relief of compensation to the association. This is so because of the absence of any showing of need for compensatory damages and, therefore, the payment to the association would be punitive in nature. Such compensation is inappropriate since no evidence exists that the Board acted in bad faith; but, instead, for most of the period at issue, it relied upon advice it received from the Office of the County Superintendent.

DECEMBER 29, 1997
DATE OF MAILING DECEMBER 29, 1997

664-97

664-97

DR. ROBERT L. JEFFERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 30, 1997

OAL DKT. NO. EDU 7282-97
AGENCY DKT. NO. 194-6/97

DR. ROBERT L. JEFFERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

DECEMBER 30, 1997
DATE OF MAILING DECEMBER 30, 1997

665-97

665-97

CARMEN AND MAX GUZMAN AND MIGUEL GUZMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 30, 1997

OAL DKT. NO. EDU 11222-96
AGENCY DKT. NO. 279-7/96

CARMEN AND MAX GUZMAN AND MIGUEL GUZMAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

DECEMBER 30, 1997
DATE OF MAILING DECEMBER 30, 1997

666-97

P.E., on behalf of minor, G.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

DECEMBER 30, 1997

OAL DKT. NO. EDU 8479-97
AGENCY DKT. NO. 381-10/97

P.E., on behalf of minor, G.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

DECMEBER 30, 1997
DATE OF MAILING DECEMBER 30, 1997

667-97

667-97

LILLIE WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND THE REGION VI COUNCIL FOR SPECIAL EDUCATION, BERGEN COUNTY, *ET AL.*	:	DECISION
RESPONDENTS.	:	

D ECEMBER 30, 1997

OAL DKT. NO. EDU 9598-97
AGENCY DKT. NO. 239-7/97

LILLIE WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY AND THE REGION VI COUNCIL FOR SPECIAL EDUCATION, BERGEN COUNTY, *ET AL.*	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

DECEMBER 30, 1997
DATE OF MAILING DECEMBER 30, 1997

668-97

J.B., on behalf of minor child, R.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

DECEMBER 30, 1997

668-97

OAL DKT. NOS. EDU 8225-97 and EDU 8770-95 (On Remand)
AGENCY DKT. NO. 347-9/95

J.B., on behalf of minor child, R.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

DECEMBER 30, 1997
DATE OF MAILING DECEMBER 30, 1997